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1811—1911.

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THE ALL INDIA DIGEST

SECTION II (CIVIL)—1811-1911

BY

T. V. SANJIVA ROW
First Grade Pleader, Trichinopoly

WITH THE HELP OF

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VOL. VIII.

Preliminary Objection—Ryotwari Tenure

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.
Agra.	Agra High Court Reports.
A. L. J.	Allahabad Law Journal.
A. W. N.	Allahabad Weekly Notes.
B.	Indian Law Reports, Bombay Series.
B. H. C.	Bombay High Court Reports.
B. L. R.	Bengal Law Reports.
Bom. L. R.	Bombay Law Reporter.
Bourke.	Bourke's Reports.
Bur. L. R.	Burma Law Reports.
C.	Indian Law Reports, Calcutta Series.
C. L. J.	Calcutta Law Journal.
C. L. R.	Calcutta Law Reports.
C. W. N.	Calcutta Weekly Notes.
C. P. L. R.	Central Provincés Law Reports.
Cor.	Coryton's Reports.
Hay.	Hay's Reports.
Hyde.	Hyde's Reports.
I. A.	Law Reports. Indian Appeals.
Ind. Cas.	Indian Cases.
Ind. Jur. N. S.	Indian Jurist, New Series.
Ind. Jur. O. S.	Indian Jurist, Old Series.
Knapp.	Knapp's Reports.
L.B. R.	Lower Burma Rulings.
M.	Indian Law Reports, Madras Series.
M. H. C.	Madras High Court Reports.
M. J.	Madras Jurist.
M. L. J.	Madras Law Journal.
M. L. T.	Madras Law Times.
M. W. N.	Madras Weekly Notes.
Marsh.	Marshall's Reports.
M. I. A.	Moore's Indian Appeals.
Moo. P. C. C.	Moore's Privy Council Cases.
N. L. R.	Nagpur Law Reports.
N. W. P. H. C.	North-West Provinces High Court Reports.
O. C.	Oudh Cases.
P. R.	Punjab Record.
P. L. R.	Punjab Law Reporter.
P. W. R.	Punjab Weekly Reporter.
R. & J's.	Rafique and Jackson's Oudh Privy Council Decisions.
Sar.	Saraswati's Privy Council Judgments.
S. L. R.	Sind Law Reporter.
Suth.	Sutherland's Privy Council Judgments.
U. B. R.	Upper Burma Rulings.
W. R.	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	Applied.
Appr.	Approved.
Cons.	Considered.
D. or Distd.	Distinguished.
Disc.	Discussed.
Diss.	Dissented from.
Exp.	Explained.
F.	Followed.
(F. B.)	Full Bench.
Obs.	Observed on.
(P. C.)	Privy Council.
R. or Refd. to	Referred to.
Rel. on.	Relied on.
(S. B.)	Special Bench.

N.B.—In the Punjab Record and the Punjab Law Reporter and also in the Punjab Weekly Reporter, the cases are known by their numbers and not by the pages where they are printed; (*e.g.*) 4 P. R. 1910 would mean Case No. 4, in the Punjab Record of 1910. The same explanation applies to the Punjab Law Reporter as well as to the Punjab Weekly Reporter also. It has also to be remarked that the Punjab Record, the Punjab Law Reporter and the Punjab Weekly Reporter have been divided into two sections, Civil and Criminal.

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Prerogative of the Crown.

(1)— *Rule of interpretation.*—The rule of interpretation that the prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a statute, applies not only to the statutes passed by the British, but also to the Acts of the Indian Legislature, framed with constant reference to the rules recognised in England. GANPAT PUTAYA v. THE COLLECTOR OF KANARA, **1 B. 7.** [*F.*, 25 M. 457=12 M.L.J. 208 ; *R.*, 14 B. 213, 31 B. 86, F.B.=8 Bom.L. R. 904=2 M.L.T. 13, 12 Bom. L.R. 34.]

(2)—*Prerogative of the Crown in India.*—Rights which, according to the common law of England, are comprised in the royal prerogative, may not either be applicable to or may not have been introduced into India. On the other hand, it is probably true that the Crown has, according to the common law of India, certain prerogatives which it may exercise in India, though not in England, notably the prerogative of imposing by an executive act assessment on lands and varying the same from time to time. The prerogatives of the Crown in India, a country in which the title of the British Crown is of a very mixed character, may vary in different provinces, as also in the Presidency towns as distinguished from the Mofussil. The determination, with anything like legal precision, of all the prerogatives of the British Crown in India is by no means an easy task. MAJOR C. BELL v. THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS, **12 M.L.J. 208=25 M. 457.**

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1.—GENERAL.
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iii.—LAND.
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3.—MISCELLANEOUS.

——1.—General.

(1)—*Prescription—Period of commencement—Right of purchaser.*—The purchaser of immoveable property is entitled to avail himself of any pleas which his vendor could have set up in respect of that property; and, therefore, where the purchaser sets up a plea of prescription, the period of limitation for prescriptive purposes is to be calculated from the date when the possession became adverse in the hands of his vendor, and not merely from the date of his purchase. HIDAYAT-UN-NISSA v. AHSAN ALI, **4 A.W.N. 1884, 296.**

(2)—*Ancient right — Prescription—Evidence.* — In this country, while the law recognises that rights may be gained by long and continuous enjoyment or, in other words, by prescription no fixed period has been laid down within which such right may be gained. The evidence must justify the Court in inferring the existence of a valid ancient right, having regard to the nature of that right and the circumstances under which it has been exercised. KRISHNA MOHAN MOOKERJEE v. JAGANNATH ROY JOGI, **2 B.L.R.A.C. 323=11 W.R. 236.** [*Disappr.*, 3 B.L.R.A.C. 166, 11 W.R. 522; *Expl.*, 3 B.L.R.A.C. 325, 12 W.R. 76; *R.*, 30 C. 281, 14 W.R. 199; *D.*, 3 B.L.R.A.C. 211.]

(3)—*Money allowance for Palki huk—Immoveable property — Bom. Reg. V of 1827.* — A money allowance for *Palki Huk* paid by Government out of the land revenue of a particular *Pergunnah* to successive *Desais*, for upwards of thirty years, does not create a prescriptive title as such; money payment is not "immoveable property" within the meaning of Bom. Reg. V of 1827, s. 1, cl. 1. THE GOVERNMENT OF BOMBAY v. DESAI KULLIANRAI HAKOOMUTRAI, **14 M.I.A. 551.**

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————I.—GENERAL.

(1)—*Easements, Law of applicability of, to British subjects in India—Civil Law.*—The law of easements in England, being derived from the civil law, has no peculiarities to debar its being applied to British subjects in India. CULLIANDAS KIRPARAM v. CLEVELAND, **2 Ind. Jur O. S. 15.**

(2)—*Easement by prescription—Twenty years' user.*—Prior to the passing of the Indian Limitation Act, 1871, the Court insisted upon twenty years' uninterrupted user being proved for acquiring the right of easement of way by prescription. NAROTAM BAPU v. GANPATRAU PANDURANG, **8 B.H.C.O.C. 69.**

(3)—*Title by prescription—Period of user.*—Length of user for any period shorter than 12 years, the ordinary period prescribed by the

Prescription—continued.

——2.—**Easement**—*continued.*

————I.—GENERAL—*continued.*

Statute of Limitation, is not sufficient to create a title by prescription DOORGA CHURN PAUL v. PEAREE MOHUN, **9 W.R. 283.**

(4)—*Prescription--User.*—A party claiming the right of user by prescription over the property of another must show not only that that right has existed from ancient days, but also that it has been exercised as of right, and has not been interrupted. MALLIK JAWAD-UL-HUQ v. RAM PROSAD DAS, **3 B.L.R.A.C. 281.** [*R.*, 14 W.R. 199.]

(5)—*Easement—Right of way—User—Prescription.*—A right of way by prescription could be acquired by proof of uninterrupted user of the way in question for a period of more than thirty years. RAMBHAU BAPUSHET v. BHAI BABUSHET, **2 B.H.C. 333.**

(6)—*User—Prescription—Period of time required.*—Where there is evidence showing a long and continuous user, it is sufficient for the Court to find whether it has or has not lasted long enough to confer the right to it without particular reference to any specific number of years. RUP CHANDRA GHOSE v. RUPMANJARI DASI, **3 B.L.R. A.C. 325=12 W.R. 274.** (3 B.L.R. A.C. 166, 2 B.L.R. A.C. 322, *Expl.*) [*R.*, 14 W. R. 199.]

(7)—*Easement—Prescription—User—Reg.* V *of* 1827—*Act* XIV *of* 1850.—Reg. V of 1827 provides that uninterrupted enjoyment for more than thirty years is necessary to acquire a title by prescription to an easement. Act XIV of 1859 has not changed the law in this respect. ANAJI DATTUSHET v. MORUSHET BAPUSHET, **2 B H.C. 334.** [*F.*, 3 B. 174 ; *R.*, 6 C. 608, 15 B. 299, 16 B. 593.]

(8)—*Reg.* V *of* 1827, *s.* 1—*Scope—Prescription.*—Where the holding of certain persons and their predecessors has been by virtue of appointment made on each occasion when a vacancy occurs, *held* that the holding is not a holding as proprietor so as to give the holders a right of property, but it is a holding not contemplated by the Regulation. TVATAT SVAMI GURU TVATAT SVAMI v. ANDANYA CHARANTI GURU TVATAT SVAMI, **6 B.H.C. A.C. 132.**

(9)—*Prescription—Easement—Act* IX *of* 1871.—The right to an easement by prescription can be acquired only by enjoyment of the right for 20 years ending within two years previous to the institution of the suit. SHAIKH HUBEEBUL HOSSEIN v. SHEIK SHAHAMUT ALI, **25 W.R. 15.**

(10)—*Ancient right—Prescription—Evidence.*—In this country, while the law recognises that rights may be gained by long and continuous enjoyment or, in other words, by prescription, no fixed period has been laid down within which such right may be gained. The evidence must justify the Court in inferring the existence of a valid ancient right, having regard to the nature of that right and the circumstances under which it has been exercised. KRISHNA MOHAN MOOKERJEE v. JAGANNATH ROY JUGI, **2 B.L.R. A.C. 323.** (9 W.R. 9, *Cons.*) [*Disappr.*, 3 B.L.R. A.C. 166; *Expl.*, 3 B.L.R. A.C. 325 ; *R.*, 14 W.R. 199 ; *D.*, 3 B.L.R. A.C. 211.]

Prescription—continued.

——2.—**Easement**—*continued.*

————I.—GENERAL—*continued.*

(11)—*Easement— Prescription — Evidence.*—A claim to easement must be proved by prescription. Conclusive evidence is required to prove an easement the result of which is great damage to the "servient tenement." The general rule of law in cases of title by prescription is that there must have been an interrupted user as of right exercised, neither by force nor by stealth, nor at the mere will and favour of the other party, and the right claimed must not be so large as to destroy or extinguish all the ordinary user or profits of the property. MOONSHEE ZUMER ALI v. MUSSUMAT DURGABUN, **1 W.R. 230.** [*R.*, 14 W.R. 199, 15 W.R. 295.]

(12)— *Prescription— Possession not merely permissive.*— A title by prescription may be acquired by long possession ; but it must be possession not merely *permissive, but as of right, e.g.*, in the capacity of a master, or, in the case of easements, adversely to the owner of the land. ASKAR v. RAM MANIK ROY, **5 B.L.R. App. 12=13 W.R. 344.**

(13)—*Hindu Law*—'Nibandha'—*Fixed permanent allowance, if immoveable property for purpose of acquiring prescription.*—Although the Hindu Law regards the right to a fixed permanent allowance payable out of the revenues of a temple or '*nibandha*' as immoveable property, when the right had once been acquired, yet, this rule of Hindu Law could not enable the payments to be regarded as the possession of immoveable property, so as to enable the right to be acquired by prescription. LAKSHMAN DAS BHAGAT RAMJI v. MANOHAR GANESH TAMBEKAR, **10 B. 149.** (5 B. 322, 6 B. 546, *R.*)

(14)—*Indian Easements Act*, 1882—*Projection for purpose of ornamentation.*—There can be no prescriptive right to projection, which has been erected merely for the purpose of ornamentation. NRITTA KUMARI DASSI v. PUDDOMONI BEWAH, **30 C. 503=7 C.W.N. 649.** (3 B.L.R. O.C. 18, 47, *R.*) [*R.*, 29 M. 511=16 M.L.J. 281.]

(15)—*Duty of Court to decide upon evidence :—Arrangement between parties as to mode of dealing with evidence, Court not to take into consideration — Documents more than thirty years old, English, rule of evidence dispensing with proof of execution of, inapplicable in absence of proof of custody—Possession and enjoyment for a long time, evidence of title against real owner, only if continuous and undisputed.*—A Court of law is bound to decide

Prescription – continued.

—2.– **Easement**—*continued.*

——I.—GENERAL—*continued.*

upon the evidence before it, and upon such evidence only ; its judgment could not in any way be fettered by any previous arrangement that might have been made between the parties with regard to the mode of dealing with the evidence. Whatever rights may be created under such an arrangement between the parties by way of contract, it could have no binding effect whatever upon a Court of law. There is a rule in the English law of evidence by which, when a document is produced from the proper custody and by the proper person, formal evidence of its execution is dispensed with, if the document be more than thirty years old. But the rule goes no further, and should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or Jury to reject it, however ancient it may be. Further, assuming the English rule applicable to the Courts in India, in cases in which it is not shown in whose custody the document had been kept, such rule could have no application. Even where this had been shown satisfactorily, it is yet competent to the Judge to reject the document if he be of opinion that it is a fabrication. [*F.*, 12 W.R. 90.] Long and undisturbed user or possession, when the origin of it is unknown, confers a title, because no other inference can be drawn than that the possession is, in some way or other, founded on title, although it is not known whence or how the title was obtained. In cases of questions of title, evidence of possession and enjoyment is, as against the real owner, good evidence of title only where it has been undisturbed and continuous ; otherwise any trespasser in possession might claim a title. GOOROO PERSHAD ROY v. BYKUNTO CHUNDER ROY, **6 W.R. 82.**

(16)—*Collection of revenue by one of two joint kabuliatdars--Kabuliat signed each year by co-kabuliatdar — No prescriptive right to collect revenues claimable as against co-kabuliatdar.*— Plaintiff sued to recover from the defendant certain money which the former had a right to collect but the latter had collected as the revenue due by the *dharekaris* of the village. The lower Courts decreed in favour of the plaintiff, on the ground that he had had exclusive enjoyment of the right for thirty years as owner and had, therefore, acquired a prescriptive title. The High Court reversed the decrees obtained by the plaintiff in the Courts below. Supposing the actual collections had been made by the plaintiff for thirty years, the defendant would not thereby have forfeited his right. The fact that the defendant or one of his family was all along executing the kabuliats jointly with the plaintiff, clearly showed a continuous assertion of his right by the defendant, and an admission of it by the plaintiff. Further, as an ordinary rule, joint kabuliatdars make themselves jointly responsible for the Government revenue and have an equal right to manage the village, and

Prescription—continued.

—2.—**Easement**—*continued.*

——I.—GENERAL—*concluded.*

one of two kabuliatdars who collects a portion of the Government revenue does not do so illegally. He is responsible to his partner for the due application of the money received, but he cannot be made to refund it as money had and received for his partner's use. BABU RAM PARBHU v. VISAJI CHANDO SAKTANEKAR, **8 B.H.C.A.C. 182.**

——II.—HOUSES AND OTHER BUILDINGS.

(1)—*Buildings adjoining each other--Side wall—Right of easement.*—The house of the defendant was built on to the house of the plaintiff which was standing by itself originally. There was a passage between the two houses. Over this passage the defendant built a room connecting the two houses. This room corresponded with plaintiff's first floor, and it had an open terrace on the top of it. The structure by which the defendant connected the two houses was quite independent of plaintiff's house. It was supported throughout by wooden pillars adjoining the plaintiff's wall which the cross beams did not penetrate. But the structure was built close to the plaintiff's wall which served as a side wall to the room. *Held* that, by merely building her house on her own ground close to the wall of the plaintiff's house, the defendant could acquire no easement over the plaintiff's premises. If she had built her house against the wall and so used it for supporting her own house, or if she had fixed her beams and posts in the wall, or if she had used the top of the wall as a terrace, she might have acquired an easement over it. But, by merely building on her own ground, close to the plaintiff's house, she could not acquire any right over the wall, even through she had built no side wall to her own house but trusted to the plaintiff keeping up his wall to shelter her house on that side. GORDHAN DALPATRAM v. CHOTALAL HARGOVAN, **13 B. 79.**

(2)—*House dedicated to public for prayer—Rights of public—New building raised by public on the site.*—A thatched house was erected by and stood on the land of one K, who used it as a house of prayer for himself, family, and neighbours and those who liked to resort to it; no objection whatever was ever taken to such use of the house ; the house having been blown down and K having no means to rebuild and restore the house, a brick built house was erected on the site by public subscription and maintained for the purpose for which it was originally used. The new building was simply a substitute for the house which was found by the Court below to have vested in the public by implied grant, tacit consent and user, for the purposes of resort for public prayer and to have been blown down. After the death of K, his heirs brought the suit to establish a title to and to recover possession of the new *pucka* house built. *Held*, that the consent of the proprietor, added to the long use of the house by the public

Prescription—continued.

——2.—**Easement**—*continued.*

——II.—HOUSES AND OTHER BUILDINGS—*concluded.*

entitled them by way of an implied grant, to the occupation of the same as a house for prayer. SUFROO SHAIKH DURJEE v. FUTTEH SHAIKH DURJEE, **15 W.R. 505.**

(3)—*Easement—Right of suit—Non-existence of dominant tenement — House.* — Where the house, the right of easement to which was claimed was not and had not been in existence for several years, nor was the intention shown of rebuilding it within a reasonable time; the right of easement (which is acquired by prescription and enjoyment and continues so long as the person enjoying it continues the enjoyment and shows an intention to continue it) would be lost by discontinuance, and by the destruction of the dominant tenement the servitude would be extinguished, and there can be no right of action to enforce the right of easement. TEEKA RAM v. DOORGA PERSHAD, **1 Agra 196.**

(4)—*Light and air—Prescriptive right—New house in place of old one.*—Any prescriptive right to air and light, which an old house may have conferred, disappears with the construction of a new one. KALEE DAS BANERJI v. BHOOBUN MOHUN DOSS, **20 W.R. 185.**

———III.—LAND.

(1)—*Right based on custom, facts and conditions necessary to decide the existence of—Trespass on land.*—Where it is sought to establish a local custom by which the residents of a particular locality are entitled to commit, on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the Court could decide that such a custom exists, only if it is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned KUAR SEN v. MAMMAN, **17 A. 87=A.W.N. 1895, 10.** [*F.*, 23 B. 666, 28 A. 434=A.W.N. 1906, 80; *Appr.*, 20 M. 389; *R.*, A.W.N. 1905, 266=2 A.L.J. 790.]

(2)—*Right to use certain land during particular festival—Customary easements—Act V of 1882 (Easements Act), ss. 4, 18*—The Court of first instance gave a decree for possession of certain land to the plaintiff subject to the rights of the defendants to use it during the celebration of their Moharam festival in accordance with an established custom in their favour. Reversing the decision of the lower appellate Court that the defendants had not established any right of easement within s 4 of the Easements Act, the High Court upheld the defendant's rights as amounting to a customary

Prescription—continued.

——2.—**Easement**—*continued.*

———III.—LAND—*continued.*

easement, under s. 18 of the Easements Act, capable of acquisition by means of prescription. MAMMAN v. KUAR SEN, **16 A. 178=A.W.N. 1894, 12.** (A.W.N. 1884, 186, *R.*)

(3)—*Land used as burial ground from time immemorial—Zamindar claiming exclusive possession.*—The inhabitants of a *mohulla* had been in the habit of burying their dead in a piece of land from time immemorial. The Zemindar of the place wanted to construct a drain in that land, which was likely to destroy the graves. *Held* in a suit by some inhabitants, to restrain the Zemindar, that such immemorial enjoyment for the purpose alleged operated to exclude any claim by the Zamindar, and that the plaintiffs were entitled to maintain the suit without joining with them all the residents in the *mohulla.* MOHUN LALL v. SHAIKH NOOR AHMUD, **1 N.W.P. 202.**

(4)—*Right to locate stall on another's land, how acquired—Market.*—The mere fact that a person, as a member of the public, is entitled to resort to the market on the land of another, is not sufficient to give the former a right to locate a stall at a particular spot on the land. Such a right may be acquired only by grant or by prescription. RAM MANICK ROY v. SHAIKH ASGUR, **11 W.R. 112.** [*F.*, 16 W.R. 268.]

(5)—*Landlord and tenant—Existence of rent-paying tenure—Decree by competent Court conclusive — Prescription—Limitation by adverse possession.*—The question in this case was whether, assuming the plaintiff to have established that, by reason of the decree passed in 1837 which he relied on, the relation of landlord and tenant then existed, the defendant, having been in possession for a great number of years without paying rent, and, as the Judge has found, always verbally denying her landlord's title, was competent to claim to hold these lands against the plaintiffs. The High Court, in the result, remanded the case to the lower appellate Court with directions to receive the decree of 1837 as conclusive proof that a rent-paying tenure then existed, unless it be clearly shown by the defendant, by affirmative evidence, that, by reason of some fraud or misrepresentation, the decree was not binding upon her. RAJ NARAIN DUTT v. GOUR MONEE DOSSEE, **6 W.R. 215.**

(6)—*Limitation—Uninterrupted possession—Reg. V of 1827, s. 1, cl. 1.*—The plaintiff sued in 1861 to recover a certain share in a *watan.* It was admitted that neither the plaintiff nor his ancestors had enjoyed any share in the *watan* since 1810 or 1811. The land was in the enjoyment of the defendants till 1830, when the Government attached the property and enjoyed possession of the *watan* till 1845, when they removed the attachment, and restored the property to the defendants. ***Held,***

Prescription—continued.

——2.—**Easement**—*continued.*

————III.—LAND—*concluded.*

that the suit was barred under cl. 1, s.1, Reg.V of 1827, the defendant having been enjoying the property for more than 30 years and for nearly 50 years, that is, from 1811 to 1861. The attachment of the property from 1830 to 1845 was not an interruption such as was contemplated by cl. 1, s. 1, Reg. V of 1827. The period of sequestration could not be taken into account. LADO LAKSHUMAN v. KRISHNAJI SADASHIV, **6 B.H.C.A.C. 41.**

————IV.—LIGHT AND AIR.

(1)—*Prescription—Light and air—When commences—Infringement of injunction--Attachment —Surveyor's opinion, Court not bound by.*—In the acquisition by prescriptive user of a right to light and air, the enjoyment of light and air begins from the time when the window frames are put into and the roof-tree and beams are laid on, the new building, with reference to which the right is claimed. When the building assumes the appearance and outward aspect of a dwelling house, there can be no doubt as to the intention of the then proprietor in erecting it. The ground of the rule of law, by which the fact of 20 years' user and enjoyment of an advantage like that of the access of light and air is held to confer a right to such advantage, is this, that it is thence presumed that the persons concerned in preventing such right from being acquired have agreed or assented to the acquisition of the same. Therefore, when a building assumes the shape and appearance of a house, and by the placing of window-frames, the intention is indicated that by their means the access of light and air is to be had, then begins the time for persons interested in preventing such user from becoming a right, to challenge the same and take steps to prevent such right from being acquired. On an infringement of an injunction restraining a person from interrupting the access of light and air to certain windows, an attachment will issue, even though the defendant has taken the advice of a surveyor and legal adviser in constructing the building complained of as a breach of injunction. The Court will not be bound by the opinion of the surveyor, but will form its own judgment as to the effect of the new structure complained of. VALLABHRAM JUGJIVAN v. WOODHOUSE, **1 B.H.C. 148.** [*R.*, 8 B.H.C. O.C. 69.]

(2)—*Easement, completion of title to—Light and air.*—Where there has been no appropriation of light and air through an aperture for the statutory period of 20 years, no right of easement is created thereby. SARUBAI *kom* JITMAL v. BAPU NARHAR SOHONI, **2 B. 660.** [*R.*, 3 N.L.R. 114.]

(3)—*Air, Right to—Right to uninterrupted passage of air.*—The owner of a house cannot by prescription claim to be entitled to the free and uninterrupted passage of a current of wind.

Prescription—continued.

——2.—**Easement**—*continued.*

————IV.—LIGHT AND AIR—*continued.*

He can claim no more air than what is sufficient for sanitary purposes. BARROW v. ARCHER, **2 Hyde 125.**

(4)—*Access of air—Interference—Right of action—Right of south breeze—Right to light, extent of—Indian Limitation Act—English Prescription Act—Scope and object—Light and air—45° rule.*—To give a right of action (in a case where there is no express contract on the subject) for an interference with the access of air to dwelling houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business. The right of air is co-extensive with the right to light. [*R.*, 8 O.C. 356, 3 S.L.R. 36.] There is no right to the uninterrupted flow of south breeze as such. [*R.*, 7 Bom. L.R. 352, 3 S.L.R. 36.] The only amount of light for a dwelling house which can be claimed by prescription, or by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. (3 B.L.R.O.C. 41, *F.*) The Indian Act, unlike the English Act, places light and air upon the same footing. The object of the Prescription Act and of the provisions in the Limitation Act was not to enlarge the extent and operation of the easement, but to provide another and more convenient mode of acquiring such easements—a mode independent of any legal fiction and capable of easy proof in a Court of Law. The two Acts do not, therefore, alter in any way the pre-existing law as to the nature and extent of the right. This rule of 45° is not a positive rule of law, but it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. Of course, where lights are closed up by high buildings at the sides, this rule may not be applicable. THE DELHI AND LONDON BANK, LTD. v. HEM LALL DUTT, **14 C. 839.**

(5)—*Easement to discharge water—Right of servient owner to build on the land without disturbing easement—Easement of light, extent of--Servient owner may build without diminishing light.*—An easement to have the water carried off over the servient land, does not disentitle the servient owner from building on his own land, provided that he makes the necessary arrangements to receive the water from the *mori* (drain) and roof and to carry it away. [*R.*, 7 Bom. L.R. 352, 4 S.L.R. 180.] An easement of light to a window extends only to the access of sufficient light to the plaintiff's room through the window, which is usually considered to be light at an angle of 45°. The servient owner can build on his land, if he does not obstruct the light to that extent. And where such light is obstructed, the Court in granting an injunction should order the removal of so

Prescription—continued.

——**2.—Easement**—*continued.*

————IV.—LIGHT AND AIR—*continued.*

much of the building only as prevents the amount of light mentioned above. BALA v. MAHABU, **20 B. 788.**

(6)—*Light and air—Suit to remove obstruction—Prescription—Lost grant—Presumption—Servitudes—Their recognition in Hindu and Mahomedan Law.—Per Norman, J.*—A right to the unobstructed access of light through the windows looking on another man's land could be conferred, firstly, by express grant or covenant that the grantee should enjoy the lateral access of light to his windows, or secondly, by implied grant or reservation, when the dominant and servient tenements had originally belonged to the same owner. Such implication might arise when such owner sold the house with its appurtenances, or, after the erection of house, sold the land overlooked by its windows. A right to the unobstructed access of light to windows is not a property or interest in the light itself, or a right to be enjoyed in or over the soil of the adjacent owner. By analogy of the Law of Limitation, an adverse and uninterrupted use of an easement for 20 years would confer a right to it. When the access of light and air through the windows of a house has been enjoyed for so long a period as 20 years, and there is nothing to rebut the presumption of title, the law implies an obligation on the part of the adjoining owner not to interrupt the free access of necessary light and air through such windows. *Per Peacock, C.J.*—A right to the unobstructed flow of the south sea breeze may be acquired by express grant, but it cannot be acquired merely by presumption arising from user, whether the presumption is a presumption of prescription, or not. The only amount of light for a dwelling house which can be claimed by prescription or by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. The uninterrupted enjoyment of light for 20 years, acquiesced in by the owner of the servient tenement, raises a presumption of right which, in the absence of any evidence to rebut it, ought to be acted upon by these, whether Judges or Jurymen, who have to determine the facts. Such presumption is one of law, and not of fact. [*F.*, 6 B.L.R. O.C. 85, 14 C. 839; *Appl.*, 30 C. 503 =7 C.W.N. 649; *R.*, 15 B.L.R. 361, 7 Bom. L. L.R. 361; *D.*, 8 B.H.C. O.C. 69.] *Per Norman, J.*—The laws of every country must necessarily recognize servitudes. It has been well said that the origin of servitudes is as ancient as that of property, of which they are a modification. It seems clear that servitudes were known and recognized both by Hindu and Mahomedan Law. JOHN GEORGE BAGRAM v. KHETTRANATH KARFORMAH, **3 B.L.R. O.C. 18.**

(7)—*Easement—Light and air — Premises situate in Calcutta—Law applicable—Prescrip-*

Prescription—continued.

——**2.—Easement**—*continued.*

————IV.—LIGHT AND AIR—*continued.*

tion—English Law before Prescription Act—Acquiescence—Presumption.—In a suit in which the plaintiff's right to the access of light and air through certain windows of his house is in question, where the premises are situated within the limits of the ordinary original civil jurisdiction of the High Court, namely, in Calcutta, the law to be applied to the case is the English law as it was before the passing of the Prescription Act, 2 and 3, Will. IV, c. 71, which does not extend to India. [*Affirm.*, 12 B.L.R. 406, P.C.; *R.*, 15 B.L.R. 361, 6 C, 608, 3 N.L.R. 114; *D.*, 8 B.H.C. O.C. 69.] By the English Law before the Prescription Act, all the presumption of a grant in the case of a claim to the access and use of light for a building was a presumption of fact, the presumption being founded on the consent, or acquiescence of the owner of the servient tenement. For acquiescence or consent, knowledge is necessary. When the owner was in possession, his knowledge was taken to be proof of his acquiescence; and in such cases, a grant was presumed. But it was otherwise when the owner was not in possession. In that case, if there was no direct evidence of his knowledge of the enjoyment, it was for the jury to say whether, from the circumstances proved, and having regard to the nature of the easement that had been enjoyed, it might fairly be presumed. As 20 years' enjoyment with acquiescence is necessary, there must be knowledge for that period. If the knowledge were for a lesser period, it would be a question for the jury whether there was a grant, and not a presumption which they would be bound to make. BHUBAN MOHAN BANERJEE v. J. S. ELLIOTT, **6 B.L.R. 85=19 W.R. 194.** [*R.*, 6 C. 608, 22 B. 1.]

(8)—*Ancient lights—New window—Enlargement of window—Obstruction.*—If a man has a right to light from a certain window and opens a new window or enlarges the old one, the owner of an adjoining house has a right to obstruct the new or enlarged opening, if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden. PROVABUTTY DABEE v. MOHENDRO LAL BOSE, **7 C. 453.** [*R.*, U.B.R. 1897—1901, Vol. II, 126.]

(9)—*Easement of light and air—New house erected on site of old house—Extinguishment of right—Test.*—The mere fact of the old house having been taken down, or having fallen down and a new house being erected on its site, would not by itself be sufficient to extinguish any right to light and air which the owner of the house may possess. Whether the right is, or is not, extinguished will depend upon the consideration of the question whether the easement claimed as appertaining to the newly constructed house imposes a different and greater burden on the servient tenement. CASPERSZ v. RAJ KUMAR *alias* RAJENDRA KUMAR SARKAR, **3 C.W.N. 28.**

Prescription—continued.

——2.—**Easement**—*continued.*

——IV.—LIGHT AND AIR—*continued.*

(10)—*Easement of light and air—Obstruction—Relief by way of injunction when may be given—Specific Relief Act* (I *of* 1877), *s.* 54.—In the case of an obstruction of light and air which had been passing through some ancient windows to a certain house, it is not enough for the owner of the house, for obtaining relief by way of injunction, to show that the light is less than before and has been sensibly diminished. But there must be such a "large, material and substantial privation of light" as to require interference by injunction, or the house, although the light and air have only been sensibly diminished, must be rendered unfit for the purpose for which it may reasonably be expected to be used. Or, in other words, the Court must consider whether the light and air have been so much diminished as to render the house—having regard to the habits of the people who occupy houses so situated—unfit for the purpose to which it might reasonably be applied. GHANASHAM NILKANT NADKARNI v. MOROBA RAMCHANDRA PAI, **18 B. 474.** [*F.*, 20 B. 704, 19 A. 259, 9 M L.T. 383; *R.*, 22 M. 251, P.L.R. 1900, 173, 5 Bom. L R. 446, 7 Bom. L.R. 352, 3 N.L.R 114, 1 Ind Cas. 958=3 S.L.R. 30]

(11)—*Easement—Light and air—Document purporting to prevent acquisition of easement—Document relating to immoveable property—Registration not compulsory.*—A document which limits or extinguishes the chance of acquiring an easement of light and air does not require registration; because a chance of acquiring right to light and air is not immoveable property within the meaning of the Registration Act, III of 1877, nor can any pecuniary value be put upon it. SULTAN NAWAZ JUNG v. RUSTOMJI NANABHOY, **20 B. 704** [*Affir.*, 24 B. 156, P.C.; *R.*, 3 N.L.R. 114, 3 S.L R 30 =1 Ind. Cas. 958.]

(12)—*Prescription—Light and air—Acquiescence—Constructive knowledge of owner of servient tenement.*—Plaintiffs sued for an injunction restraining defendants from proceeding with a certain building and that a certain portion of it might be pulled down; their case being that they were receiving light and air through certain windows in their building which, they alleged, might be obstructed by the building which the defendants were running up. The plaintiffs' windows had been completed on the 14th April, 1850; from that date, the plaintiffs were getting light and air through the same; within twenty years from such user, *i.e.*, in March, 1870, the defendants informed the plaintiffs by means of a notice that they were about to raise a building twenty feet high, which would have the effect of obstructing plaintiffs' lights; and in the same month the defendants commenced the building in question, though it reached the height so as to obstruct plaintiffs' lights *after* the lapse of twenty years from the completion

Prescription—continued.

——2.—**Easement**—*continued.*

——IV.—LIGHT AND AIR—*concluded.*

of plaintiffs' windows. *Held*, under these circumstances, that it was quite impossible to presume enjoyment on the plaintiff's part for more than twenty years with the acquiescence of the defendants, the owners of the servient tenement, so as to entitle them (plaintiffs) to the reliefs prayed for *Held*, also, that the Prescription Act, 2 and 3 Will. IV. C. 71, being inapplicable, the English law which prevailed before its passing ought to be resorted to. *Quære.*—Whether acquiescence by the owner of the servient tenement may be presumed from proof of actual knowledge of the obstruction on the part of his agent who collected his rents and fixed their amount? ELLIOTT v. BHOOBUN MOHUN BONNERJEE, **12 B.L.R. 406, P.C.=I.A. Sup. Vol. 175=19 W.R. 194=3 Sar. 236.**

(13)—*Easement — Light and air — Ancient light—Obstruction—Plea that party complaining has other windows.*—Ancient lights cannot be obstructed by a party owning the neighbouring land and building on it so as to obscure the light and air always enjoyed. It is no answer to this to plead that the party complaining has other windows on another side of his premises. He is entitled to retain the light and air he has always had and the owner of the adjacent land cannot obstruct it. PURAN MUDDUCK v. OODAY CHAND MULLICK, **3 W.R. 29.** [*F.*, 4 W.R. 23.]

(14)—*Right to ancient light and air, person wilfully obstructing, liability of, for removal of obstruction.*—Where, one person is entitled to the free use of ancient light and air, but, another person chooses wilfully and intentionally to obstruct that light and air, he is liable for the removal of the obstruction, money damages being no sufficient compensation. (The decision in 3 W.R. 29 was followed in this case. There the defendant was prevented from building a second story to his house, on the ground that it obstructed ancient lights.) SYUD MAHOMED HUSSEIN v. SYUD JAFUR ALI, **4 W.R. 23.**

(15)—*Easement--Partition of family dwelling-house by decree—Implied grant of easement.*—Where a partition between brothers in respect of a family dwelling-house having windows with ancient lights was effected by means of a decree which made no mention of the right of easement in respect of the windows, that was not claimed in the suit, *held*, the partition decree must be taken to have made an implied grant of such easement. DWARKA NATH PAUL v. SUNDER LALL SEAL, **3 C.W.N. 407.** (14 C. 797, *Cited.*)

See INJUNCTION—SPECIAL CASES, 8 B. 95, 13 B. 674.

——V.—MONEY ALLOWANCE.

(1)—*Allowance by Government not incidental to hereditary office—Prescriptive right—Reg.* V

Prescription—continued.

——**2.—Easement** —*continued.*

————V.—MONEY ALLOWANCE —*concluded.*

of 1827, *s.* 1, *cl.* 1.—In considering with reference to limitation, the question whether any particular allowance (other than an allowance incidental to an hereditary office) is or is not immoveable property, the High Court has generally, if not invariably, applied the following test, *viz.*, is or is not the allowance in question a charge upon land or other immoveable property? Where an allowance by Government is neither incidental to an hereditary office nor a charge upon immoveable property and is not supported by a grant from Government, the enjoyment of it for thirty years does not create a prescriptive title to its continuance under Reg. V of 1872, s. 1, cl. 1. THE GOVERNMENT OF BOMBAY v. GOSVAMI SHRI GIRDHARILALJI, **9 B.H.C. 222.** [*R.*, 5 B. 322, 10 B. 149, 18 B. 92.]

(2)—*Prescription*—Inam—*Annual allowance paid by* Inamdar *for over a century.*—This was a suit instituted by the plaintiffs against the *Inamdar* of an *Inam* village, to recover from him the amount of a certain *russum* or annual allowance which they alleged to be a charge on the *Inam*, in arrears for six years, and also to establish their right to recover the same. The defendant contended that the payment of the allowance claimed was not provided for in the grant of the village, and although his predecessors might have paid the amount, their payments should be taken only as voluntary payments, and that the plaintiffs had no legal claim against him. *Held*, (*Tucker, J., dissenting*), that the receipt of an annual allowance for a century or more under the circumstances found to have existed in this case gave a title by prescription to the recipients (plaintiffs), and absolved them from the necessity of showing the origin of the allowance, a sufficient consideration for it being in such a case presumable. BHAVANI v. HASAN MIYA, **1 B.H.C. 45.** [*Expl.*, 9 B.H.C. 222 ; *R* , 4 B.H.C. 1.]

(3)—*Annual payments by Government to chirda hakdar—Prescriptive right—Reg.* V *of* 1827, *s.* 1.—In this case, the collection of *giras haks* by the claimants themselves and their retainers having ceased, the duty of the chirdadars ceased with it, but the Government continued the payment to the latter of an amount equal to that of their previously accustomed percentage for many years. The enjoyment, thus continued in the chirdadars for upwards of thirty years, it was urged, constituted a prescriptive title binding the Government to the continuance of the payment. It was however, held that the repetition of a voluntary payment even for a period of over thirty years, could not create a prescriptive right to have such payment continued for ever; the mere fact of payment to a man of that to which he is not entitled is never in itself an injury, so as to afford him a just ground of complaint when the payment afterwards ceases. COLLECTOR OF SURAT v. DAJI JOGI, **8 B.H.C. A.C. 166.** [*R.*, 3 B. 3.]

Prescription—continued.

——**2.—Easement**—*continued.*

————VI.—PRIVACY.

(1)—*Right to privacy claimed under custom, nature of.*—The law as prevailing in the North-Western Provinces recognises a right to privacy whenever the existence of such right is established by custom. Such a customary right of privacy is one incidental to the possession of the property by its owner claiming such right irrespective of the religion to which he may belong. ABDUL RAHMAN v. D EMILE : D. EMILE v. ABDUL RAHMAN, **16 A. 69=A.W.N. 1893, 217.** [*R.*, 3 N.L.R. 114 ; *D.*, 18 M. 163 =5 M.L.J. 26.]

(2)—*Customary easement of privacy, infringement of—Mandatory injunction.*—Where the findings of the lower Court showed that the plaintiff was entitled to have his right of privacy observed, the High Court granted a mandatory order compelling the defendant to permanently close the door or window complained of. LACHMAN PRASAD v. JAMNA PRASAD, **10 A. 162=A.W.N. 1887, 295.**

(3)—*Right of privacy—Opening of windows—Suit to close windows—Easement.*—Whatever may be the extent of injury, if the plaintiff has a right to be exempt from the invasion of privacy and if the Court is satisfied that privacy is invaded, the plaintiff is entitled to the closing of the windows opened by the defendant. Unless the defendant can establish some right from long usage to the apertures, he cannot, merely because the comfort and ventilation of his own building is increased, claim to have them open, and the burden of erecting a screen to secure the privacy to which he is already entitled cannot be imposed on the plaintiff. If the windows are not new or are mere substitutions for former openings which had long existed, the defendant may have a right to the access of light and air by their means. GOOR DASS v. MANOHUR DASS, **2 Agra 269.** [*R.*, 10 A. 358.]

————VII.—WATER, RIGHT CONCERNING.

See RIPARIAN PROPRIETORS.

(1)—*Right to easement in flow of water—Validity against Government—Continued user—Acquisition of right to easement—Limitation Act*, 1859, *s.* 1, *cl.* 12.—The right to an easement in the flow of water through an artificial water-course is as valid against the government as it is against a private owner of land. [*R.*, 14 M.L.J. 350, 28 M. 539=15 M.L.J. 251, 5 M.L.T. 149=19 M.L.J. 131=32 M. 141= 2 Ind. Cas. 325; *D.*, 7 M.H. C.R. 60.] *Per Scotland, C.J.*—The grant of an easement may be presumed from mere continued user of the privilege openly enjoyed by the occupiers of the dominant tenement as of right throughout any long period of time without interruption on the part of the proprietor of the servient tenement, but with this qualification, that the user should be for at least the period of adverse possession which is prescribed by s. 1, cl. 12 of the Act of Limitation as a bar to the enforcing of titles to corporeal property.

Prescription—continued.

——2.—**Easement**—*continued.*

————VII.—WATER, RIGHT CONCERNING —*continued.*

Per Innes, J.—No precise period of uninterrupted enjoyment can be fixed as sufficient of itself to establish a right to an easement. PONNUSAMY TEVAR v. THE COLLECTOR OF MADURA, **5 M.H.C. 6.** [*R.*, 8 B.H.C.O.C. 69. 5 M. 253, 14 B. 213, 11 M.L.J. 75.]

(2)—*Easement—Prescription—Grant presumed from long user.*—A right to the uninterrupted flow of water through a certain channel which has its course through another's land may exist in certain circumstances independently of the statute (Act IX of 1871). A suit cannot be dismissed on the ground that it is brought to establish a right in the nature of an easement and there has been no user for the two years next preceding the institution of the suit, if, as a matter of fact, the right is claimed as an hereditary and customary right, and evidence is given in support of long user, sufficient to raise a presumption of grant. ARNI JAGIRDAR v. SECRETARY OF STATE FOR INDIA, **5 M. 226.**

(3)—*Landlord and tenant – Erection of dam by tenant on permission of landlord—Derogation of right of other tenants of same landlord—Revocation of grant—Right of landlord to remove dam.* —Suit to compel the removal of a dam erected by a tenant upon the land held by him of the plaintiff. It was found that an agent of the plaintiff had assented to the erection of the dam and the plaintiff had ratified his act. *Held* that the mere permission did not amount to a grant and the defendant's possession could not confer on him a title by prescription. The case was simply one of a tenant derogating from the natural rights of other tenants by permission of their common landlord. *Held* also that as the right of the defendant existed by permission, it might be terminated by the revocation of that permission. But the revocation could only be permitted on the terms of the plaintiff paying to the defendant the expenses which he was induced by the permission to incur. *Held* further that even if the dominant and servient tenements had been the property of different persons, such permission would not have amounted to an irrevocable license. A man may license an act in its inception and yet be entitled to relief when it is found to have injurious consequences which he could not have contemplated at the time of the license. KESAVA PILLAI v. PEDDU REDDI, **1 M.H.C. 258.**

(4)— *Easement — Diversion of water by Government from channel belonging to it—Right of adjacent owners—Damage actual or prospective—Suit for injunction against Government — Maintainability.*— The plaintiffs, as shareholders in and heads of certain villages, sued for an injunction directing Government to close an irrigation channel which was opened in 1869 and to remove a sluice. A channel had, by means of a branch, for very many years

Prescription—continued.

——2.—**Easement**—*continued.*

————VII.—WATER, RIGHT CONCERNING —*continued.*

supplied the plaintiffs' village with water. The water of the channel was diverted into the new channel at a point above the point of divergence of the branch channel to the plaintiff's village. The relief was prayed for in the Court of First Instance on the ground that the supply by the channel before the diversion had never been sufficient for the wants of the village and the new channel must necessarily cause a still further deficiency The Civil Judge found that the plaintiffs sustained no loss by the opening of the new channel and dismissed the suit. On appeal, it was contended, 1st, that plaintiff had an absolute right to the uninterrupted flow of all the water in the old channel without subtraction or diminution by the Government or those landowners for whose benefit the diversion was made, and that any diminution though not causing loss, was an invasion of their rights ; 2nd, that if they had not such absolute right, they had a right to a supply of water for the necessary purposes of irrigation and otherwise for their village, and that the possibility of loss at some future time, arising from a possible wrongful diminution of the water to their detriment through the new sluice and channel, entitled them to the relief claimed. *Held* that the plaintiffs had not the extensive and exclusive right to the water contended for by them, their right being limited to the beneficial enjoyment of the water for irrigation and other necessary purposes of their tenancies as heretofore enjoyed; that the Government, as proprietor of the channel and water in it, had, subject to the above limited use by the plaintiffs and other villages in the same position as the plaintiffs, a right to distribute the water of the channel for the benefit of the public. *Held* also that no ground existed for granting an injunction, as no right of the plaintiffs, had been invaded, no damage had accrued, and no case of prospective damage had been made out. KRISTNA AYYAN v. VENCATACHELA MUDALI, **7 M.H.C. 60.** (5 M.H.C. 6, *Dist.*) [*F.*, 7 M.H.C. 342 ; *Expl.*, 24 M. 36; *R.*, 16 M. 333, 14 M.L.J. 350, 28 M. 72=15 M.L.J. 32, 28 M. 539=15 M.L.J. 251, 32 M. 141=19 M.L.J. 131=5 M.L.T. 149 =2 Ind. Cas. 325 ; *D.*, 7 B. 209.]

(5)—*Suit by ryots against agents of Government for diminishing supply of water—Legal right—Relief.*—In a suit by certain ryots under the Government to restrain the agents of the Government and others from so altering a Calingula as to diminish the quantity of water which the plaintiffs were entitled to receive for the irrigation of their lands, where the plaintiffs alleged that the supply of water had been materially diminished by reason of the acts of the defendants and the plaintiffs put their claim upon the only ground that they had received the water for a long time, *held.*—*Per Holloway, J.*, that the plaintiffs had shown no clear legal right which could have been violated by the

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Prescription—continued.

—**2.—Easement**—*continued.*

——VII.—WATER, RIGHT CONCERNING —*continued.*

defendants, and that, if such right were established, there was nothing to show that the injury was one which could not be compensated by damages. *Per Innes, J.*, that the evidence did not show any diminution of the supply of water below the quantity to which the plaintiffs were entitled. VENKATA REDDY v. A. LISTER, **7 M.H.C. 342.**

(6)—*Easement evidenced by immemorial user —Act* XV *of* 1877, *s.* 26, *proof of title under, how far necessary—Continuing nuisance, saving of limitation under s.* 23.—In this suit to compel the defendants to remove the obstruction which they had placed over their drian, through which plaintiff alleged that the rain-waters from his buildings used to flow on to the defendants' land from time immemorial, it was *held* that the plaintiff had, by long user, acquired a prescriptive right the enforcement of which was not barred by s. 26 or any other section of the Limitation Act. S. 26 of the Act, by allowing a user of twenty years, if exercised within two years of suit, under the conditions prescribed, to give, without more, a title, cannot prevent the proof of an easement founded on another title independently of the Act. The plaintiff in this case, having made out a title evidenced by immemorial user, was held not to require the aid of the said s. 26; and inasmuch as the obstruction complained of constituted a continuing nuisance, as to which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Limitation Act, but, on the contrary, was saved by the express provisions of s. 23 of the Act. PUNJA KUVARJI v. BAI KUVAR. **6 B. 20.** [*F.*, 1 C.W.N. 96; *R.*, 8 C. 956=10 C.L.R. 577, 16 B. 592, 28 M. 72=15 M.L.J. 32, 2 Ind. Cas. 410.]

(7)—*Partition wall with drain for passage of water—Continuous and necessary easements, grant of, by implication—Findings of fact by first appellate Court binding on Court of second appeal only when supported by reasons*—Defendant having stopped the flow of water from the plaintiff's land by a drain in a partition wall between their lands, the latter instituted this suit praying for an injunction to restrain the former from doing so. *Held*, that the plaintiff would be entitled to the easement claimed by him if he could show either that it was necessary for the enjoyment of his share of the property, or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took effect. Upon a severance of tenements, easement used as of necessity, or in their nature continuous, will pass by implication of law. In the above case, the findings of the lower Appellate Court as to the necessity of the easement claimed by the plaintiff were treated by the High Court as unsatisfactory and not binding upon them because the lower Court had given no reasons for them and a finding of fact unsupported by reasons is not binding on a Court of second appeal. The decree of the lower Appellate Court was therefore reversed and remanded for re-hearing on the merits with reference to the above remarks. PURSHOTAM SAKHARAM v. DURGOJI TUKARAM, **14 B. 452.** [*R.*, P.L.R. 1900, p. 173, 8 C.W.N. 425, 5 Bom. L.R. 956.]

(8)—*Right to passage of water in defined channel—Easement.*—Where it was established that, for a long series of years, the water from the plaintiff's land escaped through certain passages in the boundary between the plaintiffs and the defendant's lands and in a particular direction, *held*, the defendant was not entitled to interfere with the plaintiff's rights in this respect in any manner. IMAM ALI v. PORESH MUNDUL, **8 C. 468=10 C.L.R. 396.** [*R.*, 1 N.L.R. 182, 10 M.L.J. 582=29 M. 539=1 M.L.T. 333.]

(9)—*Easement—Artificial channel—Water, flow of.*—A right in a flowing stream running from the lessor's to and through, the lessee's tenement, which existed as a flowing stream prior to the lease, and which was made expressly for the purpose of the tenement leased, is an apparent and continuous easement and passed by implication of law. MORGAN v. KIRBY, **2 M. 46.** [*Appl.*, L.B.R. 1872—1892, 233, P.L.R. 1900, 177, 4 L.B.R. 246; *Appr.*, 14 M.L.J. 350.]

(10)—*Right to an artificial watercourse—Presumption of title from long continued enjoyment.*—Where it was found that an artificial watercourse was constructed on the defendant's land by the plaintiff's ancestors a great many years ago, possibly fifty or sixty years--certainly more than 20 years—before suit, and was enjoyed ever since with certain advantages to the defendants to compensate them for any injury or inconvenience, a Court ought to refer such a long enjoyment to a legal origin and to presume a grant or an agreement between the original owners. RAJRUP KOER v. ABDUL HOSSAIN, **6 C. 394, P.C.=7 C.L.R. 529=7 I.A. 240=4 Sar. 199.** [*Appl.*, 5 M. 226; *R.*, 11 M.L.J. 75, 5 M. 253, 31 C. 503; *F.*, 5 M.L.T. 107.]

(11)—*Right to the use of water in artificial watercourses—Presumption of such right.*—The right to water flowing to a man's land through an artificial watercourse, constructed on a neighbour's land, must, unlike the natural right to that flowing in a natural channel, rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands, from which the water is artificially brought, or on some other legal origin. [*F.*, L.B.R. 1872—1892, 233, 11 C.W.N. 85=4 C.L.J. 370; *R.*, 7 M. 530, 18 C. 652, 14 C.P.L.R. 145,

Prescription—continued.

——2.—**Easement**—*continued.*

————VII.—WATER, RIGHT CONCERNING —*continued.*

6 Bom. L.R. 291.] Such a right may be presumed from the time, manner, and circumstances of the enjoyment of the easement. RAMESSUR PERSAD NARAIN SINGH v. KOONJ BEHARI PATTUK, **4 C. 633=6 I.A. 33, P.C.= 3 Sar. 856.** [*Rel. on*, 30 C. 281]

(12)—*Right of user—Channel—Interruption —Effect.*—A wrongful interruption of right of user of a channel to permit the egress of water collecting on plaintiff's land would not necessarily destroy the right of user, unless such interruption has been acquiesced in by the plaintiff. ROY LUCHMEE PERSHAD v. MUSSAMAT FUZEELUTOONISSA BIBEE, **7 W.R. 367.** (Marsh 506, *R.*)

(13)—*Easement—Right of passage of water—Presumption.*—Where the plaintiff has exercised the right of passage of his surplus tank water over the land of the defendant openly and uninterruptedly year by year for upwards of twenty years, an undoubted presumption arises that he has obtained this easement as of right. POORNO CHUNDER CHATTERJI v. SHURUT CHUNDER BHATTACHARJEE, **24 W.R. 228.**

(14)—*User--Prejudice to right of user.*—Where a plaintiff, who had a right of user in a tank, and had it established, sought to compel defendant to close two channels which passed through his own land, on the ground that the flow of water through these channels lessened plaintiff's a supply of water; but it was found that defendant's channels had existed for a long time, and that plaintiff had never before attempted to close them: *Held* that plaintiff's right of user did not entitle him to get the defendant's channels closed. MOOKTARAM PATTUR v. NEMYE PATUR, **26 W.R. 102.**

(15)—*Easement—Servitude—Right to flow of water.*—Where A has a right to discharge the surplus rainfall from his land on to the land of B, no length of time will give B a right to compel A to send the water on, provided that A does not interfere with any portion of the water which flows from his land to that of B in a natural and defined channel. The servient owner cannot prevent the dominant owner from putting an end to the servitude at any time he may think proper. KHOORSHED HOSSEIN v. TEKNARAIN SINGH, **2 C.L.R. 141.** [*F.*, 14 C. P.L.R. 145.]

(16)—*Easement to discharge water--Right of servient owner to build on the land without disturbing easement.*—An easement to have the water carried off over the servient land, does not disentitle the servient owner from building on his own land, provided that he makes the necessary arrangements to receive the water from the mori (drain) and roof and to carry it away. BALA v. MAHARU, **20 B. 788** [*R.*, 7 Bom. L.R. 352, 4 S.L.R. 180.]

(17)—*Easement—Time and manner of enjoying easement.*—In a suit for the recovery of a right of easement in a drain that had been closed up, in which the Moonsiff found that a drain had existed which had recently been closed, and that there was no other way whereby water could escape from plaintiff's land, and accordingly gave the plaintiff a decree which was upheld by the Judge: *Held* that the real issue to be tried was, whether the plaintiff had enjoyed the easement for the time (20 years) and in the manner laid down in the law. RAMESSUR MISSER v. BROJO BHOOKUN MISSER, **25 W.R. 271.**

(18)—*Riparian proprietors of* rayatwari *village lands, relative rights of, to use of water of river—Extent of rights of Government.*—The usufructuary interest of riparian proprietors of lands being incident to their possession of the adjacent soil, whatever may be the nature of their tenancy, it is they, and not the Government, that are entitled to the enjoyment and benefit of the water flowing in the stream. Each of such occupants is to use his right so as not to materially interfere with the rights of the other occupants. So, an action will lie where the user, by any of the occupants, of the common right to use the water, is found to be unreasonable, but the Government cannot have, at any time during such occupancy, the power arbitrarily to curtail or interfere with the right of each occupant to the enjoyment of the water, as it existed at the commencement of his occupancy, a right which must have constituted a most important consideration in fixing the amount of land assessment which each such occupant agreed to pay. THE FIRST ASSISTANT COLLECTOR OF NASIK v. SHAMJI DASRATH PATIL, **7 B. 209.** [*R.*, 16 M. 333 =2 M.L.J. 279, 23 B. 506, 28 B. 105=5 Bom. L.R. 790, 32 M. 141=5 M.L.T. 149=19 M.L. J. 131.]

(19)—*Easements Act — Natural streams—Surface water—Rights of riparian owners.*—The Indian Easement Act only declared the existing law in regard to the easement over water. An easement may be acquired in regard to the water of the rainfall, though the supply from that source may be only casual and intermittent. Surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise, is not a subject of easement by prescription. It may, however, be a subject of express grant or contract. It is the natural right of every owner of land, to collect and dispose of all water on the surface which does not pass in a defined channel. Riparian owners are entitled to use and consume the water of streams flowing by their lands for drinking and household purposes, for watering their cattle, and even for irrigating their land, or for purposes of manufacture, provided they exercise their right subject to the conditions, *viz.*, (i) that the use is reasonable; (ii) that it is required for

Prescription—continued.

——2.—**Easement**—*continued.*

————VII.—WATER, RIGHT CONCERNING —*continued.*

their purposes as owners of the land; and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or right of easement, if any. PERUMAL v. RAMASAMI CHETTY, **11 M. 16.** [*F.*, 35 P.R. 95, 3 L.B.R. 23; *R.*, 4 C.L.J. 370=11 C.W.N. 857.]

(20)—*Customary easement and customary right—Enjoyment — Dominant heritage.*—A customary right is different from a customary easement. No fixed period of enjoyment is laid down by law as necessary to establish a customary right. A customary right to draw water from a well situated on private land can be acquired by all the residents of a village using its water for a long period of time. PALANIANDI TEVAN v. PUTHIRANGONDA NADAN, **20 M. 389.**

(21)—*Easement—Right to throw back water on another's land till required for use—Acquisition of right by prescription.*—The tank used for the irrigation of the plaintiff's village was supplied in part by rain water falling on the lands of the village occupied by defendants nine to seventeen and the bund of the tank used formerly to throw back the waters so flowing into the tank on to the lands of defendants, where it remained till gradually drawn off into the area of the tank. Defendants nine to seventeen through the agency of the Government, relieved themselves of this inconvenience by making a work for drawing off the water so periodically thrown back upon their land. A channel was also constructed for conducting a supply of water to the plaintiff's tank. Plaintiffs, however, claimed to have the former state of things restored, on the ground that they had a prescriptive right to throw back the water on to defendant's lands and to keep it there till required for use. *Held* that there was here no object over which a right could be acquired. J. D. ROBINSON, COLLECTOR OF NORTH ARCOT v. AYYA KRISNAMACHARIYAR, **7 M.H.C. 37.** [*F.*, 27 M. 409=14 M.L.J. 162; *Appr.*, 11 M. 16; *D.*, 24 M. 202.]

(22)—*Limitation—Prescription—Easement—Over-hanging of roof—Right to discharge rain-water.*—Where the roof of one person overhangs the land of another for more than thirty years, such enjoyment thereof would, if considered as possession, extinguish the right of the other to sue, and if considered as mere easement, would vest in the former a proprietary right to the space occupied by the over hanging roof. [*F.*, 29 M. 511=16 M.L.J. 281; *R.*, 16 B. 353, 28 B. 428=6 Bom.L.R. 356.] A right to compel the defendant to receive upon the roof of his house rain-water flowing from the roof of the plaintiff's house can be acquired

Prescription—continued.

——2.—**Easement**—*continued.*

————VII.—WATER, RIGHT CONCERNING —*continued.*

only by contract or prescription. MOHAN LAL JECHAND v. AMRATLAL BECHARDAS, **3 B. 174.**

(23)—*Easement—Discharge of water from roof in particular direction—Imposing new mode of discharge.*—A person who has ancient rights to the discharge of water from his roof in a particular direction has a right to say that this state of things should continue. A purchaser of the servient tenement has no right, by interfering with this discharge to impose on the other party the trouble and expense of procuring some new mode of discharge. The purchaser, although he may exercise his right of ownership either by building or otherwise on his own land, must exercise such right in such a way that all proper provision may be made to prevent any interruption to the water flowing from the roof in that direction. BABOO SHEONATH SINGH v. BABOO BISHONATH SINGH, **2 Agra 391.**

(24)—*Easement—Prescriptive right to flow of water from thatch.*—Where there was clear evidence in a suit for the removal of a wall, that the plaintiff had been allowed by the defendant for a number of years, possibly 15 or 16 years, to rest the thatch of a hut upon the defendant's wall, and on this wall being thrown down by a cyclone, the plaintiff re-built the wall and erected a thatch roof thereupon; that the thatch roof had subsequently been blown down and was not existing at the date of the suit: *Held*, under these circumstances, the plaintiff could not have acquired a prescriptive right that the water from the thatch in question should pass over the defendant's lands; and he was not therefore entitled to restrain the defendant from building up the wall which was necessary for his convenience. LALL MONEE DOSSEE v. JOY NARAIN SHAHA, **11 W.R. 508.**

(25)—*Easements Act, s. 24—Right accessory to an easement.*—Where a plaintiff has an easement of having the roof of his house projecting on the defendant's land and discharging the water on such land, he has the right of going into the defendant's land for the purpose of repairing his wall and roof as a right accessory to the easement. HAYAGREEVA v. SAMI, **15 M. 286.**

(26)—*User—Prescription — Construction.*—Proof of uninterrupted user for 12 years and upwards is sufficient to establish a prescriptive right to water. The term "*barabar*" in respect to user construed to mean "*all along*" or "*always*" certainly for more than 12 years. KARTIK CHANDRA SIRKAR v. KARTIK CHANDRA DEY, **3 B.L.R.A.C. 166=11 W.R. 522.** (11 W.R. 236, *Com. on.*)

See EVIDENCE ACT, 1872, s. 11, 5 M. 253.

See LICENSE, 4 M.H.C. 98.

Prescription—continued.

——2.—**Easement**—*continued.*

——VII.—WATER, RIGHT CONCERNING—*concluded.*

See LIMITATION ACT, 1908, ss. 3, 26, 28, 5 M. 253.

See LIMITATION ACT, 1908, s. 26, 6 C. 394, P.C.=7 C.L.R. 529=7 I.A. 240.

——VIII.—WAY, RIGHT OF.

See RIGHT OF WAY.

(1)—*Easements — Modes of acquisition — Implied grant—Necessity — Limitation Act* (1877), *s.* 26.—S. 26, Limitation Act, is not intended to interfere with the other modes of acquiring an easement; it may be acquired by an implied grant, which may arise in one of two ways. (1) The use of the path and ghat (mentioned in this suit) might be absolutely necessary to the enjoyment of the defendant's tenement, in which case there would be an easement of necessity. (2) The use of the path and ghat, though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance; and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement. [*R.*, 14 B. 452, P.L.R. 1900, p. 173=49 P.R. 1900; *Cons.*, 15 A. 270=A.W.N. 1893, 151; *D.*, 26 C. 311.] The principle of the "*disposition of the owner of two tenements*" is in consonance with the rule of justice, equity and good conscience, which must guide the Court in the absence of positive direction by the Legislature. CHARU SURNOKAR v. DAKOURI CHUNDER THAKOOR, **8 C. 956=10 C.L.R. 577.** [*R.*, 18 B. 616, 26 C. 516.]

(2)—*Easement—Right of way—Unity of possession and subsequent severance—Right of passage—Mode of enjoyment—Nuisance created by acts of many.*—The words "appurtenant" or "belonging" will ordinarily carry only actual existing easements, and these will carry no right of way over the land of the grantor, though, under certain circumstances, even these words will have a wider construction. Further words, such as "therewith held or used" will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession, though not a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly. But, where, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the words are large enough to carry it. [*Affirm.*, 8 C. 677.] One, who has a right of passage over any place, must not, any more than the owner of the soil might, use it in an excessive or improper manner, so as to obstruct the exercise by the others of their rights.

Prescription—continued.

——2.—**Easement**—*continued.*

——VIII.—WAY, RIGHT OF—*continued.*

[*Affirm.*, 8 C. 677.] What may not be appreciable and be no nuisance, if done by one, may become a serious nuisance, if done by many. CHUNDER COOMAR MOOKERJEE v. KOYLASH CHUNDER SETT, **7 C. 665.** [*Affirm.*, 8 C. 677.]

(3)—*Easement—Right of way.*—This is an appeal in the case reported in 7 C. 655, the decision in which was practically confirmed. SHAMA CHURN DEY v. CHUNDER COOMAR MOOKERJEE, **8 C. 677.** (7 C. 665, *Affirmed.*)

(4)—*User—Act* IX *of* 1871 (*Limitation*), *s.* 27—*Right of way—Obstruction.*—Where the owner of a dominant tenement, with the intention of preventing the use of a way, creates an obstruction of a permanent nature rendering such use impossible, the way cannot be said, during the continuance of the obstruction, to have been 'openly enjoyed' within the meaning of the section. SHAM CHURN AUDDY v. TARINY CHURN BANERJEE, **1 C. 422=25 W. R. 228.**

(5)—*Right of way for boats in the rainy season—Extent of right—Analogy to right of way over land—Direction of right.*—A right of passage for boats over another man's channel is analogous to a right of way over another's road; and the dominant owner's right is limited to a passing and re-passing with the convenience to which he has been accustomed. A right of passage for boats over another's water can be validly claimed only in a particular direction. DOORGA CHURN DHUR v. KALLY COOMAR SEIN, **7 C. 145=8 C.L.R. 375.**

(6)—*Easements Act, whether compulsorily applicable in case of suits prior to Act* VIII *of* 1891—*Tenant, whether can acquire easement against landlord.*—The passing of Act VIII of 1891 which extended the operation of the Indian Easements Act (V of 1882) to the North-west Provinces, cannot, in the absence of express words, be taken as retrospective, or as either disturbing existing rights or creating new ones. Therefore, till the date of the coming into force of Act VIII of 1891, questions of easements were governed by s. 26 of the Indian Limitation Act, and there is nothing in Act VIII of 1891 to compel the application of the provisions of the Easements Act to a suit commenced before Act VIII of 1891 came into force. A tenant or occupier of land cannot by user acquire for his own benefit by prescription, an easement or right of way over any adjoining land belonging to the landlord. UDIT SINGH v. KASHI RAM, **14 A. 185. F.B.=A.W.N. 1892. 38.** [*Appr.*, 1 C.W.N. 151, 29 C. 363=9 C.W.N 856; *R.*, 31 C. 503=8 C.W.N. 425; *D.*, 16 A. 181.]

(7)—*Easement—Prescription—Landlord and tenant—Way of necessity—Tenants of the same landlord—Acquisition of easement by one tenant against another.*—A tenant cannot acquire, as against his landlord by prescription, an easement of way, in favour of the land occupied by

Prescription—continued.

——2.—**Easement**—*continued.*

————VIII.—WAY, RIGHT OF—*continued.*

him as tenant over other land belonging to his landlord; but a tenant is entitled to a way of necessity over the adjoining land of his landlord. (14 A. 185, *R.*) [*Appr.*, 29 C. 363=9 C.W.N. 856.] It is doubtful whether one tenant can acquire a prescriptive right of easement against another tenant under the same landlord. JEENAB ALI v. ALLABUDDIN, **1 C.W.N. 151.**

(8)—*Easement—Accessory right—Overhanging trees—Right of way for owner of trees for picking up fruit—Prescriptive right.*—The prescriptive right of a person to have the trees belonging to him overhanging the land of his neighbour, does not carry with it the right to go over the land of the latter for gathering the fruits on the trees. The right to go on the land of the neighbour to pick the fruit off the branches is perfectly distinct from the prescriptive right to have the branches overhanging the land, and cannot be said to "be accessory" to the latter right in the sense of being within the limits of that right, however useful and even necessary it might be to the owner of the trees in order to obtain the full enjoyment of the profits of the branches so overhanging. NAIK PARSOTAM GHALA v. GANDRAP FATELAL GOKULDAS, **17 B. 745.**

(9)—*Right of passage over water—Prescription.*—A right by prescription to pass and re-pass in boats, during the rainy season, over certain lands belonging to T, may be acquired by R. although the general public may have no such right of passage over the water and the channel does not lead to R's house, and is injurious to a tank belonging to T. RAMSOONDER BURRAL v. WOOMAKANT CHUCKERBUTTY, **1 W.R. 217.**

(10)—*Dispute as to right of way—Magistrate's order with consent of party—Adverse suit by consenting party.*—Where a Magistrate before whom there was a dispute concerning a right of way, which he was competent to inquire into, repaired to the spot and with the express consent of one of the parties altered the path then existing to one which would be more convenient to the public generally, *held* that the party who gave the consent was, by reason of the consent, precluded from bringing an adverse action. MUDDUN GOPAL MOOKERJEE v. NILMONEE BANERJEE, **11 W. R. 304.**

(11)—*Crim. Pro. Code, Ch.* XX, *application of, to public thoroughfares, and not to private roads—Owner of land suffering neighbour's cows to pasture—Easement, if created.*—S. 311 of the Crim. Pro. Code, and the other sections of Ch. XX of the Code refer to public thoroughfares, and cannot apply to private roads over which a right of way may have been established. It cannot be contended that, because an owner of a patch of waste land between a village and the public road allows his neighbour's cows to stray over it on their way to pasture, he thereby creates over such land a right of easement having the practical effect of depriving it of all value by rendering its cultivation impossible. GOOROO CHURN GOON v. GUNGA GOBIND CHATTERJEE, **8 W.R. 268.**

Prescription—continued.

——2.—**Easement**—*concluded.*

————VIII.—WAY, RIGHT OF—*concluded.*

(12)—*Ss.* 23, 26, *Limitation Act*, 1877—*Infringement of a right of way — Continuing cause of action.*—The infringement of a right of way is a continuous wrong giving rise to a cause of action *de die in diem*, notwithstanding the fact of the plaintiff's claiming a right of way under s. 26 of the Limitation Act and his basing his right on a previous decree giving him a title to the right of way. SREEMATI SOOJAN BIBI v. SHAMED ALI, **1 C.W.N. 96.** (6 B. 20, *F.*)

(13)—*Right of way—Twenty years' user to support servitude—Continuance of user after—Calcutta Municipal Act (Beng. Act* IV *of* 1876)—*Extent of user.*—In the matter of an easement, *viz.*, a right of way, claimed by the plaintiffs over the defendant's passage for the purpose of having their latrine cleaned several times annually by mehters or scavengers and proved to the satisfaction of the Courts below by a user of the right for upwards of twenty years before suit, the proper construction of the plaintiffs' right was held to be identical with a reasonable and convenient user for the above purpose, that is, a user of the passage as often as was necessary for cleansing the privies. There was no agreement specifying times or occasions of access to militate against this construction of the plaintiffs' right. When, therefore, in obedience to the rules framed by the Calcutta Municipality under Act IV of 1876, the plaintiffs were obliged to arrange for the daily cleaning of their privies and, in consequence, found it necessary to use the defendant's passage more frequently than before, *i.e.*, every morning daily, *held* that the above user was neither a discontinuance by the plaintiffs of their user nor an aggravation of the servitude and that, the purpose for which the right was claimed being identical with the original purpose, the user proved prior to the passing of the Act entitled the plaintiffs to the more frequent exercise of their right over the passage, when inclination, custom or a change in the law compelled them to do so. JADULAL MULLICK v. GOPALCHANDRA MUKERJI, **13 C. 136=13 I.A. 77=4 Sar. 713.** (9 C. 778, *Affirmed.*)

See FERRY, 6 C. 608=7 C.L.R. 504.

——3.—**Miscellaneous.**

(1)—*Funeral rites—Right to share in funeral fees.*—No Hindu or Mahomedan can claim in a Civil Court the right to officiate at any religious or funeral rites in respect of any member of his faith; nor can he claim to share in the offerings or fees collected by others. GHUNIA v. BOOTA, **94 P.R. 1867.**

Prescription—continued.

——3 —**Miscellaneous**—*continued.*

(2)—*User—Right to injure another—Prescriptive right.*—No prescriptive right to injure another can be acquired (as for instance, a right to throw the burnt earth, of which crucibles are made, in a neighbour's tank) however long such right may have been exercised. SREEDHUR DEY v. ADOYTO KURMOKAR, **20 W R. 237.** [*R.*, 2 Ind. Cas. 230=5 N.L. R. 52.]

(3)—*Limitation—Prescription, acquisition of right by—Practice—Basis of claim—Inconsistency—Election.*—According to the new Limitation Act, 1871, which came into operation on the 1st of July, 1871, peaceable and open enjoyment by the person claiming the right, without interruption, and for twenty years, must be proved in order to acquire a right by prescription. [*Diss.*, 4 C.L.J. 437, F.B.=34 C. 51=11 C.W.N. 21=1 M.L.T. 364; *D.*, 4 C. L.J. 367.] Where a plaintiff, coming into Court with a vague double case, is called upon by the Court to elect which branch of his case he will proceed with, the election must be distinct and clear, and such as will bind the party electing, and will show accurately on the face of the record the claim (if any) which is abandoned. RAJAH BIJOY KESHUB ROY v. OBHOY CHURN GHOSE, **16 W.R. 198.** [*R.*, 4 C.L.J. 437=34 C. 51=11 C.W.N. 21=1 M.L. T. 364 ; *D.*, 4 C.L.J. 367.]

(4)—*Suit to close a road—Possessory suit—Pleas—Suit for establishment of two rights—Proof of one right—Declaratory decree for other right also.*—The plaintiff alleged that the defendant had built a bridge over the beel, and opened a road through his land, and sought to recover possession of the land, and to close the road. The defendant alleged *first* that the land, where the road was, was his ; and *secondly* that there was a road there and that it was an ancient wide road for the public for the passage of men and carriages. *Held* that it was enough if the defendant proved one or other of his defences. Where a plaintiff asks for the establishment of two rights, and it appears that he is only entitled to one of them, the other must in some way be relinquished or abandoned. It is not sufficient to insert in the decree a declaration which would bar the plaintiff's right to that which he has failed to establish, and to give him a decree for that which he has established. DHUNPUT SINGH BAHADOOR v. NARAIN PERSHAD SINGH, **20 W.R. 94.** [*R.*, 4 C.L.J. 437=1 M.L.T. 364=11 C.W.N. 21=34 C. 51.]

Claim under, not inconsistent with relief on ground of proprietary right—*See* ALTERNATIVE CLAIMS, 4 C.L.J. 367.

See LEASE—CONSTRUCTION OF CASE, 10 B.H.C. 216.

Right to prescribe for title to a space occupied by a building — Projection of building—*See* LIMITATION—GENERAL, 16 M.L.J. 281=29 M. 511.

Prescription—continued.

——3.—**Miscellaneous**—*concluded.*

Acquisition of a title by—to a place used as a burial ground for a long time—*See* MAHOMEDAN LAW—WAKF, A.W.N. 1906, 159=3 A. L.J. 546.

Whether a right for the discontinuance of a procession of an idol can be acquired by—*See* RELIGIOUS ENDOWMENT, 16 M.L.J. 150.

Presents.

Suit for damages for withholding customary presents to member of caste.—*See* RIGHT OF SUIT—CASTE QUESTIONS, SUITS CONCERNING, 10 B. 661.

Presidency Banks Act.

See ACT XI OF 1876.

Presidency High Courts Act.

See ACT XX OF 1862.

Presidency Jails Act.

See ACT XII OF 1867.

Presidency Magistrates Court-fees Act.

See ACT IV OF 1877.

Presidency Small Courts Acts.

See REVISION — SMALL CAUSE COURT CASES.

See SMALL CAUSE COURTS, MOFUSSIL, JURISDICTION OF.

See SMALL CAUSE COURTS, PRESIDENCY TOWNS, JURISDICTION OF.

Presidency Small Cause Courts Act (IX of 1850).

[REP., ACT XV OF 1882.]

(1)—*See* COSTS—SPECIAL CASES, 1 Ind. Jur. N.S. 95.

(2)—S. 25—*See* COSTS —SPECIAL CASES, 1 B.L.R.O.C. 66.

(3)—*Act* IX *of* 1850, *ss.* 26, 41—*Calcutta Small Cause Court, rule of practice of—Service of summons.*—The meaning of s. 26, Act IX of 1859, is that the time between the service of summons and the day on which the Court is holden on which the cause is to be tried, shall in all cases be fixed by the rules for regulating the practice of the Court. The only time fixed by Rule 3 is two clear days. The words "unless the Court shall otherwise order" do not fix any other time, but give the power in any case to disregard the rule and the Act, and to have the summons served at any time before the trial. S. 41 does not authorise this. The rules for regulating the practice and proceedings of the Court, cannot override the provisions of the Act, and dispense with fixing a time for service when the Act has expressly required that it should be done. BHAIRABDAN RAMCHAND v. BASSANTLAL BHAGAT, **9 B.L.R. 256.**

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Presidency Small Cause Courts Act (IX of 1850)—*concluded.*

(4)—S. 41—*See* NO. 3, *supra.*

(5)—S. 54—*See* CERTIORARI, WRIT OF, 1 Ind. Jur. O.S. 68.

(5-a)—*S.* 58—"*Goods and chattels*" *under Small Cause Court Act* (*Mofussil Act* IX *of* 1850).—The words 'goods and chattels' in s. 58 of the Act do not include fixtures (10 B.L.R. 448, 8 B.L.R. 508, *R.*) Oil and flour mills and a steam-engine and boiler are fixtures, and not "goods and chattels" within the meaning of s. 58 of the Act and could not be seized in execution of a Small Cause Court decree. The difference in English Law between trade fixtures and other fixtures cannot be imported into matters of execution. The question whether fixtures are removable by a tenant as against his landlord has nothing to do with the question whether they are seizable in execution as goods and chattels. MILLER v. BRINDABUN, **4 C. 946=4 C L.R. 460=4 Ind. Jur. 240.** (14 B.L.R. 201, *R.*)

(6)—S. 88—*See* BAILMENT, 5 B.L.R. App. 31=14 W.R. 303.

(7)—*Ss.* 91, 98—*Jurisdiction—Court of Small Causes.*—A Small Cause Court (Madras) has no jurisdiction under ss. 91, 98 of Act IX of 1850 to try questions of doubtful title *bona fide* raised by the persons in possession. MUHAMMED ESUF SAHIB v. GEORGE AND JANE, **4 M. 385, F.B.**

(8)—S. 98—*See* NO. 7, *supra.*

Presidency Small Cause Courts Act (XXVI of 1864.)

[REP., ACT XV OF 1882.]

(1)—*See* EXECUTION OF DECREE—JOINT DECREES, EXECUTION OF, 22 W.R. 354.

(2)—*S.* 7—*High Court, Reference to.*—When a case had been heard by a single Judge of the Small Cause Court, and a new trial has been applied for, and the case has been re-heard by two Judges, the Court is bound, under s. 7, Act XXVI of 1864, to refer the case for the opinion of the High Court, if requested to do so by either party to the suit, though the Judges do not entertain any doubt or differ in opinion. MADHAB CHANDRA RUDAR v. AMRIT SINGH NARAIN SINGH, **5 B.L.R. 111.**

(3)—S. 7—*See* CERTIORARI, WRIT OF, Cor. 90.

(4)—S. 9—*See* COSTS—SPECIAL CASES, 2 Hyde 237, 1 B.L.R.O.C. 27, 1 B.L.R.O.C. 66, 4 B. 407.

Presidency Small Cause Courts Act (XV of 1882).

[REP., IN PART ACT XII OF 1891 : ACT VII OF 1896 ; REP., IN PART AND AMENDED ACT I OF 1895 ; AMENDED ACT VII OF 1892, S. 12; ACT III OF 1899 ; SS. 28, 39 (2), 69, AMENDED ACT IV OF 1906 ; SS. 2 TO 4, S. 3, LAST PARA, REP., ACT V OF 1908.]

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

(1)—Power of High Court to restrain suit in Presidency Small Cause Court—*See* CIV. PRO. CODE, 1882, ss. 20, 211, 9 C.W.N. 748.

(2)—*Abandonment of excess—Extension of jurisdiction of Small Cause Court.*—The abandonment, by a plaintiff, when the jurisdiction of the Presidency Small Cause Court was limited to Rs. 1,000, of an excess over that sum, in a suit for damages, will not, after the introduction of the Act of 1882 and a consequent rise in the pecuniary jurisdiction, preclude him from claiming such excess, if he had elected a non-suit in the first suit. SIMSON v. GORA CHAND DOSS, **9 C. 473.**

(3)—*Failure to apply for permission under the rule—Court allowing plaintiff to proceed with suit—Irregularity—Revision—Rules* 89, 98, *Madras High Court Rules.*—Where a plaintiff, who had to apply to Court under r. 98 of the Madras High Court Rules for permission to proceed with the suit, failed so to apply, but he was nevertheless permitted by Court to proceed with the suit and obtained a decree. *Held*, that the High Court would not interfere in revision on the mere failure of the plaintiff to apply under r. 98. PATCHAPERUMAL v. SAMPATHU, **8 M.L.T. 362=8 Ind. Cas. 160.**

(4)—*Injunction against person proceeding in Presidency Small Cause Court, Bombay—Power of High Court to issue.*—The High Court of Judicature at Bombay has the power to issue an injunction against a person from proceeding in the Presidency Small Causes Court at Bombay with a suit referring to the same matter to which the suit in the High Court relates. UDERAM v. HYDERALLY, **10 Bom. L.R. 1141 =33 B. 469.**

(5)—*Injunction not to carry on suit in Small Causes Court—High Court—Jurisdiction.*—The High Court, on its Original Side, cannot in the course of a suit pending before it grant an injunction, on an interlocutory application, to restrain a party to it from carrying on his suit, which he has already instituted in the Presidency Small Causes Court; but, it may remove the latter suit into the High Court and try the same under cl. 13 of the Letters Patent, 1865. JAIRAMDAS v. ZAMENLAL, **Bom. L.R. 201=27 B. 357.**

(6)—*Transfer of suit—High Court.*—The Bombay High Court has power to transfer to itself a suit pending in the Bombay Small Causes Court. MAGANLAL VIJBHUKBANDAS v. BOMBAY CO. LTD., **7 Bom. L.R. 143.**

(7)—Ss. 1, 94—*See* RIGHT OF SUIT—DECREES, 8 B. 1.

(8)—*Ss.* 6, 622, *Civ.Pro. Code*, 1882 (=*s.* 115, *new Code*)—*High Court's jurisdiction to revise orders passed without jurisdiction.*—Having regard to s. 6, Presy. S. C. Courts Act, the High Court has jurisdiction to revise, under s. 622, Civ. Pro. Code, 1882, orders which are said to have been made without jurisdiction

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

in the Presidency Small Cause Court. HALADHAB MACTI v. CHOYTONNA MAITI, **30 C. 588=7 C.W.N. 547.**

(9)—*Ss.* 6, 18, *cls.* (*a*) *and* (*c*), 33—*St.* 24 *and* 25, *Vict. Cap.* 104, *s.* 15—*Civ. Pro. Code. s.* 652—*High Court—Power to make rule* re *leave to sue defendant out of jurisdiction.*—The High Court had no power to declare under s. 33 of the Presidency Small Cause Courts Act, XV of 1882, that the granting of leave to sue a defendant out of the jurisdiction under s. 18, cls. (*a*) and (*c*) of the Act, was a non-judicial or *quasi*-judicial act within the meaning of that section. RAJAM CHETTI v. SESHAYYA, **18 M 236, F.B. =5 M.L.J. 114.** [*F.*, 34 C. 619=11 C.W.N. 649=5 C L.J. 405=2 M.L.T. 406; *R.*, 19 M. 90, 11 C.W.N. 663]

(10)—Ss. 9, 23, 37—*See* CLAIMS TO PROPERTY ATTACHED, 18 C. 296.

(11)—*Ss.* 9, 38—*Practice--Full Court--Appeal from the decision of a single Judge—Powers of full Court to interfere on questions of fact.*—There exists a long and inveterate practice, in the Court of Small Causes at Bombay, under which the full Court consists of two Judges, the Chief Judge or in his absence, the senior Judge presiding; and the Judge against whose decree any application is made, is the second member, if he is present in Court, and if he is absent any other Judge takes his place, and the Court thus constituted proceeds to hear and dispose of the application preferred against the decision of an individual Judge of the same Court. This practice is not *ultra vires* and void, although there are no rules framed respecting it under s. 9 of the Presidency Small Causes Courts Act, 1882. The power to alter, set aside, or reverse the decree or order, contemplated by s. 38 of the Presidency Small Causes Court, 1882, includes the power to pass a decree in favour of the party in whose favour the application is granted. The practice in the Court of Small Causes at Bombay, of reviewing evidence in cases in which the notes of evidence are sufficient to enable the full Court to undertake that review and of setting aside a wrongful dismissal of the suit, where the decision is manifestly against the weight of the evidence, is not contrary to law. BEHRAM v. ARDESHIR, **5 Bom. L.R 555=27 B. 563.**

(12)—*S.* 18—*Jurisdiction—Army Act* (44 *and* 45 *Vic. C.* 58), *s.* 151.—S. 151 of the Army Act does not, either expressly or inferentially, affect the jurisdiction given to Small Cause Courts by Act XV of 1882. The discretion of the Small Cause Courts in giving leave to sue under s. 18 of Act XV of 1882 is one that ought to be only very cautiously exercised in such cases. WALLIS v. TAYLOR, **13 C. 37.** [*Appl.*, 18 C. 144; *Expl.*, 14 C. 526.]

(13)—S. 18—*See* CIV. PRO. CODE, 1908, s. 20, 3 Bom. L.R. 82=25 B. 528.

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

(14)—S. 18—*See* LEAVE TO SUE, 14 C. 526.

(15)—*S.* 18 (1)—*S.* 7, *St.* 51, *Vic. C.* 4 (1888), *amending sub-s.* 1, *s* 151 *of the Army Act*, 1881 (44 *and* 45, *Vic. C.* 58)—*Effect—Grant of leave to sue a military officer.*—Sub-s. 1 of s. 151 (44 and 45, Vic. C. 58) has since been amended by an Act of 1888 (51 Vic. C. 4), s. 7, as follows:—In sub-s. 1 of s. 151 of the Army Act, 1881, the words 'where the persons so subject are *resident* within the *local* jurisdiction,' shall be substituted for the words '*within the jurisdiction.*' The words in the amending section must be meant to restrict the words '*within the jurisdiction, etc.*,' to persons resident within it, so as to meet and exclude the case of persons casually within the jurisdiction for a short time and not actually resident within it, and are limited to that purpose, and therefore do not affect the powers conferred by s. 18 of the Presidency Small Cause Courts Act (1882). [*Not F.*, P.R. 1893. F.B.] When the cause of action has arisen within the jurisdiction of a Presidency Small Cause Court but the defendant, a military officer, resides out of such jurisdiction, the Court can grant leave under s. 18 (1) of the Presidency Small Cause Courts Act. WALLIS & CO. v. BAILEY, **18 C. 372.**

(16)—*S* 18, *Expl* 1—*Set-off not agreed by defendant*—*S.* 111, *Civ. Pro. Code*, *Act* XIV *of* 1882.—*If* the plaintiff's original claim is beyond pecuniary jurisdiction of a Presidency Small Cause Court, but he reduces it to an amount below such limit by set-off of an amount due to him under an entirely different transaction, and the defendant did not, before, or at the time of the trial of the suit, agree to its being set-off against the plaintiff's claim, *held*, by *Macpherson and Trevelyan, JJ.*, (*Petheram, C.J., dissentiente*). that the suit will be liable to dismissal. *N.B.*—English cases relating to the present case considered. RAMDEO v. POKHIRAM, **21 C. 419.**

(16-*a*)—S. 18, Expl. 1—*See* SET-OFF, 20 C. 527.

(17)—S. 18—*See* NO. 9, *supra*.

(17-*a*)—Ss. 18, 22—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 11 Bom. L.R. 273=34 B. 13=3 Ind. Cas. 837.

(18)—*S.* 19, *cls.* (*f, g, h*)—*Arrears of maintenance out of hypothecated property—Suit for—Jurisdiction.*—A suit to recover arrreas of maintenance due under a covenant in a mortgage-deed, by which the defendant agreed to pay a certain amount out of the income of the hypothecated property, does not fall under cl. (*f*), (*g*), or (*h*) of s. 19 of the Presidency Small Cause Courts Act. KRISHNA DOSS PARAMANANDA DOSS v. FREDERIC WILLIAM EMERY, **2 M. W.N. 1911, 341=10 M.L T. 331=12 Ind. Cas. 426.** (28 M 394, *R.*)

(19)—*S.* 19, *cl.* (*g*)—"*Suit for determination of any right to or interest in immoveable property,*" *meaning of—Question of title incidentally raised*

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

in suit for rent—Jurisdiction not affected—Determination of jurisdiction—Bona fide *contention of defendant involving question of title, effect of.*—Cl. (*g*) of s. 19 of the Presidency Small Cause Courts Act exempts from the jurisdiction of such Courts, suits expressly brought for the purpose of obtaining a decree determining a right or interest in immoveable property, and not suits for money or moveable property in which a question of title to immoveable property may be raised by the defendant. It is the nature of the suit as brought by the plaintiff, and not the nature of the defence, that is to be looked into, to determine whether or not the Court of Small Causes has jurisdiction. It would be obviously wrong to hold that it is in the power of a defendant to oust the Court of a jurisdiction that it would otherwise have, by the mere raising of a plea of title. Nor does the *bona fides* of such a defence affect the question of jurisdiction. For such a plea, whether made *bona fide* or not, would have to be enquired into; and the Court of Small Causes has the power to enquire into it and determine it for the purpose of the suit which it has jurisdiction to try. In this case, plaintiff sued in the Presidency Small Causes Court, Bombay, to recover from the defendant *fazendari* rent in respect of certain lands. The defendant contended that no rent had been paid for the lands since 1846; that the claim was barred by limitation, and that the plaintiff had no title to the lands in question. *Held* that, although the defence raised involved the determination of a *bona fide* question of title to immoveable property, still the suit was cognizable by the Court of Small Causes. BAPUJI RAGHUNATH v. KUVARJI EDULJI UMRIGAR, **15 B. 400.** [*R.*, 20 B. 15, 5 Bom. L.R. 398.]

(20)—*S.* 19 (*k*)—*Suit to enforce arrears of annuity — Suit to enforce a trust.*—A suit to enforce the arrears of an annuity payable under a will and to which the executors have assented, is cognizable by the Presidency Small Causes Court; it does not fall under s. 19 (*k*) of the Presidency Small Cause Courts Act, 1882. DOSIBAI MARKAR v. COOVERBAI MARKER, **10 Bom. L.R. 758=32 B. 575.**

(21)—S. 19 (*q*) — Breach of promise of marriage—Contract between parent of intended bride and intended bridegroom—Jurisdiction of Small Cause Court—*See* MAD. ACT VII OF 1892, s. 3, 24 M. 652.

(22)—*S.* 20—*Valuation of suit—Jurisdiction—Small Causes Courts—High Court—Costs.*—The mere fact that the plaintiffs have claimed a sum in excess of the Small Causes Court's jurisdiction is not enough to take the case out of the operation of s. 20 of the Presidency Small Causes Courts Act, 1882, where the result of the suit shows that the true amount or value of the subject-matter was not above the Court's limit. SHRIDHAN v. GORDHANDAS, **3 Bom. L.R. 893=26 B. 235.**

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

(23)—*Ss.* 22, 11, *Presy. S. C. Courts Act,* 1895—*Suits under Rs.* 2,000 *but over Rs.* 1,000—*S.* 6, *General Clauses Act,* 1868—*S.* 9, *Act* XXIV *of* 1864.—S. 11, Presy. S. C. Courts Act, 1895, repeals *pro tanto* the provision as to amount in the Old Act (1882), but there is no provision that it should be retrospective in its operation. When at the time a suit, for an amount under Rs. 2,000 but over Rs. 1,000 was instituted in the High Court, the Amending Act I of 1895 (Presy. S. C. Court, had not been passed, the alteration of Presy. S.C. Court Act, 1882, s. 22, did not affect the suit and the matter was concluded by s. 6, General Clauses Act (1868). (16 C. 278, *Appl.*) [*R.*, 153 P.L.R. 1901=4 P.R. 1902; *Not F.*, 21 B. 779.] By the terms of s. 22, the Legislature did not intend much to extend the powers given to the Judge under s. 9, Act XXIV of 1864, according to which he could only certify when "by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decisions in like cases in the Court of Small Causes, the action was fit to be brought in the High Court." — *Per Trevelyan, J.* ISMAIL ARIFF v. S J. LESLIE, **24 C. 399=1 C. W.N. 188.**

(24)—S. 22—*See* COSTS—SPECIAL CASES, 21 B. 729.

(25)—S. 22—*See* NO. 17-*a*, *supra.*

(26)—S. 23—*See* NO. 10, *supra.*

(27)—*S.* 28—"*For the purposes of execution,*" *meaning of.*—The words "for the purposes of execution of the decree" in s. 28 of the Presidency Small Cause Courts Act only mean that, as between the judgment-debtor and the judgment-creditor, property of this particular class (*i.e.*, tiled huts) shall, for the purposes of execution, be deemed to be moveable. That section does not contemplate that the Small Cause Court should deal, in execution proceedings, with questions of title or determine any right to, or interest in, tiled huts, at any rate as between the attaching creditor and the mortgagee of the judgment-debtor. DENO NATH BATABYAL v. ADHOR CHUNDER SETT, **4 C.W.N. 470.** (18 C. 296, *D.*) [*R.*, 29 C. 498, 31 C. 1001, 34 C. 823.]

(28)—*S.* 31, *cl.* (*b*)—*Court executing decree of Presidency Small Cause Court, if must be pecuniarily competent—Civ. Pro. Code (Act* V *of* 1908), *s.* 24—*Transfer.*—Under s. 31 of the Presidency Small Cause Courts Act, the Court to which a decree may be sent for execution is the Civil Court competent to deal with it under the provisions of the Civ. Pro. Code. Pending proceedings which are without jurisdiction cannot be transferred to a Court which would have jurisdiction. Where a decree of the Calcutta Small Cause Court exceeded in value the pecuniary limit of the jurisdiction of the Munsiff to whose Court it was sent for execution: *Held*, that the Munsiff had no jurisdiction to execute the decree. SHAMSUNDAR SAHA v. ANATH BANDHU SAHA, **14 C.W.N. 662=6 Ind. Cas. 97=37 C. 574.**

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

(29)—S. 33—*See* NO. 9, *supra.*

(29-*a*)—Ss. 36, 38 and Rule 223—Garnishee proceedings—*Ex parte* order—Re-hearing—*See* GARNISHEE PROCEEDINGS, 8 Ind. Cas. 856=21 M.L.J. 525.

(30)—*S.* 37, *Act* XV *of* 1882 (*Presidency Small Cause Courts Act*)—*S.* 622, *Civ. Pro. Code* 1882—*Second new trial.*—It is competent for a Judge of the Presidency Small Cause Court to hear more than one application for a new trial in the same case, (the decree or order in s. 37, Act XV of 1882, meaning not necessarily the original "decree or order" but "the decree or order existing or subsisting in the suit.") It was not the intention of the Legislature, in using the words of s. 37, Act XV of 1882, to prohibit such practice. To allow such new trials after previous new trials, would be in accordance with the practice of the Courts in England. SURRUT COOMARI DASSEE v. RADHA MOHUN ROY, **22 C. 784.** (10 B.L.R 355, *F.*) [*D.*, 3 C.L.J. 199, 4 C. L.J. 46=10 C.W.N. 14.]

(31)—*S.* 37, *powers of Full Bench under, whether altered by s.* 13 *of Amending Act* (I *of* 1895).—The powers of the Full Bench of the Presidency Small Cause Court, to revise a decree of a single Judge or order a new trial under s. 37 of Act XV of 1882, have not been altered by the amendment of the Act by s. 13 of Act I of 1895. The alteration in the title of the chapter into "new trials and *appeals*" cannot be considered as sufficient to allow appeals to the Full Bench, notwithstanding the express words of s. 37. Further, the introduction of the words "where a suit has been contested" in the present s. 38, has the effect not of extending the powers of revision previously possessed by the Full Bench, but, on the other hand, of limiting them to contested cases. SRINIVASA CHARLU v. BALAJI RAU, **21 M. 232.** [*R.*, 23 B. 414, 27 B. 563, 31 M. 490=18 M.L.J. 480= 4 M.L.T. 283.]

(32)—S. 37—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, O. XVII, r. 2, 21 C. 296.

(33)—S. 37—*See* LIMITATION ACT, 1908, art. 164, 17 B. 507.

(34)—S. 37—*See* NO. 10, *supra.*

(34-*a*)—*Ss.* 37, 38, 69—*Judges differing on a point of law—Procedure.*—Where in an application to the Full Bench under s. 37 of Act XV of 1882 for a new trial, the Judges differ on a point of law, the proper procedure is as indicated in s. 69, to state a case for the opinion of the High Court and to reserve judgment or give judgment contingent on such opinion, and not to enter into the merits of the case and to dispose of it. Such a disposal is in effect a new trial, though an order for re-trial is not expressly made. SESHAMMAL v. MUNISAMI MUDALI, **20 M. 358=7 M.L.J. 140.** [*F.*, 31 M. 490=4 M.L.T. 283=18 M.L.J. 480.]

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

(35)—*S.* 38—*Application to Full Bench of Small Cause Court—Revision petition to High Court direct from a decision of a Presidency Small Cause Court Judge whether lies—Civ. Pro. Code* (*Act* V *of* 1908), *s.* 115.—The High Court will not, except in very special cases, interfere in revision, with the decision of a Judge of the Presidency Small Cause Court, unless the party aggrieved had first applied to the Full Court of the Presidency Small Causes under s. 38 of the Presidency Small Cause Courts Act, 1882. SEETHAPATHY NAIDU v. LAKSHMANA CHETTY, **10 Ind. Cas. 551.**

(36)—*S.* 38—*No question of law—Whether new trial may be ordered on question of fact—Scope of s.* 38.—S. 38, Presidency Small Cause Courts Act, gives the Court power, *inter alia*, to order a new trial to be held. There is no limitation in s. 38 that such power can be exercised only if a question of law arises. A new trial may be ordered where the judgment is manifestly against the weight of evidence. JOHAN SMIDT v. RAMPRASAD, **38 C. 425=12 Ind. Cas. 11.** (24 C. 455, *R.*)

(37)—*S.* 38—*Suit—Proceeding—Power of the Small Cause Court in the Presidency town to order new trial.*—The Presidency Small Cause Court cannot take action under s. 38 of the Presidency Small Causes Courts Act, 1882, in reference to an order passed in a proceeding under Chapter VII of the Act. RAMKRISHNA v. HAJI DAWOOD, **9 Bom. L.R. 208=31 B. 259.**

(38) — *S.* 38 — *Chap.* VII — *Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 108, 647—Ex parte *order—Power of the Small Cause Court to set aside the order.*—The Court of Small Causes at Bombay has inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper cause being substantiated. TYEB BEG v. ALLIBHAI, **8 Bom. L.R. 803=31 B. 45.**

(39)—*S.* 38—*Small Causes Court—Ordering a new trial—Jurisdiction—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622—*High Court—Revision.*—The jurisdiction exercised by a Presidency Small Causes Court under s. 38 of the Presidency Small Causes Court Act, 1882, is in no way limited like the jurisdiction exercised by the High Court under s. 622 of the Civ. Pro. Code, 1882 S. 38 is in the widest possible terms. BAPUJI v. DASTUR, **8 Bom. L.R. 678.**

(40)—*S.* 38—*New trial—Civ. Pro. Code, s.* 108—*Re-hearing of suit decreed* ex parte—*Rules made by the High Court—Rule* 70.—When a suit has been decreed *ex parte* and an application under s. 108 of the Civ. Pro. Code, for setting aside such decree dismissed, an application cannot be made under s. 38 of the Presidency Small Cause Courts Act for a new trial. S. 38 only applies "where the case has been contested." Where there was no contest, there was no "trial" and consequently there cannot be a "new trial." In an application, under s. 38, for a new trial of the matters arising under s. 108, Civ. Pro. Code, and Rule 70

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

of the High Court's Rules, the Small Cause Court has no jurisdiction to go into the merits of the case. ANANTA COOMARI DASSI v. RADHARANI DASSI, **3 C.L.J. 199.** (22 C. 784, 10 B.L.R. 355, *D.*)

(41)—S. 38—*See* CIV. PRO. CODE, 1908, . 115, 4 M.L.T. 325.

(42)—S. 38—Application to High Court for re-hearing—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 12 B. 579.

(43)—S. 38 — *See* NOS. 11, 29 and 34-*a*, *supra.*

(44)—*Ss.* 38, 69—"*Miscarriage of justice.*" —Where a case was gone into and thoroughly in the Presidency Small Cause Court, and the Judge of the Small Cause Court was willing to state a case for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act, if the plaintiffs desired it, but the plaintiffs, by their pleader, expressly declined this, and then applied to the High Court under s. 38 of the Act for a re-hearing on the ground that the Judge of the Small Cause Court was wrong in the view he took of the law as applicable to the facts of the case. *held* that there was no "miscarriage or failure of justice" within the meaning of s. 38 of the Act, and that therefore the application ought to be refused. It is difficult to see how there can be said to be a "miscarriage or failure of justice," when a party, instead of taking the opinion of the High Court, as he has the means of doing, voluntarily elects to have the law applicable to the case decided by the Small Cause Court. A mistake in law and a miscarriage or failure of justice are not convertible terms. VOSSONJI TRICUMJI AND CO. v. THE SOUTHERN MARATHA RAILWAY COMPANY, **17 B. 14.**

(45)—*Ss.* 38, 71—*Application for re-hearing of suit dismissed by Small Cause Court—Presidency Small Cause Courts Act* (1882)—*Court-fee to be paid in full—Supply of deficient Court-fee disallowed after expiry of prescribed period.*—Eight days are by s. 38, Act XV of 1882, allowed, within which an application for the re-hearing of a suit dismissed by a Small Cause Court could be made; and by s. 71 of the Act the application is not to be received unless the proper stamp duty has been paid in full, before the expiry of the period of eight days prescribed therefor Where, on such an application being made by petition at the rising of the Court on the last possible day, which was not a regular motion day, the hearing of the matter was postponed to a later date, and on the application being brought on that day it was found that the petition was not sufficiently stamped according to the requirements of s. 71, Act XV of 1882, *held*, that the supply of deficient Court-fee after the expiry of the prescribed period, not being a compliance with the requirements of the section, that could not be done; *held*, also, that although consideration of the application was deferred to a later date, that made no difference, as the eight days had expired before the petition was in such a condition that it could be received, and that if it had been considered then, it could not have been received, but must have been rejected. NORENDRONATH BOSE v. ABINASH CHUNDER ROY, **18 C. 445.**

(46)—*Ss.* 38, 71—*Application for re-hearing without complying with requirements of Act—Subsequent compliance, if sufficient—Practice in Bombay High Court.*—The Court of Small Causes at Bombay passed a decree against A on 9th December 1887. An application to the High Court for re-hearing was made formally under s. 38 of Act XV of 1882, on 16th December 1887 (because such applications should be made within eight days) by A's counsel, before the Court rose for the day, and the hearing of the petition was adjourned to some subsequent day. On the case being called on, the Court was informed (1) that the petition for re-hearing, which was requisite under Rule No. 208 of the High Court Rules, Bombay, had not been signed and declared until 17th December 1887, *i.e.*, the day after the application was made formally in Court, (2) that the affidavit in support of the application, as required by s. 38, had not been filed until two days after the application, and (3) that the Court-fees, which must be paid prior to the application as required by s. 71, had not been paid until four days after the application. *Held*, that the application for re-hearing made on behalf of A must be rejected. Although the application was nominally made on 16th December 1887, it was only provisionally received. Every objection to its reception which could have been taken on that day can be taken on the day when the application came on for hearing. The fact that A subsequently complied with the requirements of the Act cannot place him in a better position than he occupied at the time when he made the application. Under s. 38, read with s. 71 of the Presidency Small Cause Courts Act (XV of 1882), an application to the High Court for re-hearing a case once decided by the Court of Small Causes must be made in writing. *In re* JAIKISSONDAS PURSHOTAM DAS, **12 B. 408.**

(47)—*S.* 41 — *Mortgagor and mortgagee — Ejection suit.*—S. 41, Presidency Small Causes Courts Act, 1882, applies to the suit brought by a mortgagee to eject the mortgagor from the mortgaged property even though no actual relation of landlord and tenant is created between them. RAGHAOJI v. NARANDAS, **1 Bom. L.R. 860.**

(48)—*S.* 41—*Mortgagee—Mortgagor a tenant-at-will of the mortgagee from him, but not of the purchaser — Purchaser suing the mortgagor in ejectment in the Small Causes Court—Purchaser not a person claiming through the mortgagee—Ejectment suit—Jurisdiction.*—The defendant mortgaged his house to L on 8th April 1896. L sold it by auction to the plaintiff on 8th October 1900; and executed the conveyance on

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

20th idem. The plaintiff gave the defendant notice to quit on 15th January 1901; but defendant denied plaintiff's right to demand possession of the property. The plaintiff, then, filed suit in the Court of Small Causes at Bombay, under s. 41 of the Presidency Small Causes Courts Act, 1882, to eject the defendant from the house. The Small Causes Court submitted the following questions for the opinion of the High Court. (1) Whether the defendant was a tenant-at-will of the plaintiff or held in his own right? and (2) Whether the Court had jurisdiction to try the suit under s. 41 of the Presidency Small Causes Courts Act, 1882: *Held*, (1) that where a mortgagee conveys the mortgaged property under his power of sale it cannot be said that the mortgagor is in possession with the permission of the mortgagee's purchaser; (2) that the Small Causes Court had no jurisdiction to entertain the suit, under s. 41 of the Presidency Small Causes Courts Act, because the plaintiff could not be said to claim through the mortgagee in the sense intended by the section. CHHABIL DAS v. MOWJI, **3 Bom. L.R. 456=26 B. 82.**

(49)—S. 41—*See* EJECTMENT, SUIT FOR, 1 Bom. L.R. 860.

(50)—S. 41—*See* LANDLORD AND TENANT—MISCELLANEOUS, 10 B. 30.

(51)—*Ss.* 42, 45, 46, 48—*Order for ejectment without summons served on the defendant—Validity—Position of defendant—Applicability of the provisions of Civ. Pro. Code.*—Where the respondent was not served with a summons under s. 42, before an ejectment order was passed, but not against him, and he was ejected under it. *Held* that the respondent was not a party to the order under which he was ejected, but a person holding the position of a person other than the judgment-debtor when the case is one of dispossession under the decree. Though Ch. VII of the Act makes no express provision of the procedure to be adopted in such a case, it merely states that the party aggrieved may have a remedy by suit under ss. 45, 46, but it will not prevent the application of s. 48, which extends the provisions of the Civ. Pro. Code to Small Cause Courts, other procedure not being prescribed. BAGGIAMMA v. APPADURAI GRAMANY, **7 M.L.T. 385=6 Ind. Cas. 722.**

(52)—S. 45—*See* NO. 51, *supra.*

(53)—S. 46—*See* NO. 51, *supra.*

(54)—S. 48—*See* NO. 51, *supra.*

(55)—*S.* 69—*Case stated for opinion of High Court—Reference to be only on precise point of law or usage—Practice.*— *Held* (*Farran, J., doubting*) that the Presidency Small Cause Court ought not to make general indefinite reference to the High Court, under s. 69 of the Presidency Small Cause Courts Act. The case stated must relate to a point of law or usage having the force of law, and the question referred must be precise. Otherwise the High Court would send back the reference for amendment. In this suit before the Presidency Small Cause Court, Bombay, plaintiff claimed damages from the defendant for breach of contract to deliver goods. The defendant paid into Court the sum of Rs. 779, and the only dispute was as to the principle on which the damages were to be assessed. At the conclusion of the hearing, and before the judgment was delivered, the plaintiff's attorney informed the Chief Judge that he would require a case to be stated for the opinion of the High Court, under s. 69 of Act XV of 1882, unless the decision were in his favour. The Judge, thereupon, desired to be informed as to the exact question of law the plaintiff's attorney would wish to be referred; but the latter declared himself unable to do so until after the judgment was delivered, and said he could not then say anything more explicit than that he would require a case to be stated for the opinion of the High Court on any question of law that might arise in the case. The Chief Judge, thereupon, stated the facts to the High Court and referred the following general question for its opinion:—"Whether on the facts above set forth, the plaintiffs are entitled to recover from the defendant any, and if so what sum greater than Rs. 779-10 0 paid into the Court by the defendant." A preliminary objection was taken as to whether the reference was in proper form. No question of law or usage having the force of law having been formulated for the opinion of the Court, *held* (*Farran, J., doubting*) that the reference should be sent back to be amended by stating the precise question arising in the case. RALLI BROTHERS v. GOCULBHAI MULCHAND, **15 B. 376.** [*R.*, 15 M. 179, L.B.R. 1893—1900, 537, 11 Bom L.R. 830=33 B. 708=3 Ind. Cas. 960.]

(56)—*S.* 69—*Reference—Time—Delivery of judgment.*—The language of s. 69 of Act XV of 1882 shows that the party requiring the Judge to make a reference to the High Court must do so before the Judge has delivered his judgment, as it gives the Judge the option, on being so required, either of postponing his judgment or delivering it contingent on the opinion of the High Court. BANK OF BENGAL v. VYABHOY GANGJI, **16 B. 618.** [*Appr.*, 11 Bom. L.R. 830=33 B. 708=3 Ind. Cas. 960.]

(57)—*S.* 69—*New trial, application for, under s.* 69, *Act* XV *of* 1882—*Difference of opinion between Judges—Contingent judgment—Proper course.*—The refusal of a new trial, subject to the opinion of the High Court on certain points referred to it, is not a "contingent judgment," under s. 69 of Act XV of 1882; and the proper course, upon a difference of opinion between the Judges, would be to grant a new trial, wherein the point would be fully discussed. NUSSERWANJEE v. PURSOTUM DOSS, **11 C. 298.** (12 B.L.R. 34, *F.*) [*F.*, 15 M. 179; *D.*, 20 M. 358=7 M.L.J. 140.]

(58)—*S.* 69—*Jurisdiction—Question of title.*—The Presidency Small Court has jurisdiction

Presidency Small Cause Courts Act (XV of 1882)—*continued.*

to try questions of title, which arise incidentally in a suit before it. It may also try such a question where it is the principal question. But, it ought not to try such a question where that is the sole and the only point in the suit. RAJENDRA MULLICK v. NANDA LALL GUPTA, **31 C. 1001.**

(59)—*S.* 69, *Scope of—S.* 621, *Civ. Pro. Code,* 1882 (=*O.* XLVI, *r.* 5)—*High Court, power of.*—The conditions of s. 69, Act XV of 1882, ought to be strictly complied with, before the High Court can give an opinion on the matter referred. The conditions necessary are:—the referring Court ought to entertain a reasonable doubt upon a point of law; it ought to state the point upon which the doubt is entertained: it must give a statement of the case. If these conditions are not complied with, the High Court, under s. 621, Civ. Pro. Code, 1882, will return the case to the lower Court for amendment. BARLING v. SECRETARY OF STATE FOR INDIA, **30 C. 458.**

(60)—*S.* 69—*Reference to the High Court—Property—Risk—Bill of lading—Consignee.*—S. 69, Presidency Small Causes Court Act, enables the Small Causes Court to make a reference to the High Court on any question of law, or usage having the force of law, or the construction of document; but not on any question of fact. SURROSH v. MUGONLAL, **2 Bom. L.R. 460.**

(61)—*S.* 69—*Question whether cheque was presented within reasonable time, whether one of fact—Whether the Small Cause Court can refer such question to the opinion of the High Court.*—The question whether a cheque has been presented within a reasonable time has to be determined with regard to the nature of the instrument, the usage of trade and of bankers and the facts of the particular case. Such a question is clearly a question of fact and not of law; and it is not therefore a question which the Small Cause Court can refer to the opinion of the High Court under s. 69 of the Act. THE EAST INDIAN AND ANGLO INDIAN DEPOSIT AND LOAN SOCIETY, LTD. v. T. M. NAIR, **4 M.L.T. 89=31 M. 364.** [*Cited.*, 32 M. 206.]

(62)—*S.* 69, *Effect of High Court's decision.*—Where the Presidency Small Cause Court passes judgment in favour of a plaintiff contingent upon the opinion of the High Court and the latter decides, on the reference, that, on the plaint before the Court, the plaintiffs could not recover, the Presidency Small Cause Court ought to dismiss the suit. A. YULE & CO. v. MAHOMED HOSSAIN, **24 C. 129.**

(63)—*S.* 69—*Reference to High Court when permissible—Reasonable doubt by the referring Court.*—S. 69 of the Presidency Small Cause Courts Act permits a reference to the High Court only when the referring Court entertains a reasonable doubt on the point referred. KRISHNA DOSSPARAMANANDA v. FREDERICK WILLIAM EMERY, **17 Ind. Cas. 93.**

Presidency Small Cause Courts Act (XV of 1882)—*concluded.*

(64)—S. 69—*See* BOM. ACT II OF 1864, ss. 8, 9, 11 Bom. L.R. 830=3 Ind. Cas. 960=33 B. 708.

(65)—S. 69—Civ. Pro. Code, s. 622—Difference of opinion among the Judges constituting the Full Bench—Disposal of the case according to the opinion of the majority—Legality—Jurisdiction of the High Court—*See* CIV. PRO. CODE, 1908, s. 115, 4 M.L.T. 283.

(65-*a*) S. 69—*See* NOS. 34-*a*, 44, *supra.*

(66)—*S.* 69, *r.* 428 *of Rules of procedure of Presidency Small Cause Court—Stating case for opinion of High Court.*—R. 428 of the Rules of Procedure of Presidency Small Cause Court is not *ultra vires.* Nor is it in conflict with s. 69 of Act XV of 1882. The rule and the section proceed on different lines, the rule providing for cases in which the Judge is in doubt, and not for cases covered by the section. MUHAMMAD KHUMARALI v. RANGA RAO, **24 M. 654.**

(67)—*Ss.* 69, 70—*Effect of failure—Deposit—Costs of reference.*—Where a judgment is given contingent on the opinion of the High Court on a point to be referred to the latter, and the party, at whose instance the contingent judgment is given and the reference is made, fails to deposit the security "at once," the reference will be liable to be dismissed. JUGAL KISHORE v. SEWMICK ROY, **28 C. 260.** (14 B.L.R. 180, *D.*)

(68)—*Ss.* 69 *and* 70—*Application for new trial—Practice.*—A party requesting a Presidency Small Cause Court to deliver judgment contingent on the opinion of the High Court under s. 69 and subsequently abandoning the exercise of such right is not precluded from applying for a new trial. The last clause of s. 70 only means that the judgment becomes final and conclusive, save as provided by ch. VI. PROTAP CHUNDER SEN v. TUNSOOK DASS, **23 C. 967.**

(69)—Ss. 69, 70—*See* REFERENCE TO HIGH COURT, 28 C. 260.

(70)—S. 69, r. 428—*See* RULES—RULES MADE UNDER ACTS, 24 M. 654.

(71)—S. 70—Payments under, whether makes money the property of the decree-holder—*See* ST. 11 AND 12, Vic. c. 21, ss. 39, 40, 7 M.L.T. 207=5 Ind. Cas. 379=33 M. 467.

(72)—S. 70—*See* NOS. 67, 68, 69, *supra.*

(73)—S. 94—*See* NO. 7, *supra.*

(74)—R. 223—*See* NO. 29, *supra.*

(75)—R. 428—*See* NOS. 66, 70, *supra.*

Presidency Small Cause Courts Act (I of 1895).

[S. 4, REP. ACT I OF 1903; S. 5, VIRT. AM., ACT III OF 1899, S. 4.]

(1)—*See* EVIDENCE ACT, 1872, ss. 74, 76, 31 C. 284=8 C.W.N. 125.

(2)—S. 11—*See* COSTS—SPECIAL CASES, 21 B. 779.

Presidency Small Cause Courts Act (I of 1895)—*concluded.*

(3)—*S.* 38—*Presidency Small Cause Courts Act* (I *of* 1895), *s.* 622, *Civ. Pro. Code*, 1882(= *s.* 115, *new Code*)—*Tiled huts—Suit for title—Jurisdiction.*—Tiled huts are immoveable property, and as the law stands at present, the Small Cause Court has no jurisdiction to try a question of title to such huts as between an attaching creditor and a third person, who alleges that they belong to him and not to the judgment-debtor. AMRITA LALL KALAY v. NIBARAN CHANDRA NAYEK, **31 C. 340=8 C.W.N. 246.** (5 B. 572, *F.*; 11 C. 261, *D.*) [*R.*, 31 C. 1001.]

(4)—*S.* 38—*Dismissal of contested suit for default—Restoration of suit on application of plaintiff—Application to set aside order restoring suit.*—An application does not lie under s. 38 of the Presidency Small Cause Courts Act to set aside an order of a Judge of the Court setting aside his order dismissing a contested suit for default of plaintiff's appearance, the order setting aside the dismissal order not being a decree nor having the force of a decree. CHINNATHAMBI MUDALIAR v. VEERABADRIAH NAIDOO, **26 M. 163.** [*F.*, 31 M. 490=18 M L. J. 480=4 M.L.T. 283.]

(5)—*S.* 38—*Presidency Small Cause Court Act*, 1895—*Jurisdiction, Nature of.*—The jurisdiction given to a Presidency Small Cause Court under s. 38, Presidency Small Cause Court Act 1895 is a revisional and not an appellate jurisdiction. The judgment of the original Court can be reversed and a new trial ordered only when the judgment of the original Court is manifestly against the weight of evidence. SASSOON v. HURRY DAS BHUKUT, **24 C. 455=1 C.W.N. 44.** (19 M. 96, *F.*) [*R.*, 27 B. 563. 23 B. 414, 29 C. 498, 4 M.L T. 283=18 M.L.J. 480=31 M. 490.]

(6)—S. 39, sub-s. (1)—*See* PRACTICE AND PROCEDURE, 1 C.W.N. 32.

Presidency Small Cause Courts Law Amendment Act.

See ACT X OF 1888.

Presidency Towns Amending Act, Police.

See ACT XLVIII OF 1860.

Presidency Towns, execution in, of Mofussal Process.

See ACT XXIII OF 1840.

Presidency Towns Insolvency Act (III of 1909.)

(1)—*S.* 6—*Practice—Right of audience—Attorneys can appear before the officer appointed under s. 6 of the Presidency Towns Insolvency Act—Indian Insolvent Act* (11 & 12 *Vic.*, *c.* 21), *ss.* 3 *and* 76.—Attorneys of the High Court have a right of audience before the officer appointed by the Chief Justice, in the exercise of the powers conferred upon such officer under s. 6 of the Presidency Towns Insolvency Act. *In re* THE ADVOCATE-GENERAL OF BOMBAY, **15 Bom. L.R. 217, F.B.=19 Ind. Cas. 421.**

Presidency Towns Insolvency Act (III of 1909)—*continued.*

(1-*a*)—*Ss.* 7, 86—*Official Assignee—Suit by stranger—Suit in Civil Court—Right of suit.*—Where the Official Assignee goes into possession of or claims certain property as belonging to the insolvent, and it is also claimed by a stranger as his, it is competent to the latter to bring a suit against the Official Assignee in a Civil Court. NAGINLAL CHUNILAL v. THE OFFICIAL ASSIGNEE, **13 Bom. L.R. 900=35 B. 473=12 Ind. Cas. 391.**

(1-*b*)—*S.* 9—*Requirements of—Substantial compliance—Whether sufficient—Amendment—When to be allowed—Rights of other parties—Prejudice.*—Where a petitioning creditor relies on an act of insolvency within the meaning of s. 9 (*d*) (i) and where the petitioner does not expressly allege an intent to defeat or delay creditors. *Held*, that, if the petition and the affidavit contain language which may be construed as a statement of an intention to defeat or delay creditors, the requirements of s. 9 are substantially complied with and that the statement of such intention need not be in the exact language of the section itself. Where there is no subsisting order of adjudication, an amendment of the petition could be allowed to be made, provided it is made within three months of the act of bankruptcy upon which the petitioner relies. It is a settled rule of practice that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendment. T. MAHOMED AYYAB SAHIB v. MESSRS G.P. GUNNIS AND CO., **13 M.L.T. 275=M.W.N. 1913, 264=24 M.L.J. 562=19 Ind. Cas. 19.**

(1-*c*)—*Ss.* 9 (*e*), 10—*Partnership debt—Attachment of property in execution of a joint decree against partners—Property claimed on behalf of an endowment—Enquiry as to whether property attached was really judgment-debtor's if essential—General Clauses Act* (X *of* 1897), *s.* 13—*Act or default, if to be personal of person sought to be adjudicated—Delay in applying for annulment.*—S. 9 (*e*) of the Presidency Towns Insolvency Act requires that the act or default which amounts to an act of insolvency must be a personal act or default of the particular individual, or, in certain circumstances, of his agent. Where properties alleged to belong to three judgment-debtors remained under attachment in execution of a joint decree against them for more than 21 days. *Held*—That this alone could not be relied on as an act of insolvency on the part of H, one of the co-judgment-debtors, when, in the execution proceeding, claim was laid to what was alleged to be his share of the property on behalf of an endowment, and that claim was pending when the adjudicating order was made against him and the other co-judgment-debtors. On an application by H for annulment of the adjudication, *held*—that the above act of insolvency on the part of his co-judgment-debtors could not be regarded as an act of insolvency on the part of H. *Held*—That it was necessary to

Presidency Towns Insolvency Act (III of 1909) —*continued.*

inquire whether the property attached was in fact the applicant's. An objection that the application for annulment was not made till after the lapse of a considerable time, having been raised for the first time on appeal: *Held* that there being no bar of limitation in the matter, this objection taken at this late stage should not be entertained. HARISH CHANDRA MUKERJEE v. THE EAST INDIA COAL CO. LD., **16 C.W.N. 733=14 Ind. Cas. 576.**

(1-*d*)—S. 10—*See* NO. 1-*c*, *supra*.

(1-*e*)—S. 15—Debtor obtaining personal discharge—Right to apply again in respect of fresh debts—*See* STATUTE 11 AND 12 VIC., C. 21, s. 47, 10 Ind. Cas. 792.

(1-*f*)—*S.* 17—*Land-holder insolvent—Suit by tenant to set aside distraint—S.* 17, *inapplicable —Official Assignee—Property in his hands—Leave.*—S. 17 of Act III of 1909 applies only to suits by a creditor in respect of his debt, and not to a suit by a tenant to set aside distraint by an agent of the Official Assignee. There is no rule of law requiring that leave should be obtained from the Official Assignee on the Insolvency Court before any suit could be instituted against that officer or one claiming under him. An insolvent's property in the hands of the Official Assignee is not in *custodia legis* and there is no contempt of the authority of the Court in instituting a suit against the Official Assignee with respect to property vested in him and in his possession. RAMALINGA CHETTY v. ANANTHA CHARIAR, **M.W.N. 1913, 237=24 M.L.J. 350=13 M.L.T. 303=18 Ind. Cas. 722.**

(2)—*Ss.* 17, 103—*Adjudged insolvent—"Suit or other legal proceedings" against the insolvent —Penal Code (Act* XLV *of* 1860), *s.* 421—*Fraudulent transfer of property—Magistrate jurisdiction to try the offence.*—M applied to the Insolvent Debtors Court at Bombay for relief under the Presidency Towns Insolvency Act, 1909, and was adjudicated an insolvent the same day. Ten days later, a creditor of his filed a complaint in the Magistrate's Court, against him for an offence under s. 421, Penal Code, and against two others for abetment of the offence. M contended that the Magistrates jurisdiction to entertain the complaint under s. 421 was excluded by the Insolvency Act, 1909, and that only the Insolvency Court at Bombay had jurisdiction to entertain the complaint: *Held*, that the Magistrate's jurisdiction to try an adjudged insolvent for an offence under s. 421, Penal Code, was not taken away by the Insolvency Act, 1909. The expression "or other legal proceedings" in s. 17 of the Insolvency Act, 1909, following as it does the word "suit," a word of more limited application, must be construed on the principle of *ejusdem generis*. Where the Insolvency Act, 1909, creates an offence, it is the Insolvency Court which has jurisdiction as to it. But as to offences under the Indian Penal Code, the ordinary jurisdiction of the Criminal Courts cannot be held to

Presidency Towns Insolvency Act (III of 1909) —*continued.*

be excluded, unless expressly or by necessary implication the Act repeals the Code for the purposes of those offences. S. 103 of the Act does not substantially interfere with s. 421 of the Code. As its essential ingredient shows, it is more or less a new offence, created by the Act in addition to the offence under the Code. One statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it; but the inconsistency must be so great that they cannot both be to their full extent obeyed. EMPEROR v. MULSHANKAR HARINAND BHAT, **12 Bom. L.R. 750.**

(2-*a*)—*Ss.* 17, 126—*Effect of order of adjudication over property in the mofussil under attachment by mofussil Court—Right of Official Assignee over such property—S.* 50, *Act* III *of* 1907 (*Provincial Insolvency.*)—The Presidency Towns Insolvency Act is an Act of the Legislative Council of the Governor-General, and purports to vest the property of the insolvent wherever situate in the Official Assignee. S. 17 of that Act, therefore, vests the property of the insolvent in any part of British India in the Official assignee. (37 C. 418=37 I.A. 86, *F.*) The wording is substantially the same as that of the Imperial Statute which was repealed by the present Act. In this case, prior to the order of adjudication by the Insolvency Court at Calcutta, certain properties at Delhi belonging to the insolvent were attached and sold in execution by the District Court of Delhi, and the sale proceeds were brought into the District Court. On the passing of the order of adjudication by the Court at Calcutta, *held* that the assets of the insolvent in the Delhi Court belong to the Official Assignee, and that the District Court at Delhi should be requested to act in aid under s. 50, Provincial Insolvency Act. *In re* JEWANDAS JHAWAR, **40 C. 78=8 Ind. Cas. 908.**

(3)—*S.* 25—*Protection order—Insolvent—Practice—Change effected by the new Act*—Stare decisis—*Orders* interim—*Binding character of.* --The Presidency Towns Insolvency Act, 1909, gives to the Court and its officers the fullest powers to investigate into the conduct and affairs of an insolvent: The Official Assignee conducts his public examination and reports on his conduct when he applies for his discharge; while the burden which has hitherto rested upon creditors of protecting commercial morality has been entirely removed from their shoulders. S. 25 of the Act clearly intends that, while an insolvent diligently performs the duties prescribed by the Act he should not be harassed by execution creditors, and should not be rendered liable to pressure, whereby one creditor may get undue advantage over another. The section does not deprive the Court of its discretion in granting or refusing protection, but sub-s. 4 indicates clearly the line along which that discretion should be exercised when a creditor opposes the grant. If an insolvent can produce the certificate referred to, the *onus* is thrown on an opposing creditor of showing cause why the

Presidency Towns Insolvency Act (III of 1909)—*continued.*

protection order should not be granted, but he is not entitled to ask the Court to enter into an inquiry whether the insolvent has been guilty or not of commercial immorality, or of an offence under the Act. It is open to a creditor to show that an insolvent has imposed on the Official Assignee, and that in spite of the certificate he has not conformed to the provisions of the Act or that an insolvent has been guilty of delay in applying for his discharge; for the Court will not countenance an insolvent resting unreasonably beneath the shade of the protection order. It has never been the practice for the Commissioners in Insolvency under the Indian Insolvency Act to consider themselves bound by their previous decision on applications for *interim* orders when it has been a matter for their discretion. *In re* MEGHRAJ GANGABAX, **12 Bom. L.R. 517=7 Ind. Cas. 448.**

(3-*a*)—*S.* 36 (5), (6)—*Witness—Examination in an insolvency case—Order for delivery of property when to be made—Application by Official Assignee should be in writing.*—An order under s. 36, sub-s. 5, Presidency Towns Insolvency Act, can be made only upon application by the Official Assignee, and such application must be in writing signed by the Official Assignee. The examination under s. 36 (6) can be delegated to an officer of the Court, and an order under sub-s 5 can be based on such examination above. But the person examined should have an opportunity of contesting the granting of the order. *In the matter of appeal of* ISMAIL MAWOON DAWOODJI, **16 Ind. Cas. 87=6 L. B.R., 4th Qr., 142.**

(4)—*S.* 52—'*Absolute order, possession and dispossession'—Test of—Creditor having custody of keys during nights—Debtor left in enjoyment of goods during day—Effect—Fraud upon the Act.*—H, a creditor of an insolvent, made various advances to the insolvent and obtained a letter of hypothecation from the latter in which one term was "we agree to deliver to you the keys of the said business premises and to take from you every morning the said keys and return them to you every evening. For breach of any stipulation contained herein or failure to pay the money due when demanded, it shall be lawful for you without my consent to retain the keys and seize the goods or otherwise take possession of them." The agreement was given effect to and on the day when the insolvent absconded. H took possession of the goods and claimed to rank as a 'secured creditor.' *Held*, that, under the agreement, the goods continued to be in the possession, order or disposition' of the insolvent, notwithstanding that the keys were every night taken to the creditor and were taken from him every morning, and that the insolvent was the reputed owner of the goods under s. 52, Presidency Towns Insolvency Act. The possession which H had under the agreement was not a real but sham possession, and this is the test. (11 C. 451, *D.*) A device of this sort, under which the debtor was in effect really left in the enjoyment

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of an effective control of the goods, was simply a device to effect fraud upon the Act. In any event, during the day time and during working hours, the goods were in the insolvent's absolute order, possession and disposition. *In the matter of* GULAM ALI SHAMSUDDIN SAHEB. **11 M.L.T. 203=22 M.L.J. 441=15 Ind. Cas. 371.**

(5)—*S.* 56 (1)—'*With a view,' meaning of—Fraudulent preference—Transfer of whole stock without valuation to the creditor on account of pressure—Invalidity.*—Where, after a certain amount of pressure from one of their creditors who was also a near relation of theirs, the insolvents got a deed drawn up without any proper valuation at all, by which they transferred the whole of their stock-in-trade except the book-debts to that creditor as in satisfaction of the debt due to her. *Held* that the transfer was one which was made with the view of giving the creditor an undue preference over other creditors, and was therefore, one that cannot stand. The transfer need not be made with the sole view of giving that creditor preference, but it must be made 'with the view' and that has been explained as meaning that it must be made with this substantial or dominant view. MRS. FLORA CRONAN v. THE OFFICIAL ASSIGNEE OF MADRAS, **9 M.L.T. 211=8 Ind. Cas. 1085.**

(5-*a*)—*S.* 68—*Forward contract entered into during solvency, when can the Official Assignee take advantage of—Powers of the official assignee under s. 68 of the Act how derived.*—To take benefit under forward contracts entered into by the insolvent during his solvency, the Official Assignee must (*a*) communicate his election to take up the contracts within a reasonable time; and (*b*) tender cash before calling upon the seller to deliver the goods. The Official Assignee acting of his own motion has only two powers, *viz.*, (i) to sell property and (ii) to give receipts; the other powers conferred by s. 68 of the Presidency Towns Insolvency Act require sanction of the Court. The sanction contemplated by the second part of the section, which is founded on s. 57 of the Bankruptcy Act (1883) in England, is not a general sanction but particular leave to do particular thing or things. The Official Assignee was not entitled to carry on business of the insolvent for beneficial winding up without sanction of Court. An election to take up contracts communicated on 1st September, when shipping time for July and August shipment had expired, was far too late, and the Official Assignee could not enforce the contract or get damages, although the defendants had for the purposes of their own business not cancelled the shipment. C. E. GREY v. LAMOND WALKER & CO., **17 C.W.N. 578=18 Ind. Cas. 786.**

(6)—S. 86—*See* NO. 1-*a*, *supra*.

(7)—S. 103—*See* NO 2, *supra*.

(8)—*S.* 108—*Letters of administration, application by creditor—Debtor dying in insolvent circumstances.*—Letters of administration may

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be granted to a creditor, although the liabilities of the deceased debtor appear to be in excess of the assets. Application in the Insolvency Court is not the creditor's only remedy. *In the goods of* MAKHAN LAL CHATTERJEE, **15 C.W.N. 350.**

(9)—*S.* 126—*Adjudication in England—Petition by trustee in Bankruptcy to the Indian Court to act in aid of the English Court—Jurisdiction of Indian Court when and how arises* —*Ss.* 27, 118, *English Bankruptcy Act* (46 *and* 47, *Vic*, *C.* 52).—Under s. 118 of the English Bankruptcy Act, the jurisdiction, in respect of which the Indian Court may be asked to exercise its power as a Court in aid, is given on the *request* of the English Court, and in the absence of a letter of request by the English Court to the Indian Court, the jurisdiction of the Indian Court cannot properly be exercised. The presentation of a copy of the order of the English Court by the Trustee in Bankruptcy or some other person is not sufficient to give jurisdiction to the Indian Court. *In re* L. KING & CO., BANKRUPTS, **38 C. 542=12 Ind. Cas. 542.**

(9-*a*)—S. 126 —*See* NO. 2-A, *supra.*

(10)—S. 127 (2)—Effect—*See* ST. 11 AND 12, VIC., C. 21, 5 S.L.R. 4.

Presidency Towns, Police, Amending Act.

See ACT XLVIII OF 1860.

Presidency Towns, Small Cause Courts Act, 1850.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1850.

Presidency Towns, Small Cause Courts Act, 1864.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1864.

President of Taluk Board.

Suit against — Held wrongly framed — Special limitation under s. 156 of Mad. Act V of 1884—*See* MAD. ACT V OF 1884, ss. 27, 156, 16 M. 296.

Press and Registration of Books Act.

See ACT XXV OF 1867.

Presumption.

See BURDEN OF PROOF.

See EVIDENCE.

See EVIDENCE ACT, 1872, S. 90.

See HINDU LAW—PRESUMPTION OF DEATH.

(1) — *Presumption of joint tenancy.*— The tendency of English Courts to presume a tenancy in common rather than a joint tenancy has no application to Indian tenures; where the presumption is generally the reverse. RUN BAHADUR SINGH v. LUCHO KOER, **11 C. 301, P.C.=12 I.A. 23=4 Sar. 602.** (*On appeal from* **6 C. 406.**)

Presumption —*continued.*

(2) — *Due performance of official acts.* — Regard should be had to the presumption in favour of the due performance of official acts. PROSUNNO COOMAR ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **26 C. 792=3 C.W.N. 695.** [*F.*, 13 C.W.N. 235=9 C.L.J. 265; *R.*, 8 C.L J. 470, 11 C.W.N. 928.]

(3)—*Judicial officer having power to do certain things—Presumption.*— Where a judicial officer has powers to do certain things, it is to be presumed that, when he does these things, he was acting under these powers, though he may not expressly say so. IRSHAD ALI CHOWDHRY v. KANTA PERSHAD HAZAREE, **21 C. 935.**

(4)—*Lower Court's procedure—Presumption.* —The rule is to presume that lower Court has done its duty; neglect of duty cannot be assumed at the mere suggestion of the appellant. RAJAH RASH BIHARI LALL SINGH v. NABAYI PADDAR, **3 B.L.R. A.C. 99=11 W. R. 465.**

(5)—*Of continuance of existing jurisdiction—Applicable only to superior Courts.*—The presumption regarding the continuance of the existing jurisdiction of a Court, in the absence of express words to that effect, is usually applicable only to the jurisdiction of a superior Court. PROSAD DOSS MULLICK v. RUSSICK LALL MULLICK, **7 C. 157=8 C.L.R. 329.** [*R.*, 6 C.P.L.R. 105.]

(6)—*Inference of death — Rebuttal.*—The inference of a man's death, from his absence, may be rebutted at any time. BEJOY CHUNDER BANERJEE v. KALLY PROSONNO MOOKERJEE, **4 C 327.**

(7)—*Legal presumptions, Value of—Title—Possession.*—Where little or no evidence of actual possession or title can be procured, it would be almost impossible to administer justice, without having recourse to legal presumptions. MOBARUCK SHAH v. TOOFANY, **4 C. 206=2 C.L.R. 446.**

(8)—*Presumption as to possession.*—When the evidence of possession is conflicting, the presumption is that possession follows title. BABU KASTURI SINGH v. RAJKUMAR BABU, **8 C.W. N. 876.**

(9)—*Land, Occupancy of—Tracing possession to common ancestor — Presumption.*— When possession of land (of which the occupancy is in suit) is traced a long way back through generations, the presumption is that the last person, whose occupation is proved, got the land from his father, unless it is shown that he got it in some other way, the onus of proving which allegation lies on the person making it. It is the most natural way of getting the occupancy of land, and the presumption is by no means that the last holder, of whom living witnesses can speak, was the first of his line. BALLHU v. CHARAT SING, **18 P.R. 1876.** [*F.*, 187 P. R. 1882; *Appl.*, 62 P.R. 1882; *D.*, 90 P.R. 1883, 154 P.R. 1883.]

Presumption—*continued.*

(10)—*Presumption of right of occupancy—Continuous occupation—Act* XXVIII *of* 1868, *s.* 6—The question in this case was whether the defendant had within the meaning of s. 6, Act XXVIII of 1868, continuously occupied the land from the date of entry of his name in the first settlement record, so as to raise the presumption of his being a tenant with a right of occupancy. *Held* that the question "what is a continuous occupancy" was one that must depend upon circumstances and that a tenant's temporary absence could not be considered as discontinuing his tenancy, for, given the fact that a cultivator might arrange for the cultivation during his absence, it is clear that he might arrange for the harvest to be taken by the proprietor or effect some arrangement for a brief period which would have the effect of saving his occupancy from a break, although he might not locate a cultivator in his place. KANH SINGH v. WUZEERA, **20 P.R. 1871.**

(11)—*Right of occupancy—Landlord and tenant—Presumption.*—When a tenant gives the right of cultivation to the proprietor he is presumed to lose his rights of occupancy. JHANDA v. KHUDAYAR, **1 P.R. 1871, Rev.**

(12)—*Right of occupancy—Long possession—Continuous occupancy—Punjab Tenancy Act.*—According to the first settlement of 1847, the uncle of the plaintiff was recorded as an hereditary cultivator of the land and he had then been in possession for 15 years. From that time to the date of this suit, those whom the plaintiff represented had been in possession. *Held* that plaintiff, with this previous long possession in his favour, and subsequent continuous occupancy on the same terms with payment of nothing more than the Government demand, brought himself within the requirements of the Punjab Tenancy Act, and was entitled to hereditary tenancy of the land. LAKH RAM v. SUDDA RAM, **13 P.R. 1872.**

(13)—*Long continued possession of land—Payment at Revenue rates—Presumption—Tenants recorded at Settlement as non-hereditary cultivators—Entry impugned—Nature of investigation to be made.*—The plaintiffs, landlords, claimed possession of the suit lands from the defendants who, they alleged, were tenants at will. This allegation was supported by the entry in the Settlement Record of 1842. Defendants questioned the correctness of the entry in the Settlement Record, denied plaintiffs' right to oust them, and claimed to have held as hereditary tenants for a very long time. It was found that the defendants had been in cultivating possession for over 25 years before the Settlement of 1842 and that since then they had been in continuous possession paying only at revenue rates. *Held* that in trying the issue raised about the correctness of the Settlement entry, nothing can be argued from the existence of such entry; for such an entry, against long and continuous possession and payment at revenue rates, unless there is good evidence of the defendants having been parties to it, is of very title value. It is wrong to argue from such entry to ascertain the character of the defendants' possession. The process should rather be reversed, and the main point to be considered is possession with its length and character and what is the conclusion to be drawn as to the correctness of the entry. For, possession for a long period after the Settlement and payment of revenue rates supply an element in the case from which a presumption may arise and give effect to a possession anterior to the Settlement, which would indicate error in the record. *Held* accordingly that the defendants were entitled to a decree. SAWUNT v. AMAR SINGH, **70 P.R. 1869.** [*R.*, 21 P.R. 1873.]

(14)—*Actual amount received by person in wrongful possession — Amount recoverable by ordinary diligence.*—*Prima facie*, it is fair to infer that a person in possession of land may, by ordinary diligence, get rent for it according to the prevailing rates for such land, and that the true owner wrongfully dispossessed has been a loser by that amount. GRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY, **27 C. 951, P.C.=27 I.A. 110=4 C.W.N. 631=10 M.L.J. 356=2 Bom L.R. 709=7 Sar. 687.** [*R.*, 24 A. 376=22 A.W.N. 90, 23 A. 252.]

(15)—*Suit to recover money on bond—Refusal of defendant to enter witness-box.*—A sued to recover from B Rs. 10,000 on a bond which he alleged B had executed to him when he lent him the money. B denied having received the money or executed the bond, and contended that his alleged signature was a forgery. C, B's brother, also asserted that the endorsement which purported to have been written by him was forged. *Held* that the evidence adduced by B was most unsatisfactory, while the refusal of B and C to enter the witness-box, to deny that they had acted as alleged by A, weighed strongly against the probability of their story. RUGHOOBUR DUTT CHOWDHRY v. FUTTEH NARAIN CHOWDHRY, **7 M.J. 311.**

(16)—*Mere necessity raises no presumption of unfair advantage.*—The mere fact that a person is in urgent need of money is not, in itself, sufficient to raise the presumption that the persons to whom he applies for the loan will take unfair advantage of his necessity. UMESH CHANDRA KHASNAVIS v. GOLAP LAL MUSTAFI, **31 C. 233=7 C.W.N. 876.**

(17)—*In case of long standing transaction.*—A transaction of long standing must be presumed to have been, in all respects, rightly executed or legally done, in the absence of evidence to the contrary. JAMNABAI v. DHARSEY, **4 Bom. L.R. 893.**

(18)—*Bond—Co-obligees — Right of each.*—When a claim is on a money bond to two or more obligees, the presumption in equity is that the obligees are tenants-in-common and not joint-tenants of the debt and any security held for it. A discharge given by one obligee cannot be set up against another suing for his

Presumption—*continued.*

share of the debt. The presumption can, however, be rebutted. MANZUR ALI v. MAHMED-UN-NISSA, **25 A. 155=A.W.N. 1902, 216.** [*F.*, 32 A. 164=7 A.L.J. 99=5 Ind. Cas. 129; *R.*, 1 N.L.R. 24.]

(19)—*English and vernacular date given in document—Mistake—Effect.*—Where a patwari report as to the date of a person's death gave the English and vernacular dates and the dates did not correspond to each other, *held* that the vernacular date should be taken as the true one and the English date as a miscalculation. JAGATPAL SINGH v. JAGESHAR BAKSH SINGH, **25 A. 143, P.C.=30 I.A. 27=7 C.W.N. 209=8 Sar. 367.**

(20)—*Evidence—Proof of* Dakhilas.—A ryot who puts in *Dakhilas* as evidence to support his case is bound to prove them. Their admission as genuine is not to be legally presumed, merely because they are not formally disputed by the landlord. KIRTEEBASH MAGETEE v. RAMDHAN KHORIA, **B.L.R. Sup. 658, F.B.=7 W. R. 526.**

(21)—*Sale—Joint family—Commensality—Presumption—Act* VIII *of* 1859, *s.* 230.—To establish the presumption of joint property, commensality is not sufficient; the existence of joint funds, out of which the property may have been purchased, must be shown. RADHIKA PRASAD DAY v. MUSSAMUT DHARMA DASI DEBI, **3 B.L.R. A.C. 124=11 W.R. 499.** [*R.*, 12 B.L.R. 349.]

(22)—*Gift by judgment-debtor of all his property—Presumption of gift being in fraud of creditors and illegal.*—Plaintiff held a decree against D, who made a gift of his house to the defendant, thereby giving her all that he was possessed of. Holding that the gift was presumably made in fraud of creditors and consequently illegal, the first Court decreed that the house was liable to attachment under the plaintiff's decree. The Commissioner on appeal confirmed this decision. *Held* that there was sufficient evidence to show that the necessary effect of the gift to the defendant would be to defeat and delay the judgment-creditor, the plaintiff, and the lower Courts had drawn from this the inference that there was an actual intention to defeat the claims of creditors. Also, as laid down in 35 P.R. 1874, when a voluntary settlement of property reduces the means of the person making it to such an extent as in effect to defeat or delay creditors, the inference of an intention to defraud is justified and the transfer may be set aside as fraudulent and void, even though no attachment had been made at the time of the transfer. MUSSUMMAUT GANGI v. MEHR CHAND, **86 P.R. 1879.** [*R.*, 10 P.R. 1882.]

(23)—*Property acquired by ancestor in his wife's name—Whether advancement.*—Where the ancestor had acquired property in his wife's name, *held* that there was no presumption that he intended such property to be in the nature of advancement to her. BARKAT-UN-NISSA v. FAZL HAQ, **26 A. 272.**

Presumption—*continued.*

By acquiescence against a female — *See* ACQUIESCENCE, 4 Bom. L.R. 180=26 B. 577.

See BEN. ACT VII OF 1868, s. 8, 9 C. 271=11 C.L.R. 466.

See BEN. ACT VIII OF 1885, ss. 5, 49, 8 C.W.N. 139.

As to status from uniform payment of rent after record of rights published—*See* BEN. ACT VIII OF 1885, ss. 30, 37, 50, 52 and 115, 12 C.W.N. 904.

In s. 103-B of the Bengal Tenancy Act, applicability of, to a suit instituted before the publication of the Record of Rights—*See* BEN. ACT VIII OF 1885, s. 103-B., 4 C.L.J. 519.

As to the correctness of entries in a Record of Rights—*See* BEN. ACT VIII OF 1885, ss. 103-*a*, 111-*a*, 11 C.W.N. 48.

As to local publication of record as required by s. 103-A of Act V of 1897 (Partition)—Regularity of proceedings of officer conducting partition—*See* BEN. ACT V OF 1897, ss. 46 and 48, 13 C.W.N. 93=4 Ind. Cas. 316.

Act requiring concurrence of official—Presumption in favour of its due execution—Presumption how rebutted—*See* BOM. ACT VI OF 1888, s. 31, 11 Bom. L.R. 665=33 B. 443=3 Ind. Cas. 753.

Entry in record-of-rights—Presumption as to correctness of entry—*See* C.P. ACT XVI OF 1889, s. 72, 10 C.P.L.R. 33.

See PUN. ACT XXVIII OF 1868, s. 6, 17 P.R. 1880, Rev., 10 P.R. 1880, 11 P.R. 1880.

See PUN. ACT IV OF 1872, s. 11, 67 P.R. 1874.

As to correctness of entries in record of rights—Rebuttable presumption—*See* PUN. ACT XVII OF 1887, s. 44, 13 P.L.R. 1903.

Bye-laws passed by Municipality—Presumption—Validity—*See* U. P. ACT XV OF 1883, s. 55, 19 A. 493.

Recorded co-sharer — Presumption rebuttable—*See* U.P. ACT II OF 1901, s. 201, 6 Ind. Cas. 703.

What is a—Effect of "shall presume"—*See* U. P. ACT II OF 1901, s. 201 (3), 7 A.L.J. 682=32 A. 427=6 Ind. Cas. 609.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 12 W.R. 199=3 B.L.R. 305.

See BENAMI TRANSACTION—GENERAL, 13 W.R. P.C. 1.

Purchase in name of son by Hindu or Muhammadan father—, of benami purchase—Onus of proof to the contrary—*See* BENAMI TRANSACTION—GENERAL, 6 B. 717.

Of payment of bond—Parties between whom—is raised—*See* BOND, 12 C. 546.

See BUDDHIST LAW—HUSBAND AND WIFE, 1 L.B.R. 11.

Presumption —*continued.*

Execution sale—Material irregularity—Inadequacy of price—Presumption—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, 7 C. 466=9 C.L.R. 114.

See CONTRACT ACT, 1872, s. 230 (1), 27 M. 315.

No conclusive, that trees belong to owner of soil—*See* CUSTOM, U.B.R. 1897—1901, Vol. II, 360.

Presumption as to the genuiness of documents thirty years old—*See* CUSTOMS—PUNJAB—ALIENATION, 110 P.L.R. 1902.

See CUSTOM—PUNJAB—INHERITANCE, 60 P.R. 1895.

Entry in *Wajib ul arz*—*See* CUSTOMS—PUNJAB—PRE-EMPTION, 139 P.L.R. 1903=65 P.R. 1903.

Of permanent tenancy—Presumption of transaction—*See* DEBUTTER PROPERTY, 15 C.L.J. 227=16 C.W.N. 227.

See ENHANCEMENT OF RENT—ENHANCEMENT, EXEMPTION FROM, 1 Agra Rev. 65, 2 Hay 514, Marsh 424.

Evidence—Document—Non-production—*See* EVIDENCE—GENERAL, 6 C.L.R. 101, P.C.=7 I.A. 8=4 Sar. 112.

Evidence—Proof—Of genuineness of adoption deed—Copy only produced—Document 80 years' old—*See* EVIDENCE—GENERAL, 13 B.L.R. 495=20 W.R. 446.

Map by officer of Government in private possession of property—Of accuracy—Evidence Act, s. 83—*See* EVIDENCE—MAPS, 5 C. 287=4 C.L.R. 574.

Later Government survey map—Of accuracy of earlier map—*See* EVIDENCE—MAPS, 5 C. 822=6 C.L.R. 519.

See EVIDENCE—MISCELLANEOUS, 10 M.I.A. 165.

As to document more than thirty years old, discretion of Court as regards—*See* EVIDENCE ACT, 1872, ss. 4 and 90, 7 O.C. 290.

Public record—Ancient documents—Presumption as to their genuineness—Production from proper custody—Mortgage—Acknowledgment of liability—*See* EVIDENCE ACT, 1872, ss. 35, 74, 80, 90, 59 P.R. 1901.

Of continuance of same state of things—*See* EVIDENCE ACT, 1872, ss. 109, 114, U.B.R. 1897—1901, Vol. II, 414.

See EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, A.W.N. 1888, 49.

Malabar—Forest lands—Presumption—*See* FOREST LANDS, 9 M. 175.

Oral gift in favour of daughter of part of taluka by Talukdar—Oral gift of land before Transfer of Property Act—As to nature of estate taken by female under oral gift—Act I of 1869, ss. 13, cl. (1) and 22—Hindu Law—*See* GIFT, 5 O.C. 345.

Presumption—*continued.*

Scope of power to appoint acting Judges of High Court—in favour of validity of appointment—*See* HIGH COURT JUDGES, 16 A. 136, F.B.=A.W.N. 1894, 39.

See HINDU LAW—ADOPTION, 3 B.L.R. 27, P.C.=12 W.R.P.C. 29=13 M.I.A. 85.

Infrequency of litigation, whether gives rise to presumption of non-existence of custom—*See* HINDU LAW—CUSTOM, 17 A. 294, F.B=A.W.N. 1895, 167.

Hindu law—Husband and wife—Presumption—*See* HINDU LAW—HUSBAND AND WIFE, 2 C.W.N. 367.

See HINDU LAW—INHERITANCE, 29 C. 433, P.C.=29 I.A. 82=6 C.W.N. 490.

Precept that Byragi can acquire no property—Counsel of perfection—Presumption as to ownership of property held and money paid by head of a mutt—*See* HINDU LAW—INTERPRETATION, 26 M. 79=12 M.L.J. 439.

See HINDU LAW—JOINT FAMILY, 11 C. 177, P.C.=12 I.A. 112, 9 W.R. 558, 3 B.L.R. P.C. 13=12 W.R.P.C. 21=13 M.I.A. 523, 11 M.I.A. 369, 1 Agra 220, 8 B. 154, 27 M. 32, A.W.N. 1899, 214, 5 P.L.R. 1900, 140 P.R. 1892, 27 M. 228, 20 A. 182=A.W.N. 1898, 19, 3 C. 315, P.C., 3 C.L.R. 97, 3 C.W.N. 134.

As to age—*See* HINDU LAW—MARRIAGE, 1 C. 289, P.C.=3 I.A. 72=25 W.R. 235.

Proof of celebration of marriage—Presumption of validity and performance of ceremonies—*See* HINDU LAW—MARRIAGE, 12 C. 140.

Legitimacy, nature of—in case of opportunity for sexual intercourse—*See* HINDU LAW—MARRIAGE, 1 M.H.C. 478.

Of marriage from co-habitation—*See* HINDU LAW—MARRIAGE, A.W.N. 1906, 204=3 A.L.J. 807.

As to joint character of family property—Circumstances rebutting ordinary presumption—*See* HINDU LAW—PARTITION, 2 C.P.L.R. 87.

Grant in favour of temple—Presumption of—Annuity granted to defray temple expenses, a charge upon village out of profits of which it was to be realized—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 4 O.C. 61.

Hindu widow—Acquisitions from property inherited from husband, her power of disposition—Presumption—*See* HINDU LAW—WIDOW, 25 M. 351=12 M.L.J. 5.

Impartible property—Vatan property attached to office of desai—Presumption—Evidence of family or local custom—Onus of proof—*See* IMPARTIBLE ESTATE, 7 C.L.R. 1, P.C.=4 B. 494=7 I.A. 162=4 Sar. 154.

Of valid appointment—*See* KARNAM, 10 M. 292.

See LANDLORD AND TENANT—GENERAL, 28 C. 738=5 C.W.N. 858.

Presumption—*continued.*

Grant of land—as to nature of tenure—Erection of buildings—*See* LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY, 8 C. 960.

Mere long possession of homested land insufficient to justify presumption of permanent grant — *See* LANDLORD AND TENANT — NATURE OF TENANCY, 25 C. 896.

See LANDLORD AND TENANT—NATURE OF TENANCY, 11 C.L.R. 281.

Of law regarding person in whom property in timber on tenant's holding vests—Right of tenant to cut and remove such timber—*See* LANDLORD AND TENANT—PROPERTY IN TREES, ETC., ON LEASED PREMISES, 5 A.L.J. 99=3 M.L.T. 194=A.W.N. 1908, 51=30 A. 134.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 16 C. 223 =16 I.A. 6, P.C., 22 C. 533, P.C.=22 I.A. 60.

Tenants under inamdars, whether presumed to be tenants with occupancy rights—*See* LANDLORD AND TENANT—MISCELLANEOUS, 30 M. 502=2 M.L.T. 470.

Solicitor—Falsehood in deed—Presumption of fraud—Onus—*See* LEGAL PRACTITIONERS —ATTORNEY, 1 B.L.R. P.C., 55=10 W.R. 43, P.C.

Compromise by counsel or vakil, how far binding on client—*See* LEGAL PRACTITIONERS —PLEADER—AUTHORITY TO BIND CLIENT, 6 C.W.N. 82.

Mahomedan Law—As to dower being prompt —*See* MAHOMEDAN LAW—DOWER, 6 M.H. C. 9.

Dower—Prompt or deferred—as to—*See* MAHOMEDAN LAW—DOWER, A.W.N. 1881, 77.

Whether prompt or deferred—as to dower being prompt — *See* MAHOMEDAN LAW — DOWER, 23 M. 371, F.B.=10 M.L.J. 123.

See MAHOMEDAN LAW—JOINT FAMILY, 8 C. 826=10 C.L.R. 603.

Lengthened co-habitation — Presumptive evidence of marriage—Marriage—*See* MAHOMEDAN LAW —MARRIAGE, 21 C. 666, P.C.= 21 I.A. 56.

Mahomedan Law—Addition to joint estate by managing members—in respect of such addition—*See* MAHOMEDAN LAW—MISCELLANEOUS, 2 M.H.C. 414.

Against heritability of maintenance grant—*See* MAINTENANCE GRANT, 4 C.L.J. 399.

Marriage properly and duly performed—of alidity—*See* MARRIAGE, 12 C. 706, F.B.

Suit for mesne profits—Evidence regarding area under cultivation with held by defendants — Presumption *See* MESNE PROFITS — SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 18 C. 540, P.C.

Presumption—*continued.*

Mortgage—Payment of first mortgage by third mortgagee in ignorance of second—Registration—Notice—Presumption of intention to keep alive first mortgage—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 8 M. 246.

See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 118, 2 P.R. 1902.

Evidence of ownership—arising from possession—*See* OWNERSHIP, 14 C. 740=14 I.A. 101, P.C.

Law relating to presumptions—Whether enables wrong-doer to turn it to his own account —*See* POSSESSION—ADVERSE POSSESSION, 8 A.L.J. 247.

Nazal land in Oudh, suit for possession of—Burden of proof—Lord Canning's proclamation of 15th March 1858, effect of—Power-of-attorney signed by Deputy Collector for Deputy Commissioner — as to—*See* POSSESSION — SUITS FOR POSSESSION, 7 O.C. 65.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, 26 A. 549=1 A.L.J. 278.

See PRE-EMPTION — PURCHASE-MONEY, 29 P.R. 1875.

See PRESCRIPTION—EASEMENTS— LIGHT AND AIR, 3 B.L.R.O.C 18.

Right to an artificial watercourse—of title from long continued enjoyment—*See* PRESCRIPTION — EASEMENTS—WATER, RIGHT CONCERNING, 6 C. 394, P.C.=7 C.L.R. 529 =7 I.A. 240.

Right to the use of water in artificial watercourses—*See* PRESCRIPTION—EASEMENTS—WATER, RIGHT CONCERNING, 4 C. 633, P.C.

Public road—Dedication—of dedication—Length of use by public sufficient to give rise to a—of dedication to public use—*See* PUBLIC WAY, A.W.N. 1900, 128.

Rent Roll—*See* BEN. REG. VII OF 1822, s. 9, A.W.N. 1886, 26.

See RELIGIOUS INSTITUTIONS, 76 P.R. 1867.

See RENT, U.B.R. 1897—1901, Vol. II, 535.

See RES JUDICATA—MISCELLANEOUS, 6 C.W.N. 589.

As to possession of waste land—*See* RES JUDICATA—MISCELLANEOUS, 9 O.C. 32.

See REVIEW—GROUNDS FOR REVIEW, L.B.R. 1893—1900, 568.

See REVIEW—REVIEWS AFTER TIME, 101 P.R. 1876.

Long occupation—*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 154 P.R. 1883.

Possession for two generations—Onus—*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 187 P.R. 1882.

Evidence Act, s. 114—Failure to produce title-deed—*See* RIGHT OF WAY, 15 A. 270=A.W.N. 1893, 151.

Presumption—*concluded.*

See RIGHT OF WAY, 5 B.L R. App. 84=14 W.R. 124.

Execution sale—Material irregularity in proclamation of sale—Substantial injury—Presumption—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 7 C. 730=9 C.L.R. 341.

See SERVICE TENURE, 7 C. 697=9 C.L.R. 233.

Legacy to person appointed executor—Rebuttal of—Parol evidence—*See* SUCCESSION ACT, 1865, s. 128, 15 C. 83.

Joint Hindu family—Family debt, suit for—Certificate if necessary—Hindu Law—Evidence—Presumption as to nature of debt—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 19 B. 338.

Possession of—from evidence of title—Waste lands—*See* TITLE, 5 C.L.R. 481.

Presumption as to fraud—*See* TRANSFER OF PROPERTY ACT, 1882, s. 53, 22 C. 185.

See TREES, 16 B. 547.

Legal adviser and client—Contract with persons in fiduciary relation—Mooktear—Presumption—*Onus probandi*—*See* VENDOR AND PURCHASER—INVALID SALES, 1 B.L.R.A.C. 95=10 W.R. 128.

See WILL—GENERAL, 31 C. 885=8 C.W.N. 821.

Mental capacity of testator in dispute—Execution of will, proof of—Rules for deciding such cases—*See* WILL—EXECUTION, 21 C. 279.

Blank spaces—Alterations and erasures—Presumption—*See* WILL—MISCELLANEOUS, 16 B. 652.

Presumptive Heirs.

Right of—*See* HINDU LAW—WIDOW, 6 C.W.N. 169=29 I.A. 1=24 A. 94, P.C.=4 Bom. L.R. 233.

Prevailing Rate.

See BEN. ACT VIII OF 1885, s. 30 (*a*), 21 C. 986.

Prevarication.

(1)—*Penal Code, Act* XLV *of* 1860, *s.* 228—*Prevarication in giving evidence.*—Prevarication in giving evidence is not an offence under s. 228 of the Penal Code. REG. v. AUBA *bin* BHIRAV, **4 B.H.C. Cr. 6.** [*R.*, Rat. Un. Cr. Cas. 69, Rat. Un. Cr. Cas. 473.]

Prevention of Cruelty to Animals Act.

See ACT XI OF 1890.

Price.

Irregularity — Inadequacy of price—Inference—*See* BEN. ACT XI OF 1859, ss. 6, 33, 6 C.W.N. 526.

Price—*concluded.*

Inadequacy of—Substantial injury—Inadequacy of price, result of irregularity—Proof—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 90, 6 C.W.N. 836.

Inadequacy of—Material irregularity—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 83, 90, 92, 8 B. 424.

Execution sale — Material irregularity—Inadequacy of price—Presumption—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, 7 C. 466=9 C.L.R. 114.

Relation between proved material irregularity and inadequacy of—How established—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, 20 C. 599.

Inadequacy of price and irregularity in proceedings, connection between — *See* SALE—GENERAL, 11 C. 200.

Inadequacy of—fetched at sale being result of irregularity, complained of, established how—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 30 C. 1=6 C.W.N. 688.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 20 M. 159.

Priest.

Exclusive right to officiate as—Agreement between members of family as to division of earning as priest, how far enforceable—*See* DECLARATORY DECREE, SUIT FOR—ENDOWMENTS, 13 C.L.J. 449.

Religious endowment—Priest—Succession—*See* HINDU LAW—RELIGIOUS ENDOWMENT, A.W.N. 1881, 52.

Suit for damages by—for withholding religious observances due to his sacred rank—*See* JURISDICTION OF CIVIL COURTS, 1 M.H.C. 301.

See JURISDICTION OF CIVIL COURTS, 3 B. 9.

Prime-movers, Bengal Steam-boilers.

See BEN. ACT III OF 1879.

Primogeniture.

See HINDU LAW—IMPARTIBLE ESTATES.

(1)—*Restriction on alienation—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 462—*Leave of Court, if to be express—Presumption — Compromise decree when to be set aside.*—Where there is a custom of primogeniture, there is no restriction on alienation by the incumbent for the time being, unless a special custom is proved to the contrary (22 M. 383=26 I.A. 83, *F.*) In order that a compromise may be binding upon a minor, the leave of the Court must be express, and further it must be arrived at upon the exercise of judicial discretion as to the propriety of the compromise in the interests of the

Primogeniture—*continued.*

minor. (16 W.R. 232, 9 C. 810, 7 C.W.N. 90, 8 C.L.J. 266, *F.*; 26 B. 109, 17 A. 531, 29 M. 104, *R.*) Where a decree was passed without any judicial inquiry, or finding as to whether the compromise was for the benefit of the minor, although a formal order of sanction to file the compromise petition was given to an Official of the Court who acted as the minor's guardian *ad litem*: *Held*, that the decree was inoperative. When the Court permits a compromise, it must be presumed in the absence of evidence to the contrary that it gave due consideration to the matter. (8 C.L.J. 31, *R.*) Although in appeal, a decree made upon a compromise in a suit in which a minor was a party, would be held to be invalid as against a minor, it could not, after it had become final and been acted upon, be set aside, unless it were shown to be prejudicial to the minor. KRISHNA PERSHAD ROY v. ROMESH CHUNDER MANDOL, **8 C.L.J. 274=13 C.W.N. 163 =4 Ind. Cas. 467.** (20 A. 98, *F.*)

See U.P. ACT I OF 1869, 10 C. 511=11 I.A. 51, P.C.

Succession to Talukdari estate granted under —Succession to the estate after death of last transferee—Mahomedan Law, applicability of —*See* U.P. ACT I OF 1869, ss. 8, 11, 14, 15, and 22, cl. (*b*), 8 O.C. 45.

Meaning of the term—*See* U.P. ACT I OF 1869, s. 8. lists I and V, and s. 22 (11), 14 C. W.N. 1010, P.C.=12 C.L.J. 303=8 M.L.T. 273=7 Ind. Cas. 734=7 A.L.J. 1122=12 Bom. L.R. 1015=13 O.C. 316=20 M L J. 917=32 A. 599.

See U. P. ACT I OF 1869, s. 22, sub-ss. 4 and 7, 21 C. 997, P.C.=21 I.A. 163.

See U.P. ACT I OF 1869, s. 22, sub-s. 11, 20 C. 649=20 I.A. 77, P.C.

See U.P. ACT I OF 1869, s. 33, 26 C. 81, P. C.=25 I.A. 161=2 C.W.N. 737.

Grant by sanad in 1802 of Zamindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802—*See* HINDU LAW—INHERITANCE, 13 M. 406, P.C. =17 I.A. 134.

Inheritance by—*Onus* of proof as to—*See* BURDEN OF PROOF—HINDU LAW, 15 A. 147 =A.W.N. 1893, 85.

Custom of primogeniture set up, *onus* of proof of—Admissibility in evidence of statements of deceased persons—Opinion evidence—*See* EVIDENCE ACT, 1872, ss. 32, 49, 60, 23 A. 37, P.C. =27 I.A. 238=5 C.W.N. 33.

Rajputs of Agra, family custom of—Evidence establishing impartibility—*See* HINDU LAW—CUSTOM, 19 A. 1, P. C.=23 I.A. 147.

Deshpande vatan, partition of— Custom of primogeniture—*See* HINDU LAW—CUSTOM, 10 B. 327.

Suit for partition of vatan property—Family custom of primogeniture set up — Deshmukhi vatan, impartible nature of — Patelki vatan, partibility of—*See* HINDU LAW—CUSTOM, 10 B. 598.

Primogeniture—*concluded.*

See HINDU LAW—DEBTS, 6 C.W.N. 879.

Rule of—*See* HINDU LAW—INHERITANCE, 32 C. 6.

Succession—Lineal — Custom — Evidence—Office of Chowdhuri—*See* HINDU LAW—INHERITANCE 6 A.L.J. 364, P.C.=13 C. W. N. 581=9 C. L. J. 497=11 Bom. L. R. 530=36 C. 590=19 M.L.J. 239=6 M.L.T. 84=1 Ind. Cas 754.

Impartible estate—Succession to—*See* HINDU LAW—INHERITANCE, 4 M. 250.

Hindu Law—Succession to impartible Zemindari or Raj—*See* HINDU LAW—INHERITANCE, 5 A. 542=A.W.N. 1883, 121.

Sons of different mother—Succession—*See* HINDU LAW—INHERITANCE, 2 M. 286=8 I.A. 1=8 C.L.R. 315, P. C.=4 Sar. 203.

See HINDU LAW—INHERITANCE, 6 B. L. R. 232, P.C.=15 W.R. P.C. 10=13 M.I.A. 542, 5 B.H.C.A.C. 161, 6 M. H. C. 93.

Management of family charities—Succession—Natural heirs—Rule of—*See* HINDU LAW—PARTITION, 6 M.L.T. 319=20 M.L.J. 108= 4 Ind. Cas. 76.

Custom of—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 12 B. 331.

See MAHOMEDAN LAW—CUSTOM, 3 A. 723 =A.W.N. 1884, 43.

Mahomedan Law—Succession to religious office—Rule of primogeniture—Custom—*See* MAHOMEDAN LAW—WAKF, 13 B. 555.

See NAWAB OF TANK, 30 C. 843, P.C.=67 P. R. 1903=112 P.L.R. 1903.

See SALSETTE, 19 B. 680.

Prince.

Suit in British India by independent—Agent for instituting suit—*See* CIV.PRO. CODE, 1908, s. 85, 10 C. 136.

See CIV. PRO. CODE, 1908, s. 85, O. III, r. 2, 19 A. 510=A.W.N. 1897, 135.

Suit by or against a prince — Recognised agent—*See* CIV. PRO. CODE, 1908, O. VI, rr. 14 and 15 (1), s. 85, 54 P.L.R. 1902=41 P.R. 1902.

Principal and Agent.

1.—GENERAL.
2.—AUTHORITY OF AGENT.
3.—COMMISSION AGENTS.
4.—DUTIES AND LIABILITIES OF AGENTS.
5.—DUTIES AND LIABILITIES OF PRINCIPALS.
6.—RATIFICATION OF AGENT'S ACT.
7.—REVOCATION OF AGENT'S AUTHORITY.
8.—MISCELLANEOUS.

Principal and Agent—continued.

——1.—General.

(1)—*Advocates not necessarily agents of clients in mercantile transactions.*—Advocates who act as solicitors are not thereby, without special appointment, constituted the agents of their clients for carrying out mercantile transactions. COOVERJEE LADHA v. VISHRAM EBRAHIM AND CO., **1 L.B.R. 346.**

(2)—*Manager of joint family—Agent—Trustee and* cestui que trust.—The manager of a joint family property is not the agent of the members of the family, so as to make them liable to be sued as if they were the principals. The relation of such persons is not that of principal and agent, or of partners; it is much more like that of trustee and *cestui que trust.* ANNAMALAI CHETTY v. MURUGESA CHETTY, **26 M. 544, P.C.=7 C.W.N. 754=30 I.A. 220.** [*Expl.*, 5 M.L.T. 145=19 M.L.J. 70=32 M. 271; *R.*, 24 P.R. 1904, 29 A. 37=3 A.L.J. 785 =A.W.N. 1906, 261, 30 A. 422=5 A.L J. 375 =A.W.N. 1908, 175=4 M.L.T. 49, 13 C.W.N. 815.]

(3)—*Agency—Evidence to prove authority to execute and register a document—No mention of the name of the principal in the document—Estoppel—Entry of husband's name as joint occupier, effect of—Civ. Pro. Code (Act V of* 1908), *O. I, r. 9—Misjoinder of parties.*—A conveyance, it was alleged, was executed by the husband and the son of a woman as her agents, but the woman's name was nowhere mentioned in the conveyance, and the husband and the son did not sign as agents for any one. *Held*, that the husband and the son were not the agents of the women and that she was not bound by the conveyance. The entry of a person's name in the Revenue Maps as joint occupier with X would not estop X from claiming the lands as her sole property. Such an entry merely shows that the other man was in joint possession with X, and a transferee before taking the conveyance is bound to inquire as to the title of each. A suit cannot be defeated by misjoinder of parties. MG YE v. MY AUNG THA, **12 Ind. Cas. 206.**

(4)—*Family Karar—Agency—Words conferring power to contract debts not sufficient to constitute agency.*—Where, under the terms of a family Karar S, one of the brothers, was empowered to contract debts for specific purposes and the other brothers agreed to be bound by the same; *held* that words conferring such power were not sufficient to create S an agent of the other brothers. *In re* SRINIVASA AIYANGAR, **1912 M.W.N. 495=14 Ind. Cas. 681.**

(5)—*Principal and agent—Limited authority of latter known third party—"Holding out," principle of, if applies—Estoppel—Negligent or improper act of principal apparently investing the agent with extended authority, not proved—Misdirection.*—A person, who deals with an agent whose authority he knows to be limited, does so at his peril, in this sense, that, should the agent be found to have exceeded his authority, the principal cannot be made responsible.

Principal and Agent—continued.

——1.—General—*continued.*

In order that the principle of "holding out" should, in any given case of agency, apply to the act done by the agent, and relied upon to bind the principal, it must be an act of that particular class of acts, which the agent is held out as having a general authority on behalf of his principal to do. But if the agent be held out as having a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be so limited, the party prejudiced has notice, and should ascertain whether or not that act is authorised. Where the principal did not by any negligent or improper act allow the agent to be apparently invested with an authority beyond or greater than the limited authority which the customer knew him to possess, there could not be any estoppel as against the principal, in respect of any of the steps in a transaction whereby the customer was deceived by the agent acting beyond his authority. THE RUSSO-CHINESE BANK v. LI YAU SAM, **14 C. W. N. 381. P. C. =5 Ind. Cas. 789.**

(6)—*Agency — Agent's misrepresentation — Principal's liability.*—The principal cannot in any way be affected by the misrepresentation of the agent, when the misrepresentation does not refer to anything within the scope of his agency. RAMASWAMI AIYAR v. KANTHAYYAN, **9 M.L.J. 57.**

(7)—*Liability of master or principal for acts of servant or agent.*—A master or principal is liable for any wrong done by a servant or agent, provided the act is done on his behalf and with the intention of serving his purposes. ISWAR CHUNDER SANTRA v. SATISH CHUNDER GIRI, **30 C. 207=7 C.W.N. 126.** [*R.*, 6 Bom. L.R. 131.]

(8)—*Negligence of agent—Liability for negligence.*—Where the plaintiffs alleged that they purchased goods and directed the defendants to send them to a particular place, and the goods were directed to other places, on account of which they suffered loss and claimed damages from the defendants, who pleaded that the goods were misdirected through the negligence of Railway officials, *held* that the ownership of the goods vested in the plaintiffs from the date of purchase, and the defendants became their agents from that date. *Held* further that the defendants, in contracting with the Railway, contracted as agents of the plaintiffs, irrespective of the fact whether they did or did not disclose the names of their principals and that they could only be held to be liable to pay damages if negligence was brought home to them. KISHAN DAYAL v. HAR PRASAD, **7 A. L.J. 732=7 Ind. Cas. 287.**

(9)—*Contract Act* (IX *of* 1872), *ss.* 198, 211 *and* 216—*Secret profits by the agent—Ratification—* Res judicata—*Two appeals from one decree—*

Principal and Agent—continued.

——1.—General—*continued.*

Decrees in appeal drawn up in identical terms—Appeal from one decree only.—The defendant had entered into a contract for sale of merchandise with the plaintiff on his behalf. The defendant supplied his own goods in fulfilment of these contracts, but, when subsequently the goods consigned by the plaintiff arrived, he sold the same to another merchant at a higher rate than the contract rate. The plaintiff claimed the difference as profits and asked for a settlement of accounts. The Court of first instance found a certain amount to be due to the plaintiff and decreed the claim in part. Both parties appealed to the District Judge, who dismissed the plaintiff's appeal and allowed that of the defendants. But the decrees that were drawn up in these appeals were exactly similar. The plaintiff appealed from the decree passed in his appeal. A preliminary objection was taken that the decree in the defendant's appeal having become final, the plaintiff's appeal ought not to be heard. *Held*, that there was in fact but one decree settling the accounts between the parties, and the decree in the case in which no appeal was preferred did not operate as *res judicata* and preclude the hearing of the other appeal. *Held, further*, that the defendants, being the plaintiff's agents, could not be permitted to make any profits out of the plaintiff's goods, and were liable to account to plaintiff for the sale of his goods at a higher rate. It is a well recognised principle of law that an agent is not entitled to make a secret profit by dealing in the business of the agency on his own account. Duty of agent discussed. So long as the relation of principal and agent subsists, the principal is entitled to the exercise of the disinterested skill, diligence and zeal of the agent for his exclusive benefit. There can be no ratification, until the person ratifying comes to know all the material facts. Where the principal did not know, until after the institution of the suit, that the agents had sold to him their goods at a price which was in excess of the market price, he could repudiate the transaction after the institution of the suit. DAMODAR DAS v. SHEORAM DAS, **4 A.L.J. 587 = A.W.N. 1907, 245 = 29 A. 730.** (33 C., 1101, 29 M. 333, *R.*) [*Diss.*, A.W.N, 1908, 211 = 4 M. L.T. 172.]

(10)—*Common agent—Same person, agent of mortgagor and mortgagee.*—Where a person, who acts as agent both of the mortgagor and the mortgagee in a transaction, acts fraudulently towards the latter by not disclosing to him the flaw in the title, the latter is entitled to say that the agent's knowledge should not be imputed to him and used to his prejudice. SOOLEMAN v. RAHIMTULA, **6 Bom. L.R. 800**, *on appeal*, **7 Bom. L.R. 407, C.A., and 10 Bom. L.R. 1065, P.C.**

(11)—*Public agent—Government—Express or implied authority to bind Government—Ratification—Authorised agent.*—An agent contracting on behalf of Government is not personally bound by such a contract but it must be shown

Principal and Agent—continued.

——1.—General—*continued.*

he was acting within the scope of his agency. A Government officer as such has no express or implied authority to pledge the credit of Government for all matters necessary to the performance of the duties imposed on him by Government. Ratification of the acts of a Government officer done beyond the scope of his authority cannot be made by an unauthorized agent; it can only be made by Government itself or with its full knowledge. SECRETARY OF STATE v. SULEMANJI, **4 Bom. L.R. 706 = 26 B. 801.**

(12)—*Minor agent — Estoppel.* — Where a person knowingly enters into a contract with minors whereby the latter are appointed his agents, and contract of agency subsists for a time, it is not open to the former subsequently to say that the contract of agency, having been made by the minors, is void. MADAN GOPAL v. HINDU BUISCUIT CO. LD., **4 Bom. L.R. 627.**

(13)—*Indentor—Manufacturer sending goods through an agent—Relation between agent and indentor.*—Although the transaction between a commission merchant in Europe and an indentor in Bombay may be a contract of sale passing the property from one to the other, there may be superadded the duty of an agent to his principal, *e.g.*, to buy the goods at the lowest price possible. BEIER v. CHHOTALAL, **5 Bom. L.R. 519**, *on appeal*, **6 Bom. L.R. 948.**

(14)—*Principal and agent—Payment to unauthorised agent.*—Payment to an agent, who, to the knowledge of the debtor, had no authority to receive the payment, does not discharge the debtor. MACKENZIE LYALL v. SHIB CHUNDER SEAL, **12 B.L.R. 360.**

(15) — *Agent appointed by administrator—Liability of agent to person entitled to estate.*—Where an agent is appointed by the administrator of an estate, in his capacity as such an administrator neither the agent, nor his representative, is liable to be proceeded against, on the contract of agency, by the person entitled to the estate notwithstanding that the administrator obtained letters of administration as attorney of the mother and guardian of the person entitled. CHIDAMBARAM CHETTI v. PICHAPPA CHETTY, **30 M. 243 = 2 M.L.T. 326.**

(16)—*Gambling debt of principal paid by agent—Right of agent to recover sums actually paid—Hundi drawn by principal—Consideration—Contract Act* (IX *of* 1872), *s.* 23—*Public policy.*—*Held*, that an agent is entitled to recover from his principal sums actually paid by the agent in settling a gambling debt incurred by the principal, whether the payment is by way of adjustment of accounts or in cash. A *Hundi* executed by a principal in favour of his agent for such payments is for consideration. GHASI RAM v. JAI LAL, **60 P.W.R. 1912 = 79 P.L.R. 1912 = 13 Ind. Cas. 319.** (79 P.R. 1908 = 130 P.W.R. 1908, F.B., *F.*)

(17)—*Principal and Agent—Debt, satisfaction of.*—A, B and C jointly and severally owed a

Principal and Agent—continued.

—1.—General—*continued.*

debt to the respondents. A died and the respondents agreed to take a boat of his in full satisfaction of the debt due to them. C was asked by the respondents to bring the boat and hand it over to them. C brought the boat but did not hand it over as arranged. The respondents sued to recover the debt. It was contended that C became the agent of the respondents and delivery of the boat to him amounted to delivery to the respondents :—*Held*, that C, being one of the three principals who owed the debt, could not be considered as an agent for the respondents. It would have been a different matter if C, had been a stranger. SHWE AUNG v. ARUNACHELAM CHETTY, **11 Ind. Cas. 864.**

(18)—*Contract—Agreement to procure loan—Principal and agent—Loan stipulated for not obtained in full, but loan obtained accepted by principal—Remuneration of agent.*—The defendant applied to the plaintiff to negotiate a loan for him, and a memorandum of the terms on which the loan was to be raised was made by him to the following effect :—" Rs. 3,50,000 are required for paying off certain creditors. Interest will be 8 annas per cent. per mensem. Interest will be paid annually, and not less than Rs. 10 towards the payment of principal. Commission will be paid at 2 per cent. Estate free from any charge and yielding a profit equal in amount to the annual interest, and a quarter thereof will be hypothecated in the deed, which will be a hypothecation bond. The value of the stamp and the costs of registration will be paid by the debtor." The plaintiff failed to procure the loan which the plaintiff wanted, but did procure a loan of Rs. 3,00,000 bearing interest at 9 per cent. The defendant accepted this loan and subsequently promised to pay the plaintiffs commission at the rate mentioned in the memorandum ; but he did not do so. On suit by the plaintiff to recover commission at 2 per cent. it was *held* that the memorandum above set forth did not constitute a contract between the parties, but was no more than a note of the terms upon which the defendant would be glad to raise the loan, and that, as the defendant had accepted the loan negotiated by the plaintiff and subsequently promised to pay the commission due, the plaintiff was entitled to recover his commission at the rate mentioned in the memorandum. SETH SHAPURJI v. SHEORAJ SINGH, **A.W.N. 1900, 43.**

(19)—*Suit for accounts by principal—No set off pleaded by agent—Involves an undertaking to pay whatever is found due to agent—No claim for set off necessary—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 215-*A*, 216—*Decree in account cases.*—A suit for accounts by a principal against an agent, where the agency is not denied, necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to the defendant by him on

Principal and Agent—continued.

—1.—General—*continued.*

the taking of accounts, and it is unnecessary that the defendant should plead a set-off or counterclaim. Hence, where a suit was brought against an agent for rendition of accounts, and the agent expressed himself as ready and willing to render the accounts, but alleged that, on such accounts being taken, money would be found to be due to him without specifically praying for a decree, and the Court granted a decree to the agent upon the finding that money was really due to him, *held*, that the decree was justified with reference to the provisions of ss. 215-A and 216 of the Code of Civil Procedure (1882). PARMANAND v. JAGAT NARAIN, **7 A.L.J. 543=6 Ind. Cas. 162=32 A. 525.**

(20)—*Principal and Agent—Suit for accounts—Suit for surcharging and falsifying accounts—Reliefs in two classes of suit—Fraud—Errors—Inconsistent pleas—Amendment of plaint—Account stated, whether balancing of an account is—Money in agent's hands for specific purpose—Burden of proof.*—A suit by a principal for accounts on the allegation that the defendant, his agent, has not rendered any account, has manifestly an entirely different scope from that of a suit in which a principal alleges that the defendant, his agent, has rendered accounts, but prays to have them re-opened or to have liberty to surcharge and falsify them on the ground of fraud or material error. In the first class of cases, if it is established that the defendant is the agent of the plaintiff and has not rendered accounts, a preliminary decree must follow as a matter of course. In the second class of cases, if the plaintiff seeks to re-open settled accounts on the ground of fraud, such fraud must be specifically alleged in the plaint and proved in the evidence. If, on the other hand, he seeks merely to surcharge or falsify the accounts, the particular grounds upon which he seeks such relief, must be specifically stated, and some substantial errors pointed out so as to enable the defendant to controvert the charges and allow the Court to judge whether the plaintiff ought to be allowed to surcharge and falsify. A plaintiff may be allowed to amend the plaint and put forward two inconsistent cases, namely, first, that the defendant had never rendered accounts, and, therefore, should be called upon to render them, and secondly, that the defendant had rendered accounts but that they ought to be re-opened on the ground of fraud or the plaintiff should be given liberty to surcharge and falsify them because vitiated by overcharges and material errors. If there are errors in the account, of sufficient number and sufficient magnitude, it is not necessary that the errors shown should amount to fraud ; if they are sufficient in number and importance, whether they were caused by mistake or caused by fraud, the Court has a right to open the accounts. Although the mere balancing of an account in a book of accounts does not, of itself, constitute an account stated, yet where

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—**1.—General**—*continued.*

the defendant and his superior officer met month by month and went over the accounts, the balance was struck and accepted as correct, it cannot be disputed that the defendant has rendered accounts. Where an agent has been entrusted with the money of his principal to be expended for a specific purpose, he may be required to account on equitable grounds, and upon such accountings, the burden is upon him to show that his trust duties have been performed and also the manner of their performance. PRASANNA KUMAR MOOKERJEE v. BURN & CO. LTD., **7 Ind. Cas. 270.**

(21)—*Suit for money due after prior suit for account*—Res judicata.—In the mofussil, a second suit by a principal against his agent, for the recovery of the sum found due in a prior suit for account alone, is not barred as *res judicata* by the first suit. GOBIND MOHUN CHUKERBUTTY v. SHERIFF, **7 C. 169=8 C.L.R. 357.**

(22)—*Suit for an account by an agent against his principal—Contract Act*, 1872, *s.* 213.—An agent cannot sue his principal for adjustment of accounts and the mere fact that the principal keeps the account does not give the agent of necessity any right to claim "an account" from him. JOWAHAR SINGH v. HARIA MAL, **6 P.L.R. 1900=60 P.R. 1899.**

(23)—*Principal and agent—Accounts—Wages—Set-off.*—A claim to wages cannot properly be preferred by an agent or treated by a Court as a set-off to his principal's suit for an account; but such a claim would find its appropriate place on the debit side of the account to be furnished by the agent, and would receive the attention of the Court when the account should come to be considered. AJUDHIA BAKSH SINGH v. SHEOMANGAL SINGH, **A.W.N. 1883, 218.**

(24)—*Suit for account.*—Prayer in plaint, and the subsequent procedure, step by step, till the drawing up of the final decree, pointed out and explained. DEGAMBUR MOZUMDAR v. KALLYNATH ROY, **7 C. 654=9 C.L.R. 265.** [*R.*, 15 C.P.L.R 61.]

(25)—*Suit for account—Burden of proof—Facts to be proved by plaintiff.*—In a suit for an account against an Agent, it is not incumbent on the principal, first to satisfy the Court that there is, or ought to be, some surplus in the hands of his agent. It is sufficient if it is shown that the defendant was an agent bound to account. RAMDAS v. BHAGWAT DAS, **A.W.N. 1905, 1.** (A.W.N. 1883, 218, *R.*)

(26)—*Payment to Agent—Mode of proving items in account - Burden of proof.—Held*, that payment to agent is payment to principal, and the Court cannot direct that the debtor should recover from the agent the amount paid to him. In an account case the plaintiff is bound to prove each item, and the best mode of doing so is that the defendant should be asked what

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—**1.—General**—*continued.*

items in the account he disputes and plaintiff should be called on to prove them. TULSI RAM v. KARM CHAND, **25 P.W.R. 1912=36 P.L.R. 1912=13 Ind. Cas. 955.**

(27)—*Debt by co-sharer under power-of-attorney from other co-sharers—Promissory-note executed by agent only—Loan for paying Government revenue of joint estate—Letter given by agent—Liability of principals—Negotiable Instruments Act* (XXVI *of* 1881), *ss.* 4 *and* 28. —The defendant No. 4 was an agent of his co-sharers, the other defendants, under a power-of-attorney, under which he had authority to borrow money generally for the management of their estate. He borrowed money from the plaintiff by executing a hand-note. The money was payable to the plaintiff. As part of the same transaction he gave a letter to the plaintiff to this effect: "I have this day borrowed from you Rs. 5,000 by executing a hand-note for paying the Government revenue of estate belonging to S and others. I deposit with you the agentnamah showing that I am the agent of the said persons." The plaintiff sued all the defendants for the money: *Held*, that, by taking the hand-note from defendant No. 4, the plaintiff cannot be held to have elected to treat him as his sole debtor, and that all the defendants were liable for the money: S. 28 of the Negotiable Instruments Act does not arise for consideration when the promissory-note is not negotiable. SATTYA PRIYA GHOSHAL v. GOBINDA MOHUN ROY CHOWDHRY, **5 Ind. Cas. 110=14 C.W.N. 414=11 C.L.J. 236.**

(28)—*Contract—Principal and agent—Suit by broker to recover brokerage.*—A suit by a broker for brokerage at the rate agreed upon, will lie when he has performed his part of the contract. When a person contracts with a broker for a loan to be secured on the first mortgage of certain properties, and promises a commission to him, the broker is entitled to his remuneration, on his finding a lender willing to lend the amount, though the transaction falls through, because of the inability of the borrower to satisfy the lender's attorney on the question of title. (*Green* v. *Lucas* (1875), 33 L.T. 584, *F.*; *Prickett* v. *Badger*, (1856), 1 C.B.N.S. 296, 3 C.W.N. clxxvii, *R.*) Here, regard being had to the terms of the agreement between the broker and his principal, the broker is not bound to prove some real defect in the title, for recovering the remuneration claimed. ELIAS v. GOVIND CHUNDER KHATICK, **30 C. 202=7 C.W.N. 297.**

(29)—*Factors' Act*, 5 *and* 6 *Vict. C.* 39—*Act* XX *of* 1841—Mala fide *pledge of securities by agents—Appeal — Abatement.*—The Factors' Act, 5 and 6 Vict. C. 39, is extended to India, by the Act of the Indian legislature, XX of 1844. A banian, or agent, was entrusted by his principals with a bill of lading for a particular purpose, and he pledged the same, *mala fide*, without the consent of his principals to a native Banker, for advances made to himself;

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——1.—General—*continued.*

held that in order to invalidate a pledge made under the third section of the Act, 5th and 6th Vict. c. 39, it is necessary that the Court, or jury should find that the lender had notice of the agent's *mala fides*, or want of authority to pledge the goods To establish such notice, it is sufficient to show that the circumstances attending the transaction were such that a reasonable man of business applying his understanding to them, would certainly know that the agent had no authority to make the pledge even if the agent was not also acting *mala fide* towards his principals. An appeal abated by the death of the respondent. Administration with the Will annexed was granted to the Administrator-General of Bengal. On the application of the appellant, the appeal was revived against the Administrator-General as the personal representative of the respondent. GOBIND CHUNDER SEIN v. THE ADMINISTRATOR GENERAL OF BENGAL, **1 W R.P.C. 43=9 M. I.A. 140=1 Ind. Jur. O.S. 17.** [*R.*, 10 C.L.J. 331.]

(30)—*Construction — Document embodying terms of compromise—English word 'mistake' used in Tamil document—Principal exonerating agent from all 'mistakes'—What the term includes—Fraud.*—After the termination of the agency, the plaintiffs charged their agent with misappropriation and false entries in the accounts. In complete settlement of all the differences between the plaintiffs and their agent, a compromise was arrived at and a Tamil document embodying the terms of the compromise was executed, in which the English word "mistake" was used, and a term exonerating the agent from all his "mistakes" was inserted. *Held*, that the term "mistake" according to its common use in such a document was wide enough to cover all kinds of default and error including fraud. M.S.M.S. MYAPPA CHETTY v. PERIANAN CHETTY, **8 M.L.T. 236.**

(31)—*Fraud of agent— Agent fraudulently withholding information from the principal—Principal cannot be fixed with the knowledge—Company—Internal defects such as want of resolution or non-existence of a competent board of directors, not to affect innocent third party without notice—Agreement to borrow money on a charge on property—Agreement creates valid charge.*—The plaintiff advanced to the defendant Company six lacs of rupees on a mortgage of the Mills belonging to the Company, on the 15th April 1905. Under the terms of the deed of mortgage, the plaintiff appointed his *Munim*, J. to be a director of the defendant Company, which office J filled till the 12th July 1909 on which date he sent in his resignation. During his directorate it came to J's knowledge that the Company had on 11th July 1907 borrowed three lacs of rupees from a Bank for one year on condition not to further mortgage or charge the property of the Mill during the currency of the loan. The loan was renewed twice, but at neither time was this condition

***Principal and Agent*—continued.**

——1.—General—*continued.*

renewed. On the 5th August 1909, the Company's principal agent and director D obtained from the plaintiff a loan of two lacs of rupees and passed a receipt bearing one anna stamp which recited that the sum was a part-payment of the sum of five lacs of rupees which the plaintiff had intended as a further charge on the Mills; that if the plaintiff advanced the said amount, the Company would execute a proper legal conveyance; and that if he did not, the sum would be returned to him with interest. This transaction was not sanctioned by the board of directors; and as a matter of fact there was no competent board in existence then to authorize it. Before making the loan, the plaintiff had consulted J as to its advisability, but J had withheld the knowledge he had about the Company's borrowings from the Bank and had advised him that there was no objection to his making the loan. The receipt was subsequently stamped as a conveyance and duly registered. The affairs of the defendant Company having gone into liquidation, the plaintiff sued to have a charge declared on the Mill as to his loan of two lacs of rupees; and to have it declared that he was a secured creditor to the extent of the loan. *Held*, (1) that J, in concealing the information which he had from his master, the plaintiff, was guilty of fraud and misfeasance against the plaintiff; and that the plaintiff could not, therefore, be fixed with knowlege of things which were fraudulently concealed from him by J. (2) That the resolution by which the Company had agreed not to further charge the Mill property had exhausted itself on the 11th June 1908. (3) That, even if the condition not to further mortgage or charge the property had existed, the defendant-Company could not be permitted to plead the same in derogation of the rights and claims of the plaintiff to a charge on their property. (4) That, if the plaintiff acquired a charge on the property of the defendant-Company, that charge was valid and binding on the Company, notwithstandig the facts that, at the time the charge was given, the board of directors had not passed a resolution authorizing the creation of such charge, or that there was not at the time in existence a Board of Directors properly constituted according to the requirements of the Articles of Association. (5) That a valid, legal and binding further charge was created in favour of the plaintiff against the mortgaged property of the defendant Company for the two lacs of rupees advanced by the plaintiff on the 5th August 1909. Where the agent, though acting on the principal's behalf in some transaction in which his knowledge would othewise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge of such fraud or misfeasance. In law, neither the want of a resolution nor the defect in the board of directors of a Company can affect adversely the rights of third parties, who have no knowledge of the existence

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——**1.—General**—*continued.*

of such infirmities when dealing with the Company. SHIVLAL MOTILAL v. TRICUMDAS MILLS, **14 Bom. L.R. 45=14 Ind. Cas. 353=36 B. 564.**

(32)—*Agent under a power of attorney—Suit for recovery of money spent by him in the course of agency—Money recoverable under s. 70, Contract Act—Period of limitation— Limitation Act, sch.* II, *arts.* 61, 83, 116, *applicability of—Obligation to indemnify agent—Contract Act, s.* 222—*Obligation not expressed in writing but imposed by law, whether to be treated as in writing—Agent's right of retainer—Lien—His right to sue for money—Period within which may be enforced.*—Where an agent under a power of attorney brought a suit for recovery of monies spent by him in the course of the agency, *held*, (1) that his expenditure of monies belonging to himself in the business of the agency would be recoverable under s. 70 of the Contract Act immediately after he expended his monies (2) and that the suit ought to be brought within three years from the date of payment under art. 61 of the Limitation Act. Art. 61 relates to a suit for money payable to the plaintiff for money paid to the defendant. The article is not confined to cases where the defendant is under a legal liability to make a payment. Art. 116, which relates to a suit for compensation for breach of a contract in writing registered, does not apply to this case, for, in the power of attorney there is no promise tr pay, and there is no breach of a contract in writing registered. The obligation of the principal to indemnify under s. 222 of the Contract Act, which is not a term of the contract nor to be deemed a part of the contract, but a mere obligation cast on the principal by the operation of law,cannot be held to be in writing registered within the meaning of art. 116. Art. 83, which relates to a suit upon any other contract to indemnify, ceases to be applicable to this case, since the obligation to indemnify is not a contract to do so. Even if it would apply, the starting point of limitation would be the date of payment when the agent might be said to be damnified. Where an agent is obliged to sue for monies spent by him in the business of the agency, his right of action is not postponed until the termination of the agency, even though his right of retainer and his lien may be enforced long after the expenses have been incurred, so long as moneys or the goods of the principal in connection with the agency are held by the agent irrespective of the period that has elapsed since the expenses themselves were incurred. KANDASAMI PILLAI v. AVAYAMBAL, **8 M.L.T. 194=7 Ind. Cas. 399=20 M.L.J. 989=M.W.N. 1910, 316.**

(33)—*Joint power of attorney.*—The petitioner held a power of attorney jointly from five persons which did not authorize him to act generally in any matter in which one or more of those five persons might be severally concerned, nor was it sufficiently stamped to cover five separate powers of attorney on behalf of five individuals: *Held*, that under this power-of-attorney the agent could not act, in cases in which all the executants of the power-of-attorney were not concerned. SAHAI LAL v. LALTA PERSHAD, **1 O.C. 159.**

Principal and Agent—continued.

——**1.—General**—*continued.*

(34)—*Suit against agent, commencement of limitation for, from termination of agency—Mere absconding of agent, not such termination.*—Where an agency has been created for a fixed period, the mere absconding of the agent would not amount to such a determination of the agency as to cause limitation to run from that date, in respect of a suit against the agent for recovery of money which he was bound to collect and pay over to his principal. BISSESSUR ROY CHOWDHRY v. RAM DOOLAL CHUND, **6 W. R. Act X, Rul. 29.**

(35)—*Necessity of demand—Termination of agency—Ss.* 201, 218, *I.C.A.*, 1872.—If demand for an account is not made, no cause of action accrues against the agent until the agency is determined. The agency of a person, employed by another for selling goods on the latter's behalf, does not terminate, when the goods are sold and the money received by the agent, but only when the agent has fully accounted to the principal for money received on his behalf. FINK v. BULDEO DASS, **26 C. 715=3 C.W.N. 524.** (12 A. 541, *F.*)

(36)—*Principal and agent—Authority, termination of—Notice — Acknowledgment—Limitation.* — Plaintiff sued the defendant upon accounts and based his claim on a statement of account signed by the ex-agent of the defendant. Plaintiff knew at the time of the acknowledgment by the agent that he had quitted the defendant's service though no formal notice was given of the fact. *Held* that the plaintiff must be taken to have known that the agent had no general authority to sign the statement of account on behalf of the defendant and that the acknowledgment signed by him could not prevent the operation of the Statute of Limitations. DINOMOYI DEBI v. LUCHMIPUT SINGH BAHADUR, **6 C.L.R. 101, P.C.=7 I.A. 8=4 Sar. 117.**

(37)—*Suit for rent against agent—Limitation —Act* VIII *of* 1869 (*B.C.*)—A suit for the recovery of money in the hands of an agent, employed to collect rents, must be brought, under Act VIII of 1869, within a year after the termination of the agency. PARBUTTINATH ROY v. TEJOMOY BANERJI, **5 C. 303.**

(38)—*Suit for money against agent, limitation of one year for. commencement of. from date of plaintiff's knowledge of dues by agent.*—Where a previous suit having been brought against the agent for rendering of accounts, the latter had tendered the accounts in Court, a subsequent suit against the agent for money must be brought within one year from the date of the tender of the accounts by the agent, such date being the date on which plaintiff had obtained

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——**1.—General**—*continued.*

knowledge of the sum due to him. HURO SHURN NARAIN SINGH v. ROOCHEE DOBEY, **6 W.R. Act X, Rul. 30.** [*D.*, 12 W.R. 116.]

(39)—*Suit for money in agent's hands, limitation for, under s. 33 of Act X of 1859, to be computed from date of agent's suspension.*—Defendant, a tashildar in the service of the plaintiff, was suspended from his duties to which he never returned. The present suit for money received by him was brought beyond the period of one year limited by s. 33 of Act X of 1859. Plaintiff contended that the defendant was not actually dismissed till within the period of one year of the suit. But the High Court held that, as a general rule, the period of limitation should be counted as from the date of the suspension. RADHIKA PERSHAD CHATTERJEE v. RAMDHUN POOROHEET, **6 W.R. Act X, Rul. 27.**

(40)—*Stamp Act, s. 35—Stamp—Unstamped document—Copy cannot be accepted as evidence on payment of penalty—Principal and Agent—Power of attorney—Document not admissible in evidence for being unstamped—Agency may be established by other evidence—Ratification—Mortgage— Interest.—Held*, that copy of an unstamped document cannot be admitted in evidence on payment of penalty under s. 35 of the Stamp Act. (23 M. 49, *F.*; 30 M. 386, 17 M. 473, 18 A. 295, *R.*) It was alleged that a mortgage was effected in favour of the plaintiff by a person who had got a power of attorney from the defendant. The power of attorney was not produced in evidence though its execution was admitted. The lower Court held that evidence was not admissible to prove the agency otherwise than by production of the power of attorney and that ratification of the mortgage was not established. *Held*, by the Chief Court, that, as a power of attorney is not the only evidence legally admissible to prove the authority of the agent, the fact could be proved by evidence *aliunde*, and, so far as third parties were concerned, none the less so because the agent was appointed under a written document executed by the principal. *Held*, further, that the authority of the agent and ratification of the mortgage by the principal were established by the statements of the parties to the deed and their conduct in relation to the transaction, that the payment of the mortgage money to the agent entitled the mortgagee in equity to recover the money from the principal. The mortgage-deed provided that interest shall be payable to the mortgagee until he obtains possession of the mortgaged property, and further that he may, if he so prefers, instead of taking possession, continue to charge interest at the rate agreed upon. *Held*, that in such a case, the mortgagee is entitled to claim interest. LALA NANAK CHAND v. MUHAMMAD AFZAL, **11 P.L.R. 1913.**

(41)—*Agent — Power-of-attorney executed—Proof of agent's authority by other evidence—*

Principal and Agent—continued.

— **1.—General**—*continued.*

Third party's right prove relation of principal and agent by evidence other than written power of attorney—Evidence Act, ss. 91, 92—Unstamped original—Copy whether admissible on payment of penalty—Stamp Act, s. 35—Mortgagee given choice to recover possession or interest—Interest—Mortgage by agent—Agent's authority to mortgage not proved—Principal aware of mortgage—Money raised on mortgage received by principal—Liability of principal to re-pay mortgage-debt.—There is no rule of law that the only evidence of an agent's authority admissible in evidence is a written power-of-attorney. The fact can be proved by evidence, *aliunde*, and so far as third parties are concerned, none-the-less so because the agent was appointed under a written document executed by the principal. There is nothing in s. 91 or s. 92 of the Evidence Act to preclude such third party from proving the existence of a particular relationship between the persons who respectively executed and accepted the power-of-attorney, though the terms which govern such relationship appear to be in writing. A copy of an unstamped original cannot be accepted in evidence upon payment of the penalties recoverable in respect of the original (23 M. 49 = 30 M. 386 = 17 M.L.J. 308, 17 M. 473, *F.*) Where a mortgage-deed expressly provides that interest shall be payable to the mortgagee until he obtains possession of the property, and further that he may, if he so prefers, instead of taking possession when his right to demand possession accrues, continue to charge interest, the mortgagee is entitled to rely on the terms of the contract, and to claim interest until he obtains possession or realises the sums due to him from the mortgagor. Where an agent's authority to mortgage his principal's property is not established, but it is proved that the principal was well aware that the mortgage had been effected by his agent, and it is also proved that the money raised by the mortgage was received by the principal, the mortgagee would be entitled in equity to recover the mortgage debt from the principal. LALA NANAK CHAND v. MUHAMMAD AFZAL, **279 P.W.R. 1912 = 16 Ind. Cas. 950 = 33 P.R. 1913.** (18 A. 295 = A. W.N. 1896, 68, *R.*)

See ABATEMENT OF APPEALS, 1 Agra 215.

Suit for accounts by principal against his agent—Limitation — *See* ACCOUNTS — SUIT FOR ACCOUNTS, 7 C.L.J. 279 = 12 C.W.N. 820 = 35 C. 298.

See ACCOUNTS—SUIT FOR ACCOUNTS, 6 C. 754 = 8 C.L.R. 321, 14 C. 147 = 13 I.A. 123.

See ACT IX OF 1890, s. 77, 24 C. 306.

See BEN. ACT X OF 1859, s. 33, 2 O.C. 425.

Government Political Agent in Native State of minor Chief, whether could sue for property

Principal and Agent—continued.

——**1.—General**—*continued.*

in British territory—Political Agent not certificated guardian under Minor's Act XX of 1864 —Civ. Pro. Code, 1882, s. 37 (*c*)—Recognised agent—*See* BOM. ACT XX OF 1864, 11 B. 53.

One of several joint pattahdars is not an agent for purposes of accepting pattah under the Madras Rent Recovery Act—*See* MAD. ACT VIII OF 1865, s. 9, 28 M. 393.

Notice to agent—Effect against principal—*See* U.P. ACT XXII OF 1886, 25 A. 1=29 I.A. 203 P.C.=6 C.W.N. 849=4 Bcm. L. R. 832.

Wrongs by—Agent cannot bind his principal (a statutory body) by his own wrong—*See* ACT OF STATE, 6 Bom. L.R. 131.

Reference to arbitration by agent—Subsequent ratification thereof by principal—Legality of reference—*See* ARBITRATION—REFERENCE TO ARBITRATION, 8 O.C. 263.

Money in the hands of—Attachment of—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 16 A. 286=A.W.N. 1894, 84.

Default of principal misleading agent into doing something—*See* BANKER AND CUSTOMER, 8 Ind. Cas. 98.

"Landing agents" at Penang, position of —*See* BILL OF LADING, 13 C.W.N. 733, P.C.= 6 M.L.T. 11=19 M.L.J. 316=4 Ind. Cas. 475.

Suit for account against agent—Cross suit by agent—Separate trials—Legality—*Res judicata*—*See* CIV. PRO. CODE, 1908, ss. 10, 11, 15 C.W.N. 930.

See CIV. PRO.CODE, 1908, s. 85, O. III, r. 2, 19 A. 510=A.W.N. 1897, 135.

Conditions for suing by agent—Absence of principal from jurisdiction — Objections first raised in second appeal—Maintainability—*See* CIV. PRO. CODE, 1908, s. 99, O. III, r. 2, O. VI, rr. 14 and 15 (1), 4 L.B.R. 284.

Suit by agent for undisclosed principal — Death of agent—Principal not entitled to continue suit, when the representatives of the deceased agent are not brought on record — *See* CIV. PRO. CODE, 1908, O. XXII, r. 1, 17 M. L.J. 116.

See CIV. PRO. CODE, 1908, O. XLI, r. 4, 6 W.R. Act X, Rul. 82.

Secretary—Personal liability—*See* CLUB, 15 P.R. 1891.

Agent appointed by company, suit for injunction not maintainable by, to restrain company from, carrying into effect resolution of directors appointing solicitor—*See* COMPANY —POWERS AND LIABILITIES OF DIRECTORS, 6 B. 266.

See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 5 B.L.R. 195.

Principal and Agent—continued.

——**1.—General**—*continued.*

Ordering of goods through commission agents —Effect—Contract for sale — Form in which action should be brought — *See* CONTRACT -- CONSTRUCTION OF CONTRACTS, 13 B. 470.

Liability of principal to pay agent sums due on account of wagering contract — *See* CONTRACT— WAGERING CONTRACTS, 79 P.R. 1908, F.B.=130 P.W.R. 1908.

Wagering contract—Liability of agent—*See* CONTRACT—WAGERING CONTRACTS, 7 A.L. J. 1146=8 Ind. Cas. 783.

Agent who has to pay money to his principal must follow him and pay where his principal is—*See* CONTRACT—MISCELLANEOUS, 11 O. C. 191.

Suit to recover money paid by agent on account of bets made by him on behalf of principal—No bar of suit —*See* CONTRACT ACT, 1872, s. 30, 17 C.P.L.R. 67.

Wagering transaction — Right of agent to recover payment actually made by him— Onus—Proof of agency—*See* CONTRACT ACT, 1872, s. 30, 57 P.W.R. 1907=74 P.R. 1908.

Wagering contract—Payment by agent — Liability of principal to reimburse agent— *See* CONTRACT ACT, 1872, s. 30, 14 M.L.J. 326.

See CONTRACT ACT, 1872, s. 30, 25 A. 639 =A.W.N. 1903, 161.

See CONTRACT ACT, 1872, s. 135, 22 A. 351 =A.W.N. 1900, 106.

Liquidator of Company—Advances and disbursements by Secretaries and Treasurers of Company—Lien on property of Company as against other creditors—*See* CONTRACT ACT, 1872, ss. 171, 217, 222, 13 B. 314.

See CONTRACT ACT, 1872, ss. 230, 233, 192, 109, U.B.R. 1897—1901, Vol. II, 341.

Underselling by agent—Measure of damages —*See* DAMAGES—MEASURE AND ASSESSMENT, 20 B. 633.

Father accredited, of joint family consisting of father and sons — Father's representative without written authority—Act of father binding on sons—*See* HINDU LAW—JOINT FAMILY, 12 C.W.N. 687.

Agent has insurable interest in goods consigned on behalf of principal—Agent's right to sue for value of goods—*See* INSURANCE— MARINE INSURANCE, 13 Bom. L.R. 1211.

See JOINDER OF PARTIES, 64 P.R. 1881.

See LEASE — GENERAL, P. L. R. 1900, p. 303.

See LAMBARDAR, A.W.N. 1898, 31.

Power of agent to sign an acknowledgment on behalf of principal—Agent having authority to receive goods, whether has authority to sign acknowledgments — *See* LIMITATION ACT, 1908, s. 19, 55 P.R. 1910=6 Ind. Cas. 948=136 P.L.R. 1910.

***Principal and Agent*—continued.**

——1.—General—*continued.*

Gumasta managing master's business — Acknowledgment by gumasta — Effect of master's death—*See* LIMITATION ACT, 1908, s. 19, 13 Bom. L.R. 264=35 B. 302.

See LIMITATION ACT, 1908, arts. 59, 60, 10 B.H.C 300.

Agent failing to pay to a third person according to instructions of principal—Third person recovering from principal by suit—Principal's suit against agent—Limitation—*See* LIMITATION ACT, 1908, art. 90, 9 Ind. Cas. 54=9 M.L.T. 268=21 M.L.J. 453.

Constructive knowledge of negligence of agent—Start of limitation—*See* LIMITATION ACT, 1908, art. 90, 6 Ind. Cas. 456=7 A.L.J. 724.

See MAHOMEDAN LAW—PRE-EMPTION—GENERAL, 7 A. 41=A.W.N. 1884, 255.

See NEGOTIABLE INSTRUMENTS — HUNDIS—GENERAL, 9 B.L.R. 1.

Rights and liabilities of undisclosed principals under the Contract Act and under the Negotiable Instruments Act—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 8, 27, 78, 1 M.L.T. 377, F.B.=16 M.L.J. 508=30 M. 88.

Right of agent to sue or be sued—General rule—*See* PARTIES TO SUIT—GENERAL, 6 B.L.R. 486.

See PARTIES TO SUIT—GENERAL, 3 N.W. P. 175, 4 N.W.P. 68.

See PARTIES TO SUIT—ADDING PARTIES TO SUITS, 3 Agra 131.

Non-attendance in Court — Appearance by agent—*See* PARTIES TO SUIT — MISCELLANEOUS, Marsh. 627.

Presentation of document by—under defective power of attorney—Validity of registration —*See* REGISTRATION ACT, 1908, ss. 33, 49, 60, 87, 4 A. 384.

Duty of agent—Agency when terminable. *See* RES JUDICATA—ADJUDICATIONS, 7 M. L.T. 87=33 M. 162=5 Ind. Cas. 758.

Suit by owners for sum realised by sale of ship—Abandonment of French ship to French Consul—Principal and agent—*See* RIGHT OF SUIT—MISCELLANEOUS, Bourke O.C. 112.

Sale—Agency—Authority to sell, whether includes authority to receive purchase-money —Notice on the outer wall of house to make enquiries of vendor's vakil, whether amounts to an authority to vakil to sell the house—*See* SALE—GENERAL, 8 M.L.T. 7=20 M L.J. 479 =7 Ind. Cas. 189.

Contract by undisclosed agent—Burden of contract—*See* SPECIFIC PERFORMANCE, 11 C. W.N. 946, P.C.=17 M.L.J. 454=4 A.L.J. 740 =6 C.L.J. 682=2 M.L.T. 448.

***Principal and Agent*—continued.**

——1.—General—*concluded.*

Service of process on—Carrying on business, meaning of—*See* SUMMONS, 4 B. 416.

See SUMMONS, 8 B.H.C. O.C. 159.

Agent's liability to account—*See* VENDOR AND PURCHASER — GENERAL, 21 M.L.J. 359.

——2.—Authority of Agent.

(1)—*Principal and agent—Authority—Proof —Liability of principal.*—In order to hold a person bound by the acts of his agent, it must be shown that he was acting within the scope of his authority. MANOHUR DASS v. DEEN DYAL, **3 N.W.P. 179.**

(2)—*General agent—Powers not co-extensive with those of universal agent.*—An agent employed by a trader to manage generally his trade business has not ordinarily powers co-extensive with those possessed, by what is term -ed an universal agent, *i.e.*, an agent who may be appointed to do all acts, which principal generally can do. DOORGA CHURN v. KOONJ BEHAREE PANDEY, **3 Agra 23.**

(3)—*Powers of.*— An agent's assent to be bound by the statement of a particular witness does not amount to an assent to arbitration, but is within the scope of his general authority to carry on his principal's suits. RAJENDER CHUNDER NEWGEE v. MAHOMED AYNOOD-DEEN MOONSHEE, **W.R. 1864, 142.**

(4)—*Husband and wife—Husband allowing wife to have control over property—Effect.*—If a husband allowed his wife ostensibly to have control over the property and to mortgage it, she must be considered, in fact, to be his agent, if he was really the principal, and he would, therefore, be bound by her act. MOORADEE BEBEE v. SHEIK SYEFOOLLAH, **W.R. 1864, 318.**

(5)—*Contract Act*, IX *of* 1872, *s.* 237—*Agent for making particular purchase—No general agency.* —Where a person sent another to an auction authorising him to bid for certain articles and up to a certain sum, the authority so given cannot be considered to induce third persons to believe that that person has been employed generally for the purpose of bidding, so as to make the principal liable for all purchases made in his name. MACKENZIE, LYALL & CO. v. E. O. MOSES, **22 W.R. 156.**

(6)—*Principal and agent—General or special power of agent.*—The extent and nature of the power vested in an agent are not so much a matter of law as a matter of fact to be decided in each case in which a question of agency arises. RAM BAKS LAL v. KISHORI MOHAN SAHA, **3 B.L.R. A.C. 273=12 W.R. 130.**

(7)—*Authority coupled with interest—Irrevocability.*—What is meant by an authority coupled with an interest being irrevocable is this - that, where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some

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——2.—Authority of Agent—*continued.*

benefit to the donee of the authority, such an authority is irrevocable. (Carmichael's Case, 1896, 2 Ch. 643, *R.*) KONGATTI VALIA NAYAR v. SUBRAMANIAN PATTAR, **9 M.L.J. 290.**

(8)—*Scope of agent's authority—Fraud by agent in his own interest and not in the interest of the principal—Liability of principal—Contract Act*, s. 238.—A principal is liable for the wrongs of his agent committed within the scope of his authority and purporting to be for the benefit of the principal, though no express order of the principal can be shown, but where the fraud is committed by the agent when he is acting not in the interest of his employers but entirely in his own interests, the principal cannot be held responsible for the consequences of his fraudulent conduct. An undertaking by a broker to refund advances made by third parties to his constituents and a guarantee given by him for the re-payment of advances with profits is altogether outside the scope of his ordinary business, and would not bind his partner unless the latter assented to it or subsequently ratified it. D. MC LAREN MORRISON v. VERSCHOYLE, **6 C.W.N. 429.** [*R.*, 13 C W.N. 619=36 C. 647.]

(9)—*Authority of agent to sue on behalf of principal—Right of defendant—Right of Court to enquire as to agent's authority.*—A Court, whose aid is invoked on behalf of one person, through the agency of another, is entitled, in some form or other, to enquire whether the alleged agent really had authority to bring the suit. It may be necessary to do so for the protection of the person sued. A defendant is entitled to question the authority of an agent on behalf of his principals, as if the authority is defective; otherwise he is liable to be sued afresh at the instance of the principals, if the agency did not exist. NAM NARAIN SINGH v. RAGHU NATH SAHAI, **19 C 678, P.C.=19 I. A. 135=6 Sar. 202.** [*R.*, 109 P.R. 1907.]

(10)—*Contract — Agency — Agent exceeding authority—Liability of principal for acts of agent.*—An agent who is appointed for the general management and conduct of a business cannot bind his principal by an unusual contract not strictly relating to the conduct of the business, unless he has express or implied authority for the same. The fact that a consignor dealt in good faith with the agent who exceeded his authority is not sufficient to bind the principal. The consignor dealing with the agent ought to satisfy himself of the agent's authority. Where the principal has not ratified his agent's act by receiving the benefit of the contract, he cannot be bound by the acts of his agent and liable to make good the losses. MUDAREE LALL v. MR. J. A. G. GILMORE, **3 Agra 196.**

(11)—*Contract Act*, IX *of* 1872, *s.* 230—*Principal and agent—Contract by agent—Agent's right to suit—'Disclose,' meaning of—Presumption under section when arises.*—If a contract made by a

Principal and Agent—continued.

——2.—Authority of Agent—*continued.*

person who is an agent, is worded so as, when taken as a whole, to convey to the other contracting party the notion that the agent is contracting in that character, and that he is the mouth-piece through which the principal speaks, he cannot sue or be sued on the contract. In the present case, the plaintiffs by a charter party contracted to let the steamship *Oakdale* to the defendants upon certain terms. They made the agreement as "agents" for the owners of the steamer. The charter party, further, contained a clause by which the *owners* undertook to receive the cargo "on being paid freight" at the rate afterwards specified. But the charter party was signed with the names of the agents simply. *Held* that the contract contained sufficient indications that the plaintiffs contracted only as agents; and that their signing their own name simply did not alter their character; and that, therefore, they cannot be permitted to sue in their own name. [*F.*, 7 B. 51; *R.*, L.B. R. 1872—1892, 658, 27 M. 315.] A presumption arises, under s. 230 of the Contract Act, that an Agent may sue and be sued where he has not disclosed the name of his principal. The word 'disclose' in the section means no doubt to make known. But the essential point is knowledge, and, therefore, where there is actual knowledge, it is equivalent to disclosure, and, in such a case, the presumption mentioned above will not operate. In this case, the name of the ship and the registry number having been given, the defendant not only knew that the agents were not the owners, but could immediately find out, if they did not know before, who the owners were. Hence, it was held that it was equivalent to actual knowledge, and actual knowledge was equivalent to disclosure the sole object of which would be to convey such knowledge. MACKINNON MACKENZIE & CO. v. LANGMOIR & CO., **5 B. 584.**

(12)—*Power to sue given to agent—Agreement as to remuneration to vakil entered into by agent.*—A mere power to sue would not authorize an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration. The present agreement was of a special character by which the client agreed to pay a large sum in the event of success for the chance of having to pay nothing if the vakil failed in gaining the case. *Held* that the agent could not enter into such an agreement without express authority from his principal. KESHAV BAPUJI v. NARAYAN SHAMRAV, **10 B. 18.** [*R.*, 14 B. 455.]

(13)—*Agent and principal.*—Where an agent presumes to exercise an authority which he does not possess, and, by the exercise of that authority, induces another to enter into a contract, he is liable to the same extent, though not, according to English notions, in precisely the same manner as the principal would have been, had he been bound by the contract. Where a *Mooktear* holding a general power of attorney granted a lease containing a stipulation that the lessee was to receive from the

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— 2 —**Authority of Agent**—*continued.*

lessor the expenses which he might incur in any litigation which might take place with third parties respecting the land leased, *held* that the stipulation in question was clearly beyond the *Mooktear*'s power and would not bind the lessor. T. J. KENNY v. MOOKTA SOONDEREE DABEE, **7 W.R. 419.**

(14)—*Suit conducted by general agent—Relinquishment of claim by agent, effect of.*—In a suit instituted by their general agent G, the plaintiffs claimed certain land on two grounds, 1st, on proprietary right to the land, and 2ndly, on the right of pre-emption. The *Mukhtarnamah* by which the agent was appointed declared that, as the plaintiffs had often occasion for instituting Civil suits, Criminal actions and Revenue cases and for appointing pleaders for defending cases, they appointed G as their general agent, and that whetever prosecution made by him, questions put by him, questions answered by him, documents tendered or taken back by him, and pleaders appointed by him, acts done or performed by him in their cases pending in Courts, should be accepted and agreed to by them as if they were done by them in person. At the hearing of the suit, G admitted that the plaintiffs had no claim on the ground of ownership, the case then proceeded and was heard with reference to the plaintiff's claim for pre-emption, and dismissed. *Held* by a Full Bench (*Campbell, J., dissenting*) that G was not authorised to make the admission, and that the case must be re-tried as regards the question of plaintiff's proprietary rights. *Per Campbell, J.*—G was granted the fullest powers by the plaintiffs in their deed appointing him their attorney, and he was duly authorized to make the admission. BANSI LAL v. MAJOR TWIGGE, **37 P.R. 1877, F.B.** [*F.*, 58 P.R. 1878.]

(15)—*Civ. Pro. Code (Act* VIII *of* 1859), *ss.* 98, 376 *and* 378—*Confession of judgment by agent holding general power of attorney how far binding on principal.*—On 24th February 1877, A sued B to establish his right to the office of Diwan of a Khangah and to share in the management of the institution, as being a hereditary right. On 7th March, before the summons was served, B's general agent or C filed an '*Ikbaldawa*' or confession of judgment admitting plaintiff's claim, and a decree was passed in A's favour. On the 29th March, B applied for review of judgment, on the grounds, 1st, that the *ikbaldawa* had been accepted and judgment passed before the date fixed for hearing, 2nd, that the *ikbaldawa* had been filed without B's consent or authority. *Held* (1) that C had no authority, merely by virtue of his power of attorney, to file a confession of judgment, unless it could be shown that he had been expressly or impliedly authorized by B to do so ; (2) that under the C.P.C. (Act VIII of 1859), even a decree by consent may be set

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aside if the attainment of the ends of justice require it. ABDUL MAJID v. FAZI HAQ, **58 P.R. 1878, F.B.** (37 P.R. 1877, *F.*)

(16)—*Power of agent to borrow—Evidence of authority.*—Although a general agent may not have power to borrow money for his principal, yet the authority to borrow in a particular case may be shown by a previous authority, either express or implied, or by subsequent ratification. BUNWAREELALL SAHOO v. MOHESHUR SINGH, **Marsh 544=2 Hay 644.**

(17)—*Authority to receive money due to principal—Receipt by agent of property in lieu of cash--Ratification by principal.*—An agent, who is authorized to receive money due to his principal, can only receive cash ; but if he receives property in lieu of cash, the principal may accept the transaction and take the property. MUKUND RAM SUKAL v. SALIGRAM SUKAL, **2 C.P.L.R. 202.**

(18)—*Principal and agent—Agent exceeding authority—Liability of principal — Broker—Custom allowing deviation from instruction of principal—Validity.*—It may be said as a general rule that, in order to bind the principal, the act done by the agent must be within the scope of the authority committed to the agent. In other words, the authority or commission must be punctiliously and properly pursued, and its limitation and extent duly observed, although a circumstantial variation in its execution will not defeat it. If the act varies substantially from the authority or commission in its nature or extent or degree, it is void as to the principal, and does not bind him. Where a principal instructs his agent to enter into a contract for the delivery of cotton at the end of a certain month, but the agent enters into a contract for the delivery thereof in the middle of the month, the agent exceeds his authority, in such a manner as to exempt the principal from liability upon the contract. A custom allowing a broker to deviate from his instructions is unreasonable and cannot be enforced. ARLAPA NAYAK v. NARSI KASHEVJI & CO., **8 B.H.C. A.C. 19.**

(19)—*Principal and agent—Balance struck after termination of agency—Balance of account —Act* VIII *of* 1869 (*B.C.*) s. 30.—Where an agent, after the period of his agency has come to an end, renders his accounts to the plaintiff and a balance is struck in his presence and he afterwards gives his consent to the correctness of the balance in the shape of a letter written by him to the plaintiff, it constitutes a cause of action against the agent not within the scope of s. 30, Act VIII of 1869 (B.C.) but upon the general ground that a balance of account has been stated and agreed to by the defendant as due by him to the plaintiff. SYFOOLLAH KHAN v. JHAPA THAKOOR, **20 W.R. 309.**

(20)—*Principal and agent — Partners — Authority — Extent— Claim— Estoppel.*—It is

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clear that one partner of a partnership in trade has an implied authority to bind the firm by drawing a bill or giving a promissory note in the name of the firm; but in the case of partnerships which are not of a mercantile character, there is no such implied authority (*Hedley* v. *Bainbridge*, 3 Q. B. 310, *R.*) Where one of the partners in a firm was authorized to draw bills on the firm to the extent of Rs. 200 each, such partner had no authority to make two promissory notes in the name of the firm, but without its knowledge, for Rs. 1,000 each. In such a case, the firm will not be liable for the whole amount drawn. The firm will not be liable even to the extent of Rs. 200, as the contract was not capable of division (*Baines* v. *Euring*, L. R. 1 Exch. 320, *R.*) It would be a very dangerous doctrine that a person who honours two or three bills drawn upon him for an amount in excess of that for which he has especially authorized his agent to draw, thereby holds out to the world that he will pay any promissory note which his agent may make. PREMABHAI HEMABAI v. T. H. BROWN, **10 B.H.C. 319.**

(21)--*Agency--Authority--Original jurisdiction.*—In a suit to recover money alleged to have been advanced to C by the plaintiffs, tea-brokers, under the belief that C was the proprietor of the Laojan Tea Estates and not merely the manager, where owing to C's death and plaintiff's inability to re-imburse themselves by reason of the non-delivery of a portion of the season's tea, they sued the defendants as owners of the tea estate : *held* by *Couch, C.J.*, that the question in the case was whether the transaction between C and the plaintiffs was within the scope of the authority which C had, or was allowed by his partners to appear to have, in managing and conducting the affairs and business of the partnership. It was a question of actual or apparent authority, and whether the transaction was one which the owner of a tea garden carrying on the cultivation of it would, in the ordinary course of business, enter into. *Held*, also that the transaction would have been according to usage if C had been the sole owner of the tea garden and the defendants by allowing him to manage ostensibly as sole owner clothed him with every authority incidental to a sole owner in that business. W. SPINK v. W. MORAN, **21 W.R. 161.**

(22)—*Account opened by mother with bank through her son as agent—Banker how far warranted in advancing money to son as accredited agent.*—The defendant opened an account with the plaintiff, a banker, in order to provide for the punctual payment of the Government revenue and to meet her current expenses. The account was opened through the defendant's son who also acted as her agent in withdrawing money for the payment of revenue and for meeting current expenses. *Held* that these facts did not warrant the plaintiff in advancing to the son large sums of money upon bonds, apparently in excess of the amount to the

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credit of the defendant and without any authority from her. BEEBEE MISRAIN v. GOPALL LALL DOSS, **10 W.R. 376.** [*R.*, 15 W.R. 176.]

(23)—*Principal and agent—Contract by agent—Excess of authority—Cantract, if binding on principal.*—A contract made by an agent on the part of the Government in excess of authority given to him is not binding on the Government; still less is a payment made by him in making the contract. BEER KISHORE SAHOY v. THE GOVERNMENT OF BENGAL, **17 W.R. 497.** [*R.*, 4 Bom L.R. 706=26 B. 801].

(24)—*Agent authorized to bid at auction, collateral and separate contract by, not binding on principal.*—Supposing a man sends an agent with direct authority and positive directions to bid at an auction and purchase an estate, and the agent in the execution of such authority bids for it with the result that it is knocked down to him, but collaterally and in a bye-manner the agent enters into a distinct and separate contract with a person that in consequence of something to be done or forborne, he will pledge his principal to pay a sum to that person, the principal can in no manner be deemed as bound by such bye-transaction on the part of the agent. ISHAN CHUNDER SINGH v. SAMACHURN BHUTTO, **6 W.R. P.C. 57=11 M.I.A. 7=2 Ind. Jur. N.S. 7.**

(25)—*Power of commission agent—Breach of warranty—Purchaser's rights—S.* 112, *Contract Act.*—The purchase by a commission merchant of goods on behalf of a correspondent in a foreign market is made as principal and the authority of the correspondent is not pledged by him. He is a vendor in so far as he has a right to recover the dues from the correspondent and an agent responsible for buying goods at a price as much below that fixed in the order as he reasonably can and bound to charge what he actually paid for it. Any other conduct will amount to fraud on a principal. If there is no fraud, the goods purchased under the contract become the property of the correspondent and he must pay their proper value and cannot rescind the contract merely because the commission agent demands a price higher than that which he has actually paid. But such excess charge will be disallowed in the account between the parties. Where goods supplied under an order to provide according to sample are appreciably different in quality from such sample, the buyer may either reject the goods or keep them and claim a reduction in price by way of compensation giving notice to the seller of such claim, within a reasonable time. F. W. SHAW v. BAIJ NATH, **21 P.R. 1897.**

(26)—*Banian*—Del credere *agent—Dealings between Native and European firm.*—G. S. & Co. employed R to make purchases for them in the bazar, upon orders which were in force for two days, and they imposed restrictions on R's authority to pledge their credit, which were not made known to those with

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whom he dealt. His remuneration was to be certain *dustooree* on the purchases, and he paid and gave receipts for the jute, as agent for G S & Co. He furnished accounts, specifying the price of the goods and the expenses incurred by him upon them, and, upon being paid, he affixed his receipts to them. The purchases were unusually large, and in R's books G S and Co., were debited with the amount paid for the goods, R, retaining no interest in, or profit out of it. J S, one of the vendors to R, sued G S & Co., for the price of some of the goods so purchased by R. *Held* that a general authority implies all powers necessary, or usual, or proper, as means to effectuate the purposes for which it was created. A banian is a *del credere agent* with regard to his employer in making purchases, and is a principal with reference to third persons. A person who has been allowed to represent himself as agent of a merchant under a general authority is not as such a banian; when a Native dealer makes purchases for a European house, the presumption is that the vendor gave credit to the native dealer, and that goods having been purchased for an employer and etered to his debit, and receipts given for them in his name, raises no presumption that the buyer was a banian. GRANT SMITH & CO. v. JUGGOBUNDOO SHAW, **Bourke, A.C. 17=2 Hyde 301.**

(27)—*Held in the same above case in the Court below.*—In the absence of a specific contract, a European firm in Calcutta, is not bound by a contract made by third parties with their banian. JUGGOBUNDOO SHAW v GRANT SMITH & CO., **2 Hyde 129=Cor. 47.**

(28)—*Agency—Insurance—Proof of authority as agent.*—Where it was proved that a particular person was in the habit of underwriting policies for his principal, and the latter was in the habit of paying the losses upon policies so subscribed, it was not necessary to produce the document appointing the person as agent for the purpose of charging the principal upon a policy, so subscribed by that person. But, where there was not sufficient evidence to connect the person sought to be made liable with the document upon which the suit was brought, the Court had no other alternative than to dismiss the plaintiff's suit. MULTANI MULCHAND CHUTUMAL v. THAKAR SUNDARJI NARAINJI, **7 B.H.C.O.C. 39.**

(29)—*Conditional sale executed by mookhtear—Proof of authority to bind the principal—Power of attorney—Evidence.*—Where a plaintiff comes into Court basing his title upon a deed of conditional sale executed by the mookhtear of the defendant, and the defendant resists the plaintiff's claim founded upon this deed by denying that he executed the deed, or that it was executed by any one having authority from her to execute it, it is incumbent upon the plaintiff, before he can succeed, to show that the mookhtear, when he executed the deed on behalf of the defendant, had authority by virtue

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either of a general power-of-attorney or special power of attorney to execute that deed and to bind the defendant by executing that deed. MUSSAMUT MOHAN KOOER v. BABOO AJOODHYA DOSS, **20 W.R. 119.**

(30)—*Principal and agent—Agent authorized to buy has no power to sell—Ratification.*—An agent who has authority to buy cannot be said to have an implied authority to sell. The mere fact that the principal did not question his agent's right to sell is no proof that he consented to the exercise of such right. GOLUCK CHUNDER CHOWDRY v. KANTO PERSHAD HAZAREE, **15 W.R. 317.**

(31)—*Principal and agent—Agency to sell—Authority to pledge credit of principal not presumable from.*—Plaintiffs appellants had sought to render certain parties liable for debts incurred by an agent. They relied on the admission of the defendants that they employed the agent to sell produce. But they had not shown either that express authority to pledge the credit of the defendants was given to the agent, or that the defendants, by their course of dealing, impliedly recognised any such authority. The High Court was of opinion that a mere admission of an agency to sell will not necessarily raise a presumption of an authority to buy on credit, or otherwise to pledge the credit of the principal, and dismissed the appeal. RAM NARAIN POTDAR v. RAMNATH SHAHA, **2 W.R. 231.**

(32)—*Factor's Act, 5 and 6 Vict., C. 39—Act XX of 1841—Protection of bona fide pledger of securities by agents—Notice—Appeal—Abatement.*—The Factor's Act, 5 and 6 Vict., C. 39, is extended to India by the Act of the Indian Legislature, XX of 1814. A banian or agent, was entrusted by his principals with a bill of lading for a particular purpose, and he pledged the same, *mala fide*, without the consent of his principals to a native banker, for advances made to himself. *Held*, that, in order to invalidate a pledge made under the third section of the Act, 5th and 6th Vict., C. 39, it is necessary that the Court, or jury, should find that the lender had notice of the agent's *mala fides*, or want of authority to pledge the goods. To establish such notice, it is sufficient to show that the circumstances attending the transaction were such that a reasonable man of business applying his understanding to them, would certainly know that the agent had no authority to make the pledge, even if the agent was not also acting *mala fide* towards his principals. An appeal abated by the death of the respondent. Administration with the Will annexed was granted to the Administrator-General of Bengal. On the application of the appellant, the appeal was received against the Administrator-General as the personal representative of the respondent. GOBIND CHUNDER SEIN v. THE ADMINISTRATOR-GENERAL OF BENGAL, **1 W.R.P.C. 43=9 M.I.A. 140=1 Ind. Jur. O.S. 17.** [*R.*, 10 C.L.J. 331.]

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—**2.—Authority of Agent**—*continued.*

(33)—*Suit for goods sold and delivered to wife after separation.*—It is not necessary that knowledge of a separation between husband and wife should be brought home to the plaintiff in an action for goods sold and delivered to the wife after separation where plaintiff has long dealt with the wife as the husband's agent. SHAM CHUND DOSS v. COX, **Cor. 82.**

(34)—*Written authority to buy and send goods—Authority to draw—Money paid to and goods purchased by buyer's agent—Goods not reaching principal—Liability on hoondees drawn.*—The defendant's Karindaw H was sent to the plaintiffs with a written authority according to which the plaintiffs were directed to buy goods and send them to the defendant, and draw upon him for the money spent. Instead of doing so, the plaintiffs appeared to have given money to H, who purchased goods with the money but the goods themselves did not reach the defendant. *Held* that the plaintiffs could not claim from the defendant the value of the *hoondees* which they had drawn. GOMANEE LALL v. JEEWUN RAM, **2 Agra 33.**

(35)—*Factors, interest of, in principal's goods, by reason of advances made—Right of factors to ship goods for sale—Powers and duties of factors regulated by general mercantile law—Sale of bills drawn against consignees in their own names—Acceptance of bills by consignees—Liability of factors as drawers for amount exceeding value of goods.*—The evidence in this case showed that no particular usage or custom prevailed at Calcutta qualifying the rules obtaining under the mercantile law of England as between principal and factor, factors having an interest, in goods belonging to their principal, by reason of their having made advances, have the right to ship those goods for sale, either "on account of those concerned," or "on account of themselves," unless their general authority has been controlled by instructions from their principals, or by contract. In this case, the factors who had been entrusted with the possession of the goods belonging to their principal, who had received advances from them, shipped the goods to London and drew bills against them in their own names and sold such bills in the market with the shipping documents. Had the bills not been accepted by the consignees, the holders, though pledgees by means of the bills of lading, of the goods, could have had no remedy for any deficiency against the principal. The acceptance of the bills by the consignees, and the delivery of the shipping documents to them, made them the pledgees, but did not alter the character of the transaction, which was one whereby the factors had pledged the goods for the payment of bills on which they, and not the principal, were liable as drawers for an amount exceeding the value of the goods. No privity existing in such a case between the consignees and the undisclosed principal, where loss has occurred on the shipment, the principal should make good

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such loss to the factor's estate. MIRTUNJOY CHUKERBUTTY v. JOHN COCHRANE, **4 W.R. P.C. 1=10 M.I.A. 229.** [*R.*, 6 B. 304.]

(36)—*Master and servant—Principal and agent—Purchase of goods upon credit, servant generally instructed by master to make—Acts of servant binding on master.*—Plaintiff sued the defendant Ranee for a balance of account as due from her, as a principal purchasing by her authorized agent. Plaintiff was admittedly a dealer in chunam; and the second defendant S was employed by the defendant Ranee to repair some of her buildings; S purchased from plaintiff the materials in respect of which the present claim was made. There was in this case the deposition on oath of the defendant S in favour of the case of the plaintiff, and the High Court *held* that it was quite right for the lower appellate Court to have thrown the *onus* of rebutting that deposition on the Ranee defendant. In the absence of any such rebutting evidence, the purchases on the Ranee's credit should be taken to have been made under a recognized agency capable of fixing the principal's liability for the agent. In this case, the High Court also remarked that if it were necessary to go further they were prepared to hold that, under certain circumstances, if a master usually instructed his servants to buy goods upon credit, he will be bound by his acts, even if he has, in a certain case, specially prohibited him from buying upon credit; and in this case, the habit of entrusting S to buy on credit from plaintiff had been shown on the part of the Ranee. MAHARANEE NARAINEE KOONWAREE v. JOOGUL KISHORE ROY, **6 W.R. 309.**

(37)—*Vendor and purchaser—Broker and principal—Sale of goods.*—A person, who was both a merchant and a broker, bought cotton from the plaintiff's firm, representing himself to be a mere broker, after entering the defendant's name in the firm's books and transmitted it to the defendants, holding himself out to them as the real seller, and the latter paid him the price in good faith, *held* that such payment by the defendants protected them from any claim on the part of the plaintiff. PETUMBER BHUGUTT v. MUTHOORA DASS, **1 Agra 121.**

(38)—*Agent—Authority—Suit—Costs—Liability—Safeenamah.*—In the absence of any special power or authority, the manager of an estate under a safeenamah on behalf of his proprietor, cannot act as general mookhtear of the proprietor or represent him in any suit. Costs incurred by the manager for the defence of any such action brought against the proprietor cannot be saddled upon the latter. The manager must take the consequences of his own acts and cannot hold the proprietor responsible for them. BHOLANATH SANDYAL v. GOUREE PERSHAD MOITRO, **16 W.R. 310.**

(39)—*Contract by manager how far binding on principal.*—He who adopts and takes advantage of the management of his affairs by another,

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must fulfil the engagements which that other has contracted in his name, provided the engagements be within the proper limits of a manager's authority and be for the benefit of the estate. KOORA v. CAPTAIN ROBINSON, **2 Agra Mis. 2.**

(40)—*Partners—Undertaking by manager—Liability.*—The manager of a partnership concern has authority to bind his partners personally by an undertaking made as their avowed agent. MASSEYK v. GRISH CHUNDER CHUCKERBUTTY, **24 W.R. 34.**

(41)—*Act* X *of* 1859, *s.* 69—*Suit by* gomastha—*Power of attorney.*—Where a suit under Act X of 1859 is brought by the plaintiff as the *gomashta* of the zemindar, it is not necessary if it is proved by the evidence that he filled that character, to require the production of a power of attorney or any other formal document conferring on the plaintiff special powers. MADHO SINGH v. GUNEISHEE LALL, **2 Agra 275.**

(42)—*Gomashta employed to collect rents—Power to distrain—Ratification.*—A gomashta employed to collect rents is not authorized to distrain, unless he has been expressly authorized by power of attorney. Therefore, if a gomashta, without such express authority, distrain for rent due, or pretended to be due, to his principal, his principal is not bound by his acts, unless he ratify them, as, for example, by receiving the proceeds of the distress, knowing they had been obtained by distress. RAMJOY MUNDUL v. KALLYMOHUN ROY CHOWDHRY, **Marsh 282.** S.C. KALLYMOHUN ROY CHOWDHRY v. RAMJOY MUNDUL, **2 Hay 289.**

(43)—*Authority to sue for principal without special powers.*—A suit for rent under Act X of 1859 may be instituted by a gomashta employed in the collection of rents or management of land, on behalf of his principal, without his being specially empowered by warrant of attorney. MEAJAN KHAN V. AKALLY, **Marsh 384=2 Hay 426.**

(44)—*Gomashta, Power of—Contract through broker.*—N sued J S and Co. for damages occasioned by the inferiority of certain goods, which he alleged that he bought of them on a verbal contract made by his gomashta M through his broker F. The defendant's case was that the contract was a written one, and contained a stipulation exempting them from liability on certain conditions which had not been complied with, and was made by K one of the plaintiffs' gomashtas, by the pen of J, one of their brokers, whom R had authorised to sign the contract. The Court below found that K was N's gomashta, but could not as such depute a third party to sign a contract for N, and judgment was given for the plaintiffs. On appeal, *held* that a gomashta has a general authority to manage his employer's business, not as a mere agent, but with power to do all

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acts necessary for carrying it on, and to authorise brokers to make contracts. A broker authorized to sign a particular contract is not authorized to sign, if it contain a stipulation unknown to his employer, and *vice versa.* JARDINE SKINNER AND CO. v. NATHORAM, **Bourke A.C. 43.**

(45)—*Liability of Principal—Liability in civil action of principal for consequences of agent's fraud.*—In a suit to recover the value of the bullocks hired by the defendant's *gomastah* to convey quantities of salt from the Government golahs, which, proving to be in excess of the quantity entered in the Government pass owing to the fraud of the *gomastah* in making an addition to the lawful quantity, was seized by the salt officials as contraband, and the bullocks sold under the provisions of Regulation X of 1819; *Held* that neither the want of authority on the part of the *gomastah*, nor the ignorance of the salt merchant, the defendant, could be pleaded to exonerate him from the consequences of his servant's fraudulent act. SADHOOJUNNA v. RAMHURRY MUNDUL, **1 Hay 461.**

(46)—*Lessor and lessee—Fraud—Presumption.*—The mere fact of a lease being obtained from the manager of an estate at an abnormally low rate of rent does not give rise to a legal presumption of fraud. THE ADMINISTRATOR-GENERAL OF BENGAL v. ANUNDO CHUNDER BOSE, **21 W.R. 425.**

(47)—*Siri Nishanee—Hoondee.*—The words "Siri Nishanee," &c., at the head of a *hoondee* may make the firm so named responsible if the drawer of the *hoondee* was at the time the *gomashta* of such firm, but not otherwise. The very fact of the *gomashta* altering the form in which he had hitherto drawn hoondees on the part of the firm employing him is sufficient indication to the public that he is no longer the *gomashta* of such firm. SHADI RAM v. ARJI RAJ, **13 P.R. 1871.**

(48)—*Reg.* VII *of* 1822, *ss.* 10, *cl.* 1, 17—*Act* XIV *of* 1863, *s.* 2, *cl.* 4—*Settlement with sole proprietor — Recording of* birthyas *as zemindars during, and signing of* Malikanadar's *agent in* Wajib-ul-arz *of, latter settlement—Omission of Settlement officer to record right of* malikanadar— *Waiver or relinquishment of right.*—About 1838, the settlement of a *mouza* was made with M as sole proprietor. In 1841, certain persons who had claimed a subordinate proprietary right and had established that right by suit were recorded as *birthyas* and were made liable for the payment of the Government revenue, while the sole proprietor's right was secured in the shape of a *malikana* allowance. At the revision of the settlement in 1864, the existence of two separate properties or interests of different kinds was overlooked, and the *birthyas* were recorded as zemindars. The agent of the representative in interest of the original *malikanadar* signed the recent *wajib-ul-arz.* The widow of the auction-purchaser

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——2—Authority of Agent—*continued.*

of the rights of the original *malikanadar* sued in the Revenue Court for arrears of *malikana* dues, but the suit was dismissed. The lower appellate Court confirmed the Deputy Collector's judgment. *Held*, that the agent's signature in the *wajib-ul-arz* cannot be regarded as a waiver on relinquishment or the part of the plaintiff's husband of the *malikana* right which had been in existence since 1841; and that the oversight and omission on the part of the settlement officer to record a right which had found a place in the records of the preceding twenty-three years, cannot have the effect of extinguishing the *malikanadar's* right. MUSSUMAT IMAMBUNDEE v. BHUGWANT DASS, **1 N.W.P. 38.**

(49)—*Suit for possession of lands for rectification of thakbust map and for reversal of Act X decisions—Endorsement—Act of agent—Remand.*—The plaintiffs sued for rectification of a certain thakbust map, for the reversal of two Act X decisions, and for the recovery of possession of some lands. The first Court, the lower appellate Court and the High Court decreed in favour of the plaintiffs. On its being found that the lower Courts had before them an incorrect copy of the thakbust map, the original forming part of the record of another suit, the High Court, which refused on appeal to send for the original map, subsequently, on review, sent for it. It appeared that the original map did not, in fact, altogether coincide with the copy filed by either of the parties to the suit. The original contained an endorsement on the back to the effect that the lands in dispute were pointed by Tilak Chundra Roy acting as agent of the plaintiffs, to be measured as belonging to the defendant's talook. The copies originally before the Court did not contain them. *Held*, the case must be remanded to the lower appellate Court to determine whether Tilak Chandra Roy was the agent of the plaintiffs, and, as such agent and acting within the scope of their authority, did sign the map as a correct map on behalf of the plaintiffs; and whether, as stated by the Ameen in the endorsement on the back of the map, Tilak Chandra, as one of the *karmacharis*, did point out the lands as belonging to the defendant's talook, and if so, how far these acts of the agent were binding on the plaintiffs. SUDUKHINA CHOWDRAIN v. RAJ MOHAN BOSE, **3 B.L.R. A.C. 377.**

(50)—*Boundary disputes—Headmen of Village—Agency.*—In this case, the authority of the headmen of a village to act for their co-sharers in (among other matters) the adjustment of all disputes relating to boundaries was in question. Two of the Judges of the Sudder Court held that the headmen of the village, although possessing no formal or written authority, must, in virtue of the position and general powers accorded to them by village custom, be held to be duly empowered to act for their co-sharers in such matters.

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——2.—Authority of Agent—*continued.*

The other two Judges of the Sudder Court *held* that, in order that their acts be binding on their co-sharers, it should be shown that they were specially authorized to perform those acts for them whether by formal power of attorney or otherwise. As the opinions of the Judges were equally divided, the matter was referred under the provisions of s. 7, Reg. VI of 1831 for the opinion of a Judge of the High Court of Calcutta, who did not agree with either of the views but held as follows:—"As a question of fact, the existence of the power may be inferred from the context and acts of the several co-sharers and their ordinary usages: but this inference is not to be lightly drawn. It may be that the headmen ordinarily act for the other sharers and that much of the business of the community is transacted through them; and yet that this authority does not extend to enable them to refer to arbitration a boundary dispute between their own and adjacent villages." Generally no one can become the agent of another person except by the will of that person. His will may be manifested in writing or orally or simply by placing another in a situation in which, according to ordinary rules and usages, that other is understood to represent and act for the person who has so placed him, but in every case it is only by the will of the principal that an agency can be created. If it can be shown that the headmen of the villages or of their particular village, have usually in similar disputes been permitted to represent and act for the other sharers, their authority to do so on a particular occasion may be inferred. Specific authority by power of attorney or otherwise is not necessary; nor, in the absence of such prior authority is "an express or implicit assent and sanction" subsequently required. The requisite authority may be inferred from, the facts of each case. GANGA PERSHAD v. BABOO AJOODHIA PERSHAD, **Agra F.B. 31, Ed. 1874, 23.**

(51) — Dur-mokurruree *lease — Absence of notice of prior agreement by lessor with third party, effect of—Person authorized to negotiate, constructive notice given to.*—The *dur-mokurruree pottah* taken by one of the defendants in this case had been duly registered, and he, having taken the lease without notice of the previous agreement with his co-defendant, had a perfectly good title as against the plaintiff to whom such co-defendant, by the said agreement, had agreed to grant a lease of the same property. Where a person has been authorized to conduct negotiaions respecting a lease, he should be deemed to be such an agent as notice to him, could be notice to the principal. NUDDEAR CHAND SEIN v. KISHOREE LAL CHUKERBUTTY, **7 W.R. 463.**

(52)—*Title claimed under pretended deed of gift—Lease granted under title—Lessees not competent to maintain possession under.*—If a manager, alleging himself to be the proprietor of the trust-property under a pretended deed of

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gift, should grant a lease in perpetuity, it would be an act clearly beyond his powers as a manager ; and, especially where, as in this case, the deed of gift itself was brought into question and set aside by decree of Court, his lessees cannot claim to maintain possession. SHEO SHUNKUR LALL v. DHURM JHOY POOREE, **8 W.R. 360.**

(53)—*Lease by Ijaradar, good only for term of ijara*—Naib *not competent to grant leases without special authority.*—A lease granted by an ijaradar can be good only so long as the ijara itself remains in existence, and it is worthless for any period subsequent to the expiry of the ijara. The lease in this case had further been granted by the *naib* of the ijaradar, and because the decisions have laid down that it does not lie within the ordinary scope of a *naib's* authority to grant leases, but that special authority to grant them must be proved, the case was remanded so that it may be distinctly ascertained whether the *naib* had any special authority to grant the lease relied upon. OMA TARA DEBIA v. PEENA BIBEE, **2 W R. 155.** [*F.*, 7 W.R. 394 ; *R.*, 26 C. 546 =3 C.W.N. 336.]

(54)—*Agent—Lease—Special powers.*—Without special powers, an ordinary agent of a zemindar who cannot grant a lease, cannot authorize the *quasi* transfer of a lease by a tenant to some other party. RAI MOORAREE DOSS v. BUCHA SINGH, **4 N.W.P. 122.**

(55)—*Principal and agent—Lease by agent with authority--Suit to set aside—Fraud and collusion—Presumption — Ratification.*—In a suit to set aside a lease as granted without authority by an agent to the defendant, who was the *naib* of the estate, the plaintiff alleging fraud and collusion between the agent and the lessee-defendant, *held* that the owner must be presumed to know what was being done on his behalf by the agent. The owner having (in this case) got the benefit of these acts, it was a fair presumption that he took pains to ascertain what the agent was doing, and to keep himself acquainted with the way in which the estate was being managed. The presumption is that a man acts rightly and not fraudulently and wrongly. The mere circumstance that the rents were low did not give rise to the presumption that there had been fraudulent conduct on the part of the *naib*, or that he had not stated the circumstances to the agent before obtaining the lease from him. Even if the transaction is liable to be set aside, the ratification by a person having authority from the owner to make enquiries and ratify what had been done, would render it valid. ANUND CHUNDER BOSE v. MR. L.P.D. BROUGHTON, **17 W.R. 301.** [*Affirm.*, 21 W.R. 425.]

(56)—*Lessor's agent to receive payment of rent, not competent to receive notice of renewal by lessee—Notice to such agent, not notice to lessor.*—Plaintiff was the owner of the premises let to the defendants for seven years, the lease

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——2.—**Authority of Agent**—*continued.*

being renewable on giving notice to the plaintiff, a month before the expiration of the lease. Plaintiff gave an order to the defendant to pay the rent to one C as her agent. The notice for renewal mentioned in the lease was given by the defendant, not to the plaintiff but to the said C, and plaintiff claimed to re-enter alleging that she had no notice of renewal in the terms of the covenant. Reversing the decree of the first Court, the lower appellate Court decided against the plaintiff, on the ground that there was no express denial that plaintiff had received notice through her agent. The High Court, however, held that C was not shown to be in any way plaintiff's agent for more than receipt of rents so that a notice to him was not sufficient. If, however, C, be found to have given the notice to the plaintiff within the time fixed for the purpose by the lease, that might render the notice sufficient. This not having been either proved or admitted, the case was remanded to the first Court to give the defendants an opportunity of proving that the notice reached the plaintiff in time through her agent. MRS. E. BARNET v. MR. C.B. SKINNER, **2 W.R. 208.**

(57)—*Grant of pattas by mofussil naibs—Their powers.*—It does not fall within the ordinary scope of the duties of a mofussil *naib* to grant pattas for fixed rents. It is requisite, therefore, in such cases, that express authority should be proved to make his grants valid. GOLUCKMONEE DABEA v. ASSIMOODEEN, **1 W. R. 56.** [*F.*, 3 W.R. Act X, Rul. 1, 7 W.R. 394.]

(58)—*Authority—Grant of pottah.*—In a suit for a *kabooleut* at a specified amount of rent, the defendant pleaded a pottah for the period from the gomastha of the plaintiff. *Held* that the gomastha was not competent to grant pottahs, unless he had special authority from the plaintiff to do so. KALEE COOMAR DOSS v. SHEIKH ANEES, **3 W.R. Act X, Rul. 1.** [*F.*, 7 W.R. 394.]

(59)—*Act* X *of* 1859, *s.* 24—*Agent for collecting rents—Duty to account to principal — Act* XXVI *of* 1867, *s.* 6—*Cross appeal prior to—Act filed on two rupees stamp —Payment of additional stamp duty.*—Where a suit is brought against an agent employed in the collection of rents, under s. 24 of Act X of 1859, the defendant is bound to account to the plaintiff for all the moneys which he might have received ; but he may render such account either by showing that they were paid to plaintiff, or for his use and by his authority; and, as a general rule, such an agent cannot discharge himself of money for which he might be liable to account, by proving payments or advances to third parties unless he can show that such advances or payments were made by the express authority of his master or with his knowledge and consent. [*F.*, 18 W.R. 339.] Even in cases where a petition setting out the grounds of cross-appeal has been filed on a stamp of two rupees before the passing of Act XXVI of 1867,

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——2.—Authority of Agent—*continued.*

the Court is precluded from hearing the objection unless the respondent pays an additional stamp-duty as required by s. 6 (*e*) of the Act. G. L. FAGAN v. CHUNDER KANT BANERJEE, **7 W.R. 452.** [*F.*, 7 W.R. 462 ; *R.*, 8 W.R. 322.]

(60)—*Remission of rent by Naib — Sanction of zemindar.*—Remissions of rent by a Naib, who was shortly afterwards dismissed from his office, required the sanction of the zemindar. BHOOBUN MOHUN v. BHUBO SOONDUREE DEBIA CHOWDHRAIN, **8 W.R. 452.**

(61)—*Principal and agent—Collection of rent —Question of title.*—An agent appointed for the collection of rents cannot be allowed to question the title of his principal to realize the rents. He must pay all that he has collected for his master. DHUNUN JOY KUR v. GOBIND CHURN DOSS MOHUNT, **3 W.R. Act X, Rul. 3.**

(62)—*General authority to collect rents—Writing, whether essential.— Per Markby, J.* Though it has been decided that a general *sunnud* to collect rents and sue for them must be stamped, there is no decision to the effect that a general *authority* to collect rents and sue for them must be in writing. MODHOO SOODUN SINGH v. MESSRS. WILLIAM MORAN AND CO., **11 W.R. 43.**

(63)—*Government officers—Officers acting as agents of Government.*—Question of authority of Government officers acting as agents of Government discussed. RUNDLE v SECRETARY OF STATE, **2 Hyde 25. 36.** JOHNSON v. SECRETARY OF STATE, **2 Hyde 153.**

(64) —*Specific performance — Contract with Government through head of department or subordinate agents.*—The Executive Engineer employed by the Government requested the plaintiff to state at what rate he would agree to sell his right to quarry kunkur in certain villages. Plaintiff replied that he was willing to dispose of all his interest in the kunkur beds at 0-8-0 per 100 cubic feet of kunkur provided Government purchased all his beds. On the 14th January 1869, the Engineer, in reply to a letter from the plaintiff, wrote to plaintiff that he was directed to communicate with the Government Advocate, and if it were found that the purchase of the quarries would not involve the Government in any liabilities, the purchases were to be made at the rates proposed "to the extent of funds available." The draft agreement sent by the Government Advocate was signed by the plaintiff, who informed the Engineer that he was in a position to transfer the title-deeds of the kunkur quarries to Government. The deed was never signed by any one on behalf of Government and it was returned to the plaintiff by the Engineer with a letter stating that the Government did not desire to entertain the proposal to purchase plaintiff's right as there were no funds available. The question was whether there was such a binding contract between the parties that the Court could decree specific performance of it. *Held* that the Local Government might contract by the head of a department or through subordinate agents, but the contract made through the subordinate must clearly be within that particular agent's authority, either express or implied. In this case, the Engineer had neither express nor implied authority to contract on behalf of Government to buy the kunkur referred to. He received permission to "buy to the extent of funds available," meaning funds available to him and in his own division. The Secretary to the Government in the Public Works Department had not signed any document addressed to the plaintiff or entered into any agreement on behalf of Government to buy kunkur absolutely. There was thus no contract of which specific performance could be claimed. TAYLOR v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **60 P.R. 1871.**

(65)—*Agent of Government, extent and scope of authority of—Government whether bound by unauthorised acts of agent.*—One B corresponded with Government in connection with a contract to erect certain buildings in the Public Works Department. The Superintending Engineer through whom B communicated with the Government sent on the Government acceptance to B, without a clear explanation, giving B to understand something different from that which the Government had authorised him to do. The Engineer was authorised to say "your contract is not accepted but you may go on with the foundations," but from the reply through the Superintending Engineer B was led to understand that there was an absolute acceptance of the offer made by him. It was held by the Chief Court that the Government was not bound by the contents of the letter of the Superintending Engineer. In cases of public agents, the Government or public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held out as having authority to do the act, or is employed, in his capacity as a public agent, to make the declaration or representation of the Government. The Government in this case had in every way made known (by sending to B copies of the Secretary to Government's letters to the Superintending Engineer) that the scope of the employment of the Superintending Engineer was limited to the instructions as regards the making of such contracts as the present. BERTOLA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **64 P. R. 1875.**

(66)—Mookhtears—*Their powers—Reg.* VIII *of* 1819, *sale under—Notice.—Mookhtears* must be considered to have a certain discretion, and unless the contrary is shown, to act with authority in matters which come within the ordinary scope of their duty. So, where formal acts are done by general *Mookhtear* to enforce the rights of

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his principals (who are co-sharers) it is unnecessary to trace back his authority in each case to the explicit sanction of every single member of the family. In the case of a sale under Reg. VIII of 1819, where, in the absence of town, village or cutchery on the putnee, the peon sticks up the notice in the Collector's Office and the Sudder Cutchery of the Zemindar, and obtains the receipt of the defaulter, he carries out substantially, as far as he can, the provisions of law regarding notice as laid down by the Regulation. HURRY KISTO ROY v. MOTEE LALL NUNDEE, **14 W. R. 36.** [*R.*, 22 W. R. 202.]

See ACKNOWLEDGMENT, 1 A.L.J. 355.

Offer to be bound by opposite party's oath, persons entitled to make—Power of attorney empowering agents to act in suit, whether authorises agents to make offer—*See* ACT X OF 1873, s. 9, 14 B. 455.

Managing Agent of Company, powers of—Agreement against Company's interest—*See* ACT VI OF 1882, s. 242, 10 P.R. 1905=100 P.L.R. 1905.

Suit in British India by independent Prince—Agent for instituting suit—*See* CIV. PRO. CODE, 1908, s. 85, 1 O. C. 136.

See CONTRACT—WAGERING CONTRACTS, 12 B.H.C. 51.

Authority of agent to do what is necessary and useful- Power to refer disputes to arbitration—*See* CONTRACT ACT, 1872, s. 188, 3 S.L. R. 164=4 Ind. Cas. 1151.

See DAMAGES—DAMAGES, SUIT FOR, 3 W. R. 54.

See INSPECTION OF DOCUMENTS, 25 C. 294.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 4 B. H. C. A.C. 125.

Insufficiency of acknowledgment by agent—*See* LIMITATION ACT, 1908, s. 19, art. 148, 1 A. 642.

See PLAINT—GENERAL, 191 P.R. 1883.

See REVIEW—PRACTICE AND PROCEDURE, 58 P.R. 1878.

——3.—**Commission Agents.**

(1)—*Contract Act*, IX *of* 1872, *s.* 202—*Discretion to sell at any price—Principal's power to impose limits.*—An agreement, in pursuance of which goods are sent to an agent for sale, who pays for them in advance and who is given absolute discretion to sell at any price, and the principal agrees to re-pay shortages in sale-proceeds, creates an agency coupled with interest. The principal cannot therefore vary the terms of the agency by imposing a limit on the prices at which the goods are to be sold. KONDAYYA CHETTI v. NARASIMHULU CHETTI, **20 M. 97.**

Principal and Agent—continued.

—— 3.—**Commission Agents**- *continued.*

(2)—*Suit to recover brokerage commission—Undertaking by broker to find out solvent purchasers—Default of purchaser—Right of broker only to* quantum meruit.—This was a suit to recover brokerage alleged to be due to the plaintiff on the sale of a certain agency commission belonging to the defendants. It appeared that the stipulation in a letter to the plaintiff, to the effect that the brokerage was to be paid only on the receipt of the purchase-money by the defendants was to govern the whole of the subsequent dealings between the parties, so that the broker to the extent of his brokerage was to be answerable for the solvency of the purchaser. It was *held*, therefore, that the plaintiff could not, under the circumstances, claim to recover the entire commission, but was entitled only to a *quantum meruit* calculating the agreed percentage on the amount actually received by the defendants for the shares sold. Where the bargain actually struck is merely that the broker is to introduce the purchaser, and effect an agreement between him and the seller, the right to be paid commission accrues to the broker when his part of the transaction is performed. Where, however, as the understanding in the present case happened to be, part of the business for which the broker is employed is to find out a solvent purchaser, he will not be entitled to his brokerage till he has done so. If the contract had fallen through owing to the default of the defendants, in this case, plaintiff could claim the whole of his commission. That was not the case here because the defendants were anxious and willing to sell, and their failure to do so was due not to their own but to the default of the purchaser introduced by the plaintiff. STOKES v. SOONDERNATH D. KHOTE, **22 B. 540.**

(3)—*Contract—Agency—Contract by Insurance Company to pay percentage of premiums to agent—Right of agent to claim such percentage after determination of agency.*—Plaintiff sued to recover from the defendant, an Insurance Company a sum of money as due to him on account of the percentage of premiums payable to him, after the determination of his agency, under a contract with the defendant company. Plaintiff alleged that he was engaged as agent by the defendant company on the terms of receiving for every policy taken out through his instrumentality a certain percentage as long as the premiums continued to be paid, irrespective of the continuance between the parties of the relation of employer and agent. *Held* that, if the contract was a alleged by the plaintiff, he was entitled to claim damages, but could not sue as if he were the assignee of the premiums payable by policy-holders. In the absence of such a contract, the plaintiff was entitled to receive the percentage claimed as long as the agency lasted. RAGHAVA CHARRY v. ORIENTAL LIFE ASSURANCE CO., **10 M.L.J. 236.**

(4)—*Principal and Agent—What entitles agent to Commission—Express stipulation—Direct intervention.*—In the absence of any express

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——3.—Commission Agents—*concluded.*

stipulation, an agent, to succeed in a claim for commission for selling or letting a house, must show that such sale or lease was the direct result of his intervention and was obtained by means of his agency or some sub-agent of his; it is not sufficient for him to show that such lease or sale was obtained indirectly as a remote and casual consequence of his efforts. JORDAN v. RAM CHANDRA GUPTA, **8 C.W.N. 831.**

Commission—Agent's right to claim—Sale falling through owing to vendor's neglect—*See* CONTRACT—BREACH OF CONTRACT, 8 M.L.T. 40=6 Ind. Cas. 740.

See SALE—SALE OF GOODS, 17 B. 520.

See VENDOR AND PURCHASER—GENERAL, 20 B. 124.

——4.—Duties and Liabilities of Agents.

(1)—*Statement made by — Admissibility.* — The statement made by an agent whom the Court regards to make it, is admissible though not on oath. GOVINDJI v. CHHOTALAL, **2 Bom. L.R. 651.**

(2)—*Agent making profit in the agency.*—An agent cannot without the knowledge and consent of his principal be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. HARIVALLABHDAS v. BHAI JIVANJI, **4 Bom. L.R. 469 =26 B. 689.**

(3)—*Agent's profits beyond ordinary compensation.*—All profits and advantages which are made by an actual or constructive agent beyond his ordinary compensation, are to be deemed to have been made for the benefit of his employers. SIRDAR HEERA SINGH v. SIRDAR JOWAHIR SINGH, **19 P.R. 1867, Rev.**

(4)—*Act* VIII (*B.C.*) *of* 1869, *s.* 30—*Suit by principal more than a year after termination of agency—Account signed by agent—Fresh cause of action.*—Suit by principal against agent. The defendant pleaded that the suit, having been brought more than a year after the termination of the agency, was out of time under the provisions of s. 30 of Act VIII (B.C.) of 1869. It was, however, proved in the case that the defendant had subsequently signed an account and given a letter to the plaintiff, showing that a balance was due to the latter. *Held* that the account with the letter furnished a fresh cause of action. PEAREE MOHUN GHOSE v. MESSRS. JARDINE, SKINNER AND CO., **22 W.R. 338.**

(5)—*Agent underselling goods—Agent directed not to sell goods below a certain price without permission — Agent underselling the goods—Liability—Damages—Measure of damages.*—The plaintiffs, a trading firm in Italy, consigned to the defendants, a firm in Bombay, certain goods consisting of lead ore, under an agreement which provided that the defendants were not to sell the goods without the plaintiffs' consent below a stated price. They were sold below that price without that consent; whereupon the plaintiffs brought this suit for damages arising out of breach of contract. The original Court held that the measure of damages was the difference between the price realized and the cost of production:—*Held*, that the measure of damages awarded was not a correct measure; the correct measure was the difference between the price actually realized and the price which would have been realized had the defendants used reasonable diligence and skill. FABBRICHE v. JAGMOHANDAS, **1 Bom. L.R. 718.**

***Principal and Agent*—continued.**

——4.—Duties and Liabilities of Agents—*cont.*

(6)—*Principal and agent—Claim for services rendered—Principle upon which calculation is made.*—Plaintiff was a law agent but not an authorized practitioner of any Court. Defendant, an ex-member of the Royal House of Delhi, was ordered by Government to remove out of Delhi. At his request, plaintiff wrote letters to Government on his behalf, and brought the case of the defendant to the notice of the Secretary of State for India. An enquiry was instituted and in the result, Government ordered the defendant to reside at a place between Delhi and Calcutta. For the services thus rendered, defendant paid plaintiff a sum of Rs. 1,000. Having also suffered some losses during the mutiny, defendant again requested the plaintiff to exert himself and apply to Government on his behalf for compensation, and entered into an agreement for that purpose which ran as follows. "I Mirza Elahi Baksh agree with Mr. Fenwick that I will pay the said Mr. Fenwick ten per cent. on whatever I shall receive from the Government by way of compensation or reward. That I will make no objection. That therefore I have written this agreement for payment of 10 per cent. so that it may become a sannad." It was upon this agreement that the present suit was brought claiming a sum of Rs. 7,930, being 10 per cent. on Rs. 79,379 paid to the defendant as compensation for his losses during the mutiny. The defence was that the plaintiff was negligent in the performance of his duties, and that it was not through his intervention that the defendant obtained payment of this large sum of money, and in fact the Secretary of State had made an order directing a further enquiry into the matter, but when, upon such an order, the Government of India had to determine the amount, the plaintiff did not interest himself in his employer and did not move a finger on his behalf; though he wrote letters, etc., which procured to the defendant a re-hearing of the case, yet when the question as to the determination of the amount of the loss to be paid to the defendant arose, the plaintiff did not render him any help for that purpose. The questions therefore for consideration were:—(1) Did the fact that the amount of compensation was paid to the defendant without the intervention of the plaintiff, disentitle him to his commission according to the agreement? (2) Had the fact that the plaintiff was not possessed of the requisite skill, any bearing on the question? *Held* that in regard

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—**4.—Duties and Liabilities of Agents**—*ctd.*

to (2) it is clear that as the defendant himself had chosen the plaintiff for the purpose, he must be presumed to possess such skill as is found in persons of his class, and unless the defendant showed that even in the exercise of that skill, he was so negligent and that it resulted in loss to him, it was of no avail, and the defendant could not rely upon it for reduction of damages. But in that case, the defendant must shew that such neglect directly caused loss to him: on evidence, however, it was perfectly clear that notwithstanding there was supineness and neglect on his part, the enquiry was instituted and was going on even in his absence, and *that shewed that the neglect did not* cause any loss to him. As to (1), it was perfectly clear that it was upon the letter to the Secretary of State for India written by the plaintiff on behalf of the defendant that a further enquiry was ordered, and that was quite enough to entitle plaintiff to payment of his commission. MR. FENWICK v. MIRZA ELAHI BAKSH, **25 P.R. 1866.**

(7)—*Indian Contract Act, s.* 194—*Government Road Superintendent appointed to supervise building—Responsibility—Reasonable diligence —Compensation for loss—Bad materials, supply of, and negligent supervision—Damages.*—A Road Superintendent under Government employ was appointed by the Deputy Commissioner to superintend the building of a Tahsil Cutchery. He received Rs. 12,360 for its construction. After its completion, the Executive Engineer reported it to be worth Rs. 6,157. Thereupon he was asked to pay back Rs. 3,500. He paid nearly half of the sum demanded. When the Government sued him for the balance, he pleaded that the work was fairly good, that it was done by himself under the supervision of the Officers above him, that he purchased the materials under the direct management of his superiors, and that, consequently, he was not at all liable to pay back anything. Both the lower Courts more or less decreed the claim of the Government. The Chief Court, in remanding the suit, *held*, (*a*) that, according to s. 194 of the Indian Contract Act, the defendant having been appointed as agent of the Government, was responsible to the latter, that as such agent he was bound to act with reasonable diligence, and to use such skill as he possessed (even assuming that he, being only a Road Surveyor, was not bound to conduct the business with as much skill as was possessed by professional builders) and that he was liable to make compensation to the Government in respect of the direct consequences of his own neglect, want of skill or misconduct; (*b*) that the Court of first instance, in making its enquiry whether the defendant (as to whose want of special skill there should have been a finding and also as to whether Government had notice of it) acted with reasonable diligence and such skill as he possessed (which was a principal issue before it to try) should have decided the question of the defendant's liability in respect of his bills for materials and work from the question of his effective or non-effective supervision; (*c*) that the damages should not have been assessed without due regard to the defendant's opportunities of keeping up a complete supervision with reference to his other work. BALMOKAND v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **77 P.R. 1874.**

(8)—*Agent, Liability of, for negligence—Unstamped document, Admissibility of.*—Case where it was held that, under the circumstances thereof, a company had sustained loss in consequence of the negligence of their agent and that he was bound to make it good. A document which was unstamped having been received as evidence in the lower Court, the objection as to the want of stamp is untenable in the Appellate Court as not affecting the merits of the case or the jurisdiction of the lower Court. G. CRAWLEY v. R. MALING, **1 Agra 63.** [*F.*, 7 N.W.P. 124.]

(9)—*Banian—Liability—Custom.*—Where a man deals with a banian, *qua* banian, the principal does not incur any liability whatever. There is a peculiar presumption in Calcutta, that where a seller deals with a banian of an European firm, *qua* banian, he can look to the banian for his price, and to the banian alone. SHEIK FAIZULLA v. RAMKAMAL MITTER, **2 B.L.R.O.C. 7.**

(10)—*Contract with Municipal Overseer for doing Municipal work—Personal liability—Quasi contract—Amendment of plaint.*—The plaintiff sued one M. overseer of the Municipal Office, for the recovery of a sum of money due on a contract under which plaintiff had done a quantity of earth work for the Municipality. There was no evidence to show that the defendant had pledged his personal credit. The defendant clearly contracted for the Municipality, and for the performance of work well known by the plaintiff to be a Municipal work. The Municipality ignored the contract. *Held* that the contract in the present case was a *quasi* contract and that the defendant could not be made personally liable in the present action of contract. *Held*, further, that the plaint could not be amended so as to make the defendant liable in tort for a misrepresentation of his authority. *In re* MOHENDRONATH MOOKERJEE, **9 W.R. 206.**

(11)—*Rents received but alleged to be embezzled by agent, suit to recover, cognizability of, under Revenue law.*—The defendant, a *gumashtah* employed to collect rents, was sued for sums collected by him and not duly paid over or accounted for to his employer. *Held*, whether, with respect to moneys if any retained by him, he had committed an offence within the Penal Law or not, his liability still continued and the lower appellate Court was wrong in its decision that, the plaintiff having charged the defendant with what amounts to "embezzlement," the plaintiff's claim to recover the sum

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sued for was not cognizable under the Rent Law. MESSRS. R. SKINNER CO. v. RUJUB ALI KHAN, **2 W.R. Act X, Rul. 105.**

(12)—*Gratuitous agent, liability of, for gross negligence.*—A gratuitous agent is not bound to undertake the agency, but having undertaken it, he is liable for any loss sustained by his principal through his gross negligence. What is gross negligence is a question on the facts of each particular case. G. V. AGNEW v. THE INDIAN CARRYING COMPANY, **2 M.H.C. 449.**

(13)—*Agent—Principal—Suit.*—According to the established principles of law, a suit against an agent is bad in law. The principal only must be sued. HURISH CHUNDER TALAPATTUR v. MR. W. P. O'BRIEN, **14 W.R. 248.**

(14)—*Principal and agent—Contract—Consideration—Agent's personal liability.*—For goods sold and delivered to him the first defendant addressed a note to the 2nd defendant, his agent, calling upon him to pay a certain sum of money to the plaintiff, the vendor of the goods. The 2nd defendant endorsed as follows on the note: "The sum mentioned in the perwana I *will* pay within 15 days from this date."—In a suit for recovery of the amount mentioned in the note, *held*, that the second defendant was not at all liable. KALEE MOHUN SIRCAR v. HUMAUN KADAR MAHOMED ALI MIRZA, **25 W.R. 91.**

(15)—*Agent—Liability of agent to third parties—Money paid by mistake—Liability as between two innocent persons.*—M who was manager to K got two letters from a certain person purporting to be written by K, but which afterwards turned out to be forgeries. One of these letters directed him to obtain Rs.2,500 worth of notes from the manager of the M.S. Bank, and the other to the manager asking him to send the notes through M. The latter presented both the letters to the manager of the Bank, and procured the notes, giving a receipt which he signed for K. He delivered the notes to the person who had brought him the letters. As the letters were forgeries, the Bank suffered loss and it sued M to recover the money. *Held* that in presenting the letter, in receiving the notes, and in granting a receipt for them, it may be that M was in some sense an agent of K; but inasmuch as the notes were given under the authority of the letter addressed to the manager of the Bank itself, and not in consequence of any representation made by M, the latter cannot be held liable for the loss sustained by the former. MOONEY v. THE MUSSORIE SAVINGS BANK, **6 N.W.P. 319.**

(16)—*Money borrowed by agent—Personal transactions of agent mixed with those of principal—Right of lender to decree against agent personally.*—This was a suit by the plaintiff, against a guardian mother of certain minors, her sons and her agent to recover the amount of a bond executed by them. The lower appellate Court dismissed the suit on the ground that, as the bond did not recite how much was borrowed for the purposes of the estate, and how much for the private purposes of the agent, the latter was not authorized to mix up his own private transactions with those of his principal; and, further, that the *bona fides* of the transaction had not been established. On second appeal, the High Court held that the plaintiff was entitled to a decree against the agent. The agent exceeded his authority in mixing up his private transactions with those of his principal. So far as regards the estate, the transaction on the part of the lender was not *bona fide* inasmuch as he did not use proper diligence to satisfy himself that the agent was borrowing for the legal necessities of the estate. Consequently the agent alone was liable and he, having admitted execution of the bond but failed to prove that he borrowed for the benefit of the estate, a decree was passed against him personally. JUGGURNATH ROY CHOWDHRY v. MUNOREKHA DOSSEE, **2 W.R. 156.**

(17)—*Contract—Agency—Contract by agent on behalf of Captain and owners of ship then in the roads—Liability of agent.*—The defendants contracted with the plaintiffs as agents of the Captain and owners of a ship then in the Madras roads. The plaintiffs were aware of this at the time when the contract was made. The Captain was at the time in charge of the ship. At the time of the contract, nothing was said by either party as to the person or persons on whose credit the contract was made. All that occurred was that defendants, known by plaintiffs to have been acting as agents for the Captain and owners of the ship, agreed with the plaintiffs to carry certain goods of the plaintiffs on board the ship to Calcutta. The defendants did not, at the time of the contract, in terms say that they contracted only as agents. The plaintiffs did not know the names of the owners nor of the Captain; nor had they any further or other knowledge of the latter than that which his designation by his office of master of the ship conveyed. *Held* that, in the absence of anything more than knowledge that the defendants were acting as agents of the master and owners of a ship in the roads, a decision declaring the agents liable was strictly in accordance with English law. PATER v. GORDON, **7 M.H.C. 82.**

(18)—*Principal and agent—Liability of each—Cause of action—Jurisdiction—No carrying on business within limits.*—Where the plaintiff knew that the defendant contracted on behalf of his principal and not personally, he must sue the principal and not the agent for breach of contract. When the present suit was brought against the defendant in the Small Cause Court at Delhi, he had departed from that place and was not carrying on business there, nor was he represented by an agent there. It was therefore held that the Court had no jurisdiction. MEERKHAN v. C. J. MUNDEN, **30 P.R. 1867.**

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(19)—*S. 230, Contract Act (1872)—Presumption arises when — Rebuttal — Undisclosed principal* — The presumption, which arises under s. 230, only arises when an agent is acting for a principal, so that such a presumption cannot be said to be rebutted by the mere fact of a person signing himself as agent for a principal. The agent may nevertheless be liable. But where the principal's name is not disclosed at the time of the contract, a subsequent disclosure of the principal's name is not sufficient to rebut the presumption against the agent's personal liability. GUBHOY v. AVETOOM, **17 C. 449.**

(20)—*Personal liability of agent on contract —Disclosure of principal's name as a ground of exemption—Disclosure of principal's name by agent—Semble.*—If, on the fact of a written contract, an agent appears to be personally liable, he cannot escape liability by evidence of any disclosure of his principal's name apart from the contract. *Quære.*—Whether it is a sufficient disclosure of the principal's name by the agent, if it is not done on the face of a written contract by the latter. SOOPROMONIAN SETTY v. HEILGERS, **5 C. 71=4 C. L.R. 377.**

(21)—*Payment to agent—Agent's omission to pay to the principal—Cause of action against agent.*—A suit by a plaintiff against an agent on the ground that the latter received certain moneys from plaintiff and did not pay the same to his principal whereby he was damaged is not maintainable, in the absence of an express contract of the defendant with the plaintiff to pay the moneys to his principals. The disposal of the moneys received by the agent is a matter in which the agent is responsible to his principal only. NAGAR MAL v. PIRBHU DIAL, **57 P.R. 1887.**

(22)—*Agency—Agent of one share-holder drawing money under* mooktarnamah *from his principal—Liability to other share-holders.*—An agent of one co-sharer is not liable to other co-sharers for money drawn by him under a *mooktarnamah* from his principal, and not as trustee for the others, although the agent may have, when paying over the money to his principal, taken from him a bond by way of precaution to protect himself from any future possible claim by the co-sharers. SHAIK WALEE MAHOMED v. FATIMA BIBEE, **5 W. R. 172.**

(23)—*Proprietorship of land — Purchase of land for benefit of whole village—Agency—Adverse possession.*—A village having been washed away by flood, it was necessary to provide house sites for the fishermen who formed the inhabitants of that village. At the instance of the Deputy Commissioner, the lambardar of the village negotiated for the purchase of some lands from the zemindars of the adjoining village. The sales were in a way forced upon these zemindars for the benefit of the fishermen. The lumbardar managed to make out

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many of these sales in his own name and to have his name recorded at Settlement as proprietor, and after some time set up an exclusive title to these lands. *Held* that the sales were intended for the benefit of the whole village, that the lumbardar must be considered to have acted as agent for the village in respect of the purchases, and that his claim to exclusive possession was therefore untenable. AHMED YAR v. SHAH BUKSH, **104 P.R. 1868.**

(24)—Hundis *drawn in favour of plaintiff as agent of defendant to pay for goods brought by the latter—Agent, how far responsible for negligence in respect of the* hundis—Del Credere *agency, express or implied contract necessary for creation of—Implication of contract from dealings of particular parties or from usage of trade.*—Plaintiff did duty as the agent, at Mooltan, of the defendant, a merchant in Sialkote. For paying the price of certain goods purchased by him at Mooltan, *hundis* for Rs. 2,000 were drawn by defendant in favour of plaintiff on certain Amritsar firms. A firm in Mooltan purchased the above *hundis* on 10 days' credit. The Amritsar firms fully paid up the *hundis* but the Mooltan firm, when only Rs. 1,000 had been paid, became bankrupt, and only Rs. 300 and odd were subsequently recovered from the firm. *Held* that the liability of the plaintiff in respect of the *hundis* depended on the question whether, when selling, he acted as a *del credere* agent or not. The defendant pleaded that the plaintiff had guaranteed the solvency of the purchasers of the *hundis* and the due payment of the price for which they purchased them. But this was not made out. Unless the plaintiff was something more than an ordinary broker or factor, and was acting either by express or implied contract as a *del credere* agent which he never once became, it was the defendant that would be responsible for the loss on the transaction. It was also found and was not denied by the defendant that the Mooltan firm, at the time of the sale of the *hundis* to them, was in good credit, so that the grant of 10 days' credit to the purchasers for the payment of the amount quite accorded with the usage in Mooltan. Although, if the plaintiff had expressly or impliedly undertaken to guarantee the solvency of the purchaser, he might then be responsible, yet if he had undertaken as in the present case, only to make a bargain between his principal and the purchaser, he could not be subjected to subsequent liability. HURDIAL AND BISHENDIAL v. KHILLOO MULLICK, **98 P.R. 1869.**

(25)—*Bill of exchange—Unconditional acceptance by agent — Liability to pay.*—Plaintiffs drew a bill on the defendant payable at B in favour of certain persons, directing the amount to be charged to S and R. The defendant's agent at B, after accepting the bill unconditionally, refused to pay as S and R failed before it was due. The plaintiffs having paid the payees sued the defendant. *Held* that the

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defendant's agent's unconditional acceptance of the bill must be viewed as an admission of the defendant's obligation to pay the amount when due, and that he must be held liable for the same. SALIG RAM v. JUGGUN NATH, **1 Agra 137.**

(26)—*Principal and agent—Previous suit against Government as representing principal dismissed—Subsequent suit against agent and principal*—Res judicata.—A lent money to B as agent of C. Government having confiscated C's property, A sued Government for this debt but the suit was dismissed. He then sued B and C. It was admitted by the plaintiff that B was only the agent of C, but the plaintiff stated that he looked to B alone for payment, as he had no hope of getting the money from C. *Held* that the suit must be dismissed as against A who was admittedly an agent, that, as against C, the suit was not barred by the dismissal of the previous suit. For the issue in the previous suit was as to the liability of Government as having taken up the debts of C by having confiscated his property; it had no reference to C's own liability; whereas in the present suit, the issue was as to the liability of B or C. The plaintiff's statement that he looked to B alone for the payment of the money, cannot, in the face of his admission that B acted as agent of C, have the effect of exonerating C. against whom, therefore the suit had to proceed. MAHOMED MOHKAM v. RAMZANEE, **10 P.R. 1868.**

(27)—*Principal and agent—Liability of each—Cause of action—Jurisdiction—Not carrying on business within limits.*—Where the plaintiff knew that the defendant contracted on behalf of his principal and not personally, he must sue the principal and not the agent for breach of contract. When the present suit was brought against the defendant in the Small Cause Court at Delhi, he had departed from that place and was not carrying on business there, nor was he represented by an agent there It was therefore held that the Court had no jurisdiction. MEERKHAN v. C.J. MUNDEN, **30 P.R 1867.**

(28)—*Contract—Principal and agent—Purchase by agent in rising market—Duty of agent—Repudiation by principal.*—Agents who buy indigo seed in a rising market under an order to purchase on the most favourable terms, cannot experiment by sowing a sample and waiting before they purchase to see whether it will germinate. They are only bound to act to the best of their judgment and to use proper care and skill as agents in purchasing what they are ordered to purchase. It is incumbent on the principal to show affirmatively that the agent had been guilty of negligence in executing his order before he can repudiate the agent's action. BETTS v. ARBUTHNOT & CO., **19 W.R. 65.**

(29)—*Principal and agent—Promissory note by agent—Principal undisclosed—Liability of principal—Oral evidence, admissibility of.*—

***Principal and Agent*—continued.**

——4.—Duties and Liabilities of Agents—*ctd.*

Where a *gomashtah* signed a promissory note without disclosing the names of his principals, *held* that the latter could not be made liable; no parol evidence is admissible with a view of establishing their liability. SHEO CHURN SAHOO v. MR. G. CURTIS, **3 W.R. 139.**

(30)—*Bankruptcy of agent, effect of—Breach of contract—Damages—Amendment of bill of complaint.*—This was a suit for foreclosure of a mortgage for Rs 50,000 during a certain contract which, the plaintiffs contended, had determined by the bankruptcy of their Calcutta agents. The defence was that the contract was not so determined; and that, even if it were, the defendant had a right of lien or set off, which would cover the amount of the advances. This set-off consisted of the amount of loss in the sale of silk, which the defendants after the said bankruptcy, had shipped direct to London and sold there on non-acceptance by the plaintiffs; and of a claim of Rs. 18,024, the amount of a bill of the said agents, which the defendant had accepted from them as payment for silk, but which bill was dishonoured after the said bankruptcy. Cl. 6 of the agreement was as follows: —"The silk to be paid for on delivery. Delivery to be taken within ten days of the arrival of any parcel in Calcutta; failing the payment within that time, Carr, Tagore & Co. may sell it at the market price; and should this be under the contract rate, you agree to pay the difference." Cl. 10 of the agreement was as follows:—"As you have no authority to make advances previous to the receipt of the silk, and as Carr, Tagore & Co. stipulate for the advance in part of the sum which they are out of pocket, to carry on the cultures, the advances proposed being Rs. 50,000 at such times and in such portions as they may require after the delivery of the first parcel of silk under this contract, so that such advances shall not, at any time, be in excess of Rs. 50,000 beyond the silk delivered, for which interest at the rate of 6 per cent. will be allowed, and it is agreed that the question of advances shall be an open question; and that, in the event of advances being authorised, the contract shall at once be in force. The lower Court held that, under these two clauses, the defendant could not resort to the advances for their set-off; that the plaintiffs were not liable for the Rs. 18,024; and that the contract was not determined. Plaintiff also alleged a series of frauds on the part of their agents, with whom defendants were in collusion, but these charges were abandoned at the hearing. *Held*, that acceptance by the agent binds the principal where there is no fraud; that voluntary acceptance of an agent's bill as payment discharges the principal; that a contract is not determined by death or bankruptcy of an agent, unless there has been an express stipulation to the effect; that an impossibility of fulfilling the terms of a contract must be clearly established in order to avoid a liability for breach thereof; that when a place of delivery is specified in a contract, delivery must be made there; that the plaintiff,

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having failed to prove alleged fraud in a deed, although entitled to relief under a distinct head of equity, will not be allowed to make a new case, and cannot, in the same suit, obtain a decree on the footing of the said deed ; that amendment of a bill will not be allowed, if it appear that an account, being the relief attainable, would have been given, if demanded, and that the plaintiff has not offered to perform his part of a contract and allow compensation for breaches thereof to the defendant and to pay any balance that should be found against him ; that the mode of ascertaining damages for breach of contract prescribed in the contract must be adopted, and the remedy by action at once accrues. POLE v. GORDON, **2 Hyde 289 = Cor. 83 = Bourke O.C. 1.**

(31)—*Contract Act* (IX *of* 1872), *ss.* 192, 194 — *Agent – Sub-agent — Negligence.*— The plaintiffs were a firm engaged in business at K. The defendants were partners in another firm engaged in business at the same place. It was usual that, when one firm was sending a person to Calcutta to purchase goods for them, the other firm took advantage of the opportunity to get the same person to purchase goods on their behalf. The defendants' firm sent the third defendant, a member of the firm, to Calcutta, to purchase goods, and the plaintiffs made over a sum of money to the second defendant in order that the third defendant might purchase articles for them. The third defendant lost through his own negligence the money given by plaintiffs. It was found that the defendants' firm were agents for the plaintiffs' firm and had implied if not express authority to appoint a sub-agent. *Held* that the defendants' firm was, by cl. 2 of s 192 of the Contract Act, responsible to the plaintiffs, the principals for the acts of the sub-agent and that therefore defendants' firm, and not only the third defendant, was responsible for the amount lost. *Held* also that s. 194 has no application to a sub-agent. SEKUNDER MONDUL v. NOCOWRI BISWAS, **11 C. L. R. 547.**

(32)—*Principal and agent— Contract with defendant as servant of Government—Defendant not personally liable—Liability of Government.*—Plaintiff sued to recover from the defendant money being the unpaid portion of the price of bricks taken by the latter from the former. Plaintiff admitted that he was aware that, at the time the defendant gave him orders for the bricks, he was a servant of Government. Defendant stated that plaintiff was aware at the time of the contract that he was acting forGovernment and that the plaintiff was aware that the bricks were required for building bridges ; and, on the question that had to be decided as to whether defendant could, under the circumstances, be considered personally liable, the High Court was of opinion that the evidence in the case was sufficient to justify the Judge of the Small Cause Court in coming to the conclusion that the contract, in the case was rather with the Government and not with its agent personally and that the said Judge had rightly fixed the amount recoverable from Government by the plaintiff. SREE NATH ROY v. MR. D. S. ROSS, **4 W.R.S.C.C. Ref. 13.**

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Suit against agent for account—Sums claimed in plaint as damages—Necessity for taking accounts prior to decree—*See* ACCOUNTS—SUIT FOR ACCOUNTS, 6 C. 754 = 8 C.L.R. 321.

Receiver appointing *tahsildar* —Agent and sub-agent—Suit for accounts not maintainable against *tahsildar*—Sub-agent liable to render accounts to receiver—*See* ACCOUNTS—SUIT FOR ACCOUNTS, 8 C.L.J. 114 = 12 C.W.N. 1035.

See ACCOUNTS—SUIT FOR ACCOUNTS, 14 C. 147, P.C. = 13 I.A. 123.

Liability of agent to render accounts—*See* CONTRACT ACT, 1872, ss. 30 and 213, 95 P.L.R. 1901 = 46 P.R. 1901.

See JURISDICTION— CAUSES OF JURISDICTION, 22 P.R. 1874.

See MASTER AND SERVANT, L.B.R. 1893—1900, 67.

Adverse possession by agent—Agent acquiring title by adverse possession as against his principal—*See* POSSESSION— ADVERSE POSSESSION, 7 Bom. L.R. 836.

See VARIANCE BETWEEN PLEADING AND PROOF, 6 B.L.R. 273 = 14 W.R. 181.

See VENDOR AND PURCHASER--PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER, 4 B.H.C. O.C. 125.

——5.—**Duties and Liabilities of Principal.**

(1)—*Purchase of property by agent—Constructive purchase—Proof.*—In this case, a principal sued his agent on the allegation that he, having the charge and the management of his funds, fraudulently bought certain properties out of these funds in the names of his wives. The suit was to recover the properties. The Court observed that, in order to make out a case of constructive purchase at all, the plaintiff would have to prove not only that the defendant was his agent, but that at the time he made the purchases he had in his hands funds of the plaintiff sufficient to make the purchase. The defendant may have been the plaintiff's agent at the time he made the purchases, and he may have had no means to make the purchases out of his own funds, but these two facts alone are quite inadequate by themselves to establish even a *prima facie* case of constructive purchase. MUSST. ROOHONISSA v. SYUD WOOLFUT ALI, **3 W.R. 232.**

(2)—*Election to sue agent—Dismissal of suit —Suit against principal.*—Where a suit by a creditor against the agent of his debtor as being personally liable for the debt, is dismissed on the ground that the creditor gave credit to the

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——5.—Duties and Liabilities of Principal *—continued.*

principal, the creditor does not lose his remedy by suit against the principal. RAMAN v. VAIRAVAN, **7 M. 392.**

(3)—*Principal and agent—Authority of agent—Liability of principal—Diligence of vendor—Notice.*—Plaintiff received an order from the defendant R who was Manager of the Putturghatta Indigo Factory, for certain maunds of indigo seed at a certain rate. In the body of the letter ordering the seed, R styled himself the Manager of the factory though he distinctly signed himself "R for C," a stranger. The plaintiff now brought a suit for the recovery of the balance of purchase money against R, C and the owner of the factory. The owner of the Factory contended that R had no authority from him to purchase the seed; that he never received the seed; and that the transaction was a private one between R and the plaintiff. It was found that the seed was not purchased for or on behalf of the factory. It was also found that it was not within the reasonable scope of R's authority to make such purchases. *Held* (*Glover, J. dissenting*) that the owner of the factory was not liable for the claim. The plaintiff was bound, before he supplied R with the seed, even for the owner of the factory, to be quite certain that, R held authority to make the purchase. R in signing "R for C" disclosed to the plaintiff that. C was his principal and not the owner of the factory. Had the plaintiff made any enquiry at the time he might have ascertained for whom the seed was required. ROGHOOBURDYAL MUNDER v. MR. ALEXANDER CHRISTIAN, **3 W.R. 123.**

(4)—*General power-of-attorney — Principal bound by agent's act—Court not competent to import limitations into deed.*—Plaintiff sued the defendants for cancelment of a perpetual *jote* jumma granted to the latter by the general agent and the then owner of a factory—a grant which was entirely beyond the scope of that agent's authority. Differing from the first Court, the first appellate Court was of opinion that the power-of-attorney gave the agent no power to make such transfer and on that ground gave the plaintiff a decree. On appeal, the High Court reversed the decision and revived that of the first Court. By the power-of-attorney, the agent was vested with the most extensive powers as to the transactions with zemindars and ryots or the Government. There were no words in the instrument expressly or impliedly limiting such powers, and it would not be competent to the Court to import into the power-of-attorney a limitation which the party executing it had omitted to enter in it himself. If persons do not limit their confidence, the Court cannot limit it for them when they find that it has been misplaced; but they must, and those who purchased from them must, also suffer the effect of their own ill-judged act. The lease granted

***Principal and Agent*—continued.**

——5.—Duties and Liabilities of Principal *—continued.*

by the agent to the defendant in this case was thus within the scope of the powers of the agent and was not liable to be set aside. SHOSHEE BHOOSHUN DUTT v. CHUNDER COOMAR ROY, **6 W.R. 41.**

(5)—*Costs — Dismissal of suit brought by agent—Principal when liable for costs.*—Where a suit brought by an agent was dismissed on the ground that it must have been instituted by the principal, in the absence of any evidence that the suit was brought by the directions of the principal, the latter cannot be made liable for costs. BHOBO TARINEE DOSSIA v. MADHUB CHUNDER DUTT, **7 W.R. 143.**

(6)—*Liability of agents—Agent of foreign principal—Presumption of law as to whom credit is given.*—Where it is sought to make the agent of a foreign principal liable on a contract, there is no presumption of law, but the case must be determined by the particular facts. But in the absence of evidence to the contrary, it will be presumed, as a matter of fact, that credit was given to the agent. MCGAVIN v. WILSON, **1 Ind. Jur. N. S. 405.**

(7)—*Liability of agents—Banian, Liability of — Custom.*—There is a presumption in Calcutta that, where a vendor of goods deals with a banian of a European firm, *qua* banian, he is only to look to the banian for the price. FAIZULLAH v. RAMKAMAL MITTER, **2 B.L.R. O.C. 7**; JUGGOBUNDOO SHAW v. GRANT, SMITH AND CO., **2 Hyde 129=Cor. 47**; *S. C. on appeal*, GRANT, SMITH AND CO. v. JUGGOBUNDOO SHAW, **Bourke A.O C. 117=2 Hyde 301.**

(8)—*Contract Act, s.* 233—*Suit against agent on hypothecation bond—Purchase of hypotheca by decree-holder in execution of decree—Delivery successfully resisted by principal—Subsequent suit against principal in respect of same matter—Maintainability.*—A suit was instituted to recover the amount due on an hypothecation bond. At the time when the suit was instituted, the plaintiff knew that the defendant was only an agent. Having obtained a decree, the plaintiff satisfied it in part by attachment of a sum of money. Then he caused the hypotheca to be sold and purchased it himself. But the delivery of possession was successfully resisted by the principal on the ground that the purchaser derived no title from the judgment-debtor. Thereupon the plaintiff instituted a suit against the principal for the balance of the amount due on the bond. *Held*, that when once the plaintiff elected to hold the agent responsible upon the contract, to sue him and, having obtained judgment and decree against him, to execute such decree and write up satisfaction thereof, it was not competent afterwards for him to maintain a suit against the principal in respect of the same subject-matter. BIR BHADDAR SEWAK PANDE v. SARJU PRASAD, **9 A. 681 =A.W.N. 1887, 229.** [*R.*, 22 A. 307.]

***Principal and Agent*—continued.**

——5.—Duties and Liabilities of Principal —*continued.*

(9)—*Railway Companies—Agreement for interchange of traffic—Liability for loss of goods—Agency.*—The plaintiff at Bellary, a station in the Madras Railway, delivered there to the Madras Railway Company a bale of cloth belonging to the plaintiff to be conveyed thence to Sholapur, a station on the G.I.P Railway, and there to be delivered to the plaintiff. The bale was conveyed safely from Bellary past Raichore, where the Madras Railway terminated, and was lost between Raichore and Sholapur on the defendants' (G.I.P. Railway Company's) line, and was never delivered to the plaintiff, who by the present suit claimed damages to the extent of the value of the lost bale. The receipt was granted by the Madras Railway Company "subject to the Rules and Regulations in force on this or any other Railway over which the goods may pass, and must be produced before the goods can be delivered." There existed also between the two Companies an agreement regarding the interchange of traffic, providing that goods should be booked through to and from all stations on both lines at certain stated rates, that in such cases one Company should receive payment and should account to the other; and that any claim for loss or damage should be met with by the Company in whose custody the goods were lost or damaged. *Held* that the suit was rightly brought against the G.I.P. Railway Company, whether it might or might not have been brought also against the Madras Railway Company, because the agreement between the two Companies showed that each Company became the agent of the other for the purpose of, at least, so much of the traffic as benefited that other Company, although the agreement may not have actually constituted a partnership between the two Companies. *N B.*—*Westropp, C.J.*, reviews in his judgment the several English and Indian cases connected with this question. THE GREAT INDIAN PENINSULA RAILWAY COMPANY v. RADHAKISAN KHUSHALDAS, **5 B. 371.** [*R.*, 3 Bom L.R. 260.]

(10)—*Indian Contract Act* (IX *of* 1872), *ss.* 231, 232—*Sale to agent of undisclosed principal —Right of unpaid vendor—Accounts between principal and agent not material.*—The Indian Contract Act has by s. 232 adopted as regards the undisclosed principal, concerned as such in a transaction, the qualification imposed on him by the English Law, *viz.*, that he must take the contract subject to all the equities, in the same way as if the agent were the real principal. The section makes the right of the principal to require performance, subject to the rights and obligations existing between the agent and the other contracting party, and thus qualifies the unlimited right of the principal given by the first portion of s. 231. In the converse case of the other contracting party, however, the section does not impose upon him the qualification laid down by the rules of English Law, *viz.*, that his (the other contracting party's) right to hold the principal liable is subject to the condition that the principal has not paid the agent or that the state of the account between the principal and the agent has not been altered to the prejudice of the principal. The only qualification imposed on the assertion, by the other contracting party, of his rights against the principal, is that imposed by s. 234, namely, that he has not induced the principal to act upon the belief that the agent only will be held liable. PREMJI TRIKAMDAS v. MADHOWJI MUNJI, **4 B. 447.**

***Principal and Agent*—continued.**

——5.—Duties and Liabilities of Principal —*continued.*

(11)—*Agent—Purchase by, binding on principal in its entirety.*—In respect of the purchase of property by an agent on behalf of the principal, the latter may adopt or reject the agent's acts as he pleases; but, if he adopts them, he must take the property subject to the conditions with which the agent encumbered it, notwithstanding any secret arrangement between them, not known to third parties ISHEN CHUNDER SINGH v. SHAMA CHURN, **W.R. 1864, 3.**

(12)—*Income-tax Act* (XXXII *of* 1860), *s.* 97, *return made under, not conclusive evidence regarding perpetuity of tenure—Fraudulent statement by agent, principal not bound by.*—The principal point for decision in this case was whether a tenure held by one R, and now in the hands of the defendant, was a tenure in perpetuity or only a tenure for the life-time of R who admittedly held it at a fixed rent. The evidence relied on to show that the tenure was a tenure in perpetuity was a return made by the plaintiff in which it was described as one in perpetuity. It was contended that that return made to the income-tax officer under the terms of Rule 4, s. 97 of Act XXXII of 1860, was absolutely conclusive on the point of perpetuity of tenure as against the party who made it. The High Court *held* that the return could not be conclusive evidence upon the point of perpetuity against the plaintiff. Further, the statement was not one actually made by the plaintiff but had been made by some person on his behalf, and although, for statements of the agent made by him *bona fide* on behalf of his principal, the latter may well be *held* liable as for acts falling within the scope of the agent's authority, it could never be possibly taken that statements made fraudulently by an agent for his own benefit should be binding on the principal, and such a fraudulent intention the Court cannot be expected to carry out. JOWAHIR LALL v. TAKEIT & POOKURUM SINGH, **6 W.R. 252.**

(13)—*Fraud by agent—Effect.*—If an authorised agent commits a fraud in the sale of the principal's property, the principal, and not the stranger, is, in the absence of actual or constructive notice, the person to suffer. DOORGA NARAIN SEN v. BANEY MADHUB MAZOOMDAR, **7 C. 199.**

Principal and Agent—continued.

——5.—Duties and Liabilities of Principal —*continued.*

(14)—*Misfeasance by servant or agent—Liability of principal for, on assent or ratification.*—A principal is liable not only for the misfeasance or tort of his servant done or committed within the scope of the ordinary business, but he is also liable when such misfeasance or tort has been done or committed by the previous command or with the subsequent assent, adoption, or ratification of the principal. The Judge of the Lower Appellate Court in this case had found that the appellants were cognisant of the act of their servants in having seized the crops for which damages were claimed in this suit, and the evidence in support of such finding went even further, and, if accepted, was sufficient to prove that the trespass was comitted under their orders. And when the principal has been cognisant of and countenanced the acts of his servants it is not too strong an inference that he assented to them. RAI KISHEN CHAND v. SHEOBARAN RAI, **7 N.W. P. 121.**

(15)—*Liability of agents.*—On 6th April, 1865, A, who resided and carried on business at Bombay, through his gomastah at Calcutta, shipped on board the *Sir Jamsetjee Family* 268 bags of sugar, and received from the Captain a bill of lading by which he certified that they were shipped in good order and well conditioned on board the said ship bound for Bombay, to be there delivered in like good order and well conditioned to B, or his assigns, on payment of freight at Rs. 16 per ton. The bill of lading was subject to the usual exceptions. The vessel was at the time chartered to H A, and C and Co. were agents for the owners. H A. being unable to carry out the terms of the charter, there was a delay in the departure of the vessel. On 26th May 1865, A wrote to C & Co., addressing them as agents of the ship: "I beg to inform you that I have shipped per *Sir Jamsetjee Family* 268 bags of sugar for Bombay; I hold the bills of lading for the same, and the ship is still detained here. I hope you will be kind enough to let me know what you will do about the cargo,—if the said ship will sail for Bombay or tranship to any other vessel,or deliver the cargo here." To which C & Co, on the same day replied: "We shall be able to tell you in the course of a week or so what we propose doing with the ship *Sir Jamsetjee Family*; as soon as anything has been decided, due notice shall be given to the shippers of cargo already on board." On 1st June, C & Co., again wrote: "H A having failed to carry out his charter of the *Sir Jamsetjee Family* in terms of the shipping order and sundry goods having been sent on board by him, of which the following are believed to be to your order, and for which bills of lading have been signed and delivered to H A, we shall be glad to know whether you are willing that the said goods—268 bags of sugar—be transhipped to a steamer going to Bombay, at the current rate of freight, the bills of lading

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——5.—Duties and Liabilities of Principal —*continued.*

for the same being sent to the owners of the *Sir Jamsetjee Family*, to be delivered to the consignees of the goods upon production of the Bills of Lading already signed. You will, of course, understand that the goods are liable for the chartered rate, *viz.*, Rs. 20-10 per ton; and the charter having failed to complete the loading, the difference of freight between what H A granted you a shipping order at and the freight charged by the steamer will have to be paid by the shipper previous to the goods being delivered in Bombay." On the 8th June, A replied: "I am agreed that my goods be transhipped to a steamer going to Bombay at the current rate of freight, but I must not pay the difference of freight, whatever it may be. *In regard* to H A, I have nothing to do with them, as the bills of lading per *Sir Jamsetjee Family* for 268 bags of sugar being signed by the captain of the same at the rate of freight, Rs. 16 per ton, I am liable for the same only. If you are willing to tranship my said goods to a steamer at the same rate of freight, I am willing and must pay it; otherwise, you will kindly order to deliver my goods from *Sir Jamsetjee Family* here." C & Co., accepted and acted on the proposal in the last letter. The sugar was transshipped from the *Sir Jamsetjee Family* to the *Ganga*, from the mate of which C & Co. obtained a receipt, stating that the goods had been shipped in good order, etc. The goods were afterwards removed without the knowledge of C & Co., from the *Gunga* to another steamer, the *Mula*, which belonged to the same owners. Subsequently C & Co., gave up the receipt from the mate of the *Gunga*, and obtained in exchange a Bill of Lading signed by the agents for the captain of the *Mula*. The Bill of Lading stated the receipt of goods(in which were included those of A) from C & Co., and made them deliverable to order of C & Co, at Bombay, and receipt of freight for the whole at Rs. 15 per ton was admitted. A knew that his goods had been put on board the *Mula*, and got his policy of insurance, which was against a total loss only, transferred. There were inserted in red ink in the bill of lading, when given to A, the words "Bags all more or less in bad order and torn; contents damaged and rotten; marks indistinct; not responsible for marks or condition of packages or contents." The *Mula* proceeded on her voyage, but returned to Calcutta with her cargo damaged by the perils of the sea: 260 of A's bags of sugar were condemned and sold in Calcutta, under the authority of the agents of the *Mula*, without notice to C & Co., or to A, and neither were aware that the sales were about to take place. The remaining 8 bags were sent to Bombay in another ship by the agents of the *Gunga* and *Mula*, and were received by A. *Held* (*overruling Phear, J.,*) that C & Co., were agents only of the owners of the *Sir Jamsetjee Family*; but had C. & Co., been liable as agents for A, they would not have been liable for the full value of the goods damaged by the

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——5.—Duties and Liabilities of Principal *—continued.*

perils of the sea. *Quære*—If C & Co., had, expressly as agents of the owners of the *Sir Jamsetjee Family*, contracted to tranship and deliver at Bombay according to the terms of Bill of lading, would they have been personally liable? *Semble*—A contract made with express reference to a principal, though not by name, would not render the agent personally liable as the agent of an undisclosed principal. COWIE v. DHURMSEE POONJABHOY, **2 Ind. Jur. N.S. 75.**

(16)—*Captain and officers of man-of-war—Damages occasioned by treatment of stranded ship without consent of owner.*—A, the captain of a man-of-war, gave written instructions to B, his lieutenant, concerning a certain ship which was stranded. The official instructions contained the following passage:—"You will, in all emergencies, act as your discretion and judgment direct." At the same time, A sent a demi-official letter to B, in which, after several directions having reference to the disposal of cargo, he added, "After getting all you can, I should think that the wreck ought to be burnt; but all is left to your discretion and judgment." In pursuance of these orders, the wreck was burnt without the consent of the owner. A subsequently ratified the act of his subordinate. *Held*, first, that A, by the expressions used in the demi-official letter, rendered himself liable as principal; and second, that B, as the agent directly concerned in causing the burning of the ship, was liable jointly with A to the owner for the damage occasioned thereby. ABDULLA *bin* SHAIK ALLY v. STEPHENS, **2 Ind. Jur. O.S. 17.**

(17)—*Liability of agents—Fraud—Fraudulent agreement between agent and contractors for work.*—The ex-king of Oudh ordered M, one of his officers, to procure the erection of certain buildings. M made over to Y (also one of the King's officers) the contract for a portion of the work which the appellant undertook to execute. The contract for the work was signed by the appellant alone, and it provided, among other things, that X was to be allowed Rs. 20,000 out of every Rs. 1,000,000 paid to the appellant. By another agreement, it was stipulated that the work should be examined and checked by Y or his agents. The appellant was discharged before the completion of the work, and he sued Y M, and the ex-king jointly. *Held* that Y did not render himself personally liable, and that the contract was of such a description that the appellant was not entitled to a decree against the other respondents in respect of it, as both Y and the appellant were parties to a fraud on the ex-king. BHOGOBAN CHUNDER SEN v. BADSA ALLY SHA, **1 Ind. Jur. O.S. 103.**

(18)—*Suit for rent against lessee's agent—Plea of payment—Question at issue.*—The plaintiff sued for rent the parties in whose name

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——5.—Duties and Liabilities of Principal *—continued.*

a lease stood, knowing full well that they were only the agents of a third party and had no beneficial interest in the lease. The defendants did not raise these pleas, but only pleaded payment. *Held*, that the suit ought not to be dismissed on the ground that the defendants had, to the plaintiff's knowledge, no beneficial interest in the lease; that the plaintiff, by electing to sue the agents knowing them to be such, gave up all his claim against the principal, and as the agents, without objecting to their liability, pleaded payment, the case should be decided with reference to the question whether the payment had been made or not. GOUREE SUNKUR v. BHOLEE PERSHAD, **11 W.R. 247.**

(19)—*Practice—Amendment—Written statement—Conversion—Demand and refusal, effect of—Intention of the converter fixes him with responsibility—The Indian Contract Act* (IX *of* 1872), *ss.* 108, 178, 189—*Possession, meaning of—Pledgee has wider powers than a vendor—Principal and agent—Principal affected with the fraudulent witholding of information by his agent—Principal not liable for the sudden dishonesty of a qualified agent who has served him for years.*—The plaintiff alleged that he bought certain bales of cotton and entrusted them to his Muccadam (defendant 2) for warehousing, but the latter pledged them to a Bank (defendant 1) which in spite of the plaintiff's demands, did not restore the goods to him or compensate him. He prayed for a relief on this head: and further prayed in the alternative that, if it be held that the pledge was valid, then he claimed to stand in the shoes of his Muccadam as against the Bank. The defendant Bank replied that it never had the plaintiff's bales; that, if they were among the bales pledged by the second defendant, the pledge was valid; and that, if any of the bales pledged were lost or missing, the Bank was not liable. The defendant Bank raised issues embodying the substance of these contentions. After some evidence was *led*, the defendant Bank by its cross-examination indicated that it intended to rely on a defence that, if the Bank ever did receive the plaintiff's bales in pledge from defendant 2, it returned them to him. The plaintiff objected to this, saying that it was a new defence, which had taken him by surprise, and that, even if it were a good defence, his right to follow the property in the hands of those to whom it had passed had become barred by lapse of time: *Held*, that no amendment which would let in new defence, which was not raised in the pleadings, could be allowed. It is a general rule of pleading that the defendant must raise, by his pleading, all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise or would raise issues of facts not arising out of the previous pleadings, as for instance, release, payment, performance, etc. So, too, all facts which

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show a subsequent discharge of a once subsisting cause of action must be specially pleaded, such, for instance, as that the defendant had paid the debt or that it had been released. The rule as to amendment of pleadings rests upon a deduction from the broad principle of estoppel. The test is, whether, owing to the party who wishes to amend having kep tback either intentionally or through carelessness an attack or defence which he afterwards wishes to use, and thereby placed his opponent in such a position that, if the use of that defence or attack turns the scale against him, he could not be restored to the same position as he would have been in, had it been disclosed to him at the proper time, then, it cannot be allowed. Conversion arises by a wrongful taking but more commonly by a wrongful detention. Where the person charged with conversion has exercised over the goods a dominion inconsistent with the ownership of the rightful owner, then there has been a conversion from that moment. Conversion really depends upon the intention of the convertor, an intention which has been given effect to by some definite act which is in fact the conversion, as for instance, the passing off the property or changing or destroying it. If the intention is clear, it matters very little whether this has been done before or after demand. It is the intention of the convertor, either shown in conduct or expressly avowed, that fixes him with responsibility, not the mere accident of the time at which the true owner may happen to come down upon him. Demand and refusal is only evidence of conversion, when the demand is made while the goods are in the possession of the defendant. A false denial of ever having had the goods is at least as good and conclusive evidence of conversion as a refusal while the goods are still in the defendant's possession. For the purpose of giving a good title by sale, the possession must have been with the consent of the owner. For the purpose of making a valid pledge, all that is necessary is that the possession shall not have been obtained, from the owner or the person having the lawful custody of the goods, by an offence or by fraud. The Legislature seems to have conferred a wider power on pledgors than on sellers. S. 189, Contract Act, appears to have been framed in the interest of *bona fide* pledges. The quality of the possession under the section is immaterial. Possession may roughly be divided into three main divisions: (1) detention : (2) imperfect or qualified possession and (3) perfect or unqualified possession. Cases of imperfect or qualified possession, that is, possession to which the law has attached the right to possessory remedies, fall within the scope of ss. 108 and 178. A warehouse man, who has his own jettas and godowns completely under his control, who may put locks on his doors, who might, if the goods deposited with him were wrongfully taken from him, bring an action for their re-

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covery, is in "possession" of those goods as long as they remain in his charge. If a principal employs an agent to keep him informed, and that agent is thoroughly competent and might have kept him informed, but, in fraud of his principal and in violation of his duty, keeps back information which he has, the principal is not affected with it. Where a principal has employed qualified agents who have for years served him well, and given him no cause at all for suspicion, the sudden dishonesty of one of them ought not to be imputable because it could not have been foreseen by the principal. NANDLAL THAKERSEY v. THE BANK OF BOMBAY, **11 Bom.L.R. 926=4 Ind. Cas. 652.**

(20)—*Purchase by agent on behalf of the principal—Liability of principal — Suit by agent against the principal, when maintainable.*—Plaintiff stated that, as the agent of the defendants, he purchased goods for their shops, that they paid up only part of the price due for the goods and it was for the balance of the price due by the defendants together with commission and interest that he brought the present suit against them. The suit was decreed in favour of the plaintiff by the Court of first instance but was dismissed by the District Judge on appeal. On second appeal, it was argued on behalf of the plaintiff-appellant that he had to pledge his own credit before the wholesale dealers would consent to supply the goods, that, therefore, he was entitled to recover from the defendants the amounts due to those dealers in view of any future claim that might be made by them from himself. The above contention was overruled on the ground that it was the setting up of an entirely new case not even suggested in the pleadings before the lower Courts, and it was held that plaintiff, avowedly, acted as an agent for the defendant, and would not be personally liable to the whole sale dealers, and, inasmuch as the defendants may be liable in an action brought by those dealers, plaintiff had no cause of action against the defendants until he was compelled to pay the demands of those dealers KHURKUN SAHA v. DHATIA DAS, **32 C. 1145.**

(21)—*Agent's knowledge--Doctrine of constructive notice—Mortgage — Auction-sale under a power in it — Mortgagee's conduct to induce would-be bidders to leave—Purchaser buying with notice of such conduct—Its effect on the sale.* —A mortgage was of the English type and contained a power-of-sale in an ordinary form followed by a proviso, which was in substance an echo of s. 69 of the Transfer of Property Act, 1882. The mortgagees, purporting to act under the power of sale in the mortgage, caused the property in question to be put up for sale by auction. One of the conditions of sale was that "the purchaser shall accept such title as the vendors can give, and shall not require the vendors to enter into any other

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covenant except a covenant that they have not incumbered and shall not raise any question or objection to the title, and shall be held bound to accept such title as the vendors possess." The property was knocked down to the appellant, who signed a written contract to purchase on the same day and some days after the contract of sale was completed instructed the mortgagee's solicitor to act for him in the preparation of the deed of conveyance. A few days later the mortgagees executed a conveyance to the appellant. The Court of Appeal set aside the sale holding that although the aforesaid condition of sale was a depreciatory one, wholly unwarranted by the actual state of the title, the purchaser was affected with constructive notice of the true state of the title by reason of the fact that the solicitor knew enough of the real title to show that the condition in question was unjustiflable. *Held*, that the view of the Court of Appeal imputes to a principal the knowledge of an agent, not acquired in the matter of which he was agent, and uses it to upset a transaction of a date before the agency commenced, and that it was an extension of the doctrine of constructive notice in which their Lordships could not concur. Where, at an auction sale under a power-of-sale in a mortgage the mortgagees by themselves or their agents so conducted themselves with reference to the sale that would be bidders at it were induced to leave and the purchaser had notice of those circumstances, using the word notice as it is defined in the Transfer of Property Act, the purchaser bought at his peril, and as the sale was not a *bona fide* auction sale it must be set aside. CHABILDAS v. DAYAL MOWJI, **9 Bom. L.R. 1062=6 C.L. J. 674=17 M.L.J. 465=11 C.W.N. 1109=4 A.L.J. 750=31 B. 566=2 M.L.T. 394=34 I. A. 179**, *on appeal from* **6 Bom. L.R. 557, 5 Bom. L.R. 247.**

(22)—*Agent's acts.*—No person can as agent bind by contract a principal who does not exist at the date of the contract. LAKSHMISHANKAR v. MOTIRAM, **6 Bom. L.R. 1106.**

(23)—*Principal and agent—Fraud of latter—Liability of former—Cheque presented at the Government treasury cashed and amount misappropriated by employees at the treasury—Liability of Government.*—The true rule of law with regard to the liability of the master for the misconduct of the servant is, that the master is liable for the fraud of his servant in the course of his service and for the master's benefit, and that a master is not liable for the misconduct of the servant committed for the servant's own private benefit, and that it is not necessary that the benefit should accrue to the master. (5 I.A 130, 6 C.W.N. 429, 9 C.W.N. 495, 18 I.A. 111, *R.*) Where plaintiff, who had got a cheque for work done for the District Board, presented it for encashment at the District Treasury, but the head *poddar* and the *mohurir* employed there, misappropriated the amount of the cheque, and it was found that the latter did so for their own benefit. *Held*, that, in these circumstances, the Secretary of State for India in Council was not liable for the fraud committed by his employees. GOPAL CHANDRA BHUTTACHARYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **13 C.W.N. 619=36 C. 647=1 Ind. Cas. 735.**

(24)—*Suit against principal on agent's contract.*—A person, who has made a contract with an agent, may, if and when he pleases, look directly to the principal, unless, by the terms of the contract, he has agreed not to do so; and that, whether he was or was not aware, when he made the contract, that the person, with whom he was dealing, was an agent only. (*Calder* v. *Doball*, *R*).—*per Petheram, C.J.*. *In the matter of the* GANGES STEAM TUG AND CO., **18 C. 31.**

(25)—*Principal when bound by acts of agent—Honest belief in agent's authority.*—Even when an agent of the firm exceeds the extent of the authority given to him, the principal is bound by the contract of his agent, if the contracting party has reasonable grounds for believing and, in good faith believes, in the authority of the agent. RAM PERTAB v. MARSHALL, **26 C. 701, P.C.=3 C.W.N. 313.**

(26)—*Decree obtained by agent against third person—Suit by principal to declare himself entitled to the benefit of decree—Maintainability—Adoption of agent's transaction, subject to burdens—Single transaction of agent's suit respecting, if lies.*—Plaintiff's agent, in the course of his agency, advanced a sum of Rs. 300 to another person for the purchase of paddy, sued him for breach of contract and recovered a decree. Plaintiff who had full knowledge of the commencement and progress of the litigation did not intervene at any stage of the suit but, after its terminationsued the decree-holder and the judgment-debtor for a declaration that he was beneficially interested in the decree, and for an injunction to restrain the latter from paying any money into the hands of the former in satisfaction of the decree. Plaintiff did not however offer to bear the costs of the litigation. *Held*, that the suit was not maintainable in this form. Plaintiff might have adopted the contract made by his agent and sued on it, or he might have intervened at any stage of the action commenced by the agent. But he was bound to adopt it *cum onere* or not at all. In the absence of a special contract in that behalf, a principal cannot be permitted to select capriciously a single transaction of the agent and claim the profits thereof, without an adjustment of the rights and liabilities of the parties in relation to other transactions. GODHAN RAM BHAKAT v. JAHARMALL, **17 C.W.N. 67 =16 Ind. Cas. 583=4 O.C. 335=17 C.L.J. 636.**

Principal and Agent —continued.

——5.—Duties and Liabilities of Principal —*concluded.*

(27)—*Principal entitled to final account at the determination of agency—Accounts.*—A principal is always entitled to have a final account taken between himself and his agent at the determination of the agency. If accounts have been taken from time to time and settled between the parties, the agent when rendering the final account will be entitled to rely upon those casual accounts and to urge that they ought to be accepted as being *prima facie* correct. ABHAI CHARAN CHAKRAWARTI v. KESHO DAS, **13 Ind. Cas. 642.**

Acts or omissions of—Binding on principal —*See* MAHOMEDAN LAW—PRE-EMPTION—GENERAL, 7 A. 41=A.W.N. 1884, 255.

See SALE—SALE FOR ARREARS OF RENT —SETTING ASIDE SALE AND ITS EFFECT, 16 W.R. 80.

——6.—Ratification of Agent's Act.

(1)—*Acts of agent—Knowledge and consent of principal—Subsequent ratification bind principal though beyond the scope of agency.*—Plaintiff had acquired the land in question subject to a right of permanent occupancy vested in the 1st defendant with regard to the major portion (if not the whole) of the land. Plaintiff's son, the second defendant, acting as his father's agent, granted permanent leases to the 1st defendant in respect of the whole and it had to be decided whether the leases had been validly created by the 2nd defendant as agent. *Held*, that, since in granting the leases, the son acted with the knowledge and consent of his father and the latter subsequently ratified his son's action, the father, as principal, could not repudiate the leases, even though the son in granting them might perhaps have exceeded the limits of his agency. RAMASAMY AIYANGAR v. OBAI GOUNDEN, **15 M.L J. 487.**

(2)—*S.* 522, *Civ. Pro. Code*, 1882—*Illegal award--Appeal--Reference by unauthorised agent —Implied ratification by principal.*—An appeal will lie from an award, which is illegal and void *ab initio*. (17 B. 357, *F.*) When a principal is aware of the reference to arbitration on the application of his agent not authorised to do so, and tacitly ratifies the action of his agent in applying for such reference, he cannot then question the legality of the order of reference. SATURJIT PERTAP BAHADOOR SAHAI v. DULHIN BULAP KOER, **24 C. 469.** (9 M. 451, *R.*) [*F*, 1 Bom. L.R. 261, 2 N.L.R. 81, 8 O.C. 263; *R.*, L.B.R. 1893—1900, 548, 112 P.L.R. 1901=84 P.R. 1901, 5 O.C. 13, B; *D.*, 28 C. 303=5 C.W.N. 268, 7 C.W.N. 343.]

(3)—*Mercantile agent—Special authority required to draw or endorse bills—Authority may be implied—Act of agent in name of principal—Ratification.*—A special authority is required to empower a mercantile agent to draw or endorse bills or notes; such an authority may be implied

Principal and Agent—continued.

——6.—Ratification of Agent's Act—*contd.*

from the circumstances. Where an act has been done by an agent in the name of the principal, and such act has been communicated to and ratified by the principal, the act becomes in point of law the act of the principal. NESSERWANJEE BOTTLEWALLAH v. GOOL MAHOMED SAHIB, **7 M.H.C. 369.**

(4)—*Mortgage by unauthorised person—Subsequent ratification, when effective.*—The mortgages sought to be enforced in this case had been effected by the first two defendants, the adoptive mothers of the third, and it was contended that the mortgage had become effectual, on account of ratification by the subsequent conduct of the said adopted son. It was in evidence that the said son, the third defendant, promised his adoptive mothers that he would redeem the mortgages; but he made no promise to the plaintiff, nor was there any consideration for such promise as he made. Nor could the promise be treated as amounting to a ratification, for, a ratification of the unauthorized contract of an agent can only be effectual when the contract has been made by the agent avowedly for or on account of the principal, and not when it has been made, as in this case, on account of the agent himself. The adopted son was, therefore, not liable on the mortgage. SHIDDESHWAR v. RAMACHANDRA RAV, **6 B. 463.** [*R.*, 54 P.R. 1902=64 P.L.R. 1902.]

(5)—*Mortgage by lambardar to pay Government revenue—Mortgage as agent of co-sharers —Foreclosure—Notice suit by co-sharers to recover their shares—No appeal against decree of first Court—Acquiescence — Repudiation.*—The plaintiffs were shareholders whose interests were mortgaged by their lambardar with his own share to the lambardars of another puttee in the same estate to raise a sum necessary to satisfy an arrear of Government revenue. The defendants had served notice of foreclosure upon the lambardar who represented the plaintiffs, and obtained a declaration that the sale had become absolute and they also sued and obtained a decree against the lambardar for possession. The plaintiffs brought this suit claiming to recover possession of their own share in the puttee on the ground that the mortgage was made without their authority and was not binding on them and claiming pre-emption of the share of the lambardar. *Held* that the plaintiffs must be taken to have been parties, through their agent the lambardar, to the mortgage-deed, for, if they were not, they should have repudiated the judgment of the Court of first instance which decreed them their shares conditionally on their paying their quota of the mortgage-debt; moreover, inasmuch as the mortgage was made to obtain the sum necessary to discharge the arrears of Government revenue, the plaintiffs must be held to have been acquainted with the act of their lumbardar and content to be bound by it. Therefore, as parties to the mortgage through their lambardar, they could not repudiate the

Principal and Agent—continued.

——6.—**Ratification of Agent's Act**—*concld.*

consequences of the deed to which they were parties. Where a mortgage was made by a lumbardar for himself and as agent for other sharers, it is necessary to issue notice of foreclosure both to the lumbardar and to his co-sharers and in a suit for possession, the co-sharers also should be made parties. PUNCHUM SINGH v. MUNGLE SINGH, **2 Agra 407.**

(6)—Wajib-ul-arz—*Condition — Acquiescence by mortgagee—Agent of proprietors.*—A condition in the *Wajib-ul-arz* which has been signed and attested by a third party then in possession, not as authorized agent on behalf of the proprietors but as a mortgagee, is not binding on the original proprietors. Subsequent acquiescence by the mortgagor or his representative may be only an acquiescence in the mortgagee's act to the extent and in the qualified way in which his consent was given. BHAGEERUTH v. MOHUN, **2 Agra 129.** [*R.*, 1 N.W.P. 277.]

(7)—*Grant of lease by agent— Ratification by principal—Effect.*—Where a lease granted by the agent on behalf of his principal was subsequently ratified by the latter and was acted upon for several years, the lease was binding on the principal and he could not resile from it. HAZARI LAL v. DEBI PERSAD, **1 C.P.L.R. 87.**

——7.—**Revocation of Agent's authority.**

(1)—*Suspension of Agent—S.* 33, *Act* X *of* 1859.—If a principal suspends an agent, the agency becomes determined, within the meaning of s. 33 of Act X of 1859, from the time of the suspension. MUDDUN MOHUN ROY v. GOPEE MOHUN ROY, **W. R. 1864, Act X, 8.**

(2)—*Principal and agent—Authority—Determination—Share-holder—Manager— Partition —Intention of severance--Lease—Rights of lessee —Decree against lessor.*—It is a well-known principle of law that a principal has a right to determine the authority given to an agent at his mere pleasure, for, since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence, and no longer requires his aid. Neither can one co-sharer resist the revocation by another of the authority given to the manager, there being no distinct stipulation that the authority should continue for any definite time. Any act or declaration showing an unequivocal intention on the part of any share-holder to hold or enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition. [*R.*, 6 W.R. 139.] A lessee can take no greater rights than his lessor, and is bound by the decree in a suit against his lessor to the same extent as the lessor himself. BULAKEE LALL v. MUSSAMUT INDURPUTTEE THOWAR, **3 W.R. 41.**

(3)—*Agency—Revocation of authority—Agent if entitled to remuneration.*—The defendant

Principal and Agent—continued.

——7.—**Revocation of Agent's authority** —*continued.*

asked the plaintiff to sell certain grounds in Bombay at a profit, promising to give the plaintiff by way of brokerage half the net profits realised by the sale. Some time afterwards, the defendant wrote to the plaintiff revoking this authority. After the revocation, plaintiff secured a purchaser whose offer defendant refused to accept. Thereupon plaintiff brought the present suit to recover on the agreement. *Held* that the right of the agent to remuneration, although stipulated for in the form of part of the property to be produced by exercise of the power, was yet not such an interest that would make the authority to sell irrevocable without an express stipulation to that effect. It would be unreasonable to hold that the defendant by employing the plaintiff to sell the land on such terms, bound himself to allow it to remain on sale for an indefinite time. At the most, he would be bound to allow the plaintiff a reasonable time to find a purchaser. HURST v. WATSON, **2 B.H.C. 400.**

(4)—*Contract—Agency—Acceptance of office —Consideration—Power of revocation of agency —Agent to be paid out of rents of land - Interest in land, whether created—Improper revocation of agency—Remedy—Contract Act,* s. 205—*Agreement to pay agent a permanent annuity— Suit for specific performance by agent—Want of consideration.*—The acceptance of an office by an agent is a sufficient consideration for his appointment. Where, therefore, the plaintiff and his descendants were constituted the hereditary agents of the defendant for the management of his share in an *inam* village, *held* that the appointment was valid and binding at least as between the parties, whether or not any valuable consideration passed; for, the mere acceptance of the office by the plaintiff was a sufficient consideration for the appointment. In the case mentioned above the defendant would have a right independently of any terms of the instrument creating the agency, under the general provisions of the law (Contract Act, IX of 1872, s. 203), to revoke the authority given to the plaintiff, whether or not the agency had been created for a valuable consideration. The mere arrangement that the plaintiff's salary should be paid out of the rents, cannot be regarded as giving to the plaintiff an interest in the property which formed the subject-matter of the agency. The remedy for the improper revocation of an agency lies, under ordinary circumstances, in an action for damages for breach of contract. By s. 205 of the Contract Act, the principal is bound to make compensation to the agent, whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent. Where a person appointed another his agent, and afterwards revoked the appointment and the agent brought a suit not

***Principal and Agent*—continued.**

——7.—Revocation of Agent's authority —*concluded.*

for damages, but for specific performance of the terms of the contract which related to the payment of his remuneration, the only foundation for his claim for payment after his services ceased being a clause in the agreement, *viz.*, "If I get my work done by others, I will, without making any reduction in your pay, permanently continue to give you the sum of money now fixed," *held* that such an agreement to pay a perpetual annuity, whether any services were rendered by the annuitant or not, would be *nudum pactum*, unless there were a valuable consideration for the promise; and if there was no valuable consideration the agent would be entitled to recover only for work and services actually rendered. VISHNUCHARYA v. RAMCHANDRA, **5 B. 253.**

——8.—Miscellaneous.

(1)—*Power of attorney.*—A power-of-attorney which gave an agent authority "to make, sign, seal, execute and deliver any agreements, contracts, conveyances, assignments, leases or counterparts of leases, bills of sales, bonds, mortgages, re-conveyances, etc.," and "generally to act in the management and superintendence" of the affairs of the principal, and "in any of the aforesaid capacities without any reservation whatsoever, and to do, perform and execute all acts and things as fully and effectually as "the principal might or could do if personally present and did the same, notwithstanding no special power or authority is contained in these presents," was held to authorize the agent to borrow money for the use of the principal DURGA DAYI v. FINLAYSON AND CO., **A.W.N. 1882, 39.**

(2)—*Agents with general and special power—Transactions by— Validity.*—An agent with general power can borrow money in his principal's name, and it is not necessary that he should have special power authorising him to do so. A sale of land made by an agent with special power therefor, is binding on the principal, and proof of motive on the part of the principal in giving such power is unnecessary. MUSSAMMAT RUGHOOBUTTEE KOONWAR v. NUKHOO PUNDAH, **1 W.R. 33.**

(3) — *Contract—Agency — Termination of agency—Transaction with agent by outsiders for consideration without notice of revocation — Validity.*—The *shrotriemdars* of a village had executed a power-of-attorney to one of themselves to manage the affairs of the village. Subsequently, disputes having arisen between the agent and his *co-shrotriemdars*, the power was cancelled by them. But this fact was not brought to the knowledge of the ryots, who continued to pay rent to the agent as before. The rent for certain years having fallen into arrears, the ryots executed certain bonds in

***Principal and Agent*—continued.**

——8.—Miscellaneous—*continued.*

the name of the agent. Plaintiff, the assignee of these bonds from the agent, sued the ryots to recover the amount due thereunder. The defendants contended that, as the bonds were executed at a time when the agency had been terminated, they were not valid and the assignment thereof gave plaintiff no right to sue. *Held* that the contention that the bonds were executed to the agent-*shrotriemdar* as agent alone was not correct. He was himself a co-sharer and as such was entitled to a portion of the rent due. A contract with him for the consideration of giving time for payment was valid, even though it was made at a time when his authority to act as agent for his co-sharers had in fact been determined. As notice of determination of the agency was not given to the defendants, they were protected by s. 208 of the Contract Act from any possible claim by the other co-sharers for the rent due to them. The plaintiff as the assignee of the bonds was, therefore, entitled to sue upon them and recover the amount due. NARASINGA PILLAI v. MUTHUSAMI NAICKAR, **7 M.L.J. 218.**

(4)—*Act* X *of* 1859, *s.* 33—*Suspension of agent —Determination of agency.*—The suspension of an agent by his principal is a determination of the agency within the meaning of s. 33, Act X of 1859. MAHARAJA MAHTAB CHAND BAHADOOR v. JUDOO MOHUN MITTER, **5 W.R. Act X, Rul. 91.**

(5)—*Suit for money advanced to agent for benefit of principal — Principal and Agent —Agent, authority of—Agent, act of, beyond authority—Agent, necessary acts of, if binding on principal — Civ Pro. Code, s.* 257-*A Authority to have a sale postponed, extent of —Indian Contract Act* (IX *of* 1872), *s.*188--*Powers of attorney, construction of—Interest on loan.* Where A does an act as agent for B without any communication with C, C cannot, by afterwards adopting that act, make A his agent and thereby incur any liability or take any benefit under the act of A. Under s. 257-A of the Civ. Pro. Code, every agreement to give time for the satisfaction of a judgment-debt is void, unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be, under the circumstances, reasonable. Powers of attorney are to be construed strictly, that is to say, where ~~an act~~ purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair consideration of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms, or by necessary implication. An agent, authorised to obtain an extension of time and postponement of an intending judicial sale, has, within the meaning of s. 188 of the Indian Contract Act (IX of 1872), authority to do every lawful thing, which is necessary in order to do

Principal and Agent—continued.

——8.—**Miscellaneous**—*continued.*

the act which he is expressly authorised to do. If the implied authority of an agent to raise a loan is not established, but it is proved that the sum borrowed or a portion thereof has been applied for the benefit of the principal with his knowledge, the creditor is entitled to be reimbursed by the principal to the extent he has been benefited (1 C.L.J. 199, *R.*) Although an unqualified admission of a debt implies a promise to pay, yet if there is a covenant and an agreement to pay, which is not absolute but qualified in its terms, for instance, if there is a covenant to receive payment out of a specified fund, it does not create the relation of creditor and debtor as upon a simple loan of money. (4 C.L.J. 246, 4 C.L.J. 510, *R.*) Whether there is such a covenant must depend upon the construction of the instrument in each case and the intention of the parties as evidenced by the circumstances. An implied authority to agree to the payment of a particular rate of interest must be made out in the same manner as an implied authority to raise a loan. GHASIRAM v. RAJA MOHAN BIKRAM SHA, **6 C.L.J. 639.** (1 C.L.J. 199, *R.*) [*R.*, 3 Ind. Cas. 330.]

(6)—*Contract—Agency—Agent for sale on instructions—Sale by agent contrary to instructions—Liability of agent to pay damages to principal—Measure of damages.*—Where an agent for sale of goods consigned by the principal at a profit sold the goods in contravention of directions which he had received from the principal, with the result that it became impossible that the consignments could be sold at a profit, the principal was entitled to such damages as might have placed him in the position in which he would have been if the agent had not sold the goods in breach of his duty as such. The principal was under no obligation to replace the goods which had been wrongfully sold by the agent with a view to reselling them if and when the market rose. He was not bound to enter into a speculative transaction which might have resulted in his being able to recoup himself and might have resulted in a further loss. In the absence of proof of substantial loss, the principal was entitled at least to nominal damages. CHELAPATHI v. SURAYYA, **12 M.L.J. 375.**

(7)—*Powers of agent—Rights of third party.*—In a question between the principal and a third party who had dealt *bona fide* with the agent of the principal, the true limit of the agent's power to bind the principal, is the apparent authority with which agent is invested. In the absence of express authority, a party who is employed to find a purchaser for a horse is not authorized to receive the price, much less to take in exchange another horse and conveyance. LIVERSEY v. COLIN CAMPBELL, **1 A.L.J. 124.**

(8)—*Managing agent of Company—Liability to account—Non-joinder of parties—Objection of*

Principal and Agent—continued.

——8.—**Miscellaneous**—*continued.*

non-joinder not taken in proper time—Civ. Pro. Code, 1882, *s.* 34.—The managing agent of a Company ought to submit proper accounts to the other, though such agent may be paid by Commission or is subordinate to the control of its Directors, or had delivered up to them all the account books of the Company, as those do not exonerate him from the liability to account. (14 C. 147, P.C., 7 C. 627, *R.*) An objection as to non-joinder of parties not raised at the proper time, *i.e.*, at the earliest possible opportunity would be treated as waived by the defendant. ANDERSON v. DELHI COTTON MILLS COMPANY, LIMITED, **69 P.R. 1903.** (156 P.R. 1889, F.B., *R.*)

(9)—*Limitation*—Del-credere *agent*—*Act* XIV *of* 1859, *s.* 1, *cl.* 9.—A suit against a *del-credere* agent on a balance of accounts in respect of dealings, regarding which there is no express written contract, is governed by the three years' limitation prescribed by cl. 9, s. 1, Act XIV of 1859. OKOOR PERSAUD BUSTOOREE v. MUSSAMAT FOOL KOOMAREE DABEE, **10 B.L.R. 15, P.C. = 16 W.R. P.C. 35 = 14 M.I.A. 134.**

(10)—*Plaintiff's agent, inability of, to give evidence—Procedure—Act* X *of* 1859, *s.* 35.—On the inability of a plaintiff's agent to give sufficient evidence, the Court must require the attendance of the principal and not dismiss the suit under s. 35, Act X of 1859, that section having nothing to with a case when once it has proceeded to a hearing. BABOO LEKHRAJ ROY v. MR. W. H. BUCKLAND, **W.R. 1864, Act X, Rul. 51.**

(11)—*Act* X *of* 1859, *s.* 24—*Suit against agent for accounts and papers.*—A suit under s. 24, Act X of 1859, for accounts and papers, can be brought by zemindars and others in receipt of the rent of the land against any agents employed by them. DULEEL MAHOMED GOMASHTA v. MOHIMA CHUNDER GHOSE, **5 W.R. Act X, Rul. 36.**

(12)—*Act* X *of* 1859, *s.* 20—*Cause of action accruing against agent, survival of.*—A cause of action against an agent for money received and accounts kept falling within the class mentioned in s. 20 of Act X of 1859, survives the death of the agent, it having accrued during his lifetime MR. T HILLS v. SHOKHEE MONEE DOSSEE, **10 W R. 59.**

(13)—*Act* X *of* 1859, *s.* 24—*Common agent appointed by joint landlords—Suit maintainable against agent by one landlord separately, the other landlord being added as defendant.*—The suit was dismissed by the lower Court on the ground that it was not maintainable because when two landholders jointly appointed one agent for the collection of rents of their joint property, they could not be permitted to sue separately under s. 24 of Act X of 1859.

Principal and Agent—continued.

——8.—Miscellaneous—*continued.*

Held, that such a suit would lie, so long as the other joint landlord is made a party (defendant) to the suit, so as to ensure his interest being protected. PUDDO MONEE DOSSEE v. BISTNO CHUNDER BISWAS, **10 W.R. 495.** (9 W.R. 344, *F.*)

(14)—*Fraud—Limitation—Act* VIII (*B.C.*) *of* 1869, *s.* 30.—A suit against an agent for the recovery of money under Act VIII of 1869, (B.C.), s. 30, though brought within three years from the termination of the agency, was held barred, because it was not brought within a reasonable time after discovery of the fraud imputed to the agent. JAN ALI CHOWDHRY v. TARINEE CHURN RUKHEET, **21 W.R. 107.**

(15)—*Act* VIII (*B.C.*) *of* 1869, *s.* 30—*Agency.*—To a suit against an agent with regard to Zemindari matters for the recovery of money or the delivery of accounts and papers, there is no limitation other than that prescribed by Act VIII of 1869 (Bengal), s. 30. RAM BHUROSEE CHOWDHRY v. HUNOOMAN SINGH, **21 W.R. 240.**

(16)—*Landlord's suit to recover from agent illegal cesses realised from tenants—Agent's liability to account—Ss.* 217, 218, *I.C.A.*—A landlord's agent is liable to pay to the landlord any sum realised by him from the tenants as *khurcha* or illegal cesses; a suit by a landlord for recovery of such sums against his agent, is maintainable. In Indian, as in English Law, an agent is not discharged from accounting to his principal, by reason of unlawful acts of the principal in the matter of the agency, and an agent cannot plead that, by reason of the money having been collected under an unlawful agreement, which has been made between the principal and the person, from whom the money was collected, he is not liable to account for the money to the principal. NAGENDRA BALA DASSI v. GURU DOYAL MUKERJI, **30 C. 1011=7 C.W.N. 535.** (*Gobind Soonder Singh* v. *Chandi Charan Bhattacharjee, F.*; 25 W.R. 8, *Doubted & Expl.*)

(17)—*Agent joint—Death of one, effect of—Contract Act, ss.* 42, 43, 44, 201—*Limitation Act,* 1908, *art.* 116.—Where there are two joint agents and one of them dies, upon his death the contract of agency terminates so far as he is concerned, but, not as regards the surviving agent. By a registered *kabuliat* executed in favour of the plaintiff by the appellant and the grandfather of the second defendant, it was provided that the rent should be collected by the agents acting jointly or individually, and that receipt granted to tenants duly signed by both or one of the agents would be a sufficient discharge, although each of the agents would be liable for the sums collected by the other. The appellant continued to act for many years after the death of his co-agent, till he was discharged in June, 1906. In a suit brought on the 27th May, 1909: *Held*, that the appellant was liable under the original registered contract and not under any implied oral contract of agency subsequent to the death of his co-agent. The Rule of Limitation applicable to such a case was that provided in art. 116, Limitation Act. BHAGIRATH SAMANTO v. PREM CHAND PAL, **17 C.L.J. 201 =16 Ind. Cas. 852.**

Principal and Agent—continued.

——8.—Miscellaneous—*continued.*

Suit for accounts—Procedure — Burden of proof—*See* ACCOUNTS—SUIT FOR ACCOUNTS, A.W.N. 1905, 3=27 A. 374.

Suit for accounts by Principal against Agent —Burden of proof—What facts to be proved by plaintiff— Procedure of Court — *See* ACCOUNTS — SUIT FOR ACCOUNTS, A.W.N. 1905, 1.

Suit by zemindar against agent on account—Limitation—*See* BEN. ACT VIII OF 1869, s. 30, 7 C. 89=8 C.L.R. 285.

Suit by agent—Dismissal of suit—Principal's right of appeal—*See* CIV. PRO. CODE, 1908, O. I, r. 10 (1), 4 L.B.R. 95.

See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 6 B. 326.

Agent dealing on his own account in business of agency—Principal's rights—*See* CONTRACT ACT, 1872, ss. 215, 216, 11 Bom. L.R. 779=34 B. 292=3 Ind. Cas. 801.

See DAMAGES — MEASURE AND ASSESSMENT, 8 B.L.R. 544.

Agent's power to bind principal to arbitration—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 11 Bom. L.R. 273=34 B. 13=3 Ind. Cas. 837.

Contractor employed by agent of Ruling Prince—Contractor's right to sue Prince or Agent--Limitation--*See* LIMITATION ACT, 1908, s. 19, art. 56, 14 P.L.R. 1909=43 P.R. 1910=79 P.W.R. 1909.

Suit for balance on running account—Jurisdiction—Benami transaction — *See* LIMITATION ACT, 1908, art. 85, 128 P.L.R. 1909=115 P.W.R. 1909=4 Ind. Cas. 960.

Death of principal—Agent becoming agent of principal's sons – Suit by latter for accounts—Limitation—*See* LIMITATION ACT, 1908, art. 89, 9 C.L.J. 107=3 Ind. Cas. 684.

Suit for account against agent—Limitation —Payments made by agent, how proved—Moneys taken to pay illegal gratifications, if must be accounted for — *See* LIMITATION ACT, 1908, art. 89, 13 C.W.N. 212=4 Ind. Cas. 556.

Liability of agent, his sons and grand sons—Accounts—Limitation— Cause of action—*See*

Principal and Agent—concluded.

——8.—**Miscellaneous**—*concluded.*

LIMITATION ACT, 1908, arts. 120, 57, 62, 89, 6 A.L.J. 667=2 Ind. Cas. 118=31 A. 429.

Execution of document by attorney—Power of attorney to several persons—Name of principal signed by one attorney — Document attested by the other attorneys—*See* POWER OF ATTORNEY, 6 A.L.J. 462=2 Ind. Cas. 805.

Possessory lien of agent of mortgagor, if paramount to right of Receiver appointed in the suit of the mortgagee—*See* RECEIVER, 13 C.W.N. 654=9 C.L.J. 563=36 C. 713=1 Ind. Cas. 356.

Principal and Surety.

1.—GENERAL.

2.—DISCHARGE OF SURETY.

3.—SURETY, RIGHTS AND LIABILITIES OF.

4.—MISCELLANEOUS.

——**1.—General.**

(1)—*Debt-bond—Stipulation as to dealings between creditor and debtor not discharging surety—Contract Act,* IX *of* 1872, *s.* 135.—The plaintiff-bank sued on a debt-bond executed to the Bank by the principal debtor and two sureties. The money was repayable in monthly instalments, default in any one instalment having the effect of causing the whole amount to become at once payable. On any such default, the sureties were to become principal debtors to the Bank, so that any arrangements between the Bank and the principal debtor could not have the effect of realising them. The question arose whether or not the sureties had been released from their liability by reason of time having been granted by the bank to the borrower, and it was held that the sureties remained such till the debtor continued to pay the instalments, that they became principal debtors as soon as the borrower made default in the terms fixed for the re-payment of the debt, and that the giving of time to the principal debtor without their knowledge could not release their liability to the bank, the sureties having contracted themselves out of the rule which would otherwise exonerate them from liability on grant of time to the principal debtor. HODGES v. THE DELHI AND LONDON BANK LIMITED, **23 A. 137=27 I.A. 168, P.C. =2 Bom. L.R. 971=5 C.W.N. 1=10 M.L.J. 279=7 Sar. 767.**

(2)—*Contract Act* (IX *of* 1872), *s.* 35, *paras.* 1 *and* 2—*Surety's liability on judgment-debtor's death before specified date—Civ. Pro. Code* (*Act* V *of* 1908), *s.* 145—*Surety bond—Personal liability—Registration.*—The appellant executed a surety bond for the payment of a decretal debt, due by another person to the respondent. The appellant, by the terms of the bond, bound himself to make the judgment-debtor come and deposit the decretal amount and costs in Court

Principal and Surety—continued.

——**1.—General**—*continued.*

by a specified date, and undertook to pay the amount himself if the judgment-debtor failed to do so. There was a further provision that if the surety failed to pay, the Court could take his house in satisfaction. The judgment-debtor died before the specified date, and the surety then disputed his own liability to pay on the ground that the contract had become void under s. 35, para. 1 of the Contract Act. *Held*, that the second para of that section applied, and not the first, and that the specified uncertain event was the payment of the decretal debt by the judgment-debtor, and that as that event did not happen before the specified date, the contingent contract becomes enforceable. It was further contended that the surety bond was inoperative for want of registration, as it purported to affect a house worth over Rs. 100: *Held*, that, as there was distinct and separate personal undertaking to pay the decretal debt, the bond was admissible in evidence for the purpose of proving this undertaking. *Held*, further, that there was nothing to prevent the respondent from applying for execution, against the house, under s. 145 of the new Code, which was in force where the judgment-debtor died and when the proceedings against the surety were instituted, and that it was according to the terms of s. 145 that the case fell to be decided. WADARA DEVAN v. MA KIN, **8 Ind. Cas. 985.**

(3)—*Decree against two principal debtors and surety for a certain sum—Decree against principal debtors alone for larger sum including the former sum — Partial satisfaction of decree against the principal debtors alone by rateable distribution under s.* 295, *Civ Pro. Code—Extent of liability of surety.*—In a suit against two principal-debtors and their surety, plaintiff obtained a decree for Rs. 3,000 against all the three, and a decree for Rs. 5,000 (including the Rs. 3,000) against the principal debtors alone. As there were other creditors of the two principal-debtors, the decree-holder recovered, as against the two, a proportionate amount of his judgment-debt, by rateable distribution under s. 295, Civ. Pro. Code. On the question of the extent of the surety's liability, *held* that the decree-holder is entitled to recover in execution, as against the surety, the total amount of the judgment-debt of the surety, *viz.*, Rs. 3,000 (assuming, of course, that, after allowing for the amount received by the decree-holder in the rateable distribution, Rs. 3,000 or more remains due under the decrees) and that the surety is not entitled to deduct a proportion of the sums recovered by way of rateable distribution, from the amount which is due from him under the decree against him. If the decree-holder had, in execution, obtained the full amount of the decrees attached by him, and the amount of such decree was less than Rs. 2,000 the surety could not have been heard to say that he was entitled to any deduction from the amount due by him under the decree against him. He ought not to be in a better position

Principal and Surety—continued.

——**1.—General**—*continued.*

because, by reason of the rateable distribution, the decree-holder has only recovered a proportionate amount of the attached decrees. APPUSAWMY IYENGAR v. RAMANATHAN CHETTIAR, **2 M.L.T. 30=30 M. 167.**

(4)—*Security for debt — Surety—Procedure.*—A creditor, who holds securities from the principal debtor for his debt, need not first resort to them before suing the surety. GANPATI v. PANDU KUNBI, **10 C.P.L.R. 73.** (19 B. 578, *F.*)

(5)—*Principal and surety—Payment of interest by principal debtor—Effect on surety's liability.*—The mere payment of interest on a pronote by the principal debtor in advance does not of itself constitute a binding contract, on the part of the creditor not to sue, during the time covered by the interest, and does not therefore release the surety. DWARKANATH MITTER v. G.H. DELY, **15 B.L.R. 338, Note.** [*F.*, 15 B.L.R. 331, 4 C. 132.]

(6)—*Principal and surety—Receipt of interest in advance—Contract to give time.*—A binding contract to give time to the principal cannot be inferred from the mere receipt by the creditor of the interest in advance on the note. PUNCHANUN GHOSE v. DALY, **15 B.L.R. 331.** [*F.*, 4 C. 132.]

(7)—*Principal and surety · Forbearance to enforce claim against third person—Saving lessee from forfeiture of lease.*—The forbearance to enforce a claim against a third person is a sufficient consideration for a surety bond, though there may be no express contract by the obligee so to forbear. A surety deed, by which a person became surety for a lessee, in order to save him from forfeiture of his lease, or the institution of legal proceedings against him, was held to be of sufficient consideration, as the terms resulted in an advantage to the lessee. JAGADINDRA NATH ROY v. CHANDRA NATH PODDAR, **31 C. 242.** (29 C. 68, *R.*)

(8)—*Limitation Act* (IX *of* 1908), *sch.* I, *art.* 65.—A surety becomes liable only on his contract of guarantee and not by the mere fact of the loan. He is liable for each loan as soon as it is made, and is liable to be proceeded against as soon as default is made by the principal debtor. Time runs against the surety from each date of default, which is the date of each loan, and art. 65 of the Limitation Act applies. DWARKADOSS GOVERDHANA v. CHIVAKALA KRISHNAIYA, **9 Ind. Cas. 204=9 M.L.T. 215 =21 M.L.J. 457.**

(9)—*Appeal—Decree against principal and surety—Appeal by principal debtor only—Dismissal of claim—Liability of surety not appealing.*—Where, on an appeal, only by the principal judgment-debtor against a decree providing that, on his failing to pay the amount of decree, his surety shall be liable, the plaintiff's claim is dismissed, the latter (surety) is not discharged from the judgment-debt simply because the decree has been set aside against the former (principal judgment-debtor). SHAM LAL v. SOHNU SHAH, **14 P.W.R. 1911=98 P.L.R. 1911.** (5 B. 647, 12 C. 330, *R.*)

(10)—*Suit by surety for money paid for debtor—Cause of action.*—Where the plaintiff sued to recover from the defendant the price of a horse sold to defendant on his security, *held* that the period of limitation commenced from the date of the sale. KUNHYA v. MOLKA, **72 P.R. 1866.**

(11)—*Principal and surety—Breach of contract made with Foreign State—Payment by surety—Suit by surety against principal in British Court—Inquiry into question of breach of contract determined by Foreign State, whether permissible.*—A Native State with which A entered into a contract, found on enquiry, that he had broken the contract, and by an executive order rescinded it, and compelled B, who was a surety for A, to pay the amount for which he had become surety. In a suit then brought in a British Court by B to recover from A the money which B had been compelled to pay as surety, A pleaded that he made no default in the performance of the contract, and that he was therefore not liable to pay the money which B might have paid to the State. *Held*, (*Boulnois, J., dissenting*) that the order of the Native State on the point that default had been made by A was conclusive between the parties, and was not open to question in British Courts, and all the British Court could do was to determine whether the plaintiff did in fact pay to the State the sum demanded from him as surety; and if it determine the question in the affirmative, it must hold that the payment was rightly made under the guarantee, and the plaintiff would be entitled to recover the sum paid. *Per Boulnois, J.*—The order of the Foreign State was not conclusive and the British Court should enquire into and determine whether the defendant had made default in performing the contract; that Courts of one country have never done more than recognise the judgments of the Courts of another country, as under some circumstances, conclusive, and no comity requires that executive orders should be treated as, conclusive in regard to facts proper for establishment. SUJAN SING v. HARDYAL SING, **36 P.R. 1877, F.B.** [*Confirmed on appeal*, 7 P.R. 1882, P.C.; *F.*, 21 P.R. 1894.]

Liability of, after suit once dismissed but subsequently decreed on remand by superior Court—*See* CIV. PRO. CODE, 1908, s. 145, 8 Ind. Cas. 980.

See CONTRACT ACT, 1872, ss. 134, 137, 24 A. 504=A.W.N. 1902, 166.

Principal and Surety—continued.

——**1.—General**—*concluded.*

Time given to the principal debtor without surety's consent—*See* CONTRACT ACT, 1872, s. 135, 2 Bom. L. R. 967.

Payment of interest by principal—Whether saves limitation against — *See* LIMITATION ACT, 1908, s. 20, 9 Ind. Cas. 8.

See LIMITATION ACT, 1908, art. 81, 98 P. R. 1881.

Bill of exchange—Position of holder and acceptor—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 32, 37, 13 O.C. 206=7 Ind. Cas. 727.

Suit against—Limitation—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6, 8 A.L.J. 199.

Trust deed by mortgagor in favour of a son—Relation between trustee and mortgagor—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 8, 130 and 135, 17 M.L.J. 87=30 M. 235.

——**2.—Discharge of Surety.**

(1)—*Loss of securities by creditor - Surety's liability.*—If a creditor who has had or ought to have had the securities in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual, the surety, to the extent of such security, will be discharged. GANPATI v. PANDU KUNBI, **10 C.P.L.R. 73.**

(2)—*Lending money on security— Fresh arrangement, effect of, on suretyship.*—Where a person who has stood security for a loan to another, died before such loan was repaid, and the creditor subsequently entered into a fresh arrangement with the principal debtor, the heirs of the surety were *held* not liable for the debt, as the subsequent arrangement did not contemplate the continuance of the surety's responsibilities. SEETARAM SAHOO v. J. DACOSTA, **12 W.R. 294.**

(3)—*Principal and surety—Mortgage bond—Bond not registered—Discharge of surety—Evidence.*—Plaintiff sued one V as principal, and two others as sureties, on a mortgage bond for Rs. 230, abandoning his lien on the house which was mortgaged. One of the sureties appeared and pleaded that he was discharged from his liability in consequence of the plaintiff's neglect to have the mortgage registered. *Held* that the mortgage could not be used to prove the loan of the money, and that, if the loan could be proved by other evidence, the principal might be sued for it as for money lent. *Held* also that the surety was discharged, as he could be liable only by virtue of the mortgage bond, which being invalid, could not be used against him. SHANKAR BAPU v. VISHNU NARAYAN, **4 B.H.C. A.C. 79.** [*F.*, 10 C.P.L.R. 73.]

(4)—*Principal and surety— Discharge of surety.*—A stood surety for B for the faithful discharge of the latter's duties as gomashta.

Principal and Surety—continued.

——**2.—Discharge of Surety**—*continued.*

Subsequent to this, an adjustment of accounts took place between B and his master. B executed an ekrar which stated that a certain sum after deduction, was found to be due by the principal; he accepted the liability stating that he could not pay the amount then, and he was given sometime without the knowledge of the surety. *Held* that the acceptance of the ekrar discharged the surety. PURI SUNDARI DEBI v. SRIMATI DROBOMAYI DEBI, **7 B.L.R. App. 10=15 W.R. 252.**

(5)—*Principal and surety—Instalment bond taken from debtor without consent of surety—Discharge of surety.*—Where a creditor takes from the principal debtor, without the knowledge or consent of the sureties, a bond fixing certain periods for the payment of the sums mentioned in the bond, the sureties are entitled to be discharged of all their liability. PUREE SOONDUREE DABEE v. CHUNDER SHEKHUR GHOSSAL, **15 W.R. 252.**

(6)—*Mortgage—Relinquishment by mortgagee of his claim against portion of security—Release of sureties.*—Where a mortgagee in a suit on the mortgage relinquished his claim on a portion of the mortgaged properties, the sureties to the debt were released from the liability to pay the debt, inasmuch as their position by such release became worse. NARAYAN GOVINDOK v. GANESH ATMARAM FADKE, **7 B.H.C. A.C. 118.**

(7)—*Principal and surety—Variance in terms of contract—Discharge of surety—Indian Contract Act*, s. 133.—A variance in the terms of the contract between the creditor and the principal debtor, by which the liability of the latter is increased without the surety's consent, discharge the surety in respect of defaults or liabilities arising or accruing subsequent to such variance. KHATUN BIBI v. ABDULLAH, **3 A. 9.**

(8)—*Surety— Discharge of surety—Indian Contract Act* (IX *of* 1872), *ss.* 134, 137, 139 *and* 141.—In the course of execution-proceedings, the decree-holder agreed to accept payment of the decretal amount by a number of annual instalments; and certain other persons agreed to stand surety for the judgment-debtor. The surety-bond was in the following terms: "In case of default of paying the instalments, the whole decretal money with costs, and interest at eight annas per cent. *shall be* executed after one month; and for the satisfaction of the decree-holder, we, the executants, stand as surety of the judgment-debtor to Rs. 816-3-6, with all the costs of the Court and interest." Five annual instalments were regularly paid, and then they ceased; and the decree-holder took no steps to execute his decree, with the result that the decree became time-barred and inexecutable. He then sued the sureties for the balance of the decree, with interest. *Held*,

Principal and Surety—continued.

—2.—Discharge of Surety—*continued.*

that the suit must be dismissed, as the legal consequence of the decree-holder's omission to execute the decree was the discharge of the judgment-debtor, and likewise of the sureties also (s. 134 of the Contract Act). For, the condition of the surety-bond that, on the occurrence of a default, the decree should be executed, was a pre-emptory one, and imported much more than the usual agreement under such circumstances, that the decree-holder may, or is at liberty, to execute his decree, if he pleases, on a default. S. 137 of the Contract Act could not apply, as the omission to execute the decree was much more serious than mere "forbearance" in favour of the judgment-debtor. By his failure to carry out the express part of the agreement, the decree-holder did an act inconsistent with the equities of the sureties, (s. 139, I.C.A.) and omitted to do an act which his duty to the sureties under the agreement required him to do, whereby the eventual remedy of the sureties themselves against the principal debtor must necessarily have been impaired. The decree was a security in the hands of the decree-holder, to the benefit of which the sureties were entitled, and the loss of such security operated to discharge the sureties to the extent of its value (s. 141, I.C.A.). HAZARI v. CHUNNI LAL, **8 A. 259=A.W.N. 1886, 75.** [*F.*, 11 A. 310, 24 A. 504, 2 N.L.R. 42.]

(9)—*Principal and surety — Acceptance of interest in excess—Discharge of surety.*—Where a creditor, without the knowledge of the surety, accepts from the principal debtor a sum on account of interest in excess of the interest then due on a promissory note, without anything further appearing as to the intention of the parties, and so gives time to the principal debtor, he thereby discharges the surety from liability on the promissory note. KALI PRASANNA ROY v. AMBICA CHARAN BOSE, **9 B.L.R. 261=18 W.R. 416.** [*F.*, 4 C. 132.]

(10)—*Contract Act* (IX *of* 1872), *ss.* 134, 137—*Remedy against debtor barred—Surety discharged—Creditor's forbearance.*—If the remedy against the principal debtor be allowed to be barred by limitation, even though it is due to the creditor's forbearance, the surety will be discharged under s. 134, and the effect of this section is not limited by s. 137 which is applicable only to a forbearance, during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. RADHA v. KINLOCK, **11 A. 310=A.W.N. 1889, 94.** (5 B. 647, 12 C. 330, *Diss.*; 8 A. 259, *R.*) [*R.*, U.B.R. 1892—1896, Vol. II, 308, 2 N.L.R. 42.]

(11)—*Bond in English form—Law applicable—Limitation—Act* XIV *of* 1859, *s.* 1, *cl.* (2)—*Suit against surety—Policy of insurance accepted as collateral security—Failure to keep policy on foot—Laches of creditor—Discharge of surety.*—In a suit by the creditor against a surety

Principal and Surety—continued.

—2.—Discharge of Surety—*continued.*

for the recovery of principal and interest due on a bond, two questions arose, (1) whether the suit was barred by limitation, and (2) whether it was the duty of the creditor to the surety to keep on foot a policy of insurance on the life of the principal debtor which policy was assigned to the creditor as collateral security. The bond executed by the parties being in the English form and apparently executed with reference to the English Law of contract, the English Law with reference to special contracts was in contemplation of the parties when they executed it, and the fact of the contract having been entered into at Simla did not prevent the rights of the parties from being governed by English law. *Held* that the suit was not barred, being governed by s. 1, cl. 11 of the Limitation Act. The creditor having failed to pay the premium, the Insurance Company refused payment. Inasmuch as the surety was injured by reason of the laches of the creditor in having omitted to ascertain whether or not the premium had been duly paid, and the creditor had, by reason of his having accepted the policy on the terms of his keeping it alive, led the surety to believe that he would do so and thereby put him off his guard when he might otherwise have protected his own interests, the surety was held discharged from his liability as surety. SIMLA BANK CORPORATION v. CAREY, **72 P.R. 1873.** [*Overruled*, 77 P.R. 1875.]

(12)—*Giving time--Advance interest.*—Whether receipt of interest in advance by a creditor amounts to giving time to the principal debtor, is a mixed question of law and fact. As a general rule, the acceptance of interest in advance by the creditor, does operate as a giving of time to the principal debtor, and, consequently, as a discharge to the surety, unless the transaction is assented to by him. PROTAP CHUNDER v. GOUR CHUNDER ROY, **4 C. 132=2 C.L.R. 455.** (9 B.L.R. 261=18 W.R. 416, *F.*; 15 B.L.R. 331 338, *Not F.*)

(13)—*Accommodation acceptor—Advance interest by drawer of hundis to holder.*—Where the drawer of *hundis* pays advance interest to the holder and thereby obtains time for payment after due date, the liability of an accommodation acceptor of the *hundis* depends upon his knowledge of, and consent to, the arrangement. **6 C. 241, P.C.=6 C.L.R. 591.**

(14)—Hundi — *Accommodation bill—Principal and surety — Time given to principal.*—Plaintiff sued to recover the amount of a *hundi* drawn by defendant at Patna on defendant at Calcutta, payable 41 days after date to S. A. or order. The defence was that the *hundi* was an accommodation bill given by the defendant to S.A. for accommodation and without consideration; and that the plaintiff after the *hundi* had become due, and after notice that the defendant was, with regard to this *hundi*, only surety for S.A. the principal debtor, gave time to the principal S.A. in such a manner as to

Principal and Surety—continued.

——2.—**Discharge of Surety**—*continued.*

release the surety. *Held*, that the effect of the new arrangement was not to alter the position of the parties, *i.e.*, of converting S.A. into the principal, and the defendant into a surety, so as to release the defendant from his original obligation as principal debtor. HARJIBAN DAS v. BHAGWAN DAS, **7 B.L.R. 535=16 W R.O. J. 16.**

(15) — *Deposit bills — Sale—Redemption of securities—Surety, Release of—Application of proceeds.*—A drew five bills in favour of B on *Fergusson & Co.*, who accepted the same, and got them discounted by the Bank of *Bengal*, and, on their becoming due, procured their renewal. *Fergusson & Co.*, subsequently, drew three bills on the Bank of *Bengal*; and, for securing as well the repayment of the principal sum due on these bills and interest, as of all and every sum or sums which the Bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of *Chili* copper, of a larger amount in value than the advances then made. By a condition in these bills, the Bank were authorised, in default of payment within the time stipulated, to dispose of the copper by public or private sale, and to reimburse themselves the principal and interest due thereon. Shortly afterwards, *Fergusson & Co.*, failed, and assignees of their estate and effects were appointed under the India Insolvent Act. On presentation to A of the first of the renewed bills, he served notice on the bank not to part with the securities so deposited with them, alleging that the bills drawn and renewed by him were accommodation bills, for which he had not received any consideration, and were renewed on the faith of the securities being applicable to their discharge. The assignees of *Fergusson & Co.* redeemed the copper by paying to the bank the amount of the principal and interest due upon the bills drawn by *Fergusson & Co.* All the bills drawn by A were dishonoured, and the Bank of *Bengal* brought an action against A for their amount. On a bill filed by A, the Bank were restrained by injunction from proceeding with the action at law. *Held*, on appeal, by the Judicial Committee, discharging the injunction and reversing the decree of the Supreme Court, that, under the circumstances, the redemption of the securities was a sale within the meaning of the condition contained in the deposit bills, and that such sale was not a release to A, as surety for the previous bills, the condition not being that the copper or proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the Bank of the principal and interest due upon the bills. THE BANK OF BENGAL v. RADAKISSEN MITTER, **3 M.I.A. 19.**

(16)—*Indian Contract Act* (IX *of* 1872), *s.* 143 —*Surety's liability—"Keeping silence," meaning of—Duty of bank to disclose guilt of person*

Principal and Surety—continued.

——2.—**Discharge of Surety** —*continued.*

for whom defendant was surety.—S. 143 of the Contract Act provides that "any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid." The expression "keeping silence" implies intentional concealment as distinguished from mere non-disclosure; the withholding must be fraudulent, as necessarily is the case when a material circumstance is intentionally concealed. Where, therefore, there is no reason to suppose any intentional concealment of any fact; and the fact itself seems to be of such a trivial and unimportant nature as to least affect the readiness of the surety to make himself liable, the section will not absolve the surety from his liability. In the present case, the defendants stood sureties to the plaintiff Bank on behalf of one K for the faithful discharge of the duties of *khajanchi* by the said K. This K was holding the same office of second clerk in the Bank, and he continued to hold the same in addition to his being the *khajanchi*. It appeared that the defendants were not aware of the fact that K would continue to act as the second clerk also. The evidence also showed that the duties of the two offices were perfectly distinct, and that K's continuing to do the duties of the second clerk would not in any way materially alter or affect his duties as *khajanchi*. *Held*, that there was no "keeping silence" of any material fact within the meaning of s. 143 of the Contract Act, on the part of the Bank, and that the defendant would not be relieved of his obligation as surety by the continuance of K in his former office, unless the surety bond contained an agreement that the principal should not undertake any other business, which was not the case here. It was further contended by the defendant that the Bank ought to have informed him of what occurred in 1883, some time after the surety bond was entered into, when certain forged bills were allowed by K to pass. On that occasion, there was no suspicion of K's honesty, and, under the circumstances the Bank did not enforce their claim against K, as in strictness they might have done. *Held*, that this fact showed only that K was fallible in detecting forgeries and not that he was in any way dishonest; and, as the infallibility of K was not the ground on which the surety undertook his responsibility, it cannot be said that the omission of the Bank to inform the surety of this fact would absolve him from his responsibility as such. BALKRISHNA V. N. KRITIKAR v. THE BANK OF BENGAL, **15 B. 585.**

(17)—*Creditor and surety—Duty of creditor —Discharge of surety—Act* IX *of* 1872, *ss.* 134, 137, 139—*Discharge under English Bankruptcy Act, how far good in India.*—The creditor is not bound to show diligence in enforcing his remedy by action against the principal debtor, and mere forbearance on his part towards the principal will not release the surety. The question whether a creditor is bound to take

Principal and Surety—continued.

——2.—Discharge of Surety—*continued.*

proceedings against his principal debtor when called upon by the surety to do so and whether, in the event of his omitting to do so, the surety would be discharged, is one which seems open to argument. But when such a duty was created by correspondence between the surety and the creditor, the creditor would be held to have done his duty if he had done his best to enforce his claim against the principal debtor. Neglect to do so would not release the surety unless it could be shown that the principal was at the date of the undertaking by the creditor, solvent and had since become insolvent. A surety would not be discharged by the circumstance that the creditor has allowed his right of action against the principal debtor to become barred by the law of limitation. A discharge under the English Bankruptcy Act would be given effect to in India irrespective altogether of anything the creditor might say or do. DR. J. C. MORICE v. THE SIMLA BANK CORPORATION, LIMITED, SIMLA, **2 P.R. 1878.** [*D.*, 136 P.R. 1892.]

(18)—*Surety, liability of—Discharge—Non-disclosure of material facts by creditor.*—There is no rule of law which entitles a surety, without questions asked, to a disclosure of all the material facts known to the creditor which it may be material to him to know. The non-disclosure of all material facts to the surety is not a sufficient ground for his discharge. A surety is not entitled to his discharge without proof of fraudulent misrepresentation or concealment on the part of the creditor or his agent. DELHI AND LONDON BANK, LTD. v. HUNTER, **3 N.W.P. 264.**

(19)—*Suit against principal debtor and surety—Failure to serve summons on principal debtor, surety's liability not affected by—Civ. Pro. Code*, 1882, s. 99-*A*.—In a suit brought by the creditor against the principal debtor and the surety, the inability or omission of the plaintiff to serve the summons on the principal debtor can have the effect only of enabling the Court to dismiss the suit, as against the principal debtor, after the expiration of one year, under s. 99-A of the Civ. Pro. Code, leaving the plaintiff to bring a fresh suit. The non-service of summons on the principal debtor cannot in any way have the effect of discharging the surety from his liability under s. 134 of the Contract Act, IX of 1872. SHAIK ALLI v. MAHOMED, **14 B. 267.** [*D.*, 1 L.B.R. 150.]

(20)—*Bond debt—Decree against surety—Execution against deceased principal's property.*—A suit having been brought in a Small Cause Court on a bond which had been entered into by a principal, since deceased, whose representatives were not within the jurisdiction of the Court, the claim was inquired into as against the surety alone, who confessed liability. In the course of the inquiry, it appeared that the deceased had left some property within the Court's jurisdiction. The

Principal and Surety—continued.

——2.—Discharge of Surety—*concluded.*

amount claimed was decreed against the surety. *Held* that the property of the deceased could not be taken in execution of the decree against the surety. KALI CHARAN v. SRIRAM, **2 B.L.R. A.C. 192=11 W.R. 69.**

——3.—Surety, Rights and Liabilities of.

(1)—*Liability of surety—Extent.*—The liability of a surety cannot be stretched beyond the precise limit of his undertaking. The surety is not liable for any sum voluntarily paid by his principal to any third party for any purpose of his own. KHETTER NATH SEAL v. SHIBNATH CHATTERJEE, **W.R. 1864, 284.**

(2)—*Surety—Liability of—Decree against surety, execution of—Necessity of seeking remedy against principal debtor before suing surety.*—A creditor is not bound to exhaust his remedy against the principal debtor before suing the surety; and when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt. LACHHMAN JOHARIMAL v. BAPU KANDU; AND SURETY TUKARAM KHANDOJI, **6 B.H.C. A.C. 241.** [*R.*, 7 B.H.C A.C. 118, 4 C.L.R. 145, 16 C.P.L.R. 76.]

(3)—*Contract—Surety, when liable for costs and interest.*—A surety's liability must be measured by the contract, and where the contract is specific and not in general and indefinite terms, the surety cannot be liable for costs and interest incurred in suing the principal debtor. DABEE CHURN v. JANKEE PERSHAD, **3 Agra 141.**

(4)—*Principal and surety—Suit by surety against principal—Cause of action—Payment by surety to creditor necessary.*—The mere fact that certain bonds have been executed in favour of the sureties by the principal debtor, provided that it is shown that the transaction is really one of guarantee out of which the execution of the bond arose, does not prevent the operation of the general law that a surety cannot recover against a principal until he has paid or performed all that he is liable for. Until the sureties have actually paid the debt for which, directly or indirectly they in effect had become sureties, it is impossible to consider that their cause of action had arisen. GUNGA RAM v. RAMKISHEN, **17 P.R. 1875.**

(5)—*Debtor and creditor—Principal and surety—Surety's liability—Creditor's laches.*—It is not only open to the creditor to use the surety at once on default, but the law makes it his interest in a case of any doubt, to sue the surety in preference to the debtor. In order that the decree may be passed against the surety, the principal debtor need not be summoned. In this case, the fact that the sum lent was agreed to be re-paid in a certain number of instalments within one year, did not establish an agreement that payment after the lapse of a year was not guaranteed

Principal and Surety—continued.

——3. Surety, Rights and Liabilities of —*continued.*

by the sureties. The sureties must be taken to have guaranteed payment absolutely as well as payment within the year, and non-payment within the year did not absolve them. It is for the debtor to find out and pay his creditor. It is also for the surety to see that the principal debtor pays the debt, and it is not the duty of the creditor (in the absence of any special agreement to that effect) to call in and demand the debt within a certain time, provided the period of limitation fixed by law is not exceeded. Mere laches on the part of the creditor in regard to the principal debtor will not discharge the surety, and it is the duty of the surety to see the creditor paid. When the creditor is shown to have wilfully shut his eyes and connived at the principal debtor's default, or by any irregularity of his own to have enabled the debtor to do what he ought not to have done, or to omit to do what he ought to have done, while, *but for such conduct*, the omission or commission would not have happened, the surety is discharged. MAJOR-GENERAL INNES v. THE DELHI BANK, **100 P.R. 1866.**

(6)—*Suretyship—Consideration.*—When the contract between the principal debtor and the creditor is completed, by the exchange of a loan and a bond, a surety bond subsequently given by the surety is without consideration and void. Observations on the legal position of a surety. (*Per Stuart, C.J.*) NANAK RAM v. MEHIN LAL, **1 A. 487.**

(7)—*Security— Contribution — Liability to costs incurred in defence of suit.*—One of several sureties who is compelled to pay the whole debt, can in equity compel the others to contribute towards payment of it. This equitable right is one independent of contract, although it may be taken away by special agreement. As a general rule, one co-surety cannot recover from the others the cost of defending an action, unless he is authorised or induced by the latter to do so, or unless, from some combination of circumstances, it became necessary to defend such suit. MRS. K. C. BYRNE v. C. H. MACLEOD, **86 P.R. 1868.**

(8)—*Joint and several liability—Liability of principal—Decree against one, no bar to suit against other.*—Under the terms of a bond, if two parties (surety and principal) are jointly and severally liable to the creditor, the latter is entitled to bring a suit against the principal debtor notwithstanding that he had already obtained a decree against the surety for the same sum. The creditor is not bound to bring his action to suit the convenience of his debtor, and may defer it to the last moment that the law allows a suit to be brought. MAHOMED-ROHEE MOODDEEN v. INDOOR CHUNDER JOWHUREE, **12 W.R. 191.**

(9)—*Punjab Civil Code, Part* II, *s.* 1, *para* 6—*Re-opening of suit already decided—Powers of Commissioner--Appeal time—Right of creditor to sue principal or surety.*—The Commissioner

Principal and Surety—continued.

——3.—Surety, Rights and Liabilities of —*continued.*

is vested with power to revise the decisions of Courts subordinate to him for special reasons, although no appeal should have been preferred, *provided* such revision takes place within the time prescribed for the hearing of appeals. He cannot therefore reopen a case after the appeal time has expired without any appeal having been filed. A creditor is entitled to sue either principal or surety when there is a default in payment and is under no obligation to proceed against one before suing the other. A decree against the principal is when it cannot be executed against him no bar to a suit against the surety. The practice of the Punjab Court is to implead both the principal and surety together in one suit, though their liabilities being several, they ought not to be sued jointly. MIRCER v. DECORTANZE, **8 P.R. 1866**

(10)—*Indian Contract Act, s.* 145—"*Rightfully paid*" —*Money paid by surety for debt barred as against principal, whether recoverable from the latter.*—S, a surety, sued P his principal to recover the amount paid by him under a decree obtained by X the creditor, against him as surety. In the first suit P was also sued and the decree in the Court of first instance was against both P and S. P appealed and the decree against him was reversed on the merits. S did not appeal but acquiesced in the decree against himself. In the first suit, the action of X as against P was barred by limitation and that against S. would also have been barred but for the circumstances that S had, during the currency of the period of limitation, struck a balance of the account against P and signed an acknowledgment that the balance was due. *Held* that the obligation of the surety is accessory to that of the principal, and, under ordinary circumstances is extinguished when the principal obligation is extinguished, and that a surety who discharges the mere moral obligation of his principal has no legal right to be indemnified by his principal, and S could not therefore recover from P the money that he had paid to X. A sum is "rightfully" paid within the meaning of s. 145 of the Indian Contract Act when the surety has been compelled to pay it as a result of the principal's default and without any mistake or want of prudence on his own part. SUJA v. PHALWAN, **30 P.R. 1878.**

(11)—*Principal and surety — Liability of surety—Suit against lessee and surety—Jurisdiction—Revenue and Civil Courts.*—Where a contract of guarantee has been given and the principal debtor makes default, the creditor may at once prefer the claim against the surety, or if there be more than one, then against all or any of them, unless the contract of guarantee contains any stipulation to the contrary. A lessor sued the lessee and two other persons who had jointly guaranteed the payment of the rent by the lessee, for arrears of rent, by enforcement of the lien expressly

Principal and Surety—continued.

——3.—**Surety, Rights and Liabilities of** —*continued.*

created by the sureties on their houses. The suit was brought in the Court of the Munsif of Moradabad. The house of one of the sureties was not situated within that District. *Held* that the suit as against the lessee was cognizable by the Revenue Courts and not by the Civil Courts and that part of the claim which sought to enforce the lien in respect of property out of the District, should also be dismissed. But the suit should be decreed against the other surety. KARIM BAKSH v. BITHUL DAS, **A.W.N. 1882, 132**.

(12)—*Release of judgment-debtor's representative by decree-holder—Property, which is security for payment of debts by principal debtor, if liable.*—A decree-holder, who releases his decreed judgment-debtor's representative into whose hands that debtor's assets have come and thus exempts the property from execution, is not entitled to proceed against property which was not liable in the first instance, but only became so by way of security for the due payment of the debt by the principal debtor. NOWAB SYUD VELLAYAT ALI KHAN v. SHAH AMEENOODDEEN AHMED, **23 W.R. 19**.

(13)—*Rights and liabilities of surety—Mutual debts--Set-off--Discharge of surety.*—R borrowed money of the D. B. Corporation payable by monthly instalments, and G. became security for him. R. failed to pay the D.B. Corporation, having then a considerable balance to his credit in their hands. A year after they sued G. as surety for the sum borrowed. *Held*, in giving a decree for the plaintiffs, that a banker need not set-off against a debt a cash balance of the debtors in his hands, but may proceed against the surety. DELHI BANK CORPORATION v. GREENWAY, **Bourke O. C. 227.**

(14)—*Surety for discharge of clerical duties —Liability of surety.*—In a suit against the surety, who had undertaken to secure the due performance by the principal, of his duties as clerk of the Small Cause Court, for the recovery of moneys misappropriated by the said clerk out of the proceeds of sales of moveable properties held in execution of decrees, passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, *held* that the surety was liable for the moneys so misappropriated, as the grant and exercise of Subordinate Judge's powers was an incident attached by law to the office of Small Cause Court Judge, and the clerk of the Court is as much bound to perform the incidental, as the ordinary duties of his appointment; and that it would have made no difference that, at the time of the execution of the bond, the Small Cause Court Judge was not invested with the powers of a Subordinate Judge. CROSTHWAITE v. HAMILTON, **1 A. 87.**

(15)—*Rights and liabilities of surety—Bond for faithful discharge of duty of overseer—Carelessness of principal.*—By a bond given for the faithful discharge of the office of overseer to a ferry fund Committee, the surety became bound "to make good any funds entrusted to the overseer which may be misused." *Held* that, under these words, the surety was liable for a loss of funds arising from the mere carelessness or indiscretion of the principal, independently of any dishonesty, as by his lending the money to contractors. SECRETARY OF THE FERRY FUND COMMITTEE v. WARD, **Marsh 89=1 Hay 155.**

(16)—*Cash credit loan account—Bond by principal debtor and sureties—Running accounts—Notice to surety.*—A bond was entered into between the manager of a Bank as obligee, and W.M. and the respondents as obligors, by which W.M. was allowed to open a cash credit loan account for a certain sum secured on a policy of Life Assurance. It was stipulated that the respondents were to be liable for the said sum if the full amount with interest, premium and charges were not paid by W.M. within one year from the date of the bond. At the end of one year, he was indebted to the bank to a large extent. But the bank allowed him to keep a running account for two years more beyond the due date, during which time payments made by him exceeded the amount of the debt secured by the bond and there were subsequent withdrawals. The Bank sued the sureties. *Held* that, as the whole account from beginning to end was an ordinary running account, the rule "that each item of payment or credit is applied in payment of the earliest items of debit standing in the account, until the whole payment, or credit is exhausted," should be applied and as the debt secured by the bond had been satisfied, the bank was not entitled to maintain the suit against the respondents. *Semble*: It was open to the respondents to show by evidence *dehors* the bond, that they were sureties, although on the face of the bond it may not appear to be so. *Semble* that the sureties were not entitled to notice from the bank of the default made by their principal. *Semble* that there being no express stipulation in the bond prohibiting a greater credit than the amount mentioned in it the fact that the principal overdrew his account would not have discharged the sureties from their liability. KOONDEN LALL v. E.D. JAHANS, **1 Agra 17.**

(17)—*Mahomedan Law—Mutwali—Treasurer, misapproriation by — Surety, liability of—Fraud—Connivance — Rights of mutwali—Acquittal of principal on misappropriation of funds —Civil action against sureties not barred—Bond —Rights of obligee—Optional stamp—Act* XXVI *of* 1860, *s.* 14.—Under the Mahomedan law, the mutwali of an endowment, though himself guilty of gross neglect in supervising his accounts and cash balances, has a right to recover from the sureties of the treasurer, sums misappropriated by the latter, in the absence

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of any fraud or virtual connivance at the delinquency of the treasurer. The acquittal of the principal in a Criminal Court on a charge of misappropriation of funds does not prevent the institution of a suit against the sureties in a Civil Court. Where a person knowingly and without mistake, ignorance or inadvertence executes a document on an optional stamp, the obligee can recover such a sum only as that optional stamp covers; no larger sum than that can be recovered in any Court of Justice under the provisions of s. 14, Act XXVI of 1860, and no amount of penalty can make up the deficiency in the stamp. SYED KERAMUT ALI, MUTWALI v. MOONSHEE ABDOOL WAHAB, **17 W.R. 131.**

(18)— *Hundi—Accommodation acceptor—His liability—Surety—Indian Contract Act* (IX *of* 1872), *s.* 128.—In a suit on a hundi against the acceptor, it is not open to the defendant to say that he accepted the hundi for the accommodation only of a third person, that he was liable only as surety and that all the remedies must first be exhausted against his principal. In the absence of a contract to the contrary, the liability of the surety is co-extensive with that of the principal and so it is not necessary for the plaintiff to exhaust all his remedies first against his principal. J. C. PANIOTY v. DWARKA MOHUNDASS, **4 C L.R. 145.** (4 M. H.C. 190, 6 Bom. H.C. 241, *R.*)

(19)—*Remedy against principal debtor barred —Liability of surety--Contract Act*, 1872, *ss.* 133, 139.—The liability of a surety (for arrears of rent) will not be extinguished, merely because the liability of the principal debtor has been allowed to become barred by limitation. KRISTO KISHORI CHOWDRAIN v. RADHA ROMAN, **12 C. 330** (5 B. 647, *Appr.*) [*Diss.*, 11 A 310=9 A.W.N. 94. U.B.R. 1892—1896, Vol. II, 308, 2 N.L.R. 42; *D.*, 1 L.B.R. 150.]

(20)—*Suit against surety to recover damages on contract to deliver goods—No allegation of willingness on the part of plaintiff to pay on delivery—Suit not bad on that account--Surety beginning to perform duty contracted to be performed by principal debtor.—No alteration of liability.*—In a suit to recover damages against a surety upon a contract to deliver coffee to the plaintiff, the circumstance that the plaint contains no allegation of the willingness of the plaintiff to pay on delivery does not render the suit bad, when the absence of such an allegation has not prejudiced the defendant. A surety is at liberty to perform that for the non-performance of which he has rendered himself liable, and his liability for non-performance cannot be altered by his having done so. ROBERT HODGES PIERCE v. OPENDRA SHEFFI GANAPATHY, **7 M.H.C. 364.**

(21)—*Contract of Guarantee—Evidence to prove it—Damages, Measure of.*—In a suit by the plaintiff to recover from the defendant, the amount misappropriated by his employee, A, whose honesty the defendant had guaranteed

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——3.—Surety, Rights and Liabilities of —*concluded.*

it was contended on behalf of the defendant that the evidence proving the guarantee consisted merely of a statement made at the time that the defendant believed A to be honest and that, though he subsequently wrote two letters wherein he specially referred to A's honesty, he refused to sign any guarantee bond. *Held*, that the words used at the time of taking A into service, were sufficient evidence of a contract of guarantee and as the same was confirmed by subsequent letters, the contract was complete. In a suit against the surety for damages for the dishonesty of the employee, the Court must act upon the principle that the damages must be proved to have resulted from the dishonest act of the employee. On this principle, the amount misappropriated by the employee can be claimed, but not the travelling allowance paid to him to join the appointment or the costs of a suit against the employee. DECERTANZE v. MERCER, **1 P. R. 1866, O.J.**

(22)—*Execution of decree—Surety after decree.*—A person who becomes a surety after the passing of a decree cannot be proceeded against in execution of such decree. BUNSIDHAR v. BEHARI LALL, **62 P.R. 1871.** [*F.*, 59 P R. 1880.]

See DAMAGES — MEASURE AND ASSESSMENT, 106 P.R. 1866.

Mortgage—Purchase of mortgaged property by one of two joint-mortgagees, effect of, on the debt under the joint-mortgage—Guarantee for personal default of the obligors—Extent of surety's liability—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 9 A. 205=A W.N. 1886, 279.

——4.—Miscellaneous.

(1) - *Suretyship — Liability and rights of surety.*--A and B became sureties for a Treasurer in a Collectorate, and bound themselves to make good any losses or deficiencies which might occur in the Treasury from any cause whatever. The Collector discovered certain deficit in the deposit accounts of some zemindars, carried to account the amount then in deposit, and attached the property of the sureties for the recovery of the balance of the deposit. A and B (the sureties) then sued the Zemindar, the Collector and the Treasurer for a refund of the moneys. *Held* that the treasurer only was liable, but not the Collector or the Zemindars. SADUT ALI KHAN v. MANIKARNIKA CHOWDHRAIN, **W.R. 1864, 119.**

(2)—*Oral guarantee—Evidence to establish it —Mandate.*—A offered a building contract to B, who, being unable to accept it on the score of some other engagement, introduced C and D as persons fit to undertake the work, promising in a general way to supervise their work and see that it was properly done. A contract was eventually entered into with C and D. They

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did the work very badly, committed acts of fraud and absconded. A therefore sued B, C and D for damages. There was no evidence that B connived at any acts of fraud on the part of C and D, and that he had any interest in their contract. Nor was there any consideration for his guaranteeing the good work of C and D. *Held*, under the circumstances, that B was not liable. Nor could B be held liable as under a contract of mandate entered into by him gratuitously, but nevertheless binding on the ground of the trust reposed in him. GENERAL BRIND v. MUTHRA, **93 P.R. 1868.**

(3)—*Surety—Subrogation.*—By the law of England and the law of Scotland, and by the general law of Europe, when a surety has paid off the debt of his principal, not only are all the collateral securities transferred to the surety but, by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every remedy which the principal creditor himself could have used. The law of this country may be reasonably taken to be that which has been considered equitable in other countries, namely, that the surety is not debarred from proceeding against the original debtor upon the instrument itself which created the debt, by reason of the debt having been paid by himself. HEERA LAL SAMUNT v. SYUD OOZEER ALI, **21 W.R. 347.** [*D.*, 4 C.W.N. 590.]

(4)—*Decree, execution of, against third party—Agreement of such party in respect of decree—Effect.*—A third person by becoming a party to an agreement made between the immediate parties to a suit, and by varying the terms of a decree, does not thereby become a party to the decree so that execution may be had against him; he is and continues to be a stranger to the suit, and to the decree, and any rights against him arising out of his agreement must be enforced against him in a separate proceeding. DIWAN RAM CHAND v. MUHAMMAD SULTAN, **75 P.R. 1876.** [*F.*, 59 P.R. 1880.]

See EXECUTION OF DECREE—EXECUTION ON OR AFTER AGREEMENTS OR COMPROMISE, 62 P.R. 1871.

Principal Sadr Amins, etc., Bengal.

See BEN. ACT XVI OF 1868.

Printing.

(1)—*Rates of Printing executed at private Presses.*—Indents for Stationery. Cir. No. 9 dated the 13th March 1866, **5 W.R. Civ. Cir. Orders, p. 4.**

See COSTS—SPECIAL CASES, 10 C. 106.

Priority.

Among several mortgagees—*See* ATTACHMENT—PRIORITY OF ATTACHMENT.

Priority—*continued.*

See MORTGAGE—SALE OF MORTGAGED PROPERTY.

See REGISTRATION ACT, 1908, s. 50.

(1)—*Priority—Purchase of jote at successive rent and mortgage sale—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 65, 161, 167 — *Mortgage-decree, if an incumbrance.*—After a mortgagee had obtained a decree for sale on his mortgage, the landlord of the *jote*, the subject of the mortgage, brought a suit for rent and sold the *jote* in execution of a decree obtained therein. Later on the property was sold in execution of the mortgage-decree and purchased by the mortgagee, who took possession. *Held*, in a suit for possession brought by the purchaser at the rent sale after notice served on the mortgagee under s. 167, Bengal Tenancy Act, purporting to annul the mortgage, that the question was really one of priorities, and the purchaser at the rent sale had priority over the purchaser in execution of the mortgage-decree. GOPI NATH MOHAPATRO v. KASHI NATH BEG, **13 C.W.N. 412=9 C.L.J 234=1 Ind. Cas. 35.** (29 C. 813, *R.*) [*F.*, 10 C.L.J. 640.]

(2) — *Judgment-creditor—Official Assignee—Priority.*—A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order. FREDERICK PEACOCK v. MADAN GOPAL, **29 C. 428=6 C.W.N. 577, F.B.** (15 C. 202, *F.*; 28 C. 419, *Overruled*; 5 B.L.R. 691, 10 C. 150, *D.*) [*F.*, 29 B. 405=7 Bom. L.R. 488; *R.*, 26 M. 673=13 M.L.J. 278, 7 O.C. 314, 5 C.L.J. 80=11 C.W.N. 163, 5 P.W.R. 1909=6 P.L.R. 1909; *D.*, 30 M. 413=7 M.L.J. 334=2 M.L.T. 365.]

(3)—*Registered and unregistered documents, priority between—Quære.*—Whether the case of a second registered purchaser with notice of a prior unregistered sale in an exception to the rule in 8 C. 597, F.B. BAMASUNDARI DASSI v. KRISHNA CHANDRA DHUR, **10 C. 424.** [*Expl.*, 13 C. 70.]

(4)—*Priority — Priority between registered sale and prior unregistered sale of which the registration was optional — Notice.* — Where, when two documents being of the kinds specified in the first clause of s. 50 of the Registration Act, 1877, come into competition, the earlier of which the registration is optional being unregistered, and the latter being registered. The holder of the latter document is not affected by notice of the former. LEHNA v. GANPAT, **115 P.R. 1890, F.B.** (159 P.R. 1883, 37 P.R 1882, *Overruled*; 3 M.H.C. 89, 5 M. 75, *F.*)

Unregistered mortgage without possession optionally registrable—Subsequent registered sale - Priority—*See* ACT XIX OF 1843, 4 B. 459.

See ACT XIX OF 1843, 6 M.H.C. 391, 18 B. 332.

Priority—*continued.*

See ATTACHMENT BEFORE JUDGMENT, 4 B.L.R. F.B. 63=13 W.R. 9, Bourke O.C. 260, 1 Ind. Jur. N.S. 393=Bourke O.C. 92.

See BOTTOMRY BOND, 1 Ind. Jur. N.S. 303.

Registered certificate of sale—Unregistered previous optionally registrable sale-deed — Priority—*See* CERTIFICATE OF SALE, 7 M. 418.

Insolvent—Distribution of assets—Dower debt — Mortgage debt — *See* CIV. PRO. CODE, 1882, s. 356 (*d*), A.W.N, 1884, 33.

Decree-holder first attaching property—First applicant in execution— Priority—*See* CIV. PRO. CODE, 1908, s. 73, 5 M.H.C. 113.

Decree-holder first attaching property—Not forfeited by delaying to obtain order for sale—*See* CIV. PRO. CODE, 1908, s. 73, 6 M.H.C. 348.

See DECREE—DECREE, FORM OF, 22 C. 100.

Claim of attaching-creditor and incomplete equitable title of assignee of decree, preference between—*See* EQUITABLE ASSIGNMENT, 5 C. 869=6 C.L.R. 498.

Of mortgage by Receiver for preservation of estate, over subsequent equitable mortgage—*See* EQUITABLE MORTGAGE, 4 C.L.J. 495=11 C.W.N. 1=34 C. 427.

See EXECUTION OF DECREE — JOINT DECREES, EXECUTION OF, 5 N.W.P. 98.

Hindu Law—Benares School—Inheritance—Priority among daughters—*See* HINDU LAW—INHERITANCE, 3 C. 587, P.C.=5 I.A. 40=2 C.L.R. 51.

Of Official Assignee—*See* INSOLVENCY — CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE, 2 Ind. Jur. N.S. 188, 2 Ind. Jur. N.S. 337.

Subsequent insolvency—Of Official Assignee—*See* INSOLVENCY — MISCELLANEOUS, 1 Ind. Jur. N.S. 11=Bourke O.C. 339.

See INSOLVENCY — MISCELLANEOUS. 1 Ind. Jur. N.S. 325 *and on appeal Ibid.* 373, 2 B.L.R. A.C. 61=10 W.R. 353.

Over purchaser in execution of decree under prior unregistered Mortgage, of subsequent registered purchaser without notice of the mortgage—*See* MORTGAGE—GENERAL, 4 C.L.J. 490.

See MORTGAGE—GENERAL, 13 C. 10.

Of mortgage—Intention to preserve prior security—*See* MORTGAGE — CONSTRUCTION OF MORTGAGE DEEDS, 16 C. 523.

See MORTGAGE—MARSHALLING, 6 C.L.R. 336, 23 P.R. 1891.

Purchaser of equity of redemption at sale in execution of money-decree, neither certificate of sale nor possession obtained by—Sale in

Priority—*continued.*

execution of decree on prior mortgage—of rights of purchaser under—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 9 B. 10.

Successive mortgages of same property—Sale under both mortgagee—Redemption—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 11 C.L.R. 1=9 I. A. 21, P.C.

Mortgage— Fraud — Priority — Lien—*See* MORTGAGE — SALE OF MORTGAGED PROPERTY, 3 B.L.R. A.C. 1=11 W.R. 286.

Mortgage in renewal of prior mortgage—Right of mortgagee to—over subsequent mortgages—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 20 M. 274=7 M.L.J. 87.

See MORTGAGE — SALE OF MORTGAGED PROPERTY, 4 B. 34, 11 B.H.C. 41.

Mortgage—Purchase in succession by mortgagees in execution of mortgage decrees —Delivery of possession — Date of delivery—*See* MORTGAGE—MISCELLANEOUS, 26 M. 486.

Relinquishment of—*See* MORTGAGE—MISCELLANEOUS, 5 C.W.N. 649, P.C.=3 Bom. L.R. 713=28 I.A. 203=23 A. 313.

Prior mortgage—Subsequent registered sale—of claim—*See* MORTGAGE — MISCELLANEOUS, 4 M.H.C. 434.

Earlier unregistered mortgage—Subsequent registered mortgage- Suit by second mortgagee—Sale of mortgaged property — Prior rights of first mortgagee over holder of money decree against mortgagor — *See* MORTGAGE— MISCELLANEOUS, 18 B. 684.

See MORTGAGE —MISCELLANEOUS, A.W.N. 1885, 130.

See MOVEABLE PROPERTY, 2 C.P.L.R. 108.

Of other sharers of joint estate, entitled under partition decree, to receive owelty money from co-sharer over mortgagees of that co-sharer's undivided share in joint estate— *See* PARTITION—GENERAL, 12 C.W.N. 373=35 C. 388.

Applicability of priorities given by s. 12 of the Punjab Pre-emption Act II of 1905 to a claim to right of pre-emption with reference to a sale executed before the commencement of the Act—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 18 P.W.R. 1908, F.B.=17 P.R. 1908=153 P.L.R. 1908.

See RECEIVER, 16 B. 577.

Registered mortgage—Subsequent sale with possession—Priority—*See* REGISTRATION, 2 B. 662.

Registered conveyance — Unregistered conveyance with possession—Priority—Notice—*See* REGISTRATION, 7 C. 753=10 C.L.R. 129.

Registered conveyance—Unregistered contract for sale—Preference—*See* REGISTRATION, 6 B.L.R. App. 1=15 W.R. 239.

Priority—*continued.*

Registered deed of sale—of—Tangible immoveable property, definition of—*See* REGISTRATION, 2 O.C. 74.

Registered and unregistered-deed—*See* REGISTRATION, 4 B.L.R.A.C. 8=12 W.R. 456.

See REGISTRATION, 10 B.L.R. 380=19 W. R. 279, L.B.R. 1872—1892, 151.

Registered conveyance—Unregistered mortgage—*See* REGISTRATION ACT, 1908, s. 17, 13 C.L.R. 256.

Of later registered deed—*See* REGISTRATION ACT, 1908, s. 17, 10 C. 82.

Mortgage—Value of mortgage — Deed for purposes of registration—*See* REGISTRATION ACT, 1908, ss. 17, 50, 5 A. 447, F.B.=A.W.N. 1883, 87.

Several deeds of sale registered — Priority according to date of execution—*See* REGISTRATION ACT, 1908, s. 47, 8 B. 182.

See REGISTRATION ACT, 1908, ss. 47, 49, 50, I L.B.R. 293.

Possession under unregistered lease — *See* REGISTRATION ACT, 1908, s. 48, 5 B.L.R. App. 86=14 W.R. 250.

Sale of property mortgaged with possession — Subsequent sale by a registered document—Priority—*See* REGISTRATION ACT, 1908, s. 48, P.L.R. 1900, p. 8, 352.

See REGISTRATION ACT, 1908, s. 48, 9 M. 267.

Preference between innocent purchasers—*See* REGISTRATION ACT, 1908, ss. 48, 50, 5 C. 336=4 C.L.R. 257.

See REGISTRATION ACT, 1908, ss. 49, 50, 8 M. 167.

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 12 A. 546=A.W.N. 1890, 77.

Revenue sale for patni—Darpatnidar's decree for compensation—Attachment by patnidar's mortgagee—Priority—*See* SALE—SALE FOR ARREARS OF RENT — SURPLUS PROCEEDS OF SALE, RIGHT TO, 7 C. 173=8 C.L.R. 341.

See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 1 A. 727.

See SALE—SALE IN EXECUTION OF DECREE—MORTGAGED PROPERTY, SALE OF, 5 N.W.P. 81.

See SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHTS TO, 4 N.W.P. 5.

Sale under attachment during subsistence of prior attachment—*See* SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 6 C.L.R. 85.

Sales in execution of different decrees—Prior sale under later attachment—*See* SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 8 C.L.R. 468.

Priority—*concluded.*

Successive sales in execution of decrees—Confirmation—C.P.C. 1882, ss. 11 and 320—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1887, 267.

Of title between purchasers at rent sale and at execution of mortgage decree—*See* TITLE, 10 C.L.J. 640=4 Ind. Cas. 750.

See TRANSFER OF PROPERTY, U.B.R. 1897—1901, Vol. II, 573.

Mortgages— Prior unregistered mortgages, subsequent registered mortgagee with notice of, not entitled to the—Under s. 50 of the Registration Act III of 1877—*See* TRANSFER OF PROPERTY ACT, 1882, s. 53, 8 A. 540=A.W.N. 1886, 174.

See TRANSFER OF PROPERTY ACT, 1882, s. 54. 18 M. 61.

Of registered over unregistered deeds—Scope of rule—*See* VENDOR AND PURCHASER—POSSESSION, 6 B. 193, F.B.

Prisoner.

(1)—*Appeal petition of prisoner in jail under Civil warrant—Duty of Court.*—A prisoner in jail under a civil warrant is entitled to present a petition of appeal to the Court having power to hear appeals, without the intervention of a Vakil. KRISTNAPPAH, PETITIONER, **6 M.H.C. 38.**

See VAKALATNAMA, 1 B.H.C. 16.

Prisoners Act, State.

See ACT III OF 1858.

Prisoners in Calcutta.

See BEN. ACT XII OF 1865.

Prisoners' Testimony Act.

See ACT XV OF 1869.

Privacy.

Invasion of right of—*See* EASEMENT, 4 A. L.J. 445=A.W.N. 1907, 183=29 A. 582.

See EASEMENT, 108 P.L.R. 1903.

Invasion of—*See* JURISDICTION OF CIVIL COURTS, 3 Agra 253.

Right of—Pardanashin woman—*See* JURISDICTION OF CIVIL COURTS, 5 B.L.R. 676=14 W.R. 103.

Suit to have windows removed—Invasion of—Of woman— *See* JURISDICTION OF CIVIL COURTS, 5 B.L.R. 677, Note.

See JURISDICTION OF CIVIL COURTS, 3 M.H.C. 141, 18 M. 163.

Right to have windows closed—Invasion of privacy, comfort and ventilation—*See* PRESCRIPTION—EASEMENTS— LIGHT AND AIR, 2 Agra 269.

Privacy, Right of.

(1)—*Easement— Right of privacy—Invasion of the right—Question of fact.*—The question whether a right of privacy exists, and whether it has been substantially infringed, is a question of fact. RAM NARAIN v. SHIB LAL, **6 Ind. Cas. 398.**

Privacy, Right of—*continued.*

(2)—*Succession of right of privacy—Mandatory injunction.*—Although the right of privacy is not recognized by the law of England, such a right exists in the country where the conditions of life are different. The object of a mandatory injunction is to restore things to their original order and not to create a new state of things. Hence a defendant who has made a roof which interferes with the privacy of the plaintiff's house cannot be ordered to erect a wall on the roof, so as to prevent a view of the plaintiff being had from the roof. The decree which the plaintiff is entitled to is a decree restraining the defendants by injunction from permitting any portion of the building raised by them, by which the privacy of the plaintiff's house is or may be invaded, to remain, and from erecting any building or permitting any erection to remain on the site of the former building of the defendants so as to interfere with the privacy of the plaintiff's house, as the same was enjoyed prior to the erection of the building complained of. SHEO NATH RAI v. ALI HUSSAIN, **1 A.L.J. 118.**

(3)—*Right of privacy, Nature of.*—The right of privacy does not arise from prescription but is a creation of custom, which has been recognized as such in Gujrat by judicial decisions. The right, however, is limited to particular apartments secluded from general observation. NATHUBHAI v. CHHAGANLAL, **2 Bom. L.R. 454.**

(4)—*Privacy, suit to enforce right of — Customary right of privacy.*—The plaintiff brought a suit for removal of windows in the defendant's house which overlooked the female apartments of his house. A lane separated the two houses. A custom was proved to exist by which the plaintiff was entitled to the right of privacy which he claimed. *Held*, that the plaintiff was entitled to the relief prayed for and the fact that the houses of the parties were separated by public thoroughfare did not prevent the existence of a custom of privacy which could be enforced. LALA BHAGWAN DAS v. SHAHZADA MIRZA MASUD QUADAR, **7 O.C. 126.** (10 A. 358, *F.*)

(5)—*How arises—Usage, proof of—Prescriptive right—Limitation Act*, 1877, *s.* 26.—There is in Bengal no inherent right to privacy, and such a right can arise at all only by local usage, by grant or by special permission. In a suit for closing the window on the wall of the defendant and for the issue of a permanent injunction restraining him from opening any windows in future in that wall, on the ground that the privacy of the plaintiff had been interfered with, it was proved that it had not been usual for windows to be opened out in any one house in the village so as to overlook the female apartments of another, but not that the villagers had been in the habit of preventing their co-villagers from opening windows in such a manner. *Held* that the usage as to the right of privacy was not proved. The right of privacy cannot be claimed under s. 26 of the Limitation Act. The fact that the defendant's wall had been standing there over 50 years, and that during this period no window had been opened, is not sufficient to give the plaintiff a prescriptive right to prevent the defendant opening a window in that wall. If the plaintiff be able to establish that, for a long period sufficient to establish a right by prescription, he had been exercising the right of preventing the defendant from opening such a window, that might establish a prescriptive right. SRI NARAIN CHOWDHRY v. JODOO NATH CHOWDHRY, **5 C.W.N. 147.**

(6)—*Right of privacy in N.W.P.—Interference with such right actionable—English law—Questions to be determined—Right of privacy to new buildings, when reasonable, and when not.*—The right of privacy exists by custom in the N.W.P., among the Hindus and Muhammadans, who observe the custom of *parda*; and any substantial interference with such right, where it exists, if without the consent of the owner of the dominant tenement, affords such owner a good cause of action. The fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India a usage or custom of privacy valid in law. [*R.*, 8 A. W.N. 270, 16 A. 69, 5 C.W.N. 147, 7 O.C. 126, 29 A. 64=3 A.L.J. 670=A.W.N. 1906, 283; *D.*, 18 M. 163=5 M.L.J. 26.] Every case of interference with the right of privacy must depend on its own facts. A primary question must in all cases be:—Does the privacy in fact and substantially exist and has it been and is it in fact enjoyed? If this is answered in the negative, no further question arises. But, if in the affirmative, the next question would be:—Was it substantially and materially interfered with by acts of the defendant done without the consent or acquiescence of the person seeking relief against those acts? [*R.*, 29 A. 582=A. W. N. 1907, 183=4 A. L. J. 445.] In the case of a building for *parda* purposes newly erected, without the acquiescence of the owner of an adjacent building site, a custom which would prevent the owner of such site from building so as to interfere with the privacy of the first new building, would be unreasonable, and consequently, a bad custom in law. If, however, the owner of such an adjacent building site were without protest or notice, to allow his neighbour to erect, and consequently to incur expenses in erecting building, or premises for the use of *pardanashin* women, a custom, which would prevent him from subsequently interfering with the privacy of such new building, would not be unreasonable in this country. *N.B.*—The Indian case law relating to right of privacy discussed and reviewed. GOKUL PRASAD v. RADHO, **10 A. 358=A.W.N. 1888, 135.**

(7)—*Privacy, Invasion of — Opening new windows.*—Where a person opened a new window in his own premises rendering thereby the defendant's house less private than before, *held* that he was not guilty of any tortious act, and

Privacy, Right of—*concluded.*

should not be debarred from improving his own house, though, the effect might be, to some extent, prejudicial to his neighbour. The right of privacy will not be allowed unless a special custom to that effect is proved. SHRINIVAS UDPIRAY v. L. REID, DISTRICT MAGISTRATE OF DHARWAR, **9 B.H.C. 266**. [*F.*, 18 M. 163=5 M.L.J. 26; *R.*, 10 A. 358=8 A.W.N. 135.]

See CUSTOMS—PUNJAB—MISCELLANEOUS, 19 P.R. 1882.

See EASEMENT, A.W.N.1892,159, 3 Ind.Cas. 88, 21 P.R. 1869, 91 P.R. 1869, 96 P.R. 1876.

Suit to close doors—*See* JURISDICTION OF CIVIL COURTS, 6 B.L.R. App. 76.

Private Agent.

Mukhtear and — Distinction between— *See* LEGAL PRACTITIONERS—MUKHTEAR, 6 C. 585=7 C.L.R. 562,

Private Fisheries Protection Act.

See BEN. ACT II OF 1889.

Private Lotteries Act.

See ACT V OF 1844.

Private Market.

Private market, the Chowpati foreshore is not a—*See* BOM. ACT III OF 1888, s. 410, 7 Bom. L.R. 726.

Private Street.

Private street, balconies abutting on, can be removed by District Municipality—*See* BOM. ACT VI OF 1873, s.33, 5 Bom.L.R.48=27 B.221.

Private Water-Courses Act.

See ACT XII OF 1866.

Private Way.

Right of private way, suit for—Special damage, proof of, whether necessary—*See* RIGHT OF WAY, 6 C.W.N. 197.

Privilege.

(1)—*Libel — Debtor—Qualified privilege.*—Of two creditors of the same debtor, one creditor sued him for a certain sum. *Held* that the other creditor who intervenes and presents a statement to the Court, pointing out what he considered suspicious elements in the other creditor's claim, is protected on the ground that he had the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interests. HINDE v. BAUDRY, **2 M. 13.** [*F.*, 17 B. 127, 17 B. 573; *Appr.*, 11 M. 477; *R.*, 14 B. 97, 23 C. 867, 4 A.L J. 614; *R.& D.*, 29 A. 685.]

Attaching to an official publication is absolute —*See* ACT OF STATE, 6 Bom. L.R. 131.

Privilege — Good Faith, proof of — *See* DEFAMATION, 3 A. 815=1 A.W.N. 81.

Suit for damages for defamation—Judicial proceeding — Pleadings — *See* DEFAMATION, A.W.N. 1885, 204.

Privilege—*concluded.*

Of Judge—*See* DEFAMATION, 17 M. 87.

Privileged communication—Malice, proof of — *See* DEFAMATION, 83 P.R. 1908 = 152 P.W.R. 1908=26 P.L.R. 1909.

Attaching to reports by a public officer to his superiors—*See* DEFAMATION, 5 Bom. L.R. 664 =27 B. 585.

See DEFAMATION, 28 C. 794=5 C.W.N. 804, 23 C. 867.

Defamatory statement in affidavit—Privilege—*See* EVIDENCE—MISCELLANEOUS, 6 Ind. Cas. 309=8 M.L.T. 55.

Of a European British subject to be tried by High Court—*See* HIGH COURT—JURISDICTION OF BOMBAY, 5 Bom. L.R. 869.

Application for production and inspection of document—Affidavit of document—Right of party to put in a further affidavit in support of claim of privilege, if original affidavit is insufficient — Practice — *See* INSPECTION OF DOCUMENTS, 22 C. 105.

See INSPECTION OF DOCUMENTS, 11 C. 655.

Libellous statements during judicial proceedings, suit for damages whether maintainable—*See* LIBEL, 14 B. 97.

Foundation of doctrine of—Welfare of society —*See* LIBEL, 12 C.W.N. 1053, P.C.=19 M.L.J. 20=14 Bur. L. R. 225=4 M.L.T. 21=1 Ind. Cas. 348.

See PARDANASHIN WOMEN, 1 B.L.R. F.B. 31=10 W.R.F.B. 21.

To papers passing between a Company and its officers after threatened suit—*See* PRACTICE AND PROCEDURE, 10 Bom. L.R. 796.

Privileged Communication.

See EVIDENCE ACT, 1872, S. 126.

See PRIVILEGE.

(1)—*Indian Evidence Act, I of 1872, s. 129—Communications with legal advisers, privileged nature of.*—Compulsory disclosure of confidential communications with legal advisers ought not to be pressed in the absence of any necessity for doing so for the purpose of explaining any evidence given by the party who has offered himself as a witness. The rule of protection provided for by s. 129 of the Evidence Act should be construed in a sense most favourable to bringing professional knowledge to bear effectively on the facts out of which legal rights and obligations arise and disclosures of the ordinarily privileged confidential communications should not be enforced in any cases except where they are absolutely necessary. MUNCHERSHAW BEZONJI v. THE NEW DHURUMSEY S & W. Co., **4 B. 576.**

(2)—*Letters between solicitor of several plaintiffs—Privileged communication.*—One of the letters, of which inspection was sought in this case, was a letter written by the solicitors of two of the plaintiffs in the suit to the solicitors of the third plaintiff, and the other was a letter

Privileged Communication—*continued.*

written to the third plaintiff by his solicitors, and it was *held* that they must be regarded as confidential communications and, as such, need not be produced and that the defendant had, therefore, no right to see them. The mere fact of parts of the letters having been read to the defendant's solicitors could not amount to a waiver of the privilege, so far as regards the portions which were not so read, or give any right to the defendant to inspect the documents which were of a confidential nature. KAY v. POORUNCHAND POONA LAL JAVHERRY, **4 B. 631.**

(3)—*Evidence Act* (II *of* 1855), *s.* 24—*Vakeel's evidence.*—Although under s. 24 of the Evidence Act, II of 1855, a vakeel may be excused from answering certain questions relating to communications between him and his client, the section does not excuse him from being put in the witness box. DOOLAR JHA v. RUNJEET ROY, **15 W.R. 340.**

(4)—*Defamation—Allegations in petition and written statement—Privileged communication—Damages substantial.*—Suit for damages for defamation. Defendant had put in a petition to the Magistrate alleging that his clerks in collusion with the plaintiff had abstracted a bundle of papers and leaves of account books, etc., and that the fact should be proclaimed by a crier. *Held* under the circumstances of the case that the filing of the petition was done with the sinister motive of giving a colour to the statement which the defendant intended to file in connection with a suit pending in the Civil Court, that the allegations were not privileged as the action of the Magistrate was ministerial and not judicial; and that the *defamatory* statement was utterly irrelevant to the occasion and did not fairly arise out of it as it would have been sufficient for the defendant to have informed the Magistrate that he had reason to believe that his papers were stolen, without specifying any person as the object of his suspicion; and that the plaintiff was entitled to recover substantial damages. CHOWDHRY GOORDUTT SINGH v. GOPAL DASS, **1 Agra 33.**

(5)—*Affidavit of documents—Privileged communications.*—Where privilege is claimed for a correspondence, by reason of its containing instructions and confidential communications from the client to his solicitor, it must not only appear that the correspondence generally contains instructions, etc., but that each letter contains instructions or confidential communications to the attorneys with reference to the conduct of the suit. (*Bewicks* v. *Graham*, 7 Q.B.D. 405, *Followed.*) THE ORIENTAL BANK CORPORATION v. J. F. BROWN & CO., **12 C. 265.** [*R.*, 15 B. 7.]

(6)—*Defamation — Petition by raiyats to Tahsildar*—Bona fide *statements against Zemindar held privileged.*—When an application by a Zemindar for the removal of a Village Munsiff was being considered by the Tahsildar, the raiyats of the village addressed a communication to him containing several statements

Privileged Communication—*concluded.*

reflecting upon the character of the Zemindar and imputing certain criminal acts to him. Prior occurrences justified the communication and the raiyats had acted *bona fide*. The communication was held to be protected from being defamatory, since the occasion of the publication conferred a privilege under the principle that a communication made *bona fide* upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without the privilege, would be slanderous and actionable. VENKATA NARASIMHA v. KOTAYYA, **12 M. 374.**

(7)—*Defamation—Statements made by the manager of a company regarding its servant—Privilege.*—Communications of a defamatory character touching a servant of a company, contained in letters from the manager, to the directors of the company, and to another of its servants written ostensibly in the interest of the company, were held to be privileged. The *onus* lay on the plaintiff, the person defamed to prove that the defendant believed them to be untrue when he made them or acted maliciously in making them. LEISHMAN v. HOLLAND, **14 M. 51.**

See DEFAMATION, 1 Bom. L.R. 478=24 B. 13.

See INSPECTION OF DOCUMENTS, 11 C. 655, 2 B. 453, 15 B. 7.

See LETTERS PATENT, HIGH COURT, N.W.P. 1 Ind. Jur. N.S. 192, Bourke O.C. 18.

What amounts to—Proof of malice—*See* LIBEL, 13 C.W.N. 1165=36 C. 907=3 Ind. Cas. 831.

Privilege of Counsel.

See LEGAL PRACTITIONERS—ADVOCATE, 2 Bom. L.R. 3.

Privity of Contract.

See CONTRACT—MISCELLANEOUS, 6 Bom. L.R. 421.

Privy.

Grant of land for habitation—Right to erect privy — Implied grant— *See* GRANT—CONSTRUCTION, 16 B. 552.

Privy Council Appeals Act.

See ACT VI OF 1874.

Privy Council, Practice of.

1.—GENERAL.

2.—CONCURRENT JUDGMENTS NO FACTS.

3.—COSTS.

4.—CROSS APPEAL.

5.—DISMISSAL OF APPEAL FOR WANT OF PROSECUTION.

6.—PRACTICE AS TO OBJECTION.

7.—QUESTIONS OF FACT.

Privy Council, Practice of—continued.

8.—REHEARING.

9.—REMAND OF CASE TO INDIA.

10.—RESTORATION OF APPEAL.

11.—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL.

12.—STAY OF PROCEEDINGS IN INDIA PENDING APPEAL.

13 —VALUATION OF APPEAL.

14.—MISCELLANEOUS.

See APPEAL TO PRIVY COUNCIL

See CIV. PRO. CODE, 1908, ss. 109—112, O. XLV, rr. 1-16.

——1.—General.

(1)—*Privy Council's power to rectify mistakes —Misprision - Judgments.*—By the common law, this Court possesses the same power as the Courts of Record and Statute have of rectifying mistakes which have crept in by misprision or otherwise, in embodying its judgments. RAJUNDER NARAIN RAE v. BIJAI GOVIND SINGH, **2 M.I.A. 181=1 Moo. P.C. 117=1 Sar. 175.**

(2) — *Procedure — Mistake in drawing of decree—Wrong judgment and decree--Remedy.*— Where it was alleged for the appellant before the Privy Council that the Judges of the three Courts below were mistaken in saying that a certain bond had not been set up by him in a previous litigation, whereas in fact it had been so set up and that the decree was wrong in not dealing with it, it was held by the Judicial Committee that the decree might have been corrected if not in accordance with the judgment, or appealed against when both judgment and decree were wrong; and that their Lordships could not go behind such decree, where neither of these courses had been adopted. SRI GOPAL v. PIRTHI SINGH, **6 C.W.N. 889, P.C.= 4 Bom. L.R. 827=29 I.A. 118=24 A. 429=8 Sar. 293.**

(3)—*Practice in interfering with discretion of lower Courts.*—The Privy Council is always slow to reverse the decisions of the Courts below made in the deliberate exercise of a discretion vested in them by law. JAIPAL KUNWAR v. INDAR BAHADUR SINGH, **26 A. 238, P.C.= 31 I.A. 67=8 C.W.N. 465=6 Bom. L.R. 495= 14 M.L.J. 149=8 Sar. 625.** [*R.*, 29 B. 71=6 Bom. L.R. 780, 101 P.R. 1909.]

(4)—*Discretion of lower Court not interfered with by Judicial Committee.*— The Judicial Committee is always reluctant to interfere with a matter of discretion exercised by the Courts in India, unless it can be shown that the Court has acted upon an erroneous principle. BANK OF HINDUSTAN, CHINA AND JAPAN v. THE EASTERN FINANCIAL ASSOCIATION, LTD., **3 B.L.R.P.C. 8=12 W.R.P.C. 27=13 M.I.A.15= 2 Suther. 250=L.R. 2 P.C. 489=20 L.T. 889 =2 Sar. 476=6 M.P.C. (N.S.) 114.**

(5)—*Appeal to Privy Council—Restoration.* --The High Court has the power, and ought to exercise its discretion in each particular case,

Privy Council, Practice of—continued.

——1.—General—*continued.*

with regard to restoring appeals to the Privy Council dismissed for default, or removed for any reason from the file of the High Court. *In the matter of the petition of* RADHA BINODE MISSER, **B.L.R. Sup. Vol. 730, F.B=7 W.R. 531.**

(6) -*Documents not part of the record—Procedure— Transmission.* — Privy Council, on application, may direct High Court to transmit certain documents used in the litigation, but not sent up as part of the record. HIS HIGHNESS THE MAHARAJAH OF VIZIANAGAR v. ZEMINDAR OF BOBBILI, **4 M.J. 283.**

(7)—*Fact, concurrent findings of, by lower Court—Judicial Committee, practice of.*—The Judicial Committee will not make a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts, especially when such findings are based on facts, whose significance is best appreciated by Judges, most familiar with Indian manners and customs. KUNWAR SANWAL SINGH v. RANI SATRUPA KUNWAR, **3 C.L.J. 86, P.C.=10 C. W.N. 230=1 M.L.T. 6=16 M.L.J. 77=28 A. 215=33 I.A. 53=8 Sar. 903.** (21 C. 997=21 I.A. 163, *F.*)

(8)—*Improper admission of documents by Court below—Practice of Judicial Committee—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 39.—The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of this tribunal to do substantial justice between the parties, and to see if there is sufficient evidence on the whole record to justify the conclusion at which the Court below has arrived. According to the true construction of s. 39 of Act VIII of 1859, it is not fatal to the admission of documentary evidence that it is brought in subsequent to the filing of the plaint, if it appears to have been received with the sanction of the Court. GOSAIN TOTA RAM v. RAJA RUKINIBALLAB, **3 B.L.R. P.C. 34=12 W.R. P.C. 32 =13 M.I.A. 77=2 Sar 487=2 Suther. 253.** [*F.*, 8 M. 373; *R.*, 6 C.L.J. 621, 13 C.W.N. 797=10 C.L.J. 33=2 Ind. Cas. 946.]

(9)—*Document impeached as forged—Document sent for from India.*—Where a document was impeached as being forged on the face of it, the case was directed to stand over for the original document to be transmitted from India for inspection at the hearing of the appeal. RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY BAHADOOR, **10 M.I.A. 123=1 Suther. 548=2 Sar. 60=2 W.R. P.C. 13.**

(10)— *Will, admitted to probate— Proof— Semble.* — Where an instrument has been admitted to probate, and acted upon in the Courts below, the Privy Council will not enter into the question whether the instrument is sufficiently proved or not. KHOORSHEDJEE MANIKJEE v. MEHRWANJEE KHOORSHEDJEE, **5 W.R.P.C. 57=1 M.I.A. 431=1 Suther. 73=1 Sar. 38.**

***Privy Council, Practice of*—continued.**

——1.—General—*continued.*

(11)—*Credibility of witnesses.*—Where the two lower Courts gave concurrent judgment upon a question of facts, their Lordships of the Privy Council did not consider it necessary to review at length all the evidence bearing upon it. Their Lordships of the Privy Council did not conceive it to be any part of their duty to criticise with any strictness the opinion expressed by the lower Court as to the credibility of witnesses, that being eminently a question for the Court in India. MUSAMMAT SHAFIQ-UN-NISA v. RAJA SHABAN ALI KHAN, **6 Bom. L.R. 750=26 A. 581=9 C.W.N. 105=7 O.C. 290=31 I.A. 217=8 Sar. 674.**

(12)—*Practice—Evidence of doubtful admissibility.*—When evidence of doubtful admissibility has, under the looser practice of the Indian Courts, been received in an Indian cause, the Judicial Committee, sitting as an appellate Court, will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. BOTH NARAIN SINGH *and* AJODHYA PRASAD SINGH v. UMRAO SINGH, **6 B.L.R. 509, P.C. =15 W.R.P.C., 1=13 M.I.A. 519=2 Sar. 607= 2 Suther. 371.** (7 M.I.A. 137=4 W.R.P.C. 121, *F.*)

(13)—*Fresh evidence—Review—Act* VIII *of* 1859, *s.* 355.—The Privy Council will not lightly admit fresh evidence. GOBIND SUNDARI DEBIA v. JAGADAMBA DEBIA, **3 B.L.R. P.C. 25.**

(14)—*Appreciation of evidence—Miscarriage of justice.*—Where, in a case of appreciation of evidence, both the lower and appellate Courts agreed, *held* that the usual rule of Privy Council should be followed and the decisions confirmed as the appellant had failed to prove any real miscarriage of justice. GOVIND SOONDAREE DEBYA AND OTHERS v. JUGGODUMBA DEBIA, **6 M.J. 113=6 B.L.R. 168= 15 W.R. P.C. 5=2 Suther. 375=2 Sar. 611.**

(15)—*Remand—Further evidence available—Previous occasions not availed of.*—The Judicial Committee will not send back a case to a Court below for further investigation, on the ground that further evidence might now be produced before it, when the party has had opportunities of bringing forward that evidence below, of which he has not availed himself. RAJA ROW VENCATA NILADRY ROW v. ENOOGOONTY SOORIAH AND RAMANIAH, **2 Knapp. 259=1 Suther. 16=5 W.R. P.C. 79.**

(16)—*Judicial notice of country from which appeal preferred—Right to sue—Evidence—Hindu Law--Adoption--Succession to collaterals.*—The Judicial Committee are bound to take notice of the law of the country from which the appeal comes, and to decide according to it, although it has not been noticed in the Court below. When, therefore, a Court below had decided upon the ground of evidence of which they had cognizance in another suit, but which was not legally before them in the suit

***Privy Council, Practice of*—continued.**

——1.—General—*continued.*

in question, their decree was supported on the ground that the appellant, who was the plaintiff before them, had, according to the law of the country, no right to sue. An adopted son, according to the Hindu Law, is entitled to succeed to his collateral as well as his direct relations by adoption. SUMBOOCHUNDER CHOWDRY v. NARAINI DIBEH, **3 Knapp. 55 =1 Suther. 25.**

(17)—*Privy Council — Appeal— Practice—Concurrent judgments on facts--Disagreement on subordinate points.*—The Judicial Committee does not ordinarily entertain an appeal from concurrent judgments on a mere question of fact. The mere fact that the two Courts do not agree on all the steps which lead to one and the same conclusion, is no reason for disregarding the above well-known rule. That rule, however, is not an absolute rule; it presses upon the appellant with more or less weight according to the circumstances of the case, and the fact that the Courts have differed on some important but subordinate questions as matter to be taken into consideration in determining whether the evidence before the lower Courts should be reviewed in detail. RAJAH CHITPAL SINGH v. BHAIRON BUKSH, **10 C.W.N. 225=1 M.L.T. 7=16 M.L.J. 76, P. C.=28 A. 219.**

(18)—*Questions of fact—Reveresed of judgment by Privy Council—Costs—Fresh evidence.*—When a Court below has decided upon a case depending upon questions of fact alone, the Judicial Committee will not advise a reversal of their judgment, unless there appears some clear distinct point in which they are wrong, although doubts may be entertained as to its correctness. A superior Court having affirmed the decree of an inferior Court, with costs against the appellant, but not until they had required and taken much evidence in addition to what had been taken below; *Held* that they ought not to have given costs against the appellant, and their decree so far reversed although affirmed in other respects. BABOO ULRUCK SINGH v. BENI PERSAD, **2 Knapp. 265=1 Suther. 13.**

(19)—*Statute* 3 *and* 4, *Wm.* IV, *C.* 41, *appeals prosecuted by Government under—Costs incurred by Government, suit for recovery of—Limitation—Inapplicability of Reg.* II *of* 1805 *—Reg.* III *of* 1793, *s.* 14—*Printed case, Lodging of.*—In an appeal which was heard in virtue of Statute 3 and 4, William IV, c. 41, empowering the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing, it was directed, by an order in Council of 1836 that the costs incurred by the East India Company should be paid by the respective parties to the suit. No fruitful proceedings having been taken on the part of the Government to realise these costs, the present suit was brought by the Government in 1852 against the representatives of one of the parties to the appeal to recover part of the

***Privy Council, Practice of*—continued.**

——1.—General—*continued.*

costs incurred in bringing the appeal to a hearing. The main objection taken on behalf of the defendant was that the suit was barred by the statute of limitation. The important point for decision was whether Regulation II of 1805 extended to the present case so as to enable the Government to sue notwithstanding the lapse of time. It was *held* that the recovery of the costs sought for in this case cannot be regarded as a "public right" within the provisions of cl. 2, s. 2 of Bengal Regulation II of 1805 giving the Government a period of 60 years for bringing the suit. The admission by the defendant in this case that the demand was claimable from some quarter or other but not as against the plaint property, could not amount to an admission capable of saving the suit from limitation under Regulation III of 1793. The claim was, therefore, barred by s. 14 of that Regulation, and the Court in India precluded from entertaining this suit which had not been brought within the 12 years' period prescribed by that Regulation. The respondents appeared by Counsel at the hearing to argue the appeal, without having lodged a printed case. Their Lordships refused to hear the appeal until a printed case was lodged. THE GOVERNMENT OF BENGAL v. MUSSAMAT SHURRUFFUTOONNISSA, **3 W.R.P.C. 31 =1 Sar. 749=1 Suther. 405=8 M.I.A. 225.**

(20) —*Judgment reversed—Costs left to discretion of Courts below.*—In reversing the judgment of the Court below, the Judicial Committee remitted the cause with certain directions, leaving the question of the allowance of costs in the discretion of the Court below. GOPEEKRIST GOSAIN v. GUNGAPERSAUD GOSAIN, **6 M.I.A. 53=2 Suther. 13=1 Sar. 493=4 W.R.P C. 46.**

(21)—*Leave to appeal on* ex parte *application —Security for costs—Prosecution of appeal—Recognisance.*—Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the appellant prosecuting the appeal and giving security for £ 500. No step was, however, taken by the appellant to perfect the security or prosecute the appeal. The respondents, on being served with the order admitting the appeal, filed a counter-petition to revoke the leave granted to appeal. The Judicial Committee, under the circumstances, there having been great delay, made an order, putting the appellant upon terms of lodging his petition of appeal within six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognizance to £. 1,000 to cover the expenses occasioned by the proceedings in the Master's Office, reversing the costs of the application to revoke the leave to appeal, to the hearing. MCKELLAR v. WALLACE, **5 M.I.A. 372=8 Moo. P. C. 378=1 Equity Rep. 309=1 Sar. 453.**

(22)—*Appeal from Judicial Commissioner of Oudh not provided for—Privy Council, Admission of appeal by—St.* 3 *and* 4, *Vic., c.* 41, *s.* 4.

***Privy Council, Practice of*—continued.**

——1.—General—*continued.*

—No provision by Statute, or Charter, being made for appeals to Her Majesty in Council from judgments of the Court of the Judicial Commissioner of *Oudh*, created on the annexation of that kingdom in the year 1858, the Judicial Committee to prevent the denial of justice, admitted an appeal under Statute 3rd and 4th Will. IV, c. 41, s. 4. SALIK RAM v. AZIM ALI BEG, **8 M.I.A. 270=14 Moo.P.C. 329=1 Ind. Jur. N.S. 117=1 Sar. 840.**

(23)—*Refusal by High Court to grant leave to appeal to Privy Council—Application to Privy Council for special leave—Value of the matter for appeal within s.* 596.—In a suit for damages for Rs. 30,000, on the original side of the High Court, no assessment of the amount of damages having been made by the Court, an appeal was preferred before the appellate side of that Court. The appeal was dismissed and an application for leave to appeal to the Privy Council, was made, which was refused by the High Court, on the ground of the petitioner's failure to establish the value of the matter in dispute, for the appeal, to be Rs. 10,000 or upwards. A petition, preferred to the Privy Council thereon, for special leave to appeal, was granted, their Lordships holding that the value of the subject-matter of the suit must be taken to be the value for the purposes of the appeal, unless a different value has been determined for the latter as result of enquiry by Court or otherwise. IKRAMUL HUQ v. WILKIE, **33 C. 893, P.C.=33 I.A. 106.**

(24)—*Case involving new and arguable point —Grant of special leave to appeal.*—The Judicial Committee of the Privy Council will give special leave to appeal in cases coming from a place from which no appeal has hitherto been filed and involving new and important arguable points. The Court of the Political Agent in Kathiawar having refused to entertain a suit on the ground that the debt in question had not been certified to by the Political Agent, the plaintiff appealed to the Governor-in-Council and the latter also overruled the plaintiff's contention that the notification of the Government of India requiring the certificate of the Political Agent did not apply to his case. The question involved in the case was as to the retrospective effect of the notification. The plaintiff in another suit against another Talukdar, whose suit was also dismissed by the Court of the Political Agent on the same ground presented a petition to the Privy Council for grant of special leave to appeal, without preferring an appeal to the Governor-in-Council in the first instance. *Held* that, as the point raised by the petitioner had been adversely decided by the Governor-in-Council in another suit, the petitioner could apply direct to the Privy Council without having previously appealed to the Governor-in-Council, and their Lordships of the Judicial Committee could grant special leave to appeal. MAUN BHAGWANJI KANJI v. DARBAR SHRI VALA

***Privy Council, Practice of*—continued.**

——1.—General—*continued.*

JASA RUKHAD *and* HEMCHAND DEVCHAND v. AZAM SAKARLAL CHOTAMLAL *and* BUGWANDAS BECHARDAS v. VALA MANASIA NAG, **13 M.L.J. 154, P.C.**

(25)—*Leave to appeal to Her Majesty in Council granted without authority—Objection when to be taken—Special leave to appeal.*—The order of a High Court in India granting leave to appeal to Her Majesty in Council in a certain case being *ultra vires*, the respondent took a preliminary objection, before the commencement of the hearing of the appeal before Judicial Committee. Such objection was allowed and the appeal was dismissed with costs. An objection to the maintainability of an appeal must ordinarily be taken at the earliest possible opportunity. Their Lordships of the Judicial Committee may, however, in proper cases, entertain such objections at any stage and also grant special leave to appeal, directing that the petition for leave should go to Her Majesty with the report on the appeal itself. Such an application was under the special circumstances of this case refused. GAJADHUR PERSHAD v. THE WIDOWS OF EMAM ALI BEG, **15 B.L.R. 221, P.C.=2 I.A. 205=3 Sar. 495.**

(26)—*Lower Courts failing to decide principal question—Question of fact—Interference by Judicial Committee.*—Although the Judicial Committee adhere to the rule not to disturb the findings of two concurrent Courts in India upon a question of fact, yet, such rule does not prevail where the Courts in *India* have never dealt with the real question raised by the issues, and have drawn wrong inferences from the evidence. In such a case, the Court of ultimate appeal will disregard those concurrent judgments and decide the case upon the evidence contained in the record. MOULVI SYAD AZHAR ALI v MUSSAMAT BIBI ALTOOF JATINA, **4 B.L.R.P.C. 1=13 W.R.P.C. 1=13 M.I.A. 232=2 Suther. 279=2 Sar. 522.**

(27)—*Mistake of law — Point not taken in Court below.*—When parties before the Privy Council allege that a mistake has been made on a point of law, if they have not raised the point in the Court below, although it is certainly open to them to raise it before their Lordships, yet their Lordships ought to be satisfied that the Judge below has really made the mistake imputed to him and that the wrong decision complained against is attributable to such mistake. PAHALWAN SINGH v. MAHARAJA MUHESSUR BUKSH SINGH BAHADUR, **9 B.L R. 150, P.C.=16 W.R. P.C. 5=2 Sar. 683=2 Suther. 442, 660.**

(28)—*Privy Council—Practice—Fresh point—Not to be raised.*—It is not usual to allow a point to be raised on appeal to the Privy Council, which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of that Court. JIT SING v. MAHARAJ SINGH, **10 M.L.T. 551=M.W.N. 1912, 29, P.C.=15 C.L.J. 78=14 Bom. L.R. 30=16 C.W.N. 122=13 Ind. Cas. 257=21 M.L.J. 122.**

***Privy Council, Practice of*—continued.**

——1.—General—*continued.*

(29)—*Point not raised by issues in suit.*—A point not having been raised by the issues in the suit, the Judicial Committee refused to decide the question. KOOER GOLAB SING v. RAO KURUN SINGH, **10 B.L.R. 1, P C.=14 M. I.A. 176=2 Suther. 474=2 Sar. 722.** [*R.*, 2 M. 346.]

(30)—*Minors — Compromise — Procedure — Practice—Privy Council—Sale of claim—Collusion—Burden of proof.*—Where minors are parties to a suit, a compromise of such suit ought to be carried out by proper deeds and filed in Court so as to have the assent of the Court at the time instead of its being concealed from them. Objections to matters of practice will not be taken notice of by the Privy Council unless their Lordships could see and see very clearly that justice had not been done to the parties. [*F.*, 26 B. 109=3 Bom.L.R. 565; *R.*, 24 C. 908, F.B.=1 C.W.N. 597, 3 C.L.J. 119.] A suit was instituted by the plaintiff's guardian for the plaintiff's mother's share in certain dower. The suit was sold by the guardian for a smaller amount to a stranger who then proceeded with the suit and got a decree according to the plaint. The plaintiffs on attaining majority brought the present suit to set aside the sale as collusive. *Held* that it was incumbent on the purchaser to prove that he paid the consideration to the plaintiffs when they came of age or at least that the money reached the plaintiffs' hands when they came of age. MOULVIE ABDOOL ALI v. MOZUFFER HOSSEIN CHOWDHRY, **16 W.R.P.C. 22=2 Suther. 462.** [*F.*, 26 B. 109=3 Bom.L.R. 565; *R.*, 24 C. 908, F.B.=1 C.W.N. 597, 3 C.L.J. 119.]

(31)—*Execution of orders of Privy Council—Procedure Act* II *of* 1863, *s.* 14—*Declaratory orders.*—A party in a suit, desirous of executing an order or judgment of Her Majestty in Council, ought to apply, in conformity with s.14, Act II of 1863, to the Court from which the appeal was finally brought to the Queen in Council, to enforce and execute the decree of Her Majesty in Council; and it is the duty of such Court to give directions for executing the decree to the Court of first instance by which the suit was originally tried. A declaration of Her Majesty in Council must not be considered as not being equivalent to an order. When Her Majesty in Council does make a declaration, the form in which that declaration is conceived, and the words in which the order is framed, amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed. If any difficulty should arise in that form, or be sought to be produced from having recourse to that non-existent ground of objection, the Privy Council will not fail to recommend Her Majesty to deal with such obstructiveness in the most serious and stringent manner. BARLOW v. ORDE, **3 P.R. 1872, P.C.=18 W. R. 175.** [*R.*, 9 B.H.C. 398; *D.*, 19 W.R. 232.]

***Privy Council, Practice of*—continued.**

——1.—General—*concluded.*

See APPELLATE COURT—DUTY OF APPELLATE COURT, 1 Hyde 223.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 16 W.R. 5, P.C.=9 B.L.R. 150.

Whether appeal lies from Governor-General's agent in Bhopal to— *See* ARBITRATION—MISCELLANEOUS, 12 C.W.N. 585, P.C.=7 C.L.J. 520=138 P.L.R. 1908=10 Bom. L.R. 581=18 M.L.J. 266=99 P.W.R. 1908=14 Bur. L.R. 146=4 M.L.T. 25=80 P.R. 1908=35 C. 648=35 I A. 83.

See CHUR LANDS, 6 B.L.R. 677, P.C.=15 W.R.P.C. 20=13 M.I.A. 607.

See CROWN GRANTS, 2 Knapp. 103.

See EVIDENCE—PRACTICE, 2 W.R. 1, P.C.

See GRANT—CONSTRUCTION, 18 W.R. 469.

See HINDU LAW—INTERPRETATION, 7 A. 114=A.W.N. 1884, 282.

High Court refusing to admit appeal beyond time—*See* LIMITATION ACT, 1908, ss. 4, 5, 30 C. 309, P.C.=30 I.A. 20.

Order of Privy Council confirming decree of lower Court—Application to enforce the order—Application of art. 180, Limitation Act (1877)—*See* LIMITATION ACT, 1908, art. 183, 4 Ind. Cas. 402.

Order of—Confirming decree of lower Court—Execution—*See* LIMITATION ACT, 1908, art. 183, 8 C. 218, F.B.=10 C.L.R. 425.

See MESNE PROFITS—SUIT FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 5 B.L.R. 611, P.C.=14 W.R.P.C. 21=13 M.I.A. 479=2 N.W.P. 402.

See PRACTICE AND PROCEDURE, 2 M.I.A. 181, 2 M.I.A. 441, 13 M.I.A. 232.

Where question of fact involved legal considerations in every point in the reasoning process, though findings of Indian Courts were concurrent, the Privy Council could review such findings in appeal—*See* BEN. REG. III OF 1891, 12 C.W.N. 1095=4 M.L.T. 234=10 Bom. L.R. 1102=8 C.L.J. 436=18 M.L.J. 549=36 C. 1=P.L.R. Journal parts, 110=1 Ind. Cas. 182.

View of—Weight to be attached—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 10 M.L.T. 298.

——2.—Concurrent judgments on facts.

(1)—*Concurrent findings of fact—Practice.*—When there are concurrent findings of the Courts below on questions of fact, the Privy Council will not interfere with such findings. KADIR MOIDIN v. NEPEAN, **26 C. 1, P.C.=2 C.W.N. 665=25 I.A. 241=7 Sar. 394.** [*F.*, 50 P.R. 1904=83 P.L.R. 1904.]

(2)—*Findings on fact—Practice.*—Where the findings of the two Courts are concurrent on a

***Privy Council, Practice of*—continued.**

——2.—Concurrent judgments on facts —*continued.*

matter of fact, they would not be questioned by the Judicial Committee MAHABIR PERSHAD v. RADHA PERSHAD SINGH, **18 C. 540, P.C.=6 Sar. 16.**

(3)—*Question of fact, concurrent findings of two lower Courts on—Practice of Privy Council.*—The ordinary rule of the Judicial Committee is not to disturb the concurrent findings of two lower Courts, on a question of fact, but to accept them. The mere fact that a part of the evidence in the suit has not been considered by the lower Court does not prevent the rule from applying when both Courts have arrived at the same result. RAM LAL v. MEHDI HUSAIN, **17 C. 882=17 I.A. 70, P.C.=5 Sar. 572.**

(4)—*Concurrent findings of fact—No question of law involved—Practice*—No question of law being involved in the case, *held* that the Judicial Committee will not interfere with the concurrent findings of two lower Courts on a question of fact. LACHMAN LAL CHOWDHRI v. KANHAYA LAL MOWAR, **22 C. 609, P.C.=22 I A. 51=6 Sar. 558.** [*R.*, 10 O.C. 308-B, 4 A.L.J. 121=A.W.N. 1907, 36=29 A. 267.]

(5)—*Practice—Concurrent findings — Privy Council.*—The Privy Council followed in this case the usual course of confirming the concurrent judgments of the Courts below on questions of fact, and stated that, even if they had felt some doubts in it, they would have hesitated long when they were asked to continue the litigation, and send the matter again for trial in India. DEVAJI GAYAJI v. GODABHAI GODBHAI, **2 B.L.R. P.C. 85=11 W.R. P.C. 35=2 Suther. 208.**

(6)—*Practice—Concurrent findings on facts.*—Where two Courts have concurred, their findings will be accepted and the Privy Council will not disturb such concurrent findings of fact. BIRESWAR MUKERJI v. ARDHA CHANDER ROY, **15 C. 452, P.C.=19 I.A. 101=6 Sar. 171.**

(7)—*Practice — Concurrent findings.*—The Judicial Committee will not, as a rule, disturb the concurrent decisions of both the Courts below upon a question of fact, unless it very clearly appears that there has been some miscarriage of justice, some mistrial or that the conclusion is very plainly erroneous. GOSAIN TOTA RAM v. RAJA RUKINIBALLAB, **3 B.L.R.P.C. 34=12 W.R.P C. 32=13 M.I.A. 77=2 Sar. 487=2 Suther. 253.**

(8)—*Concurrent judgments on fact.*—The rule of the Privy Council, not to allow the concurrent judgments of two Courts, on a question of fact, to be disputed, may be relaxed if the questions of fact are a great deal mixed up with questions of law. PAULIEM VALOO CHETTY v. PAULIEM SOORYAH CHETTY, **1 M. 252=4 I.A. 109, P.C.=3 Sar. 698**

(9)—*Privy Council -- Appeal on question of fact—Concurrent findings in Indian Courts —Practice.*—In an appeal to the Privy Council

***Privy Council, Practice of*—continued.**

—2.—Concurrent judgments on facts *—continued.*

on a question of fact which has been decided in the same way by both Courts in India, it is the duty of the appellant to satisfy their Lordships of the Privy Council, beyond all reasonable question, that there was some miscarriage in the Courts below in respect of some principle which they acted upon, in respect of some presumption to which too much weight was given or in respect of something as to which they could see that there was a matter of principle involved which they ought to set right for the guidance of the Courts of India in other cases. GOBINDSUNDARI DEBI v. JAGADAMBA DEBI, **6 B.L.R. 168, P.C.=15 W.R. P.C. 5=6 M.J. 113=2 Suther. 375=2 Sar. 611.** [*R.*, 14 B. 463.]

(10)—*Practice of Privy Council, in disturbing concurrent findings of lower Courts, on a matter embracing a number of facts.*—Where a question is not simply one of fact, but one which embraces a great number of facts, whose significance is best appreciated by those who are most familiar with Indian manners and customs, the Privy Council would be specially unwilling to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. UMRAO BEGUM v. IRSHAB HUSAIN, **21 C. 997, P.C.=21 I.A. 163=6 Sar. 469.** [*F.*, 28 A. 215, P.C.=10 C.W.N. 230=3 C.L.J. 86=16 M.L.J. 77=1 M.L.T. 6.]

(11)—*Concurrent findings of fact by lower Courts, discretion of Appellate Courts not to interfere with.*—Where, touching the concurrent findings of fact in both the lower Courts, nothing was stated on appeal to the Privy Council, that could make Their Lordships form an opinion that, if they went through the whole of the evidence, and differed from the Courts below, they would differ from them on any thing but questions of pure fact, the case was held by Their Lordships to fall within the rule which makes the appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. On the question of the credit due to witnesses, Their Lordships will have the same reluctance to interfere with the concurrent findings of the lower Courts thereon. KRISHNAN v. SRIDEVI, **12 M. 512, P.C.=5 Sar. 455.**

(12)—*Appeal to Privy Council—Concurrent findings on facts.*—Where the lower Courts proceeding upon evidence, had come to the same decision on substantially the same grounds, the Judicial Committee of the Privy Council, as a rule of practice, would not enter into the question whether the decisions of the Courts below were or were not correct on matters of fact. JAIMUNGAL KOERI v. MOKHUN KOERI, **10 C.L.R. 611=4 Sar. 344.**

(13)—*Practice of Privy Council—Concurrent findings on fact—Miscarriage of justice or violation of law.—Appellants failing to prove.*—On

***Privy Council, Practice of*—continued.**

—2.—Concurrent judgments on facts *—continued.*

the appellants before the Judicial Committee failing to show any miscarriage of justice or the violation of any principle of law or procedure, their Lordships refused to interfere with the concurrent findings of two Courts on pure questions of fact, although they thought the case to be one of great difficulty. RANI SRIMATI v. KHAGENDRA NARAIN SINGH, **31 C. 871, P.C.=31 I.A. 127=9 C.W.N. 74=8 Sar. 635.**

(14)--*Inferences of fact--Concurrent findings by two lower Courts, not influenced by precisely the same considerations, upon the same evidence.*—It cannot detract from the weight of concurrent findings of fact that different Courts, in arriving at the same results upon the same evidence, have not been influenced by precisely the same considerations ; a difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it necessarily leads to one and the same inference. NILMONI SINGH DEO BAHADUR v. KIRTI CHUNDER CHOWDHRY, **20 C. 847, P.C.=20 I.A. 95=6 Sar. 321.**

(15)—*Concurrent findings of fact.*—Where the question is essentially one of fact, and of the weight and credibility of evidence upon which the Court of review can never be in quite as good a position to form an opinion as the Court of first instance, it would probably be enough to prevent their Lordships from interfering if it should appear that there was evidence such as might justify either view without any clear preponderance of probability. FATIMA BIBI v. SHEIKH AHMED BUKSH, **10 Bom. L.R. 50=35 C. 271=22 C.W.N 214=7 C.L.J. 122=18 M.L.J. 6= 35 I. A. 67, P.C.**

(16)--*Concurrent judgments on facts--Practice.*—It is a principle recognized by the Judicial Committee, and commonly observed in second Courts of appeal, that such Courts will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned. MOUNG THA v. MOUNG PAN, **2 Bom. L.R. 985=28 C. 1=4 C.W.N. 808=27 I.A. 166=7 Sar. 786.**

(17)—*Concurrent findings of fact.*—It would be inappropriate that the Privy Council, in reviewing concurrent judgments, should rediscuss the evidence in detail. IBRAHIM v. SAIBOO, **9 Bom. L.R. 872=4 A.L.J. 572=11 C.W.N. 973=35 C. 1=6 C.L.J. 695=17 M.L.J. 408=34 I.A. 167.**

(18)—*Trial—Question of fact.*—Where the issue is one of fact only, and there have been concurrent judgments by the Courts in India, the Judicial Committee will not disturb such finding, unless they are satisfied that the Courts below were wrong in the conclusions they arrived at from the evidence. MEETHUN BEBEE v. BUSHER KHAN, **7 W.R. P.C. 27=11 M.I.A. 213=1 Suther. 683=2 Sar. 255.** [*R.*, 17 A. 294, F.B.]

***Privy Council, Practice of*—continued.**

—2.—Concurrent judgments on facts *—continued.*

(19)—*Pleadings — Concurrent findings — Frame of issue upon question of title to land.*—As a rule, the Judicial Committee will not disturb the concurrent judgments of the Courts below on questions of fact, if the facts, as found, are decisive of the real issue between the parties under the circumstances. [*F.*, 20 B. 699.] From the frame of the issue upon a question of title to land, decrees of the Courts below were by their lordships reversed, without prejudice to a new suit being brought by the plaintiff upon a different issue. RAJAH BURDACANT ROY v. BABOO CHUNDER COOMAR ROY, **11 W.R. P.C. 1=2 B.L.R. P.C. 1=12 M.I.A. 145=2 Suther. 169=2 Sar. 402.** [*F.*, 20 B. 699.]

(20)—*Appeal to Privy Council—Concurrent judgments — Questions of fact — Conflicting evidence—Practice.*—Where the circumstances are very extraordinary, and it is difficult to come to a satisfactory conclusion one way or the other on account of the conflicting evidence in the case, the Privy Council will not disturb the judgment given by the Courts in India, where the party appealing was the party upon whom the *onus* of proof lay, and who had failed to make out his case to the satisfaction of those who had to decide. RAJA ROW VENKATA NILADRY ROW v. ENOOGOONTY SOORIAH, **5 W.R. P.C. 79=1 Suther. 16=2 Knapp. 259.**

(21)—*Hindu Law — Joint property—Self-acquired property thrown into common stock—Questions of fact—Concurrent judgments.*—The Courts in India, original and appellate, had found, and arrived at the conclusion that certain property, though originally self-acquisition of a member of a joint Hindu family, had been thrown into the common stock and had thereby become joint property. These conclusions were based upon admissions made by the parties in documents. The Judicial Committee refused to disturb the judgments of the Courts below. CHELLAYAMAL v. MUTTIAL AMAL, **15 W.R. P.C., 1.** [*F.*, 33 C. 1119=10 C.W.N. 765=3 C L.J. 616.]

(22)—*Concurrent findings of fact by lower Courts—Interference by appellate Court—Its powers.*—The findings on questions of fact by two lower Courts when they are concurrent, cannot be interfered with by the appellate Court. So, in a case where, on the allegation that he and the defendant had lived in commensality and enjoyed certain joint property, of which the defendant, being the elder, was the manager, and that the latter had no exclusive possession thereof as alleged by him, the plaintiff applied for his share of the joint property, and both the lower Courts had found against the defendant, *held* that there was no ground for reversing the decree. JOYNARAIN GIRI v. SHEEB PROSHAD GIRI, **19 W.R. 275 =2 Suther. 816.**

(23)—*Appeal—Concurrent findings—Question of fact—Custom.*—Their Lordships of the Privy Council declined to interfere in a case where

***Privy Council, Practice of*—continued.**

—2.—Concurrent judgments on facts *—continued.*

there were two concurrent decisions on a question of fact, *viz.*, whether there was any special custom, applicable to the class of persons to whom the parties belonged, which would exempt them from the operation of the Mitakshara Law with reference to inheritance. MUST. KISHMISH KOER v. PHUL CHAND LAL, **6 Bom.L.R. 764.**

(24)—*Concurrent findings of fact by two Courts—Interference by Privy Council.*—Findings on questions of fraud and undue influence are findings of fact, and the judicial committee of the Privy Council will not, except under peculiar circumstances, interfere with findings of fact by two Courts. AJIT SINGH v. BIJAI BAHADUR SINGH, **11 C. 61, P.C.=11 I.A. 211 =4 Sar. 560.**

(25)—*Question of fact — Considerations of law involved in the process of reasoning.*—Their Lordships were unable to accept the contention that the question whether certain *jhum* lands lay within or without the limits of the settled estates was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India because, in a sense the question was one of fact; but at every point in the process of the reasoning considerations of law had to be regarded. MAHOMED ALI v. SECRETARY OF STATE, **10 Bom. L.R. 1101 =12 C.W.N. 1095=4 M.L.T. 234= 36 C. 1=8 C.L.J. 436=18 M.L.J. 549=35 I.A. 195.**

(26)—*Concurrent decisions of fact—Fabricated documents—Practice.*—Judgments of the lower Courts—holding that two documents set up by the defendants under which they claimed to hold as jotedars were fabrications — upheld. Where the lower Courts have come to the same finding on a question of fact, their Lordships, before interfering with such finding, will see not merely that there is a mere balance of testimony, but that there is so strong a preponderance of testimony against that finding, that they can confidently pronounce it to be wrong. RANI SARAT SUNDARI DEBI v. KUMAR PARESNARAYAN ROY, **8 B.L.R. 113, P.C.=16 W.R. P.C. 9.**

(27)—*Practice of Privy Council—Question of fact—Concurrent findings.* — Where the first Court found that the instrument was not genuine, and the High Court on appeal, upheld this finding, but had considered relevant, and had admitted in evidence documents rejected by the first Court when tendered by the appellant, such reception of evidence would afford no reason for making the case an exception to the application of the rule, in the discretion of the Committee, against the disturbance of concurrent decisions upon a fact in issue below. HURRI BHUSAN MUKERJI v. UPENDRA LAL MUKERJI, **24 C. 1, P.C.=23 I.A. 97 =6 Sar. 680.**

(28)—*Case in which the Judicial Committee refused to go into questions of fact and evidence.*—In a suit, which involved a disputed question

Privy Council, Practice of—continued.

——2.—Concurrent judgments on facts —*continued.*

of fact as to an alleged adoption and the due execution of a Will, the Court in India, disregarding other evidence, relied solely upon the evidence of a witness examined at the instance of the Court itself. The effect of the evidence of this witness was to show that at the time of the adoption and execution of the Will, the alleged Testator was in a dying state, and, although at times roused to consciousness, was, from his enfeebled mind, incapable of understanding the acts he was represented to have performed; the Court below, however, upon the evidence of this witness as to his testamentary capacity, corroborated, as it thought, by a letter of the widow of the alleged Testator, recognizing the adoption, and by her acquiescing in the performance of certain funeral rights of her deceased husband by the supposed adopted son, pronounced both the adoption and the will to be valid. Upon appeal, *held*, that although as a general rule, on a question of fact, the Judicial Committee were unwilling to disturb the judgment of the Court below, yet that as it was the duty of the appellate Court to weigh the evidence and probabilities, and form an independent judgment, and taking into consideration the evidence regarding the state and capacity of the alleged adopter and Testator, they were of opinion that the evidence relied upon was so unsatisfactory, that neither of the decrees of the Courts below could be supported, and reversed the same with costs. TAYAMMAUL v. SASHACHALLA NAIKER, **10 M.I.A. 429=2 Sar. 139.**

(29)—*Evidence as to custom of inheritance—Concurrent findings by lower Courts—Re-examination of case by Privy Council.*—Where an alleged custom of inheritance among an Oudh clan was found not proved by the original and appellate Courts, upon evidence of instances of succession in kindred families and of rights recorded in certain *wajib-ul-arz*, *held*, that, in the absence of proof of any principle of evidence not having been properly applied or of any documentry evidence to show that the lower Courts had been led into error, the case would not be re-examined on appeal to the Privy Council. THAKUR HARIHAR BAKSH v. THAKUR UMAN PRASHAD, **14 C. 296, P.C.=14 I.A. 7=4 Sar. 766.** [*R.*, 3 O.C. 22, 26 A. 299, P.C.]

(30)—*Question of fact—Privy Council—Practice.*—When the question is one simply of fact, and when, above all things, the question of fact is as to boundaries, where the local knowledge of the local Judges and the observation of the local witness are all important, the Privy Council will not interfere with the concurrent decisions of the lower Courts. MAHARAJ KUMAR BABOO GANESWAR SING v. DURGA DUTT, **7 B.L.R. 651, P.C.=15 W.R. P.C. 37=6 M.J. 143.**

(31)—*Practice—Concurrent findings of fact—Interference by Privy Council—Compromise and decree thereon—Review.*—Where the controversy is as to the weight to be attributed to

Privy Council, Practice of—continued.

——2.—Concurrent judgments on facts —*continued.*

evidence, the Privy Council will not differ from the concurrent decisions of the two Courts below, unless they find that there has been some violation of the ordinary principles upon which causes ought to be tried. A decree was founded upon a compromise. An application for review was made, and facts were brought to the knowledge of the Court showing that the compromise ought to be treated as a nullity. The Privy Council treated that application for review as a proper mode of raising the question whether the compromise ought to be treated as a nullity or not. LALJI SAHU v. THE COLLECTOR OF TIRHOOTT, **6 B.L.R. 648, P.C.=15 W.R.P.C. 23=6 M.J. 143.** [*F.*, 10 C. 612; *Rel. on*, 6 C.W.N. 82; *Cons.*, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 865; *R.*, 34 C. 83.]

(32)—*Will—Constructive compliance with terms of Will—Will admitted to probate Proof.*—The heirs of a Parsee merchant having, upon his death, taken possession of his shop and continued to carry on his business for nearly two years, the Courts below refused to disturb their possession upon the production of a will, by which the business was directed to be carried on by the executor for their benefit, until he should think proper to admit them into possession. *Held*, that the abstaining from producing the Will for the above period was a consent on the part of the executor to the heirs' possession of their father's estate and business and was, therefore, a virtual compliance with the terms of the Will. *Semble*:—Where an instrument has been admitted to probate, and acted upon in the Courts below, the Privy Council will not enter into the question whether the instrument is sufficiently proved or not. KHORSHEDJEE MANIKJEE v. MEHRWANJEE KHOORSHEDJEE, **5 W.R. P.C. 57=1 M.I. A. 431=1 Suther. 73=1 Sar. 138.**

(33)—*Mortgage—Conditional deed of sale—Concurrent decision of Indian Courts.*—Where a question arose as to whether a document was an ordinary mortgage or a conditional deed of sale, and both the Indian Courts decided that it was an ordinary mortgage. *Held*, that the concurrent decision of two Courts should not be lightly set aside; and that upon the evidence adduced, the lower Courts came to a correct conclusion. AGHA HUSSUN KHAN BAHADOOR v. MUSSAMUT JANEE BEGUM, **8 M.J. 149.**

(34)—*Pleadings—Practice—New plea before Privy Council.*—In the lower Court, the only point raised and argued by the defendant was whether or not defendant's agent signed certain accounts by which it was sought to bind the defendant. That point was decided against the defendant in the Indian Courts. On appeal before the Privy Council, the defendant raised the plea, for the first time, that his agent had no authority to bind him. The Judicial Committee refused to entertain such plea. BABOO LALL v. LUTTOO RAM, **18 W.R. P.C. 233.**

***Privy Council, Practice of*—continued.**

——2.—Concurrent judgments on facts *—concluded.*

(35)—*Civ. Pro. Code, s.* 596—*Substantive question of law, meaning of—Privy Council—Practice—Concurrent findings of facts by lower Courts.*—The last paragraph of s. 596 of the Civ. Pro. Code, is to be construed with reference to the practice of the Privy Council declining to interfere with concurrent findings of fact of the lower Courts, and so, a question which only arises if the concurrent findings of fact by the lower Courts are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, cannot constitute a substantial question of law which the appeal to the Privy Council involves. It cannot be said that an appeal involves a question of law, when it is in a high degree improbable that the Privy Council will entertain the question at all, having regard to its established practice above referred to. BANKE LAL v. JAGAT NARAIN, **23 A. 94=A.W.N. 1901, 8.** (2 C. 228, 16 C. 292 N, 20 B. 699, *R.*) [*F.*, 59 P.R. 1905=177 P.L.R. 1905.]

See TITLE, 19 W.R. 1.

——3.—Costs.

(1)—*Privy Council decree—Costs.*—When a decree of the Privy Council gives a certain specified sum as the costs of the appeal to England and also awards the costs incurred in the Courts in India, it must be construed as entitling the decree-holders to take out execution in respect also of the costs of translating the record of the appeal and transmitting it to England. ASGUR ALI v. NUGENDRO CHUNDER GHOSE, **23 W.R. 463.** (15 W.R. 356, 18 W.R. 89, 21 W.R. 411, *F.*)

(2)—*Inclusion of irrelevant papers in appeal—No objection by respondent—No costs.*—The Privy Council did not deprive the successful appellant of any part of his costs for the inclusion in the record of a bulk of papers absolutely irrelevant to the appeal, as the respondent did not object to their inclusion. BIJOY GOPAL MUKERJI v. SHRIMATI KRISHNA MAHISHI, **9 Bom. L.R. 602=11 C.W.N. 424=5 C.L.J. 334=2 M.L.T. 133=17 M.L.J. 154=4 A.L.J. 329=34 C. 329=34 I.A. 87.**

(3)—*Costs of inserting irrelevant matter in printed record—Procedure of Privy Council.*—Where plenty of irrelevant matter had been introduced into the printed record in an appeal before the Privy Council, their Lordships directed the Registrar to omit such matter in taxing the costs. PITTAPUR RAJA v. BUCHI SITAYYA, **8 M. 219, P.C.=12 I.A. 16=4 Sar. 598.**

(4)—*Appeal to Privy Council—Costs occasioned by inclusion of unnecessary documents.*—In taxing the costs of appeal to the Privy Council, all such costs and expenses as may have been unnecessarily occasioned by the inclusion, in the transcript sent from India, of matters

***Privy Council, Practice of*—continued.**

——3.—Costs—*continued.*

improperly introduced therein, should be disallowed. TARAKANT BANNERJEE v. PUDDAMONEY DOSSEE, **5 W.R. P.C. 63=10 M.I.A. 476=2 Sar. 184=1 Suther. 631.**

(5)—*Privy Council—Costs.*—Where the Privy Council reversed the decrees of three Courts in India with costs in each, and dismissed the suit with costs specifying a sum as the costs of the appeal to itself, *held* that such sum did not include the costs of translation, etc., incurred in the High Court. MUSSAMAT UMATUL FATIMA v. AZHUR ALI, **9 B.L.R. App. 23, Note.** [*R.*, 10 C. 106.]

(6)—*Respondents filing printed case and not appearing at hearing—Hearing* ex parte—*Right of respondents to costs—Practice.*—When the respondents file their printed case, and do not appear at the hearing, they, notwithstanding their non-appearance, are, on the appeal being dismissed, entitled to the costs thereof, up to, and including the filing of their printed case, as well as to the cost of applying for those costs. SUMBHU NATH SANTRA MAHAPATRA v. SURJAMONI DEI, **25 C. 187, P.C.=24 I.A. 191=1 C.W.N. 649=1 Sar. 247.**

(7)—*Appeal to Privy Council—Specific costs—Translating and printing, costs of—Waste.*—Although, upon ordinary principles, where an order directs payment of costs, and afterwards specifies a particular sum, such sum comprises all costs, yet as it has never been the practice of the Privy Council to make a specific order as to costs incurred here for preparation and transmission of the record, and as it had been too long the practice of the High Court to allow costs to adopt now a different rule, and as there had not been unnecessary expense in this case, the Court allowed the costs. *Semble*:—Had there been extravagance and waste in the preparation of the record, the Court would have referred the parties to England. SARODA PRASAD MULLICK v. LACHMIPAT SINGH DUGAR, **9 B.L.R. App. 23, N=18 W.R. 89.** [*F.*, 9 B.L.R. App. 22=18 W.R. 253; *R.*, 23 W.R. 463.]

(8)—*Costs—Appeal to Privy Council—Court's discretion as to costs—Bombay Code, Reg.* II *of* 1800, *s.* 7—*Practice.*—Where a discretion is vested in a Court as to costs, the Privy Council will not allow an appeal against the exercise of that discretion, because no appeal against a mere decree as to costs will be allowed. But where the Court has no discretion to exercise upon the subject (as for instance, where a suit was instituted by parties who had no right to institute it, as the person, in whose name and on whose behalf they instituted it, was dead at the time and therefore, having no right to institute it and the judgment was upon the merits), costs ought to follow the decree. MUSSUMAT KEEMEE BAEE v. LUCHMUN DAS NARAIN DAS, **5 W.R. P.C. 59=1 M.I.A. 470=1 Suther. 75=1 Sar. 141.** [*R.*, 3 M.H. C. 279.]

***Privy Council, Practice of*—continued.**

—3.—Costs—*continued.*

(9)—*Misstatements in petition for special leave to appeal—Costs.*—An order in Council granting leave to appeal is liable at any time to be rescinded with costs, if it appear that the petition upon which the order was granted contains any misstatements or any concealment of facts which ought to be disclosed. Even in the absence of bad faith the effect of a misstatement of a material fact is the same, if the Court has been induced to make an order, which, if the facts were fully before it, it would not or might not have been induced to make. In order, therefore, to maintain the order, it is not enough to clear the case of bad faith. (8 M. I.A. 195, *R. & F.*). Where, of three grounds on which special leave to appeal had been obtained, two were found to have been correctly stated, but in respect of the third, there was error in the petition, to which objection was taken at the hearing, *held*, on its appearing that there had been no intention to mislead, that the appeal might be heard and allowed, but without costs. THE MUSSORIE BANK v. ALBERT CHARLES RAYNOR, **4 A. 500, P.C. = 4 Sar. 346 = 9 I.A. 70.** (2 I A. 82, *R.*)

(10)—*Costs — Defending judgment—Appeal. —Proof of gomastah's authority to endorse.*—A suit was decreed in the Court of first instance and the decree was affirmed in appeal. The Privy Council, holding that the plaintiff had not made out his case, reversed the judgment and awarded to the defendant costs in the first Court and not in either of the Appellate Courts, on the ground that the plaintiff, as respondent, was defending the judgment. A party resident at Baroda indorsed two *hoondies*, or Bills of exchange, in the name of a firm carrying on the business of banking at Surat, alléging himself to be the *Gomastah* or Agent of the firm, and afterwards, on the Bills being dishonoured, absconded. *Held*, that in order to fix the firm at Surat with the amount of the Bills, clear evidence ought to have been produced of the authority to act as *Gumastah*; and their Lordships not being satisfied with the evidence admitted in the Courts below, reversed the decrees of both the *Zillah* and *Sudder Courts* with costs. MADHO ROW CHINTO PUNT GOLAY v. BHOOKUN-DAS BOOLAKI-DAS, **5 W.R. P. C. 33 = 1 M.I.A. 351 = 1 Suther. 54 = 1 Sar. 128.**

(11)—*No appeal by defendant from interlocutory decree—Report of master's office—Interlocutory decree appealed from to England—Costs of proceedings in master's office.*—A defendant did not appeal from an interlocutory decree, but proceeded in the Master's office in respect of the matters included in the accounts; but before the general report was made by the Master, he appealed from such interlocutory decree to England. In reversing such decree, the Judicial Committee ordered him to pay the costs of the proceedings in the Master's office, and remitted the cause to the Court below, with directions, that the costs payable to the defendant upon the dismissal of the bill, and the costs payable by him consequent upon his proceedings in the Master's office, should be set off, the one against the other, and the balance paid to the party entitled to the same. MC. KELLER v. WALLACE, **5 M.I.A 372 = 8 Moo. P.C. 378 = 1 Equity Rep. 309 = 1 Sar. 453.**

(12)—*Evidence—Existence of probabilities in favour of transaction, duty of Court to consider —Letter in the nature of guarantee.*—The sole question in this case was whether the appellant had produced adequate proof that a document upon which he relied was a true and genuine instrument. It was not denied on the part of the respondents that, if that document were genuine, the effect of it would be to exonerate the appellant from the demand made against him; nor was it said on the part of the appellant that he would not be liable if not protected by the document in question. The Judicial Committee agreed with the following arguments among others, urged for the respondents, *viz.*, that considering the habits and customs of the natives of India, their well-known propensity to forge any instrument which they might deem necessary for their interest, and the extreme facility with which false evidence is procurable from witnesses, the probability or improbability forms a most important consideration in ascertaining the truth of any transaction relied upon. The Committee expressed their opinion that the whole of the transaction under consideration was perfectly consistent with probability; and, in support of the genuineness of the document relied on, there was the evidence of witnesses against whose veracity no solid objection had been raised beyond the general observation that oral evidence in India is untrustworthy; and held that where the probabilities are thus in favour of the transaction, the Court should not conclude against it solely because of the general fallibility of native evidence; such an argument would go to an extent not maintainable in any Court, for, it would tend to establish a rule that all oral evidence must be discarded, and it is manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it. In this case, their Lordships also observed that, however much they may lament the great latitude with which documentary evidence is received in the Courts in India, it would be contrary to justice in any particular case, to visit upon an individual penal consequences merely because the administration of justice was not more strictly conducted with reference to the admission of evidence. A letter in the nature of a guarantee, wholly in the handwriting of *A.*, written upon stamped paper, sealed, but not signed or attested by witnesses, or registered, to *B.*, a co-plaintiff with *A.*, undertaking to indemnify *B.* from costs, if he would join as a co-appellant with *A*, in an appeal to England, established, and *held* to operate as a release in an action brought by *A*'s heirs

***Privy Council, Practice of*—continued.**

—3.—Costs—*continued.*

against *B.* to recover his *pro rata* share of the costs of the appeal. BUNWAREE LAL v. MAHARAJAH HETNARAIN SINGH, **4 W.R.P.C. 128=7 M.I.A. 148=1 Sar. 610=1 Suther. 307.** [*R.*, W. R. F. B., p. 4.]

(13)—*Interest, slight modification of rate of —Costs of appeal—Respondent's right to costs.*—A slight modification as to the rate of interest was *held* not sufficient to deprive the respondent of costs of appeal. LALLA BUNSEEDHUR v. KOONWUR BINDESEREE DUTT SINGH, **10 M.I.A. 454 = 2 Sar. 167.**

(14)—*Agreement by Council not to appeal—Effect—Costs—Sum given* nomine expensarum. —The High Court at Calcutta, at the instance of the appellant's Counsel, agreed to confine the decision of that Court to one point, with an undertaking that no appeal to Her Majesty in Council should be made from the decree. Notwithstanding such undertaking, an appeal was brought to England. The High Court certified in the record the undertaking. *Held*, by the Judicial Committee, on a preliminary objection being taken to the hearing on the ground of the incompetency of the appeal, that such undertaking precluded an appeal. [*App.*, 8 C. 455 ; *R.*, 1 A. 267 F.B., 15 C.P.L.R. 73.] As none of the respondents had applied in the first instance to dismiss the appeal on that ground, but had allowed the case to proceed to the hearing of the appeal, a fixed sum of money *nomine expensarum* was allowed to each of the respondents. MUNSHI AMIR ALI v. MAHARANI INDERJIT KOER, **9 B.L.R. 460, P. C.=14 M.I.A. 203=2 Suth. 479=2 Sar. 731.**

(15)—*Rules of English law relating to champerty and maintenance, not applicable as such in India—Nature of transaction, Court to look into—Appeal affirmed—Costs.*—The grounds on which the Judicial Committee arrived at the conclusion in this case made it unnecessary to decide whether, under the law as administered in the Courts of India, those acts which in the English Law, are denominated either maintenance or champerty, and are punishable as offences, partly by the common law, and partly by Statute, are forbidden. They observed however, in passing, that although it may be admitted that the Court would have the right, perhaps even be under an obligation, to take cognizance *proprio motu* of any objection manifestly apparent on the face of the proceeding which showed that it was against morality or public policy ; yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation or answer by counter evidence, it is highly inconvenient,as well as contrary to the ordinance which regulates the practice of the Court, and may lead to the most direct injustice to enter into the enquiry if the issue has not been presented by the pleadings, or the points recorded for proof. In the present case, their Lordships *held* that the nature of the transaction

***Privy Council, Practice of*—continued.**

—3.—Costs—*concluded.*

was such as not to affect the points on which the whole question of maintenance depended, which was this—was the appellant suing in respect of his own interest for a violation of a contract made with himself, or was he representing another man's interest and suing on a contract to which he had been originally a stranger, in virtue only of the objectionable assignment ? The appellant was the real party to the original agreement, and the person really interested in its performance ; he was to advance the loan; the profits that were expected to result from the loan were to be his ; he might have intervened in the first instance, and conducted the litigation which first ensued in his own name. The agent was contracting for the appellant avowedly as agent only, not undertaking to borrow from the appellant the money, and then lend it to the respondent but to procure for him the loan of it from the appellant. [*F.*, 1 M.H.C. 153; *Appl.*, 12 M. 118, 6 B.H.C. 63, 8 B.H.C.O.C. 1, 22 W. R. 148, 2 C. 233, P.C.=4 I.A. 23 ; *R.*, 11 A. 57, 31 C. 433=8 C.W.N. 408, 2 Ind. Cas. 385 ; *D.*, 14 B. 72.] Where an appeal was affirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs. FISCHER v. KAMALA NAICKER, **3 W.R.P.C. 33=8 M. I. A. 170=1 Suther. 395=1 Sar. 733.**

See CO-SHARERS—GENERAL, 16 C. 62, P.C.

See COSTS—INTEREST ON COSTS, 1 P. R. 1877.

—4.—Cross-appeal.

(1)—*Cross appeal before appeal—Admission of —Conditions.*—A cross-appeal from a decree of the *Sudder Dewanny* Adawlat Court in India, although not interposed within the proper time was admitted, upon conditions (1) of the principal appeal being prosecuted ; and (2) that the principal and cross-appeals be consolidated and heard on one printed case. OMANATH CHOWDRY v. SHEIKH NUJEEB CHOWDRY, **8 M.I.A. 498=1 Sar. 812.**

(2)—*Cross-appeal allowed although respondent did not apply in India for leave to appeal.* —Cases where a cross appeal was allowed from part of a decree of the *Sudder* Court appealed from to England, although the respondents had not applied in India for leave to appeal within the proper time The respondents being mistaken in the practice of the Judicial Committee upon a cross-appeal ; such cross-appeal directed to be prosecuted and heard upon one printed case, if the principal appeal was proceeded with ; but, in the event of the principal being dismissed for want of prosecution, liberty was reserved to the respondents to prosecute the cross-appeal as a separate appeal. NANA NARAIN RAO v. HURREE PUNT BHAO, **6 M.I.A. 464=11 Moo. P C. 36.**

(3)—*Appeal from portion of decree—Leave to present cross-appeal—Reference of question to law officer.*—A question was raised on the part

Privy Council, Practice of—continued.

——4.—Cross-appeal—*concluded.*

of the respondents, whether the appeal, although from part of the decree only, did not open to them, the respondents, the whole decree? Their Lordships were of opinion that it did not, but they thought that, under the circumstances of this case, leave should be given to present a cross appeal, and the appellants not having insisted that the mere form of presenting such an appeal should be gone through, it was agreed that the whole decree should be considered as open. Where a question of right and title in a suit has to be referred to a law officer, in order that such reference may be valid and bind the right, it should embrace all important facts proved or admitted in the cause, which may affect the conclusion, and it is the duty of the Court itself so to frame the questions that they may elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained, but are stated and disputed, then the questions should embrace either view of the facts. When the opinion given is apparently irreconcilable with the opinions of text-writers, those who gave the opinion should be asked further to explain that which appears *prima facie* thus irreconcileable, so that they may show on what they ground an exception from the general law, whether on general custom modifying text, on local usage, family customs, or other exceptional matter. MYNA BOYEE v. OOTTORAM, **2 W.R. P.C. 4 =8 M.I.A. 400=1 Sar. 797=1 Suther. 452=2 M.H.C. 196.** [*R.*, 8 M.I.A. 498.]

——5.—Dismissal of appeal for want of prosecution.

(1)—*Dismissal of—By Sudder Court where no steps taken by appellant after grant of leave to.*—An appeal was allowed in October, 1854, by the Supreme Court at Calcutta to England. After the allowance of the appeal, no further steps were taken by the appellant. In March, 1856, the Judicial Committee, upon a certificate of the Registrar of the Supreme Court that no further proceedings had been taken after the order allowing the appeal, dismissed the appeal, at the instance of the respondents, for want of prosecution. SREEMUTTY RABUTTY DOSSEE v. RADANAUTH SEIN, **6 M.I.A. 346=1 Sar. 547.**

(2)—*Restoration of appeal—Conditions—Security for costs.—Costs.*—Case where the restoration of an appeal was allowed upon condition of the appellant lodging in England security for the costs the appeal. Six months having elapsed without the appellant having lodged the required security, the respondent applied to dismiss the appeal by reason of the non-performance of that condition. As it appeared that the appellant's agent was in daily expectation of funds from India, the case was, upon the appellant paying costs of the day, ordered to stand over for three months, for the appellant to perform that condition: in failure thereof, the appeal to stand dismissed. RANEE HURROSOONDREE DEBHIA v. RAJA PRAN KISHEN SING, **7 M.I.A. 16=11 Moo. P.C. 305=1 Sar. 590.**

Privy Council, Practice of—continued.

——5.—Dismissal of appeal for want of prosecution—*concluded.*

(3)—*Appeal by guardian—Appellant attaining majority—Infant applying for withdrawal of appeal—Costs of guardian.*—The guardian of an infant who has filed an appeal to the Privy Council on behalf of her infant son has not such an interest in the appeal or such a *locus standi* as to insist that the appeal shall go on, when the party in whose name it is brought wishes, on coming of age, to withdraw from it. If she has incurred costs, there can be no appeal for mere costs; having incurred costs on behalf of the infant, she may have a claim to be recouped from his estate, if he has any; but that does not entitle her to prosecute the appeal in his name against his will. RANI BISTUPRYA PATMADYI v. BASUDEB DHALL, **6 B.L.R. 190. P.C.=15 W.R P.C. 19=13 M.I.A. 602=2 Sar. 631=2 Suther. 391.**

——6.—Practice as to objection.

(1)—*Practice of Privy Council.*—Case in which the Privy Council refused to entertain a mere objection of form, that did not affect the substantial merits of the case. THE MOKUDDIMS OF MOUZAH KUNKUN WADY v. THE ENAMDAR BRAHMINS OF MOUZAH SOORPAL, **7 W.R. P.C. 8=3 M.I.A. 383=1 Suther. 164 =1 Sar. 292.**

(2)—*Practice as to objections—Method of disposal.*—The Judicial Committee, in appeals from the native Courts in India, will look to the broad principles of justice, and discourage mere technical objections which do not affect the merits of the case, and, more especially, will discountenance the introductions of objections that may have occurred in the course of litigation, but were not raised at the commencement of the suit. THE ZEMINDAR OF RAMNAD v. THE ZEMINDAR OF YETTIAPOORAM, **7 M.I.A. 441=1 Sar. 701=1 Suther. 360=4 W.R. P.C. 31.**

(3)—*Suit for possession under* Wusseeyutnamah—*Reg.* III *of* 1793, *s.* 13, *issue of proclamation under—Forms of pleadings in appeals from India—Practice—Privy Council.*—In this suit brought by the descendants of a deceased Rajah for possession of his property under an alleged *wusseeyutnamah* or deed of gift, the Court directed proclamation to issue in accordance with s. 13 of Reg. III of 1793 to all persons claiming any right to the property, to come in and prosecute the same. The lower Courts passed a decree declaring the claimants' right of succession any specifying the shares pursuant to the above Regulation. On this appeal, objection was raised on behalf of the appellant that, in the Court below, some of the questions which had been determined were never put in issue, and that, in consequence, the appellant was aggrieved, not by this omission only, but by being deprived of the opportunity of producing evidence materially to support his own case. But their Lordships were of opinion that this objection was in both respects void of any solid foundation. In

Privy Council, Practice of—continued.

—6.—**Practice as to objection**—*continued.*

reviewing the proceedings in India, whence the appeal was brought from the Courts where the Hindu and Mahomedan laws were the rule, and the forms of pleading are wholly different from those in use in Courts where the law of England prevailed, the Judicial Committee would look to the essential justice of the case, not considering whether matters of form had been strictly attended to. GHIRDHAREE SINGH v. KOOLAHUL SINGH, **6 W.R P.C. 1 = 1 Sar. 200 = 1 Suther. 98 = 2 M I.A. 344.** [*R.*, 11 B.H.C 249, 10 C.L J. 517 = 3 Ind. Cas. 34]

(4)—*Events subsequent to decision of suit, no right of appeal in consequence of—Untraversed averments whether to be deemed as admitted.*—The main question for decision in this case was, whether the decision of the Principal Sudder Ameen was, when pronounced, a correct decision of the issues then pending before him between the then parties to the suit. *Held* that no subsequent event or devolution of interest can affect the above question, and, to give effect to these, should justice require it, would be the office, not of an appeal, but of some supplemental proceeding. Their Lordships were of opinion that the strict rule that averments not traversed must be taken to be admitted was inapplicable to the Courts in India, and in the present case their Lordships thought that it would be objectionable to disturb or vary decrees properly made by the Zillah and Sudder Courts in this suit for the mere purpose of guarding against the possible error of some other tribunal in some future suit. ANUNDMOYEE CHOWDHRAIN v. SHEEB CHUNDER ROY, **Marsh 455 = 2 W.R.P.C. 19 = 9 M.I.A. 287 = 1 Suther. 485 = 1 Sar. 854.** [*F.*, 34 C. 57 = 11 C.W.N. 225 = 5 C.L.J. 181; *R.*, 18 W.R. 287]

(5)—*Privy Council—Special leave to appeal on questions of great general importance—Technical objections urged at a late stage—Permissibility.*—The defendant in a suit applied for and obtained leave to appeal to the Privy Council, which leave, however, became abortive owing to his failure to make the deposit for costs in due time. He then applied to the Privy Council for special leave to appeal on the ground that the suit was one concerning properties of large value, and involving questions of great importance to the sect to which he belonged. Special leave having been granted on the ground, the appellant urged, at the hearing before the Privy Council, certain preliminary objections to the maintainability of the suit, objections to which no reference had been made either in his application to the High Court for leave to appeal, or to the Privy Council for special leave. *Held* that, though it was not, by any means, intended to lay down, as a rule, that no questions can be raised at the hearing, which are not indicated in the petition for special leave to appeal, yet in the present cases considering the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, objections which altogether excluded the consideration and discussion of those very important questions, the appellant ought not, at that stage, to be allowed to insist that, by reason of these objections, the suit ought to be dismissed. SHEO SINGH RAI v. DAKHO, **1 A. 688, P.C. = 2 C.L.R. 193 = 5 I.A. 87 = 3 Suther. 529 = 3 Sar. 807.** [*F.*, 8 A. 365 = 6 A.W.N. 1886, 129.]

(6)—*Point not submitted to either Court in India not entertained in Privy Council.*—Their Lordships of the Judicial Committee were unable to entertain a point urged by the appellants, the same having been submitted in the conduct of the case to neither Courts below. MA WEEN DI v. MA KIN, **10 Bom.L.R. 41 = 35 C. 232 = 12 C.W.N. 220 = 7 C L J. 112 = 18 M.L.J. 3 = 5 A.L.J. 63 = 35 I.A. 41 = 3 M L.T. 93 = 14 Bur.L.R. 3 = 4 L.B.R. 75, P.C.**

(7)—*Point not taken before either of the lower Courts—Whether the same was open before the Privy Council.*—A point not taken by a party before either of the lower Courts was not open to it at the time of the hearing of the appeal before their Lordships. MUHAMAD NASEEM v. MAHAMAD ABBAS ALI, **10 Bom.L R. 126 = 18 M.L.J. 133 = 7 C.L.J. 215 = 12 C.W.N. 355, P.C.**

(8)—*Concurrent decisions — Estoppel.*—A point not raised in the plaint in the District Court, nor in the High Court, cannot be raised before the Privy Council. SUMBHU NATH SANTRA MAHAPATRA v. SURJAMONI DEI, **25 C. 187, P.C = 24 I.A. 191 = 1 C.W.N. 649 = 7 Sar. 247.**

(9)—*Concurrent findings of facts—Special circumstances, not raised in pleadings and in lower Court.*—Where there were concurrent findings of facts by two Courts, and it was sought to distinguish the case against two of the defendants on the ground of special circumstances (connected with their holding), which were never relied upon in the pleadings and no issue was directed as to them and there was no proper examination of the case with respect to them, the High Court was justified in refusing the appellant to raise the point. NAM NARAIN SINGH v. BHIM GANJHU, **3 C.W.N. 249, P.C.**

(10)—*Technical objection not taken in Court below.*—The Privy Council will not entertain a purely technical objection to a party's right of action which has not been made in the Court below. THE BANK OF BENGAL v. MACLEOD, **5 M.I.A. 1 = 7 Moo. P.C. 35 = 13 Jur. 945 = Taylor, 434 (b) = 1 Sar. 391.**

(11)—*Right of suit not questioned in Courts below—Question in Privy Council.*—The right of a party to institute a suit as heir of the original grantee, not having been disputed in the Courts below, cannot be questioned before

Privy Council, Practice of—continued.

——6.—**Practice as to objection**—*concluded.*

the Judicial Committee. MILLS, COLLECTOR OF KAIRA v MODEE PESTONJEE KHOORSEDJEE, **2 M.I.A. 37=3 Moo. P.C. 368=1 Sar. 215**

(12)—*Objection as to limitation raised for the first time at the hearing before the Privy Council.*—An objection raised for the first time at the hearing of the appeal before the Privy Council, that the Government's right to sue was barred by the Regulation of Limitation II of 1805, from lapse of time, sustained; the proceedings in India before the Revenue Collector and Special Commissioner under Regulations II of 1819, and III of 1828, not being in the nature of a regular suit. MAHA RAJA DHEERAJ RAJA MAHATAB CHUND BAHADOOR v. THE GOVERNMENT OF BENGAL, **4 M.I.A. 466=1 Sar. 285.**

(13)—*Death of a sole appellant pending appeal to England— Substitution of one of the respondents instead · Objection to such substitution at hearing of the appeal—Practice.*—Pending an appeal to England the sole appellant died, and the *Sudder* Court made an order substituting one of the respondents in his stead as appellant. *Semble*:—It is not competent to the other respondents to object to such order at the hearing of the appeal, the proper course being to move the *Sudder* Court to discharge such order. BABU KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER, **5 M.I.A. 146=1 Sar. 412=1 Suther. 225.**

(14)—*Objections to report of Commissioner for examination of accounts.*—In this case, the Court of First Instance appointed a commissoiner for examining, and reporting upon, certain accounts. This officer made a report and also a supplemental report. No objection was taken thereto either in the first Court or in the grounds of appeal before the appellate Courts in India. The appellant, for the first time, took certain objections to the report of the Commissioner before the Privy Council. *Held*, such objections as were not taken in the Courts in India not entertainable. SETHS GUGMULL, JETHMULL AND THANMULL v. MUSSUMAT CHAHEE KOWAR, **2 I.A. 34=3 Sar. 419.**

(15)—*S. 561, Civ, Pro. Code, 1882—Variation of decree, asked by respondent, requiring cross appeal—Practice.*—A respondent cannot ask for a decree to be varied in his favour except by means of a cross appeal. When he has not filed a cross appeal, the rule prevails that he can only be heard to support the decree, s. 561, Civ. Pro. Code, not applying here A CASPERSZ v. KISHORI LAL ROY CHOWDHRI. **23 C. 922, P.C.=1 C.W.N. 12=7 Sar. 31.** [*R.*, 27 M. 543, 2 C.L.J. 288]

——**7.—Questions of Fact.**

(1)—*Reversal of decrees by Privy Council—Practice.*—It is not the practice of the Judicial Committee to disturb the finding of the Courts below upon mere issues of fact, unless it is

Prvly Council, Practice of—continued.

——**7.—Questions of Fact**—*continued.*

clearly satisfied that there has been some miscarriage, either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination, and of inspecting the original documents. RICHARDSON v. THE GOVERNMENT, **1 W.R.P.C. 47=1 Suther. 513.**

(2)—*Practice — Consideration of case as a whole by Privy Council.*— Considering the advantages the Judges in India generally possess of forming a correct opinion of the probabilities of a transaction, and in some cases of the credit due to the witnesses, the fact that the Courts in India have decided against the validity of an instrument (a question of fact only) affords a strong presumption in favour of the correctness of their decision, but does not and ought not to relieve the Privy Council, the Court of last resort, from the duty of examining the whole evidence and forming for itself an opinion upon the whole case. MODHOO SOODUN SANDIAL v. SOROOP CHUNDER SIRCAR CHOWDHRY, **7 W.R. P.C. 73=4 M.I.A. 431=1 Suther 216=1 Sar. 378.** [*F.*, 10 M. 429.]

(3 & 4)—*Credibility of witnesses--Disturbance of judgment--Conclusion from evidence—Semble*: The Judicial Committee will not disturb a judgment of a Court in India upon a question of the credibility of witnesses, unless it is manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence. MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLU MAHOMED SHOOSTRU, **6 M.I.A. 27=8 Moo. P.C. 110=1 Sar. 489.**

(5)—*Disputed facts—Appeal to Privy Council—Procedure of Privy Council.*—It is the practice of the Judicial Committee, in a case of disputed facts, when the Courts in India appear to have diligently investigated the evidence, and no palpable mistake is apparent in the appreciation by the Court below of such evidence, to affirm the decree appealed from with costs. CHUNDERMONEE DEBIA CHOWDHOORAYN v. MUNMOHEENEE DEBIA, **8 M.I.A. 477=1 Sar. 809.**

(6)—*Practice—Evidence improperly admitted—Appeal.*—Where evidence which ought not to have been admitted has been improperly admitted, it is the duty of the Judicial Committee who are Judges of the fact in such a case to consider whether, throwing aside such evidence, there still remains sufficient evidence to support the decrees. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal. MOHURSINGH v. GHURIBA, **6 B.L.R. 495, P.C.=15 W.R. P.C. 8=6 M.J. 193=2 Sar. 379.**

(7)—*Concurrent findings as to facts—Grounds of decision different—Practice of Privy Council.*

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

***Privy Council, Practice of*—continued.**

—7.—Questions of Fact—*continued.*

—The rule that the Judicial Committee will not disturb a finding as to facts, upon which both the Courts below are agreed, unless such finding can be shown to be clearly erroneous, —is none the less applicable, because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence, and in this way may not have been quite agreed on the grounds of their decision. The rule is applicable to a case where one Court has relied on the oral testimony and the other on the documentary evidence. RAM ANUGRA NARAIN SINGH v. CHOWDHRY HANUMAN SAHAI, **30 C. 303, P C.=30 I.A. 41 =7 C.W.N. 225=5 Bom. L.R. 6=8 Sar. 409.**

(8)—*Practice—Question of fact decided by the first Court—Not submitted to appeal Court—Raised before the Privy Council.*—Where on appeal to the Privy Council the argument offered was on a question of fact, which was decided in the first Court and was not submitted for review to the Appeal Court below. *Held*, that it was out of their Lordships' power to entertain the ground of appeal. DHANAKDHARI v. MAHABIR PERSHAD, **9 Bom. L R. 651=11 C.W.N. 739=6 C L.J. 11=34 C. 709= 17 M.L.J. 353=34 I.A. 164, P.C.**

(9)—*Appeal to Privy Council—Question of fact.*—Their Lordships declined to reverse a decision of the High Court upon a question of fact in which the High Court had the documents and had the evidence of the witnesses before them, and had an opportunity of witnessing the demeanour of the witnesses on both sides. RAJAH JUGOJEEBUN LALL DHUBAL DEB v. KARTICK CHUNDER BONDOPADHYA, **25 W.R. 1, P C.=11 M.J. 108=3 Sar. 559=2 I.A. 283=3 Suther. 213.**

(10)—*Appeal to Privy Council—Questions of fact—General rule—Finding by Civil Court—Interpretation of — Decree based on finding—Finding in first Court—Appeal.*—In an appeal to the Privy Council, the appellant cannot generally succeed upon a pure question of fact which had been found against him by the Courts below. A finding by a Civil Court must be taken altogether. A decree cannot be passed, based on one part thereof, if it would be inconsistent with another part of the same finding unless it is proved that this latter part is incorrect. Where a party to a suit waives the benefit of a finding in his favour by the first Court, he is not competent to get a decree based thereon in appeal, although he could have the benefit of it in some future proceeding. KOER PORESH NARAIN ROY v. ROBERT WATSON AND CO., **23 W R. 451.**

(11)—*Practice — Concurrent findings—Evidence—Native Courts.*—The native Courts in India, in receiving evidence, do not proceed according to the strict technical rules adopted in England. According to the practice there, a copy of a public document, authenticated by the signature of the proper Officer, is received as

***Privy Council, Practice of*—continued.**

—7.—Questions of Fact—*continued.*

prima facie evidence, subject to further inquiry, if it is disputed. It is not the practice of the Judicial Committee to advise the reversal of a decision of the Court below, merely on the effect of the evidence or the credit due to witnesses, as the Judges in India have better means of determining questions of fact than the appellate Court. NARAGUNTY LUCHMEDAVAMMA v. VENGAMA NAIDU, **1 W.R.P.C. 30=9 M.I.A. 66=1 Suther. 460=1 Sar. 826.** [*Appl.*, 10 W R.P.C. 10; *R.*, 10 W.R.P.C. 10= 10 M.I.A. 196; *Expl.*, 6 C. 171, F.B.=6 C.L. R. 439.]

(12)—*Claim to inheritance in defendant's possession—Defence pleading deed of gift by last owner—Question in issue—Decision by both lower Courts that gift deed even if executed was inoperative—Execution of deed, if contested.*—Where, in a claim to an inheritance in the possession of the defendant, who, although related to the last owner, set up, independently of other title, a deed of gift from the latter in his favour, and it was decided in both the lower Courts that the deed, even if it had been executed, was inoperative, and an appeal was made to the Privy Council, on the ground that the question of the actual execution of the deed was left undisposed of, *held* that an issue having been fixed as to the execution, and the plaint also showing that the execution was disputed, it cannot be assumed that the matter had never been in contest. ANAND KUAR v. TANSUKH, **11 A. 396, P.C.= 5 Sar. 372=13 Ind. Jur. 171.**

(13)—*Appeal—Failure to produce evidence at hearing.*—Where the decision went against a party, owing to his non-production of a document to prove a material fact, though he had sufficient warning of it, the fact that it could have been proved by a reference to records in another proceeding would be no ground for reversing the decision, especially when that was not made a ground of appeal in two appellate Courts. CHANDI CHURN SHASHMAL v. DURGA CHURN MIRDUA, **9 C. 260=12 C.L.R. 81, P.C.=4 Sar. 351.**

(14)—*Privy Council appeal—High Court's decree confirmed—Execution— Mis-translation.* —In this case, the Privy Council confirmed a decree of the High Court, but left the question whether the respondents were entitled to the full amount claimed in the plaint or not for the determination of that Court. The latter Court allowed execution to issue for the whole amount, as the doubt entertained by the Privy Council was owing to the word "*Shahodar*" in the plaint being mistranslated as "sons" instead of "uterine brothers." *In the matter of* MEER MAZUFFER HOSSEIN CHOWDHRY v. AMEEROON-NISSA KHATOON, **17 W.R. 340.**

(15)—*Privy Council—Interference with findings of fact—Civ. Pro. Code*, 1882, *ss.* 584, 585—*Jurisdiction to hear second appeal, on*

Privy Council, Practice of—continued.

——7.—**Questions of Fact**—*continued.*

what matters—Second appeal to Judicial Commissioner - Appeal to Privy Council—Interference with findings of facts.—The Privy Council will not, unless under very exceptional circumstances, disturb a finding of fact in which the Courts below have concurred. Under ss. 584, 585, no second appeal shall lie except on the ground of the decision being contrary to some specified law or usage having the force of law, or the decision having failed to determine some material issue of law or usage having the force of law, or for substantial defect in procedure. The Privy Council, sitting on appeal from the order of the Judicial Commissioner, can only do what the Judicial Commissioner himself in second appeal could have done; and no special leave to appeal from the decree of the Commissioner (the first appellate Court) having been applied for, the Privy Council will be bound by his findings of facts. LUCHMAN SINGH v. PUNA, **16 C. 753=16 I.A. 125 P.C. =5 Sar. 370.**

(16)—*Evidence— Unwillingness to interfere with conclusions of Courts below on questions of fact—Plunder during mutiny.*—A sued 126 persons for plundering his house during the mutiny and robbing him of treasure laid at Rupees 92,450. Principal Sudder Ameen, who tried the suit, awarded Rupees 21,498 against 13 of the defendants. Sudder Court, in appeal, reversed this decree, even as regards those who had not appealed. *Held* that, on the subject of evidence, Courts below have advantages which do not belong to the Tribunal of the Privy Council, and that their Lordships will not interfere with conclusions of fact, except when clearly satisfied that there has been error or mistake in arriving at such conclusions. In the present case the Principal Sudder Ameen, who tried the cause, appeared to have proceeded throughout very cautiously in considering the evidence, while the Court of Appeal overlooked the fact that the main evidence had received important corroboration. The decree of the Sudder Court, therefore, reversed, and that of the Principal Sudder Ameen restored and affirmed. RAMBUKSH SINGH v. JUGUT NARAIN SINGH, **5 M.J. 232.**

(17)—*Principal and surety —Novation of bond—Evidence.*—A treasurer of a Collectorate was found, on going into his accounts, to have been a party with another in embezzling Government moneys in the Collectorate. His defalcations ran over several years. A surety-bond had been given on behalf of the treasurer, and the bond was renewed three times by the same surety during the period the treasurer was in office, but the surety never asked for the old bonds to be delivered up when they were renewed. In an action by Government against the surety to recover the amount embezzled, *held* that the renewal of the bonds did not discharge the surety from his liability under the first bond, as the renewed bonds were not in substitution of the first bond. The *ex parte* deposition of a witness who might have been called and cross-examined at the trial ought not to have any weight given to it. The lower Courts having admitted inadmissible evidence, the Judicial Committee examined the whole evidence and, on being satisfied that there was sufficient evidence to support the decision of those Courts independent of such inadmissible evidence, dismissed the appeal. LALA BANSHIDHAR v. THE GOVERNMENT OF BENGAL, **9 B.L.R. 364, P.C.=16 W.R.P.C. 11=14 M.I.A. 86=2 Suther. 448=2 Sar. 689.**

See EVIDENCE—MISCELLANEOUS, 15 W. R. 20, P.C.=6 B.L.R. 677=13 M.I.A. 607.

Findings of Lower Courts on questions of fact—*See* PRACTICE AND PROCEDURE, 9 M. I.A. 456.

——8.—**Rehearing.**

(1)—*Privy Council order, grounds for re-opening.*—The finality of a judgment of the Privy Council particularly after its confirmation by an order in Council, cannot be generally questioned; such an order will not be allowed to be re-opened or varied, unless it is shown that, by some accident, without any blame and without any default on the part of the party himself, he has not been heard and an order has been inadvertently made as if he had been heard. PERTAB NARAYAN SINGH v SUBHAO KOOER, **4 C. 184, P.C.=5 I.A. 171=1 C.L.R. 11=3 Sar. 840.**

(2)—*Re-hearing—Conditions.*—There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. The indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard. APPA RAO, *In re*, **10 M. 73, P.C. =13 I.A. 155=4 Sar. 755.** [*R.*, 14 M. 439, P.C.]

(3)—*Rehearing of case decided by the Privy Council—Fresh evidence--Practice.*—A judgment of the Privy Council, reported to and confirmed by Her Majesty in Council, cannot be re-opened merely because new evidence was forthcoming. SRIMANTU RAJA YARLAGADDU DURGA v. SRIMANTU MALLIKARJUNA, **14 M. 439, P. C.=17 I.A. 134** (10 M. 73, *R.*)

(4)—*Re-hearing of appeal—Privy Council.*—The re-hearing of an appeal heard *ex parte*, on which an order in Council had been made, refused, the default in not appearing and contesting the appeal being occasioned by the agents of the respondent who sought to have the appeal re-heard. *N.B.*—A re hearing will not be allowed except under very special circumstances. RANI SWARNAMAYI v. SHASHI MUKHI BARMANI *ex-parte*, KRISHNA NATH ROY, **2 B.L.R. P.C., 60.**

***Privy Council, Practice of*—continued.**

——8.—Rehearing—*continued.*

(5)—*Suit in ejectment*— Onus— *Possession—Dispossession — Remand—Settlement of issues and trial—Irregularities.*—Decrees were made in the year 1816, in suits respecting disputed boundaries of certain mouzahs in two zemindaries, and the boundary line determined. In 1845, a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of those mouzahs, which land, it was admitted by the plaintiff, the defendants had been in possession of since the year 1834. It was pleaded in defence, first, that the land claimed was within the boundary declared by the decrees of 1816 to belong to the defendants ; and, secondly, that the plaintiff, or those under whom he claimed, had been out of possession for upwards of twelve years, and that the cause of action was, consequently, barred by Ben. Reg. III of 1793, s. 16. In such circumstances, it was held that the issue as to possession was the first point to be considered and that such issue was wholly independent of the question of boundary. *Held* further, that as the plaintiff sought to disturb the possession of the defendants admitted by him to have existed for eleven years, but which the defendants alleged was a much longer period, the *onus probandi* was upon the plaintiff to remove the bar to the action imposed by Ben. Reg. III of 1793, s. 16, by satisfactory proof that the cause of action accrued to him on a dispossession twelve years before the commencement of the suit, and that he, or some person through whom he claimed, was in possession during that period ; and that no proof of anterior title in his favour, such as would be involved in the boundary question, could relieve him from this *onus*, or shift the *onus* on the defendants by compelling them to prove the time and manner of possession. Although the evidence of witnesses for the defendants as to possession, if of no better character than those produced by the plaintiff as to dispossession, yet, it lies on the plaintiff to make out his case, and as the probabilities were against dispossession, it was held by the Judicial Committee, affirming the judgment of the Sudder Dewanny Adawlat, that the plaintiff had failed to prove the fact of the dispossession of the defendants, which was necessary to maintain the suit. [*F.*, 2 W.R. 65, 2 W.R 75, 7 W.R. 212, 14 W.R. 135, 15 W.R 43, 9 C. 744, F.B.=12 C.L.R. 257 ; *R.*, 14 W.R. 51, 4 C.L.R. 390, 9 M. 175, 7 C. 225=8 C.L.R. 126, 6 B. 508, 9 C W.N. 111, 7 C.L.J. 414=12 C.W.N. 272=3 M.L.T. 212 ; *D.*, 15 W.R. 35, 6 C. 725=8 C.L.R. 90.] A remand having been ordered for the proper issue to be laid down, and for the trial of the case *de novo* after calling upon the parties for their proofs, and the appellant having declined to adduce further evidence on the issues so settled, and having called for the judgment of the Court upon the evidence already given :— *Held* that, if this manner of trial were irregular, it was not for the appellant to complain of the irregularity. The suspicion that a party, who has failed to prove his case, may prove

***Privy Council, Practice of*—continued.**

——8.—Rehearing—*concluded.*

more successful on the second and fuller investigation, is no sufficient ground for directing a new trial. MAHARAJAH KOONWAR SINGH v. BABOO NUND LALL, **1 W.R.P.C. 51=8 M. I.A. 199=1 Suther. 420=1 Sar. 744.**

(8)—*Respondent in appeal to Privy Council, whether entitled to notice of transmission of records from High Court.*—No formal notice of the transmission of the records to the Privy Council is required, by the rules of the High Court, to be given to the respondent in the appeal to the Privy Council. The mere fact that no express notice of such transmission was given to the respondent and that the hearing before the Judicial Committee therefore went on *ex parte*, is no sufficient ground for the granting of a re-hearing thereof. LALTA PRASAD v. SHEIKH AZIZ-UD-DIN, **19 A. 209=24 I.A. 49, P.C.=7 Sar. 123.**

——9.—Remand of case to India.

(1)—*Suppression of documents—Privy Council's opinion on merits—Remand.*—The Judicial Committee will not act as a Court of original jurisdiction. Therefore, where the Judge of the Court below improperly suppressed documents, which were not discovered until after the transmission of the appeal to Her Majesty in Council, their Lordships refused to give an opinion on the merits, and remitted the case to the Sudder Dewanny Court for consideration. JUVEER BHAEE v. VURUJ BHAEE, **3 M.I.A. 324=1 Sar. 286.**

(2)—*Practice—Appeal to Privy Council (upon the merits)—Decree of High Court (questions as to form of).*—Parties appealing to the Privy Council upon the merits ought not to take the general decree which the High Court may have given, without asking the High Court to condescend upon the details of it, if they mean to object that the general judgment is not sufficient to found the proper execution. A suit for possession and redemption of certain mortgaged property, in which a third party intervened upon a claim that the mortgagor the plaintiff had sold and conveyed to him one-half of the mokurari property in dispute, was dismissed. On appeal by the plaintiff, in which the intervenor did not appear, the lower appellate Court merely reversed the decree of the first Court, and the High Court affirmed the decree of the lower appellate Court. The Privy Council affirmed the judgment of the High Court, but remanded the cause to the High Court to amend their decree in conformity with their judgment, by declaring affirmatively what the plaintiff was entitled to recover, though it observed that the question ought to have been raised in the High Court. LALA SHAM SOONDUR LAL v. SOORAJ LAL, **26 W. R. 48.**

——10.—Restoration of Appeal.

(1)—*Leave to restore appeal—Consolidation of appeals.*—Leave given to restore an appea dismissed for want of prosecution, the Cour

Privy Council. Practice of—continued.

——10.—**Restoration of Appeal**—*continued.*

below having consolidated it with another appeal in the same cause, which was still pending. SURROOPCHUNDER SIRCAR CHOWDRY v. RAMRUTTON MULLICK, **1 M I.A. 358=1 Moo. P.C. 404=1 Sar. 128.**

(2)—*Transcript received late—Dismissal of appeal—Restoration.*—Leave given to restore an appeal dismissed for want of prosecution, the appellant's agent, though instructed to prevent the dismissal of the appeal, not having received the transcript until after the expiration of a year and a day from the time of the allowance of the appeal, and the respondent having, in consequence thereof, obtained an order of dismissal. SREEMUTTY BISSNOSOONDERY DABEE v. RAJAH BURRODACAUNT ROY, **2 M I.A. 127=3 Moo. P.C. 11=Morton 372=1 Sar. 160.**

(3)—*Ignorance of appellant of introduction of new rules.*—Appeal restored, after being dismissed for want of effectual prosecution, within the time limited by the fifth rule of the Order in Council of the 13th of June, 1853; the new rules having been only recently adopted by the Sudder Court at Calcutta, and the appellant, in ignorance of their existence, being engaged in taking steps to prosecute the appeal within the time and according to the practice previously existing. GUDADHUR PURSHAD TEWARREE v. MUSSUMAT SOONDER KOOMAREE, **6 M.I.A. 201=1 Sar. 530.**

(4)—*Same question at issue between same parties—Appeal under St. 8 and 9, Vict., c. 30, s. 2—Non-prosecution—Restoration of appeal.*—In circumstances showing conflicting and opposite decisions by the Sudder Court upon the same question at issue, between the same parties, an appeal treated under the Statute, 8th and 9th Vict., c. 30, s 2, as abandoned for non-prosecution, was restored upon terms of paying costs and undertaking to lodge cases forthwith, and to lodge security or a bond in England to the amount of £500. Where an appeal has been treated as abandoned by Statute, 8th and 9th Vict., c. 30, s. 2, their Lordships have no power to grant leave to institute a new appeal; only a discretion to allow the original appeal to be restored. RANEE HURROSOONDREE DEBIAH v. RAJAH PRAN KISHEN SINGH, **6 M I.A. 491=11 Moo. P.C. 152.**

(5)—*Dismissal of appeal—Want of effectual prosecution—Restoration of appeal—Recognizances to prosecute appeal.*—Appeal from the Sudder Court in India, which stood dismissed under Rule V of the Order in Council of the 13th *June*, 1853, for want of effectual prosecution, restored, as the appellant was in ignorance of the existence of the new rules, the Sudder Court having served the appellant (after interposition of the appeal) with notice that two years were allowed after the arrival of the transcript in England, for prosecuting the appeal. Where Government securities for the

Privy Council, Practice of—continued.

——10.—**Restoration of Appeal**—*continued.*

due prosecution of the appeal and costs were deposited in the Registry of the Sudder Court, the Judicial Committee, in restoring the appeal, dispensed with the usual recognizances in England. SETO LUCHMEECHUND v. SETO ZORAWUR MULL, **6 M.I.A. 204=1 Sar. 531.**

(6)—*Privy Council—Dismissal of appeal on failure to prosecute—Application for restoration—Deposit of fresh security in England.*—This was a petition for restoration of an appeal dismissed for want of prosecution. Their Lordships observed that the circumstances were such that, if the petitioner's personal interest had been alone concerned in the matter, his application would be wholly unsuccessful, yet, taking into consideration the circumstance that there were infants concerned whose interests were confided to him, and the manner in which such interests of the minors were involved, they would accede to the application on condition that the applicant must find fresh security to be deposited in England and that he must undertake to get the appeal set down for a hearing within the time fixed in the order restoring the appeal. RANEE BIRJOBUTTY v PERTAUB SINGH, **3 W. R. P. C. 36=8 M.I.A. 160=13 Moo.P.C. 465=1 Suther. 408=1 Sar. 740.**

(7)—*Dismissal of appeal for default of prosecution owing to vakeel's illness—Act XVI of 1845*—Act XVI of 1845 amending Act XXIX of 1841, enacts, that it is competent to the Sudder Court in the case of the dismissal of an appeal for want of prosecution, upon the application of the appellant within three months after the appeal has been dismissed, to re-admit the appeal, if the appellant satisfies the Court that the dismissal was "occasioned by the default of his Vakeel or by unavoidable accident" An appeal was made to the Sudder Court at Calcutta, but in consequence of the absence from illness of the appellant's Mookhtar, the written reasons of appeal were not lodged within six weeks, the time prescribed by Act XV of 1853, s. 6, and the appeal was dismissed. Upon application for re-admission of the appeal, the evidence showed that there had been no wilful delay, and that the appellant was in ignorance of the fact of the reasons of appeal not having been filed. *Held*, reversing the decree of the Sudder Court, that such circumstances constituted a case of "unavoidable accident," within the meaning of the Act XVI of 1845, and the appeal ordered to be re-admitted on the file of pending causes. ANUNDMOYEE DOSSEE v. POORNOO CHUNDER ROY, **9 M I.A. 26=1 Sar. 820.**

(8)—*Appeal to Privy Council—Dismissal for want of prosecution—Terms as to security and costs before restoration.*—On an appeal having been presented to the Privy Council the records were sent up to the Registrar of the Judicial Committee. No further steps were taken by the appellant, and the appeal was dismissed under r. 5 of the orders in Council. On the

Privy Council, Practice of —continued.

——10.—Restoration of Appeal —*concluded.*

delay and omission by appellant being satisfactorily explained, their Lordships directed the appeal to be restored upon condition (1) that money as security for costs be deposited in the registry of the Privy Council and (2) that the respondents be paid all costs hitherto incurred by them. RABIABAI v. MAHOMED ISMAIL, **21 B. 723, P. C. = 24 I. A. 128 = 7 Sar. 217.**

(9)—*Appeal—Revival of abated appeal—Substitution of new appellant.*—Where, owing to the death of the appellant before the hearing, the appeal abated, but was revived on the application of another person, whose name was substituted for that of the deceased appellant, *held*, that the substituted appellant could not be allowed to use the position so obtained, for the purpose of advancing his own personal claim. UMRAO BEGUM v IRSHAB HUSAIN, **21 C. 997 P.C. = 21 I.A. 163 = 6 Sar. 469.**

——11—Special leave to appeal and to defend appeal.

(1)—*Application for leave to appeal to Privy Council, conditions necessary.*—By the order in Council of April 1838, the Sudder Court has been empowered to grant leave for appealing to the Privy Council only in cases where the petition for the purpose has been presented within the prescribed period and the matter in dispute in such appeal amounts to the sum of at least Rs. 10,000. Where, in such a case, the appeal is from the whole decree covering an amount of over Rs. 10 000 including interest up to the date of the decree, *i.e.*, the sum recoverable at the date of the judgment exceeds Rs. 10,000, the case clearly falls within the terms of the said order in Council. But, in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree, their Lordships intimated that the grant of leave to appeal was a matter resting in their discretion. MAHARAJA SUTEESCHUNDER ROY v. GANESH CHUNDER, **3 W.R.P.C. 14 = 8 M.I.A. 164 = 13 Moo. P. C. 469 = 1 Suther. 399 = 1 Sar. 741.** [*Appl.*, 8 M.I.A. 262.]

(2)—*Privy Council, leave to appeal to—Civ. Pro. Code*, 1882, *s.* 596, *cl.* 4 (= *s.*110, *present Code*)—*Concurrent findings of fact—No question of law.*—To allow leave to appeal to the Privy Council on the ground that "there seems to be a point of law" is not a compliance with s. 596 (4), Civ. Pro. Code, which requires that there "must be some substantial question of law." KARUPPANAN SERVAI v. SRINIVAS CHETTI, **6 C.W.N. 241 = 29 I. A. 38 = 25 M 215, P.C. = 4 Bom. L.R. 248 = 8 Sar. 250.**

(3)—*Criminal cases—Leave to appeal in criminal cases—Grave and substantial injustice to be shown — Crim. Pro. Code (Act V of* 1898), *ss.* 233, 234, 235, 236, 237 *and* 239—*Joinder of charges.*—Before granting leave to appeal, in criminal cases, to the Judicial Committee of the Privy Council, the High Court must be satisfied that by a disregard of the

Privy Council, Practice of —continued

——11.—Special leave to appeal and to defend appeal - *continued.*

forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. *In re* BAL GANGADHAR TILAK, **10 Bom L R. 973 = 33 B. 221.**

(4)—*Salvage cause—Dismissal of the case of the salvors—Leave to appeal from the principal sentence — No objection to competency of appeal taken in India* - In a salvage case, the Supreme Court, by its sentence pronounced in March, 1849, dismissed the claim of the salvors. In the month of April following, the Promovents moved for a rule *nisi* to show cause why the defendants should not pay their costs. This rule the Court refused. In August, in the same year, the Promovents applied for, and the Supreme Court granted, leave to appeal to England from the principal sentence of March 1849. No objection was taken to the competency of the appeal in Bombay by the respondents, nor was any protest against the right of appeal entered in England, but the respondents at the hearing objected to the reception of the same, contending that the appeal was prevented by the proceedings had in the month of April. *Held*, that such objection was fatal, that the application for costs, after the decision in the cause, had the effect of absolutely perempting the appeal, so as to entirely take away from the Supreme Court the power of granting leave to appeal, as nothing could, after the proceedings in April, be done to restore the appeal from the principal sentence. Costs of appeal, under the circumstances, refused. LOUGHNAN v. HAJI JOOSUB BHULLADINA, **5 M.I.A. 137 = 7 Moo. P.C. 373 = 1 Sar. 410.**

(5)—*Valuation of appeal to Privy Council—Bengal Stamp Regulation X of* 1829, *necessity of compliance with the terms of.—Fresh evidence, on question of value, if admissible.*—In this case the leave to appeal originally granted provided that such leave should be null and of no effect unless satisfactory evidence should be supplied by the appellants to the Registrar of the Sudder Court, that the real or market value of the land in dispute exceeded the sum of Rs. 10,000. This order having been obtained *ex parte* and appearing to have been obtained upon an inaccurate statement of the facts, was discharged. The present application was put in to discharge the said order of discharge and to restore the appeal. *Held*, there was no fraud practised upon the Court in obtaining the order granting leave to appeal and the condition on which that order was granted had been fulfilled. There was therefore, *prima facie* no ground for refusing to restore the appeal. It was contended for the respondents that the value of the land in dispute was untruly stated in the plaint in fraud of the Revenue Laws of India, and that leave to appeal ought not therefore to be granted. But it was *held* that it was a mistake on the part of the Court, no less than that of the appellants, to have allowed the cause to proceed

Privy Council. Practice of—continued.

——11.—**Special Leave to appeal and to defend appeal**—*continued.*

upon such a representation of the value as was contained in the supplementary plaint, and their Lordships suggested that Bengal Regulation X of 1829 upon the subject of value should be carefully attended to. Permission was asked by the respondent to go into evidence on the question of value, but their Lordships were not disposed to deviate in this respect from their original order, which was carefully and designedly confined to evidence to be adduced by the appellants, with a view to prevent the introduction, for the purpose of a merely fiscal Regulation, of a contested issue on the question of value, a result, which in their Lordships' judgment, ought, in all cases, as far as justice will permit, to be avoided. MOHUN LAL SOOKUL v. DEBEE DOSS DUTT. **2 W.R.P. C. 9=8 M. I. A. 492=1 Suther. 458=1 Sar. 811.**

(6)—*Subject matter under appealable value—Leave to appeal refused—Prior application to High Court.*—The Judicial Committee will not entertain an application for special leave to appeal to Her Majesty in Council from a decree of the High Court, where the subject-matter in suit is under the appealable value prescribed by the 39th and 40th section of the Bombay Charter of 1862, unless the petitioner has applied to the High Court for such leave, and has been refused. GUNGOWA KOME MALUPA v. ERAWA KOME JOGAPA, **13 M.I.A. 433=2 Sar. 583.**

(7)—*Privy Council, appeal to—Case below appealable value in original Court--S. 596, Civ. Pro. Code* 1882 (=s. 110, *Civ. Pro. Code*, 1908), *construction of—Special leave to appeal —Substantial question of law—Practice—Application for special leave to appeal to be first made to High Court—S.* 600, *Civ. Pro. Code*, 1882, (*O.* XIV, *r.* 3, *Civ. Pro. Code*, 1908)—*Interests subsequent to decree—Value of subject matter.*—Where the value of the subject-matter of the suit in the Court of first instance is below Rs. 10,000 the appealable value, the conditions prescribed by s. 596, Civ. Pro. Code, are not fulfilled and the High Court cannot grant the certificate of leave. The word 'and' in the first part of s. 596, Civ Pro. Code, means 'and' and not 'or', [*R.* 13 C.W.N. 1127.] The practice of the Judicial Committee is not to give special leave to appeal in cases which are not otherwise appealable, unless there is some substantial question of law of general interest involved. Where a party in an Indian case comes for special leave to appeal, the case being under appealable value, and, therefore, not to appeal as of right, he should, in the first instance, apply to the High Court for leave to appeal, on the ground that it is otherwise a fit one for appeal to His Majesty in Council, but this rule will not bind the Judicial Committee, although that course has not been taken. As a rule, however, that course ought to be followed. [*R.* 13 C.W.N. 1127.] *Semble*:—Interest falling due subsequent to the date of the decree

Privy Council, Practice of—continued.

——11.—**Special Leave to appeal and to defend appeal**—*continued.*

in the original Court cannot be taken into consideration in determining the value of the subject matter of the suit in the Court of first instance within the meaning of s. 596, Civ. Pro. Code. MOTI CHAND v. GANGA PERSHAD SINGH, **6 C.W.N. 362, P.C =29 I.A. 40=24 A. 174=4 Bom. L.R. 159=8 Sar. 247.**

(8)—*Leave to appeal granted* ex parte—*Appeal allowed on allegation unfounded in fact—Appeal dismissed.*—If leave to appeal be obtained *ex parte*, the respondent may, as a matter of course, present a counter-petition to dismiss. Where an appeal had been granted *ex parte* upon an allegation unfounded in fact, the Judicial Committee refused to hear the case, and dismissed the appeal with costs. SIBNARAIN GHOSE v. HULLODHUR DOSS, **6 M.I.A. 207=1 Sar. 532.**

(9)—*Decree affirming original decree.*—Where in a Land Acquisition case, the claimant appealed from the District Court's award and stamped the appeal according to the difference between his claim and the amount awarded, and the High Court granted a sum in addition to that awarded by the lower Court, but less than that claimed, *held* that this was properly a decree affirming the first Court's decree, and since there was no point of law involved, the application for leave to appeal to the Privy Council ought to be refused. RAJA SREE NATH ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **8 C.W.N. 294.** [*Diss.*, **10** O.C. 65.]

(10)—*Special leave to appeal on facts—Practice—Evidence.*—The Privy Council will only, under very special circumstances, grant to an appellant from a judgment of the High Court passed in special appeal, *nunc pro tunc*, special leave to appeal on the facts. In this case, the Privy Council declined to grant that leave, and agreed with the High Court that a certain chitta was fairly admissible as evidence, and that it tended very much to negative the case put forward by the appellant. GOLAM ALI v. KALLY KISHEN THAKOOR, **12 B.L.R. 107, P. C.=18 W.R. 299.**

(11)—*S.* 626, *Civ. Pro. Code*, 1882—*Special leave to appeal—Review—Mere omission to record reasons.*—The provisions of s 626, Civ Pro. Code, requiring the Judge granting a review to put his reasons on record, is rather a direction to the Judge how to act when he has decided to grant the application, than a condition of granting it. The failure to record his reasons is not a ground for granting special leave to appeal to the Privy Council. SHANKAR BAKSH v. BULWANT SINGH, **27 C. 333, P.C.=27 I.A. 79=4 C.W.N. 203=2 Bom. L.R. 596=7 Sar. 686.** [*R.*, 7 O.C. 345.]

(12)—*Leave to appeal—Appeal—Political act —Act of State—Order passed by the Governor-General of India in Council.*—Their Lordships of the Privy Council declined to grant leave to

Privy Council, Practice of—continued.

—11.—**Special Leave to Appeal and to defend appeal**—*continued.*

appeal against an act of the Governor-General of India removing the appellant from the Government of the State of Panna; inasmuch as it was clearly a political Act—an Act of State—done by the Viceroy in Council in the interest of the State of Panna, and the inhabitants of Panna, and for the peace and good government of India generally. *In re* MAHARAJAH MADHAVA SINGH, **6 Bom. L.R. 763=32 C. 1=8 C.W.N. 841= 1 A.L.J. 691=8 Sar. 731.**

(13)—*Leave to appeal to Privy Council—Civ. Pro. Code.* 1882, *ss.* 595, 622 *Letters Patent of* 1865, *s.* 39—*Permission to sue as pauper.*—An order passed by the High Court under s. 622 of the Civ. Pro. Code, deciding that a party should be allowed to sue in *forma pauperis* is not a final decree within the meaning of s. 595, nor is it a final judgment made on appeal within the meaning of s. 39 of the Letters Patent of 1865, and, therefore, the High Court has no power to grant a certificate for leave to appeal to the Privy Council against such order. BABU SAKAN SINGH v. GOPAL CHANDRA NEOGI, **8 C.W.N. 296.**

(14)—*Appeal in* forma pauperis *to the Queen in Council —Semble.*—Although the Courts in India admit a party to appeal to England, in *forma pauperis*, yet the appellant ought to make a special application to the Queen in Council, for leave to prosecute such appeal in *forma pauperis.* MUNNI RAM AWASTY v. SHEO CHURN AWASTY, **7 W.R. P.C. 29=4 M.I A. 114=1 Suther 166=1 Sar. 323.**

(15)—*Application for special leave to appeal —Necessity to state full particulars of case and particular points of law involved.*—A petition for special leave to appeal contained a general statement of the proceedings in India, and an averment, that they were irregular and contrary to law. Such petition ordered to be dismissed or to stand over for amendment, as being too general and vague. It is incumbent upon a party applying for special leave to appeal to set out in the petition a full statement of the facts and legal grounds, to show that there is a substantial case on the merits, and a point of law involved, proper to be determined by the Appellate Court. On an amended petition, stating in detail the facts, and specifically showing legal grounds of objection to the decrees and order of the Court below refusing leave to appeal, special leave to appeal was granted. GOREE MONEE DOSSEE v. JUGGUT INDRO NARAIN CHOWDERY, **11 M.I.A. 1=2 Sar. 207.**

(16)—*Matter not appealable grievance—St.* 3 *and* 4, *Wm.* IV, *c.* 41—*Matter referred by Her Majesty to Privy Council—Leave to appeal.*—Where a matter has been referred by Her Majesty to the Judicial Committee which is not strictly an appealable grievance, their Lordships may, under the reservations contained in the 3rd and 4th Wm. IV, c. 41, advise

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—11.—**Special Leave to Appeal and to defend appeal**—*continued.*

Her Majesty to grant the petitioner leave to appeal. MORGAN v. LEECH, **2 M.I.A. 428=3 Moo. P.C. 368=1 Sar. 215.**

(17)—*Decree in cross-appeal, petition for leave to appeal from—Grant of leave without further security.*—On the present application for special leave to appeal from a decree of the High Court in the cross-appeal, the applicant having already been granted such leave as for an appeal to the Privy Council, from a decree to the same effect passed by the High Court in the appeal itself, the Judicial Committee was of opinion that they should recommend the granting of leave applied for, without the petitioner having to file any further security; than had already been taken. MUHAMMAD IKRAM-UD-DIN v. MUSAMMAT NAJIBAN, **19 A. 95=23 I.A. 167, P.C.=7 Sar. 99.**

(18)—*Leave to appeal to the Privy Council granted after six months from decree—Authority of Supreme Court to grant leave after six months —Leave granted by the Privy Council as a special case.*—The Supreme Court at Madras admitted an appeal to the King in Council, after the expiration of six months from an original decree. *Held*, that the Court was not authorized by the Madras Charter of 1800, creating the Supreme Court, to grant leave to appeal. Upon a special application to the King in Council, founded upon the fact that the uniform practice of the Supreme Court at Madras, though upon an erroneous construction of the Charter, was to admit only appeals upon a final decree; leave to appeal was granted by the Privy Council. THE EAST INDIA COMPANY v. SYED ALLY, **7 M. I.A. 555=1 Sar. 867.**

(19)—*Decree as to interest—No appeal to Privy Council in time —Payment of costs—Leave to appeal granted* — Leave to appeal granted, on payment of costs, from an order of the *Sudder* Court at Bombay, decreeing interest upon the amount awarded by the judgment of the Court; the appellant having failed to apply to the Court in India, within six months, as required by the Order in Council of the 10th April, 1838. KIRKLAND v. MADEE PESTONJEE KHOORSEDJEE, **3 M.I.A. 220=1 Sar. 270.**

(20)—*Non appearance of respondent* — Ex-parte *hearing of appeal—Appearance of respondent before hearing—Prayer for adjournment —Leave granted on terms.*—The respondent not having appeared, the appeal was, after two years, set down for hearing *ex parte.* Before the hearing, the respondent appeared, and moved, under special circumstances, to postpone the hearing for six months, to enable him to lodge his case. The Judicial Committee put him upon the terms of having the appeal heard at the next sitting, restraining him from doing anything in the interval to the prejudice of the fund in the Court below, and with payment

Privy Council, Practice of—continued.

——11.—Special Leave to Appeal and to defend appeal—*continued.*

of the costs of the application. WATSON v. SREEMUNT LAL KHAN, **5 M.I.A. 447=1 Sar. 468.**

(21)—*Special leave to appeal — Importance of the question involved.*—The question in this case was whether a Zillah Court, refusing to set aside an order of a Registrar refusing to register a compulsorily registrable document under the Registration Act VIII of 1871, had power to admit a petition for review and whether, when such a petition has been admitted, the High Court had power to interfere with the order of the Zillah Court. Considering the importance of the question involved, the Judicial Committee granted special leave to appeal. MEER REASUT HOSSEIN v. HADJEE ABDOOLLAH, **1 I A. 72=3 Sar. 315.**

(22)—*Wrongful act amounting to legal injury, damage occasioned by, liability for—Plea of action under order of Government not sustainable—Leave to appeal*—When a wrongful act of the plaintiff is complained of as having occasioned damage to the defendants, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained, if its agent were not personally responsible for them. In the case of damage occasioned by a wrongful act—that is an act which the law esteems an injury—malice is not a necessary ingredient to the maintenance of the action. It cannot therefore be deemed to make any difference that the act complained of had to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. [*R.*, 4 M. 344, 6 Bom. L.R. 131, 28 B. 314=6 Bom. L.R. 65.] In an action the Court at Calcutta gave damages, the amount of which was under the appealable value prescribed by the Calcutta Charter. As an important point of law was involved, special leave to appeal was, upon petition, granted. ROGERS v. RAJENDRO DUTT, **2 W.R.P.C. 51=8 M.I A. 103=13 Moo. P.C. 209=3 L.T. 160=9 W.R. 149 (Eng.)=1 Suther 413=1 Sar. 755.**

(23)—*No application for leave to—Made to Court below—Value of subject-matter exceeding appealable value though decreed amount was below appealable value.*—Special leave to appeal granted, notwithstanding that no application had been made for such leave to appeal to the Court below, upon the allegation that, though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject-matter at issue exceeded in value the appealable amount. MUTUSAWMY JAGAVERA YETTAPA NAIKER v. VENCATASWARA YETTIA, **10 M.I.A. 313=1 Ind. Jur. N S. 203=2 Sar. 131.**

(24)—*Consolidation of Appeals — Defendant accepting the consolidated value precluded from questioning valuation of appeal to Privy Council.*—Two suits, each of which was valued at less than Rs. 10,000 were consolidated and heard together by the Court of First Instance. The defendant accepted, and acted upon such valuation in preferring an appeal to the High Court. The Defendant having succeeded in the High Court, the plaintiff applied for leave to appeal to the Privy Council. The defendant contended that no leave ought to be granted on the ground that each of the two appeals, taken separetaly, was less than Rs. 10,000 in value. *Held*, the defendant having consented to, and acted upon, the consolidation of the suits and having also accepted the consolidated value for purposes of his own appeal to the High Court, it was not open to him to question the valuation of the plaintiff for purposes of the latter's appeal to the Privy Council. Under the circumstances, special leave to appeal was granted. KRISTO INDRO SAHA v. HUROMONEE DASSEE, **1 I.A. 84=3 Sar. 317.**

(25)—*Subject-matter trifling—Amount under appealable value — Jurisdiction — Leave to appeal – Terms.*—The Supreme Court, in overruling the objections to the jurisdiction of the Court, refused leave to appeal; the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon petition, the Judicial Committee granted leave to appeal, but upon terms of the East India Company paying the respondent's costs of the appeal, to enable him to appear to prevent the question being argued *ex-parte*. SPOONER v. JUDDOW, **4 M.I.A. 353=6 Moo. P.C. 267=Perry O.C. 392=1 Sar. 363.**

(26)—*Appeal to Privy Council—Value of subject-matter found to be below Rs. 10,000. though laid in the plaint as above that sum—Leave to appeal granted on condition of appellant reopening the question of value of subject-matter.*—The value of the subject-matter in dispute, though laid in the plaint at a sum exceeding the minimum amount of Rs. 10,000, provided, by the Order in Council of the 10th of April, 1836, was reduced on calculation by the *Zillah* Judge to an amount under that sum; and the finding upon the merits was for the plaintiff for such reduced sum. Upon a cross-appeal, the *Sudder* Court dismissed the entire claim, and, on the ground that the matter in dispute was under the appealable value, refused leave to appeal to England. Upon special petition, leave to appeal allowed, the appellant claiming

Privy Council, Practice of - continued.

——11.—**Special Leave to Appeal and to defend appeal**—*continued.*

to open the question of the value of the subject-matter in question calculated by the *Zillah Judge*. PRANNATH ROY CHOWDRY v. RANEE SURNOMOYEE, **7 M.I.A. 553 = 1 Sar. 708**

(27)—*Amount under appealable value—Point of law—Aggregate amounts more than appealable value—Leave to appeal.*—In circumstances, special leave to appeal granted, although the amount involved in the action was under the appealable value, Rs. 10,000. There being (1), an important question of law raised, and eleven other actions brought involving the same question of law, and which had been directed by an order of the Court below to be heard upon the same evidence and concluded by the same judgment; and (2), the aggregate amount involved in the actions being more than the appealable value. KO KHINE v. RICHARD SNADDEN, **5 Moo. P.C.N.S. 67 = L.R. 2 P.C. 50 = 37 L.J. P.C 119.**

(28)—*Leave to appeal—Terms—Appealable value below Rs.* 10,000.—Where the Privy Council grants leave to appeal, under the general jurisdiction of the Queen in Council, it will impose such terms upon the party applying as the special circumstances of the case require. Appeal admitted from an order confirming the report of Commissioners in a partition suit, although the appealable value was under Rs. 10,000, the amount prescribed by the Order in Council of the 10th of April, 1838. The petitioner (the plaintiff) had offered to compensate the defendant, if the report of the Commissioners was varied. The Judicial Committee, in granting leave to appeal, put the petition upon terms of lodging in the Council Office, within four months, a certificate of recognizance to the Queen in the sum of £1,500, for such compensation and costs as might be awarded *In re* SIBNARAIN GHOSE, **5 M.I A 322 = 8 Moo. P.C. 276 = 1 Sar. 448.**

(29)—*Leave to appeal to Privy Council granted on certain conditions though time limited by Charter expired.*—Leave given to appeal, under the circumstances, though the time limited by the Bombay Charter had expired, and the decree of the Court below sanctioning the sale of real estate—the subject of the suit—had been partially acted on; the petitioner undertaking not to disturb the possession or title of the purchasers of any part of the property actually sold; to give security for costs, and to abide by any order which the Judicial Committee might think fit to make, touching the matters in dispute. *In re* MUSADEE MUHOMED CAZUM SHERAZEE, **5 M.I.A. 196 = 8 Moo. P.C. 90 = 1 Sar. 416.**

(30)—*Undischarged insolvent, mortgage by—Lien under mortgage, Priority of, to claim of Official Assignee.—Leave to appeal under special circumstances.*—The right of the Official Assignee to the subsequently acquired property of an insolvent is subject to th qualification that, if the insolvent carries on trade at a subsequent period, with the assent of the Assignee of the estate under the Insolvent Act, in the first instance, the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency. In the present case, the insolvent carried on the business of a hotel agent or manager for others. Subsequently, he made an arrangement with the appellant, by which he became the purchaser of the property in dispute and carried on the said trade on his own account with the knowledge of the Assignee under the insolvency. The appellant had advanced a sum of money for the purpose of being laid out in the purchase of the property subject to an agreement that it was to be laid out in a particular manner, and a mortgage of the property was accordingly executed. Under the circumstances, the insolvent was held not to have acquired anything except subject to the lien of the creditor, and the Assignee could stand in no better situation. [*R.*, 8 C. 556 = 12 C.L.R. 253, 17 M. 21, 20 B. 636, 7 Bom. L R. 337.] The sum involved was under the prescribed amount limited by the Order in Council of the 10th April, 1838. Upon a special application, the fact appearing that the question involved the construction of an Act of Parliament respecting the operation of the law of insolvent debtors in India, leave to appeal was granted. KERAKOOSE v. BROOKS, **4 W R P C. 61 = 8 M I.A. 339 = 1 Suther 426 = 1 Sar. 778.**

(31)—*Suspension of a pleader for misconduct—Act XX of 1865—Special leave to appeal—Expiry of period of suspension—High Court's finding on question of fact.*—Where a pleader was suspended for professional misconduct, and the period of suspension had considerably expired, before application was made for special leave to appeal against his suspension, that in itself would form some ground why their Lordships should not accede to the application; but, if the effect of the order of suspension had been to inflict, upon the character of the applicant, a lasting stigma, and there had been a clear miscarriage of justice shown, the fact that the period of suspension had expired would not alone have sufficed to refuse the application. Where the High Court, acting regularly within their jurisdiction, come to the conclusion, from facts placed before them, that a pleader is guilty of professional misconduct, and suspend him from practice, and there are no materials to show that such conclusion, on a pure question of fact, is wrong, or even where there is some doubt on the subject, the Judicial Committee will refuse to grant special leave to appeal. *In the matter of* QUARRY, **2 A. 511, P.C. = 7 I A. 6 = 4 Sar. 99.**

(32)—*From the original decree and the order refusing review.*—In circumstances, where the

Privy Council, Practice of—continued.

——11.—**Special Leave to Appeal and to defend appeal**—*continued.*

six months prescribed by the Order in Council of 10th April 1838, from the date of the decree of the High Court at Calcutta, had expired, special leave to appeal from the original decree and the order refusing a review was allowed. NAGENDER CHUNDER GHOSE v. MAHOMED EUSUFF, **12 M.I.A. 107=2 Sar. 358.**

(33)—*Special leave to appeal.*—Special leave to appeal given in a case involving a question of tenure service called *Chakeeran*, although the subject-matter in dispute was below the appealable value; there being many other suits depending on the decision of the case JOYKISSEN MOOKERJEA v. THE COLLECTOR OF EAST BURDWAN, **8 M.I.A. 265=1 Sar. 773.**

(34)—*Special leave to appeal from an order taking a minor from her mother's custody.*—Special leave to appeal allowed from an order of the High Court of Judicature for the North Western Provinces of India, by which order, an infant daughter was taken from the custody of her mother, a Mahomedan, on the ground that the minor's deceased father had been a professed Christian, and her mother, who was, as the Court held, living in adultery, was inducing her daughter to adopt the faith and habits of a Mahomedan. Liberty given, pending the hearing of the appeal, to the petitioner to apply to the High Court to have access, at suitable times to her daughter. *In re* SKINNER, **13 M.I.A. 532=2 Sar. 615.**

(35)—*Privy Council — Special leave to appeal on questions of great general importance—Technical objections urged at a late stage—Permissibility.*—The defendant in a suit applied for and obtained leave to appeal to the Privy Council, which leave, however, became abortive owing to his failure to make the deposit for costs in due time. He then applied to the Privy Council for special leave to appeal on the ground that the suit was one concerning properties of large value, and involving questions of great importance to the sect to which he belonged. Special leave having been granted on this ground, the appellant urged, at the hearing before the Privy Council, certain preliminary objections to the maintainability of the suit, objections to which no reference had been made either in his application to the High Court for leave to appeal, or to the Privy Council for special leave. *Held* that though it was not, by any means, intended to lay down as a rule, that no questions can be raised at the hearing, which are not indicated in the petition for special leave to appeal, yet in the present case, considering the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objection raised to the maintenance of the suit, objections which altogether excluded the consideration and discussion of those very important questions, the appellant ought not, at that stage, to be allowed to insist that, by reason of these objections, the suit

Privy Council, Practice of—continued.

——11.—**Special Leave to Appeal and to defend appeal**—*concluded.*

ought to be dismissed. SHEO SINGH RAI v. MUSSAMUT DAKIO, **2 C.L.R. 193=5 I.A. 87=1 A. 688. P.C.=3 Sar. 807.** [*F.*, 8 A. 365=6 A.W.N. 129.]

(36)—Special leave to appeal on the ground of a conflict of decisions. OLAGAPPA CHETTY v. ARBUTHNOT, **7 M.J. 190.**

——12.—**Stay of Proceedings in India pending appeal.**

(1)—*Leave to appeal granted—Application, ex-parte, for stay of proceedings in Lower Court refused.*—The *Sudder* Court at Calcutta, remanded a suit to the *Zillah* Court for trial *de novo*. An appeal to England from this decree was refused, but, upon special application, was admitted by the Privy Council. The appellant then applied to the High Court at Calcutta to stay proceedings pending the appeal to England, on the ground that the decision of the appellate Court would govern the question at issue, which application that Court refused. The appellant then presented a petition to Her Majesty in Council, and applied *ex parte* for the same relief, but the Judicial Committee, in the respondent's absence, refused to make any order, though without prejudice to the petitioner's further application when he had served the respondent. RAJAH PERLADH SEIN v. BABOO BHOODOO SINGH, **10 M I.A. 78=2 Sar. 73.**

(2)—*Stay of proceedings—Proof of injury, in case proceedings are not stayed, should be given.*—Application, to stay proceedings in a cause in which an appeal from an order in the nature of an interlocutory order is pending before Her Majesty in Council, ought satisfactorily to show that a serious injury will be the result to the party applying, unless the delay, asked for, be granted, and that the party applying has come promptly to make the application. Where, therefore, an appellant from an Order of the High Court of Judicature, which remitted a cause, appealed to that Court from the *Zillah* Court, back for the trial of issues framed in accordance with the provisions of Act No. VIII of 1859, s. 139, having failed in obtaining an Order from the High Court to stay proceedings in the *Zillah* Court, pending the appeal, but, not having appealed from that decision, presented a petition to Her Majesty in Council, praying that all proceedings in the remanded suit might be stayed till the pending appeal had been heard; the Judicial Committee, without determining the question of their right to interfere in such circumstances, *held* that the petitioner had not shown any such injury, or used such expedition, as entitled him to ask for a stay of proceedings. *Quaere.*—Whether, where an order has been made by the Superior Court below, refusing to stay proceedings, and such order is not specially appealed from, the Judicial Committee have any authority to interfere, though an

Privy Council, Practice of—continued.

—12.—Stay of Proceedings in India pending appeal—*continued.*

appeal is pending before them from a previous order of the Superior Court made in the same suit, remitting the cause back to the inferior Court before which it is pending? NAWAB SIDHEE NUZUR ALLY KHAN v. RAJAH OOJOODHYARAM KHAN, **10 M.I.A. 322=1 Ind. Jur. N.S. 185=6 W.R.P.C. 83=2 Sar. 183.**

(3)—*Stay of execution — Order of* Sudder *Court, Application to rescind— Limitation.*—Motion to rescind order of the *Sudder* Court at Madras, for the execution of a decree pending an appeal, and to stay execution, refused, on the ground of the length of time that had elapsed from the making of the order, and the probability of its having been acted on in India. *In re* RAJAH BOMMARAUJEE BAHADOOR, **5 M.I.A. 298.**

(4)—*Appeal to Privy Council—Security for Privy Council decree Grant of leave to appeal from interlocutory orders in execution—Order staying execution—Intimation to Court below.*—The Privy Council granted leave to appeal from certain interlocutory orders in execution in the matter of a decree from which leave to appeal to the Privy Council had been obtained; but refused to order stay of execution, as the decree had not yet been appealed to the Privy Council, but intimated to the lower Court that the petitioner's prayer was reasonable, and observed that the petitioner might apply to the proper (lower) Court for due security being taken from the opposite party, who, it was not advisable, should be put in possession of large sums of money in dispute in the suit. INDER KUMARI v. JAIPAL KUMARI, **14 C. 290, P.C. =14 I.A. 1=4 Sar. 757.** (10 M.I.A. 322, 10 M.I.A. 196, *R.*) [*Expl.*, 5 C.W.N. 781.]

(5)—*Practice of Privy Council—S.* 608(*c*), *Civ. Pro. Code*, 1882—*Stay of execution, order for.*—Where the Judges of the High Court had differed in opinion as regards the propriety of staying execution of decree under cl.(c), s. 608, and their discretion had not been exercised, as they were empowered to exercise it under that section, their Lordships of the Privy Council ordered that the execution of the decree should be stayed. CHATRAPAL SINGH DURGA v. DWARKA NATH GHOSE, **22 C. 1, P.C.=21 I A. 170=6 Sar. 514.** (15 C. 725, P.C., *R.*) [*R.*, 29 M. 379, P.C.=8 Bom. L.R. 497=16 M.L J. 299=4 C.L.J. 101=10 C.W.N. 945.]

(6)—*Stay of proceedings, application for — High Court's jurisdiction to order security for costs pending appeal by special leave to Privy Council— Privy Council, jurisdiction of —S.* 608, *Civ. Pro. Code*, 1882.—On the refusal of the High Court for want of jurisdiction, to direct that the manager of the estate in suit should remain in possession, pending an appeal by special leave to the Privy Council, the Judicial Committee refused to interfere, but ordered stay of proceedings, the appellant being

Privy Council, Practice of—continued.

—12.—Stay of Proceedings in India pending appeal—*concluded.*

answerable in damages, and any aggrieved respondent having leave to move for the discharge of the order. When the Courts below have jurisdiction, and an intimation to them would be effective, or when the appellant being in possession, a stay of proceedings would keep the position of things in fact, the Judicial Committee would ordinarily interfere. The Judicial Committee would not directly interfere to appoint or continue a manager of a receiver. The Judicial Committee would not direct the High Court to make any order for *interim* protection, unless their Lordships were satisfied that the Court below had jurisdiction. *Quaere.* — Whether the High Court has jurisdiction to make an *interim* order pending appeal by special leave. MOHESHCHANDRA DHAL v. SATRUGHAN DHAL, **27 C. 1, P.C.=26 I A. 281=4 C.W.N. 34=7 Sar. 561.** [*Rel. on*, 3 O.C. 243 (*b*); *R.*, 28 C. 171, 5 C.W.N. 781; *Appl.*, 10 C.L J. 326.]

(7)—*Abandonment of appeal—Recognisance.*—Recognisance entered into to abide the determination of an appeal vacated upon petition of the appellant upon the abandonment of the appeal. REED v. SREEMUTTY GOURMONEY DABEE, **6 M. I. A. 490=11 Moo. P. C. 151.**

—13.—Valuation of appeal.

(1)—*Application for leave to appeal to Privy Council, Conditions necessary.*—By the order in Council of April 1838, the Sudder Court has been empowered to grant leave for appealing to the Privy Council only in cases where the petition for the purpose has been presented within the prescribed period and the matter in dispute in such appeal amounts to the sum of at least Rs. 10,000. Where, in such a case, the appeal is from the whole decree covering an amount of over Rs. 10,000 including interest up to the date of the decree, *i.e.*, the sum recoverable at the date of the judgment exceeds Rs 10,000, the case clearly falls within the terms of the said order in Council. But, in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree, their Lordships observed that the grant of leave to appeal was a matter resting in their discretion. MAHARAJA SATEESCHUNDER ROY v. GANESH CHUNDER, **3 W. R. P. C. 14=8 M. I. A. 164=13 Moo P. C. 469 =1 Suther. 399=1 Sar. 741.** [*Appr.*, 8 M. I. A. 262.]

(2)—*Method of ascertaining appealable value Whole matter to be looked to—Reg.* X *of* 1829, *s.* 17—*Stamp—Leave to appeal.*—In estimating the appealable value, restricted by the Order in Council of the 10th of April, 1838, for regulating appeals from the Supreme and *Sudder Dewanny* Courts in the East Indies, to Rs. 10,000 as the amount in dispute, regard should be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered. A suit was brought to recover a zemindary in the possession of different persons under deeds of sale in

Privy Council, Practice of—continued.

—13.—**Valuation of appeal**—*continued.*

execution of a decree. The value of the property sued for was, by Ben. Reg. X of 1829, s. 17, stated in the plaint to be Rs. 14,325. The *Sudder* Court upheld the sales so far as related to the claim of some of the defendants. The other defendants applied for leave to appeal to England, which the *Sudder* Court refused, on the ground that, as the value of their portion was only Rs. 8,215, it was not within the appealable value prescribed by the Order in Council of the 10th of April, 1838. Such construction overruled, and leave to appeal granted by the Judicial Committee. *Quære.*—Whether the stamp upon the plaint required by Ben. Reg. X of 1829, s. 17, being for fiscal purposes only, is conclusive of the value of the property sued for. MUSSAMMAT AMEENA KHATOOR v. RADHABENOD MISSER, **7 M.I. A. 261=12 Moo. P.C. 470=1 Sar. 644.**

(3)—*Beng. Reg.* X *of* 1829—*Market-value—Test of.*—By Ben. Reg. X of 1829, the test of the value of the property in suit is the selling or market-value. MOHUN LALL SOOKUL v. BEBEE DOSS, **8 M.I.A. 193=1 Sar. 792.**

(4)—*Leave to appeal—Proof that subject-matter of suit is worth more than Rs.* 10,000—*Stamp duty.*—Leave to appeal granted conditionally, upon the production of satisfactory evidence in India by the petitioner, and transmitted with the transcript, that the real or market value of the property in dispute exceeded Rs. 10,000, otherwise the leave granted to be null and of no effect. By the procedure of the native Courts, the value of the suit, for the purpose of the stamp duty, is assessed at three times the annual rent payable to Government in respect of the property sued for. *Held*, on an *ex parte* petition for leave to appeal, in a case in which the value was laid in the plaint as being under Rs. 10,000, that, as the calculation was estimated with reference to the stamp duty only, leave to appeal would be granted conditionally, upon the production of satisfactory evidence in India by the petitioner, and transmitted with the transcript, that the real or market value of the property exceeded Rs. 10,000, otherwise the leave granted to be null and of no effect. MOHUN LALL SOOKUL v. BEBEE DOSS, **7 M.I.A. 428=1 Suther. 458 =1 Sar. 739.**

(5)—*Aggregate value of five suits exceeding Rs.* 10,000, *though value of each was below that sum—Leave to appeal to Privy Council—Same point of law involved in all suits*—Five separate suits were brought by the same plaintiff against the same defendants, in which the same question of law was raised. The amount involved in each suit was under Rs. 10,000, the appealable value, although in the aggregate the amounts claimed exceeded that sum. Leave to appeal in the five suits granted, upon the understanding that, if the parties consented within two months, by a proceeding before the *Sudder Dewanny Adawlut*, to abide by the

Privy Council, Practice of—continued.

—13.—**Valuation of appeal**—*concluded.*

decision of the Privy Council in the first appeal, as governing the four other appeals, the Registrar of the *Sudder Dewanny Adawlut* was to transmit only the transcript of the first suit; otherwise the five transcripts to be remitted in the ordinary course. BABOO GOPAL LALL THAKOOR v. TELUK CHANDER RAI, **7 M.I. A. 548=1 Sar. 737.**

(6)—*Stat.* 21, *Geo.* III, *c.* 70, *s* 21—*Consolidation of suits—Appeal to Privy Council.*—Two suits having been brought for sums due on the same account, each of which was under £5,000—*held* that such suits could not be consolidated for the purpose of appeal, though the original severance of them was contrary to the plaintiff's instructions, and the aggregate amount of both exceeded that amount. MOOFTI MAHUMMUD UBDOOLLAH v. BABOO MOOTECHAND, **5 W. R. P. C. 34=1 M I.A. 363=1 Suther. 56=1 Sar. 129.** [*F.*, 24 A. 236=A.W. N. 1902, 46.]

(7)—*Costs cannot be added to the sum awarded.*—Costs of suit cannot be added to the principal sum and interest, in calculating the appealable value of Rs. 10 000, the amount restricted by the Order in Council of the 10th of April, 1838. DOORGA DOSS CHOWDRY v. RAMANAUTH CHOWDRY, **8 M I.A. 262=1 Sar. 772.**

(8)—*Value of property sued for laid in plaint at less than Rs.* 10,000—*Evidence showing value to exceed that sum.*—Appeal admitted from the *Sudder Court* at Calcutta, in a case where the land sued for was laid in the plaint as under Rs. 10,000, upon evidence stating the value of the property much to exceed that sum. GOURMONEY DEBIA v. KHAJA ABDOOL GUNNY, **8 M I.A. 268=1 Sar. 774**

(9)—*Costs — Appealable value—Objection.*—*Quære*: Whether, in estimating the appealable value of Rs. 10,000, the costs of suit can be added to the principal and interest decreed? An objection to an appeal, on the ground that the amount in dispute is below the appealable amount, comes too late, when made to the Privy Council at the hearing of the appeal. NILMADHAB DAS v. BISWAMBHAR DAS, **3 B. L.R. P.C. 27=12 W.R.P.C. 29=13 M.I.A. 85 =2 Suther. 251=2 Sar 489.**

(10)—*Valuation for purposes of Court-fees—Appealable value.*—The fact of a party's valuing the subject-matter of a suit at less than Rs. 10 000, under the law obtaining in India relating to Court fees, will not be a bar to his obtaining leave to appeal to the Privy Council, should it appear that the actual market value exceeds Rs. 10 000, which is the appealable value. BABOO LEKHRAJ ROY AND OTHERS v. KANHYA SINGH, **1 I A. 317=3 Sar. 373.**

This circular lays down the rules regarding Regular Appeals valued at 10,000 rupees and upwards. **14 W.R.H.C. Rules. p. 5.**

***Privy Council, Practice of*—continued.**

—14.—Miscellaneous.

(1) — *Kathiawar Courts — Jurisdiction — Kathiawar— British Dominions—Appeal lies to King in Council from a judicial order by a Court administering justice on King's behalf—Court of Political Agent—Jurisdiction exercised by it is political and not judicial* — Kathiawar is not as a whole within the King's dominions. If a Court, administering justice on the King's behalf, makes an order judicial in its nature, by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject. The jurisdiction exercised by the Court of the Assistant Political Agent in Kathiawar and upon appeal from him to the Court of the Political Agent and of the Governor of Bombay in Council is political and not judicial in character, and therefore no appeal lies to the King in Council HEMCHAND v. SAKARLAL; TALUKA OF KOTDA-SANGHANI v. STATE OF GONDAL, **8 Bom. L.R. 129=10 C. W.N. 361=3 A L.J. 250=33 C. 219=3 C.L J. 395=16 M L J. 115=1 M.L T. 115=33 I.A. 1, P C.**

(2)—*Order of Privy Council, nature of—No distinction made between appeals to Privy Council from High Court in its original civil jurisdiction and those from appellate jurisdiction.*— When once an order is made in Council, it becomes the paramount decision in the suit. When a decision of the Judicial Committee has been reported to Her Majesty, and has been sanctioned and embodied in an Order in Council it becomes the decree or order of the final Court of appeal. No distinction is made between cases going up to the Privy Council from the High Court in the exercise of its original civil jurisdiction and those from its appellate jurisdiction. FUTTEH NARIAN CHOWDHRY v. CHUNDRABATI CHOWDHRAIN, **20 C. 551.** (8 C. 218 and 6 App. Ca., 482, *appr.*)

(3)—*Sudder Dewanny Court refusing to carry out an Order in Council—Pre-emptory orders by the Judicial Committee to Sudder Dewanny Court.*—In suits before the *Sudder Dewanny Adawlut* at Madras, that Court decided in favour of A and, pending appeals to England by B and others, put A into possession of the disputed estates, which were of great value, without taking from him the security required by Madras Reg. VIII of 1818, s. 4. The Judicial Committee of the Privy Council reversed the decree of the *Sudder Dewanny Adawlut*, and directed that Court to put B into possession of the estates. Pending the appeals the Board of Revenue took possession, sold a portion of the estates for satisfaction of arrears of revenue, and became themselves purchasers. The *Sudder Dewanny* Court declined to interfere or carry into execution the Order in Council confirming the report of the Judicial Committee, on the ground that the estates were then in the possession of the Madras Government. Upon a petition by B

***Privy Council, Practice of*—continued.**

—14.—Miscellaneous—*continued.*

to the Judicial Committee complaining of such refusal, a peremptory order was issued, commanding the *Sudder Dewanny Adawlut* forthwith to carry into execution the Order in Council made on the appeals, and to direct the Collectors of the Districts in which the estates were situate to put B into possession, according to the terms of the Order in Council. The application, being *ex parte*, was postponed for notice to be given to the East India Company and the Board of Control of the petition and proceedings. *In re* RAJAH VASSAREDDY LUTCHMEPUTTY NAIDOO, **5 M.I.A. 300=8 Moo. P C. 115=1 Sar. 446.**

(4)—*Discretion of the Court Interference.*— Their Lordships of the Privy Council are always slow to reverse the decision of the Court below made in the deliberate exercise of a discretion entrusted to them by law. THAKURAIN JAIPAL KUNWAR v. BHAIYA INDAR BAHADUR SINGH, **6 Bom. L. R. 495=14 M.L J. 149=8 C. W. N. 465=26 A. 238=31 I. A. 67 =8 Sar. 625, P.C.**

(5)—*Reversal of judgment.*—To induce the Privy Council to reverse the judgment appealed from, the appellant must do something more than show that the respondent's title is not free from doubts; the appellant must at least give some acceptable explanation of the circumstances which have led the Court below to its conclusion. DINOMONI v. BROJO MONINI, **4 Bom. L. R. 167=12 M. L J. 83. P. C.=6 C. W. N. 386=29 C. 187=29 I. A. 24=8 Sar. 224.**

(6)—*Non-appearance of respondent—Service of notice through lower Courts.*—No appearance having been entered by the respondents, to appeal from India, and the appellant's case being ready to lodge for hearing, their Lordships, upon the application of the appellant, made an order, that the respondents should be served with notice, that, unless they brought in their case without delay, the appeal would be heard *ex parte*; giving the appellant liberty to proceed in the Court below, to render such service effectual; and the Court was ordered to certify to the Judicial Committee what had been done with respect to the same. WISE v. KISKENKOOMAR BOUS, **4 M.I.A. 201.**

(7)—*Order in Council giving leave to appeal —Construction of order.*—On special application for leave to appeal from two decrees of the Sudder Court and also two decrees made by the Court of first instance, the order in Council made on the leave given was confined to the Sudder Court decrees. *Held*, that such order was, for the purpose of the hearing of the appeal, to be considered as embracing all four decrees RAM CHUNDER DUTT v. CHUNDER COOMAR MUNDUL, **13 M.I.A. 181=2 Sar. 507.**

(8)—*Admission to practise in Privy Council —High Court Vakil—Ss. 2, 38of the Rules of 31st March* 1871.—The words of Ss. 2 and 3 of

***Privy Council, Practice of*—continued.**

——14.—Miscellaneous—*continued.*

the Rules only apply to solicitors or others practising in London, and to solicitors admitted by the High Courts in India or the Colonies respectively. They have not left an undefined class to be admitted at the discretion of the Judicial Committee. *In the matter of the Petition of* R. E. TWIDALE, **16 C. 636, P.C.=16 I. A. 163=5 Sar. 336.**

(9)—*Appeal to Privy Council—Preparation of record—Practice.*—Where the High Court has based its decision on some issues only and left out of consideration other issues in the case, the only papers to be printed for transmission to the Privy Council are those parts of the record which properly bear upon and are material to the questions decided by the High Court and forming the subject of the appeal. RAJA RAO VENKATA SURIYA MAHIPATI RAM KRISHNA RAO BAHADUR v. THE COURT OF WARDS, **20 M. 395, P.C.=24 I. A. 194=7 Sar. 252.**

(10)—*Revivor—Substitution of parties—Practice of Privy Council.*—Where a party on the record of an appeal pending before the Privy Council dies, proper evidence must be given in the Court from which the appeal was preferred of the representative character of the person or persons by or against whom the revivor is sought. There ought to be some finding of the Court below. That Court should also give its own opinion as to who are the parties proper to be substituted upon the record and make a certificate or statement on which their Lordships of the Privy Council can act. HAIDAR ALI v. TOSSADUCK RASUL **16 C. 184=15 I.A. 209, P.C.=5 Sar. 270.**

(11)—*Extension of time to appeal, jurisdiction of Judicial Committee to grant.*—The Judicial Committee have no jurisdiction to entertain an application for extension of time to appeal, until the petition of appeal is lodged. GUNGADHUR SEAL v. SREMUTTY RADDAMONEY DASSE, **6 M.I.A. 209=1 Sar. 532.**

(12)—*Insolvency of appellant—Abatement of appeal—Omission of Official Assignee to revive appeal as ordered—Appeal dismissed.*—After an appeal from Calcutta had been set down for hearing, intelligence reached England, shortly before the day appointed for the hearing, that the appellant had been adjudged an Insolvent under the Indian Insolvent Act, 11th Vct., c. 21. Upon the appeal being opened, the Court postponed the hearing for six months, to enable the Official Assignee in Insolvency at Calcutta to revive the appeal and prosecute the same; and, in default, the appeal to be dismissed; and directed the respondents to serve the Official Assignee in India with such notice. No steps having been taken by the Official Assignee within the time limited for prosecution, their Lordships refused a further extension of time, and dismissed the appeal. GOOROOCHURN SEIN v. RADANAUTH SEIN, **7 M.I.A. 1=11 Moo. P.C. 76=1 Sar. 586.**

***Privy Council, Practice of*—continued.**

——14.—Miscellaneous—*continued.*

(13)—*Resumption of invalid* lakhiraj, *suit by Government for, under Reg.* II *of* 1819—*Intervention of Zemindar—Interlocutory orders, Appeal from—Application for review of judgment—Re-consideration by same Judge as distinguished from appeal--Causes explaining delay in applying for review—Review before another Judge, exceptional cases of.*—In this suit for resumption of invalid *lakhiraj* brought by the Government, under Reg. II of 1819, the Zemindar, apprehending that his interest might be affected by the decision of the Collector declaring the *lakhiraj* lands to be more extensive than they really were, intervened by petition. It was *held* that, in any view of the case, he had an interest which justified him in so doing; for, even assuming it to be true that the Collector's report as to the extent of the land subject to revenue, was not binding on the Zemindar, and that he had a remedy against such a proceeding in another Court, still he had clearly an interest in averting an erroneous decree being made to his prejudice, the creation of *prima facie* evidence prejudicial to himself, and the necessity of resorting to the Civil Courts to remedy an evil already inflicted. There is no law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. Nothing can be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby, on the one hand, he might be harassed with endless expense and delay, and, on the other inflict upon his opponent similar calamities. [*F.*, 28 C. 324=5 C.W.N. 509; *Appr.*, 11 W.R. P.C. 19; *R.*, 7 B.H.C. 149, 11 A. 35, 14 B. 232, 23 C. 406, 29 C. 758=5 C.W.N. 617, 12 C.W.N. 590=6 C.L.J. 547; *D.*, 23 C. 279.] An application for review is perfectly distinct from an appeal. From the regulations passed relative to the question of granting reviews, the primary intention of granting a review clearly appears to be to secure a re-consideration of the same subject by the same Judge as contra-distinguished from an appeal which is a hearing before another tribunal. There might no doubt be cases in which a review may be had before another Judge as where death or some unexpected cause has prevented the Judge from reviewing it; such exception, however, are allowable only *ex necessitate*. In all practicable cases, the same Judge ought to review and, for the attainment of such object, expeditious presentation of the petition for review is indispensable. The Regulations relating to review by the Sudder Court are applicable to the proceedings of the Special Commissioners granting a review of their own decrees. Also, the cause accounting for the delay and intended to justify the grant of a review ought always to be of grave importance. On a consideration of the

Res Judicata —continued.

—2.—**Adjudications**—*continued.*

1901. The Court was asked to admit it under the provisions of s. 5 of the Limitation Act, on the ground that the appellant had sufficient cause for not presenting it within time, inasmuch as, at the time when he preferred the appeal in suit No. 32, he consulted a pleader as to whether an appeal in that suit should only be preferred or appeals in both suits should be preferred; and, as he was advised by the pleader that it would suffice to prefer an appeal in suit No. 32 only, he preferred an appeal in that suit only. But on the 26th August 1901, the date fixed for the hearing of that appeal, he was told by another pleader that he should have preferred appeals in both. He had no personal knowledge as to whether one or two appeals should be preferred and in preferring only one he acted honestly and on the advice of the pleader first mentioned. The truth of this statement of the appellant (G.P.) was accepted by the Court. *Held*, that the circumstances that the appellant did not prefer the appeal within time in consequence of having been erroneously advised by a legal practitioner not to prefer the appeal was not a sufficient cause for not presenting it within time, and that his appeal in suit No. 33 should be dismissed. *Held*, further, that the decree in suit No. 33, which determined that K had a right of pre-emption, having become final, the Court was debarred from trying that question in the appeal in suit No. 32 by the principle of *res judicata*. GAJADHAR PERSHAD v. MUSSAMAT LACHMIN, **5 O.C. 384.**

(41)—*Case taken up and enquired into on verbal application—Irregularity.*—In this case, the Settlement Officer called on the plaintiff, in the presence of the defendant's agent, seemingly on his verbal application, to state his claim to the village in question, which the plaintiff did. The Officer then passed a decree for proprietary rights in favour of the defendant, which was confirmed on appeal. In a suit to set aside these decisions, it was contended that they were not judicial ones, but were vitiated by the Settlement Officer having no jurisdiction inasmuch as he took up the case without any proper petition and did not carry out the proper procedure which should have prevailed in a judicial trial. *Held* that the suit did not lie as it was perfectly clear that both parties looked after their interest to the best of their power and that the Courts went thoroughly into the claims of both parties and gave well-considered judicial decisions. MULLIK SHER BAHADUR KHAN v. MULLICK FUTTEH SHUR KHAN, **60 P.R. 1870.**

(42)—*Prior suit for possession—Occupancy rights set up by defendants—Defendant referred to separate suit*—Res judicata.—In a previous suit for possession, the present plaintiffs, then defendants, pleaded their right as occupancy tenants. The suit was decreed and the defendants therein were directed to bring a separate suit to establish their occupancy rights, and they accordingly instituted the

Res Judicata—continued.

—2.—**Adjudications**—*continued.*

present suit. *Held* that the decree for possession in the former suit, though erroneously ignoring the then defence of the present plaintiffs on the ground of occupancy and leaving the question of their status undetermined, was a bar to the present suit. The remedy of the plaintiffs was to have appealed from the decree passed against them. KALA v. WILAYAT, **45 P.R. 1879.** [*D.*, 25 P.R. 1884.]

(43)— *Suit relating to occupancy rights—Decree passed before passing of Tenancy Act*, 1868 — *Second suit relating to same matter after passing of Act*—Res judicata—*Compromise—Tenancy Act, s. 2, effect of.*—In a suit tried by the Court of the Superintendent of Settlement, with the aid of assessors, the plaintiff A claimed proprietary rights in a certain land, and the Court, in accordance with the finding of the assessors which was accepted by both parties, passed an order that the defendant B should be allowed occupancy rights for 7 years. After the expiry of the 7 years, A served a notice of ejectment on B, and the latter brought the present suit claiming to hold the land as a tenant with rights of occupancy under s. 5 of the Tenancy Act, 1868, which was passed subsequent to the decision in the former suit. *Held* that the decision in the former suit barred the present suit. *Per Plowden, J.*—The order in the previous suit was a *judgment* of a competent Court in a contested suit and not merely an order giving effect to a compromise between the parties, and barred the plaintiff's claim, by the rule of *res judicata*; the claim was also barred by s. 2 of the Tenancy Act. If the order in the first suit be regarded as one merely based on compromise, so that it could have no effect as a judgment upon the matter in dispute, the compromise itself would furnish a complete answer to the second suit to establish the disputed claim. *Per Fitzpatrick, J.* The judgment in the first suit was passed by consent of parties and was based on a compromise of a doubtful and disputed claim and the present suit was barred by the general law relating to *res judicata*, according to which a decree by consent is regarded as an estoppel *quasi* of record. BAGGU KHAN v. SUJA, **77 P.R. 1877.** [*R.*, 22 P.R. 1879, 67 P.R. 1880, 104 P.R. 1884.]

(44)—*Bombay Act*, III *of* 1876, *s.* 13—*Suit in Mamlatdar's Court—Dismissal for default—Suit under s. 9, Specific Relief Act.*—A plaintiff, whose plaint has been rejected for default in the *Mamlatdar's* Court under Bombay Act III of 1876, would be barred by *res judicata* from bringing another possessory suit on the same cause of action in the Civil Court under s. 9 of the Specific Relief Act, 1877. The rejection of a plaint for failure of appearance under s. 13 of the Bombay Act III of 1876 is a hearing and a final decision of the suit for the purpose of the rule of *res judicata* in s. 13 of the Civ. Pro. Code (Act X of 1877). RAMCHANDRA v. BHIKIBAI, **6 B. 477.** [*Diss.*, 24 B. 251; *R.*, 21 B. 91, 25 B. 82, 28 B. 601=6 Bom. L.R. 612.]

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

(45)—*Act* X *of* 1859, *decision passed under, Civil Court bound by.*—This case had been remanded to the Judge of the lower appellate Court because he had not considered the effect of a former decision in an Act X suit and he was directed to consider the legal effect of that decision alleged by the plaintiff to be a pre-adjudication in his favour, and he again dismissed the plaintiff's suit.—The High Court *held* that he was wrong in saying that a decision in an Act X case could not bind a Civil Court. An Act X Court is a regular Court. and all questions involving title are appealable to the Judge, and the present case had been so appealed to the Judge. WOOMESH CHUNDER SOOTE v. RAM CHUNDER MOWREE, **4 W.R. Act X, 40.**

(46)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Joint right declared in first suit—Separate share claimed in second suit—Mode of enjoyment—Ijmalee property.*—Plaintiff sued for a declaration of his right to occupy one half of a *chundee mundul* for *pooja* purposes, to a joint right in which he had been previously declared to be entitled. Looking at it as an attempt to reverse a previous decision passed in a suit in which the plaintiff claimed a separate share of the *chundee mundul* but in which the Courts declared him entitled to joint possession of it, the suit was not maintainable under s. 2, Act VIII of 1859; but regarding it as a means of obtaining from the Court an order as to the mode in which an *ijmalee* right should be exercised, it was equally untenable. The mode of enjoyment of *ijmalee* property is a matter for private arrangement, and not for judicial determination. ROMESH CHUNDER BHUTTACHARJEE v. SOORJOO COOMAR BHUTTACHARJEE, **5 W.R. 90.**

(47)—*S.* 13 (*Civ. Pro. Code*, 1882)—*Res judicata—Selami and tehwari cesses agreed to be paid under kabuliyat—Previous decision disallowing the same.*—Plaintiff sued a *Mokuraridar* for rent and, also, for certain illegal cesses known as *selami* and *tehwari* on the basis of a *kabuliyat*, under which the defendant-*mokuraridar* had agreed to pay the same. The defendant denied his liability to pay the cesses and relied, in his support, on a judgment between the same parties and in relation to the same property in a suit for a previous *fasli*. *Held*, the claim for the cesses was *res judicata*, the judgment in the previous suit having declared the non-liability of the defendant to pay the same. RAJAH PADMANAND SINGH BAHADUR v. RADHE SINGH, **9 C.W.N. 469.**

(48)—*Civ. Pro. Code*, 1882, *s.* 13—*Suit for recovery of lands.*—Where a prior suit for the recovery of lands, claimed as a portion of certain parcels situate in a mouza leased in putni, was dismissed on the ground of those parcels having been included in a putni lease of an adjoining mouza, granted prior to the

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

plaintiff's lease, a subsequent suit for the recovery of certain other lands forming portion of the same parcels on the same title was held barred as *res judicata*. SUNDHYA MALA v. DABI CHURN DUTT, **6 C. 715.** (1 M. H.C. 245, 13 W.R. 64, 2 C.L.R. 33, 3 C. 145, *F.*) [*R.*, 12 C.W.N. 739=9 C.L.J. 597.]

(49)—*Act* XIX *of* 1863, *ss.* 8 *and* 9—*Adjudication of title—Res judicata.*—An adjudication of title by a Collector under s. 8 of Act XIX of 1863, which, under s. 9, becomes final by not being appealed against, is *res judicata* and cannot be re-opened in a civil suit. HARSAHAI MAL v. MAHARAJA SINGH, **2 A. 294.** [*F.*, 5 A. 280= A.W.N. 1883, 20; *D.*, 2 A. 839.]

(50)—*Landholder and tenant—Ejectment of tenant by order of Revenue Court—Suit by tenant in Civil Court for declaration of title—Jurisdiction*—Res judicata—*Act* XVIII *of* 1873 (*N. W. P. Rent Act*), *ss.* 34, 93 (*b*)—*Civ. Pro. Code*, *s.*13.—Where the question of a tenant's liability to ejectment in consequence of certain acts committed by him, being made exclusively cognisable by the Revenue Court, is decided by such Court, such decision, on becoming final, is *res judicata*, and bars a fresh suit in the Civil Court in respect of the same matter. RADHA PRASAD SINGH v. SALIK RAI, **5 A. 245=A. W.N. 1883, 10.** (3 A. 85, *D.*)

(51)—*Act* II *of* 1901, (*Agra Tenancy Act*), *s.* 199—*Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself.*—In a suit for ejectment under Act II of 1901, the defendants did not plead their own title to the plot in suit, and, in fact, did not oppose the suit for ejectment. *Held* that a subsequent suit, brought in a Civil Court by the then defendants, for proprietary possession of the same plot, was barred by the principle of *res judicata*. BIHARI v. SHEOBALAK, **A.W.N. 1907, 189=4 A.L.J. 545=29 A. 601.** (A.W.N. 1904, 109, 141, 27 A. 569, *D.*; A.W.N. 1907 1, 6, *R.*; 29 C. 707, *Disc.*) [*R.*, 6 A.L.J. 259.]

(52)—Res judicata—*Decision in rent suit—Ex-parte decree—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13.—The rule of *res judicata* may be applied, although the decree in the former suit was passed *ex parte*. Where an issue was raised on the points now called in question, and the issue was heard and finally decided by the Court on the previous occasion in the rent suit, the rule of *res-judicata* applies, although the suit was decided *ex-parte*. HARA CHANDRA BAIRAGI v. BEPIN BEHARY DAS, **6 Ind. Cas. 860.** (2 Ind. Cas. 11, *Affirmed.*)

(53)—Res judicata—*Matter of record—Estoppel.*—Where, in a previous suit for rent, the Court found that the defendant was not the plaintiff's tenant, the defendant is estopped by a matter of record from pleading in a subsequent suit for

Res Judicata—continued.

—2.—**Adjudications**—*continued.*

khas possession that he is plaintiff's tenant. FAYJ DHALI v. AFTABUDDIN SIRDAR, **6 C.W.N. 575.** [*F.*, 3 C.L.J. 201, 34 C. 922; *Doubted & D.*, 9 C.W.N. 928=2 C.L.J. 389; *D.*, 11 C.W.N. 100, N, 7 C.L.J. 483=35 C. 807.]

(54)—*Civ. Pro. Code*, 1882, *s.* 13—*Suit for rent based on a lease deed—Subsequent suit for possession and rent based on same lease deed—* Res judicata—*Oaths Act* (X *of* 1873)—*Decree of appellate Court on strength of oath of party—Confirmation of first Court's decree—Final adjudication.* — Plaintiff sued to recover a *paramba* with arrears of rent. A prior suit by the plaintiff for rent in respect of the same land and based upon the same lease deed had been dismissed. Plaintiff contended that as the former suit was cognizable by a Small Cause Court, the present suit was not barred by the decision in that suit. *Held* that the present suit was within the competency of the Court which tried the other suit, notwithstanding that in that other case there could have been no second appeal. The suit was, therefore, barred by s. 13, Civ. Pro. Code. (17 M. 273, *R.*; 28 C. 78, *F.*; 18 M. 189, *R.*) [*Overruled*, 29 M. 195=16 M.L.J. 41=1 M.L.T. 25, F.B.; *F.*, 13 M.L.J. 23; *R.*, 27 M. 63, 13 M.L.J. 134, 9 C.W.N. 656.] Where an appellate Court confirms the decree of the first Court on the strength of the oath of a party to the suit on a question of fact, the decree of the appellate Court is none the less a final adjudication. AHMED v. MOIDIN, **24 M. 444.**

(55)—*Suit for declaration of nature of rent payable by tenant and that plaint lands were* nij-jote *lands — Settlement proceeding fixing certain kind of rent, existence of, whether a bar to suit—Necessity for adjudication as to* nij-jote *or otherwise of land—Bengal Tenancy Act,* ss. 104 (2) *to* 107 *and Civ. Pro. Code, s.* 13.—The plaintiff sued for a declaration that the land in dispute situated in Orissa, was held by the defendants under the plaintiffs on a produce-rent and not on a money-rent as shown in the settlement records and also for a declaration that the lands were the *nij-jote* lands of the plaintiffs and used to be cultivated before the plaintiffs and their ancestors. Both the lower Courts held that the first question was *res judicata* by virtue of a settlement proceeding and that there was no necessity for determining whether the lands were *nij-jote* or not. *Held*, the Settlement Officer had jurisdiction to deal with the question of fair rents arising between the parties, because a settlement of revenue was being made in the province of Orissa. That being so, the Settlement Officer had jurisdiction under sub-s. 2 of s. 104 of the Bengal Tenancy Act. He fixed a money-rent and not a produce-rent as payable by the defendants to the plaintiffs. No objection was preferred under s. 105 and no dispute was raised under 106 and, therefore, under the provision of 107, the decision of the Settlement Officer in

Res Judicata—continued.

—2.—**Adjudications**—*continued.*

the proceedings for settlement of rent under s. 104 had the force of a decree. Consequently, the plaintiff's claim for rent in kind was barred by rule of *res judicata*. *Held*, also, that it was quite unnecessary in this case to decide whether the lands were the *nij-jote* lands of the plaintiffs or not, for, in Orissa, occupancy-right can accrue in *nij-jote* and their accrual is not barred, as in Bengal, under s. 116 of the Bengal Tenancy Act. This section was not extended to Orissa. BRAHMANUNDA MAHAPATRA v. ARJUN RAUT, **1 C.L.J. 310.**

(56)—*Legality of resumption by Zamindar—Question decided once—Subsequent suit between same parties in respect of same matter—Maintainability.*—Where the question of the legality of a resumption made by a zemindar had become final by a decision, of the second appellate Court, it was not competent to the parties to litigate again in respect of the same matter. VENKATA NARASIMHA APPA ROW v. SOBHANADRI APPA ROW, **13 M.L.J. 134.**

(57)— *Enhancement* — Res judicata—*Fresh evidence, discovery of—Review of judgment.*—The question of the right to enhance, having been decided in the plaintiff's favour in the former suit, it must be considered as *res judicata* in this suit for enhanced rent. The course for the defendant when he discovered fresh evidence not in his knowledge or power at the time of the first decision, is to apply for a review. BHUGGOBUTTY DABEA v. RAM KANNAYE LOHA, **1 W.R. 167.**

(58)—*Suit for enhancement—Dismissal—Re-assessment—Subsequent suit—Maintainability.*—A suit for enhancement of rent was dismissed on the ground that the defendant held under an unexpired lease. Subsequently, Revenue authorities re-assessed the land. A second suit was then brought for enhancement. *Held* that the circumstances that the Government had increased the assessment will not alter the relative position of the parties and therefore the second claim was *res judicata*. MUHAMMAD GUL v. KARAM CHAND, **6 P.R. 1890, Rev.**

(59)—Res judicata—*Right of Brahmans of* Mauza *Sangal*, Tahsil *Kaithal to one-fourth of* khudi kamini *or hearth tax—Revision—S.* 16 *of Act* XVII *of* 1887.—*Held*, that Brahmans of *mauza* Sangal, *tahsil* Kaithal, are entitled to get from the Lambardars of that place one-fourth of the *khudi kamini* or hearth tax collected by them, and their right to get it is *res judicata* by reason of a previous decision between the parties. *Held*, also that an order of a Revenue Court, which re-opens a *res judicata* question between the parties, is liable to be set aside on revision under s. 16 of Act XVII of 1887. BODHA RAM v. NET RAM, **4 P.W.R. 1911, Rev.=10 Ind. Cas. 299.**

(60)—*Suit to enforce award of, for partition—Alternative relief.*—Where disputes as to partition of family properties had been submitted to arbitrators and an award had been made and

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

some properties divided in pursuance thereof, but the partition was not completed on account of disputes, *held*, in a suit to enforce the award, that an alternative claim for partition cannot succeed, since there has been already a valid award. SUBBARAYA CHETTI v. SADASIVA CHETTI, **20 M. 490**.

(61)—*Suit for partition—Award, effect of.*—An award duly passed in accordance with a submission of the parties is equivalent to a final judgment. To give effect to it, the subsequent consent or approval of neither party is required. After an award made for a partition of joint property neither party can sue for partition, any more than he could, if a decree in a suit for partition had been passed. In order that the parties should be remitted to their previous rights, there must be positive evidence that both parties agreed that the former state of things should be restored. It is not enough that the award was not enforced or that even both the parties objected to it. KRISHNA PANDA v. BALARAM PANDA, **19 M. 290**. [*F.*, 20 M. 490, 33 C. 881=4 C.L.J. 162=11 Bom. L.R. 20=5 M.L.T. 220, 1 S.L.R. 236; *R.*, U. B.R. 1906, 1st Quarter, Specific Relief, 30.]

(62)—*Partition-proceedings — Determination of question of title*—Res judicata—*Act* XIX *of* 1873 (*N. W. P. Land Revenue Act*), *ss.* 113, 114.—An adjudication of a question of title raised between parties to partition-proceedings under Act XIX of 1873, is a bar to a suit in the Civil Court between the same parties in respect of the same title, although, in some respects, such adjudication may have been defective or irregular. (2 A. 294 and S. A. No. 129 of 1881, decided on 27th July, 1881, *F.*) Such an adjudication, being one under s. 113 of the Act, can be questioned only in the manner provided by the subsequent sections, and not by separate suit. BATESHAR NATH v. FAIZUL-HASAM, **5 A. 280=A.W.N. 1883, 20.**

(63)—*Civ. Pro. Code* (1882), *s.* 13— *Decisions of questions of title in suits under s.* 283, *when operate as* res judicata.—Where in his suit under s. 283 of the Code, the claimant-objector claims both in form and substance, against the judgment-debtor, a declaration of his title to the whole of the property, the title to which is in issue in the suit, a decree in such suit declaring the liability or non-liability of the property to attachment and sale in execution of the creditor's decree, must necessarily, unless the suit be decided on a ground not involving the question of title, decide and determine all questions of title on which the parties to the suit could rely, so that such decision would operate in any future suit between the parties as *res judicata* on those questions of title, though such subsequent suit might relate to property not in question in the prior suit under s. 283 of the Code. DWARKA DAS v. KAMESHAR PRASAD, **17 A. 69=A.W.N. 1895, 3.** [*R.*, 57 P.R. 1907=66 P.W.R. 1907.]

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

(64)—Res judicata—*Dismissal for default—Questions of title—Civ. Pro. Code*, 1882, *s.* 13.—Where, in a former suit between the parties, issues had been fixed on the question of title, and the suit was dismissed, as the plaintiffs had failed to adduce evidence, which it was incumbent upon them to do, it must be held to have been dismissed on the merits, so that a subsequent suit for possession of the property on the same title would be barred as *res judicata*. KARTICK CHANDRAPAL v. SRIDHAR MANDAL, **12 C. 563.** [*R.*, 9 C.W.N. 679, 6 C.L.J. 362.]

(65)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11)—*Dismissal of suit—Decree providing that fresh suit might be brought as to part of subject-matter*—Res judicata.—Where a suit for possession of immoveable property was dismissed on the ground that plaintiff could not prove his title to the whole property, although he could to the extent of one-third, it was held that the decision was *res judicata* in regard to the one-third, although the decree declared that he could bring a second suit for it, and although this portion of the decree was not appealed against. SUKH LAL v. BHIKHI, **11 A. 187, F.B.=A.W.N. 1889, 13.** (5 A. 595, 8 A. 282, 9 A. 155, A.W.N. 1885, 171, *Expl.*) [*R.*, 6 Bom. L.R. 594; *D.*, 17 C. 398.]

(66)—*Decision in previous suit for possession, holding plaintiff's right barred by reason of an agreement — Whether* res judicata *in a subsequent suit, after bar of the agreement by time.*—The present suit for possession was on a cause of action identical with that of, and between parties virtually the same as those in, a prior suit, in which, it had been held that the plaintiff was not entitled to possession, by reason of an agreemet to sell in favour of the defendant. The Subordinate Judge dismissed the present suit as *res judicata* by reason of the prior decision, but the District Judge held that the plea of *res judicata* was not sustainable. Setting aside the decree of the District Judge *held* the fact that the agreement to sell in favour of defendant was enforceable by him, at the time of the prior suit, but had become barred by time, at the time of the subsequent suit, could not prevent the operation of the bar by *res judicata*. ADAKKALAM CHETTIAR v. RAMALINGA CHETTIAR, **29 M. 320.**

(67)—*Civ. Pro. Code. s.* 13—*Suit for joint possession—Prior suit for same relief dismissed*—Res judicata.—The plaintiffs had brought a suit against the defendants for exclusive possession, and, in the alternative, for joint possession of the plaint land. The questions raised in that suit having been brought into issue and evidence having been taken, the action was dismissed. The Court in dismissing the suit, though wrongly, did not reserve to the plaintiffs the right to bring a fresh action. The present suit was for joint possession of the same land. *Held*, that the dismissal of the

Res Judicata—continued.

——2.—Adjudications—*continued.*

former suit was a bar to the present suit. KUDRAT v. DINU, **9 A. 155=A.W.N. 1887, 5.** (5 A. 595, 8 A. 282, 13 M.I.A. 160, *R.*) [*F.*, 9 A. 690; *Appr.*, 11 A. 187.]

(68)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Suit for declaration when plaintiff was entitled to possession—Passing of decree accordingly—Subsequent suit for possession—Mistake of law—Maintainability of suit.*—There were two divided brothers. One of them, in conjunction with his senior wife and to the exclusion of the first defendant, his junior wife, took a son of the other brother in adoption. On the date of the adoption he made a settlement of some of his properties upon the first defendant for life and with remainder to his daughter by her. He died sometime after and was followed by his senior wife and the adopted son successively. Thereupon his brother, claiming as the reversionary heir of the deceased adopted son, sued for a declaration that he was entitled to succeed to the properties left by his brother, including the properties comprised in the deed of settlement made by him in favor of the first defendant and her daughter. The suit was dismissed as regards the properties comprised under the deed of settlement, and a decree was passed in respect of the other properties. On the death of the then plaintiff, his sons, the present plaintiffs, instituted the present suit for possession of the properties in respect of which a declaratory decree had been passed in the former suit. Plaintiffs contended that on the death of the adopted boy, the first defendant, being only in the position of adoptive step-mother, could not succeed to his properties and their father succeeded to those properties and on their father's death, the same devolved on them by descent as his heirs. They sought avoid the effect of the former decree on the ground that it proceeded on a mistake of law, namely, that the first defendant was entitled to succeed as adoptive mother and that their father was only presumptive reversioner on her death. *Held*, that the express adjudication in the former decree, that the plaintiff's father was entitled to succeed to the properties now sued for only on the death of the first defendant, necessarily implied that the first defendant and those claiming under her were entitled to the possession and enjoyment of the properties during her life-time. When such declaration was embodied in the decree itself, it was immaterial that no question or issue was actually raised and decided as to whether or not plaintiffs' father was entitled to succeed to the properties on the death of the adopted boy as his immediate heir, which was the claim on which the present suit was founded. The plaintiffs' claim could not be allowed and declared in the present suit and plaintiffs put into possession by ejecting defendants, without setting aside the prior decree. The present suit was therefore barred as *res judicata*, quite independently of explanation I or explanation II to s. 13, Civ. Pro. Code. KAVERI AMMAL v. SASTRI RAMIER, **26 M. 104=13 M.L.J. 58.** [*R.*, 13 M.L.J. 448, 9 O.C. 243, 30 M. 461=17 M.L.J. 250, 44 P.R. 1908, 26 M. 760.]

(69)—*Decision as to point pleaded by one defendant and supported by another defendant to be* res judicata *between them.*—The plaintiff, S, brought a suit against the defendant, C, for possession of a deceased Hindu's property on the ground that he became entitled to it by survivorship. The defendant, besides pleading adoption, custom, &c., also pleaded that, if his adoption was invalid, it was not the plaintiff but one R who was entitled to the property by right of inheritance. In consequence of this last plea, it would seem, R instituted a suit for possession of the property. The Subordinate Judge thereupon made R a defendant to the plaintiff, S's suit and S a defendant to her suit. In the suit of R, it was pleaded by the present defendant, C, that R had a better right than the present plaintiff, S. The Subordinate Judge held that R had no title as against the plaintiff, S, and accordingly decreed to claim of S and dismissed that of R who did not appeal. The defendant C appealed, making the plaintiff, S, alone a respondent. *Held*, that the question whether it was R or the plaintiff, S, who had a better title was *res judicata* between the plaintiff and R as well as between the plaintiff and the defendant, C. CHUNNI LAL v. SRIMANDIR DAS, **9 O.C. 125, B.**

(70)—*Civ. Pro. Code* (1882), *s.* 13 (=*s.* 11, *Present Code*)—Res judicata—*Suit by puisne mortgagee—Prior mortgagee's omission to plead his charge—Decree for sale—Subsequent suit on puisne mortgage, not maintainable.*—If, in a suit by a subsequent mortgagee for sale of the mortgaged property, a prior mortgagee who is impleaded as defendant, fails to plead his prior mortgage and his right to have it redeemed, and a decree is passed for sale of the mortgaged property, but not subject to his prior charge, a subsequent suit by him on his prior mortgage will be barred by Expl. II to s. 13, Civ. Pro. Code. SRI GOPAL v. PIRTHI SINGH, **24 A. 429, P.C.=6 C.W.N 889=4 Bom. L.R. 827=29 I. A 118=8 Sar. 293.** [*F.*, 2 C.L.J 574; *Rel. on*, 31 C. 428; *Expl.*, 1 C.L.J. 248, 1 C.L.J. 337; *R.*, 7 O C. 152, U.B.R. 1906, 3rd Qr. C.P.C. 46, 36 C. 193=1 Ind. Cas. 913=5 C.L.J. 611, 12 C.W.N. 292=7 C.L.J. 504, 10 O.C. 146, 12 C.W.N. 862=8 C.L.J. 82=35 C. 979, 12 O.C 347, 9 C.L.J. 78=3 Ind. Cas. 686, 13 M.L.J. 448=26 M. 760; *Appl.*, 17 M.L.J. 301=2 M.L.T. 330=30 M. 353.]

(71)—*Dismissal of suit for possession—Second suit for redemption by same plaintiff*—Res judicata—*Act* VIII *of* 1859, *s.* 2.—A suit for proprietary possession of a house having been dismissed on the ground that the defendant had been in adverse possession, the plaintiff brought a second suit for redemption against the same defendant, alleging that the house had been

Res Judicata—continued.

——2 —**Adjudications**—*continued.*

mortgaged to defendant by the plaintiff's father, and the defendant was in possession as mortgagee. *Held*, that, as the plaintiff had an opportunity of bringing the question of mortgage before the Court in the former suit and failed to do so, he could not rest a new suit on that ground, and that the second suit was barred by s. 2 of Act VIII of 1859. PARI MAL v. VASAND RAM, **33 P.R. 1877.**

(72)—*Civ. Pro. Code*, 1882, *ss.* 13, *Expl.* II, 42, 43—*Dismissal of suit for redemption of mortgage—Subsequent suit for redemption of another mortgage.*—Though the subject of *res judicata* was dealt with more comprehensively in Act XIV of 1882 than in the former Code, yet, ss. 13 and 43 of the Code of 1882 were not exhaustive of the law of *res judicata.* That law was the same under the Codes of 1877 and 1882 and was substantially the same as the English law. The expression "the subjects in dispute" in s. 42 signifies the jural relation between the parties to the suit, for the determination of which the suit was brought. The object of s. 42 was to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object matter of the suit. Where several independent grounds of action are available, a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action. Plaintiff, claiming as the daughter's son and legal representative of the original owner of certain property, sued for redemption of an alleged usufructuary mortgage thereon. The defendants, while denying the plaintiff's relation to the owner as well as the mortgage sued upon, pleaded that a portion of the property had been usufructuarily mortgaged to them by the said owner and that the same had been sold to them subsequently. Without deciding the question of plaintiff's relation to the owner, the suit had been dismissed, on the ground that the mortgage sued upon was not proved. Thereupon, plaintiff brought the present suit substantially against the same defendants for redemption of the usufructuary mortgage admitted by the defendants in the previous suit. *Held* that neither of the decisions of the Privy Council in 11 B.L.R. 158 and 20 C. 79, nor Expl. II to s. 13, could be relied on as lending any support to the proposition that a plaintiff who sought to redeem a specific mortgage or to eject on a specific lease and failed in such suit, because the mortgage, or lease was not proved, was thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage, or to eject, on the strength of his title, the person in possession. The real test was whether the cause of action, or the transaction on which the two suits were

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

based, was the same, and not whether the transaction was sought to be established in different modes or by different means. Consequently, the present suit to redeem a mortgage other than that which formed the subject of the prior suit was not barred by s. 13, Expl II, or by s. 43 of the Code. RAMASWAMY AYYAR v. VAITHINATHA AYYAR, **26 M. 760 = 13 M.L. J. 448.** (21 M 91, 22 M. 259, *Disc.*; 25 B. 189, *Diss.*) [*Not F.*, 6 Bom. L.R. 594; *F.*, 28 M. 406, 29 M. 153 = 16 M.L.J. 48, F.B.; *Appr.*, 27 M, 102; 2 N.L.R., 94; *R.*, 27 M. 380, 1 C.L.J. 337. 30 B. 395 = 8 Bom. L.R. 296, 55 P.R. 1907 = 96 P.W.R. 1907 = 65 P.L.R. 1908, 7 C.L.J. 504 = 12 C.W.N. 292, 31 M. 385, 12 O.C. 347.]

(73)—*S.* 11, *Civ. Pro. Code*, 1908, *Expl.* IV—*Suit on first mortgage—Order for unconditional sale—Non-disclosure of second mortgage—Subsequent suit on second mortgage — Bar.*— Where a mortgagee holding two mortgages, under two separate deeds, of the same property, sued upon the first mortgage without disclosing the existence of the second mortgage, and obtained a decree for unconditional sale of the property, and where he subsequently sought, by a second suit, to enforce his second mortgage by sale of the same property, *held* that he was barred from suing a second time for sale of the property on his second mortgage, by s. 11, Expl. IV, Civ Pro. Code, 1908. DIWAN SAHIJRAM TAHILRAM v GAGUMAL DHARAMDAS, **4 S.L. R. 82 = 8 Ind. Cas. 216.** (24 A. 429, P.C., 30 M. 353, *F.*)

(74)— *S.* 13, *Civ. Pro. Code*, 1882—*Prior mortgage of entire share with possession—Second mortgage of two-third share—Suit for sale on second mortgage— Prior mortgagee party—No prayer for possession of one-third—Second suit for possession*—Res judicata.—D, father of R K, R L and G, mortgaged his property to S with possession Subsequently R K and R L executed a simple mortgage of their two-third share to B. B brought a suit for sale upon his mortgage and offered to redeem S. He did not ask for possession of G's share after redemption. The Court gave him a decree ordering him to pay up S's mortgage. B applied for an order absolute praying for sale of G's share after redemption. The application was rejected. He then brought the present suit against G for possession of G's one-third share. *Held* that the suit was barred by the rule of *res judicata* inasmuch as the plaintiff in the first suit ought to have claimed possession of G's one third share, which could not be sold in execution of his decree against the other two-third. The cause of action for demanding possession had accrued when B brought the former suit. The right for the redemption of the entire mortgage, as then interpreted, had vested in B, and to demand possession was part and parcel of that right. BHURA v. GHURE, **8 A.L.J. 352.** (26 B. 661, *R.*)

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

(75)—*Act* IV *of* 1882 (*Transfer of Property Act*), ss. 90, 100—*Suit to enforce vendor's lien by sale—Determination in that suit of vendee's personal liability—Application for decree over under s.* 90.—In a suit for enforcemsnt of a vendor's lien by sale of the property, the Court further decided that " the defendants cannot, either personally or their other properties, be held liable for any part of the amount claimed. The property sold to them can alone be liable." Subsequently, the plaintiffs applied for a personal decree under s. 90 of the Transfer of Property Act, 1882. *Held*, that it was within the competence of the Court to determine the personal liability or otherwise of the defendants—if not, at that stage, to pass any decree under s. 90—and that the matter so determined was *res judicata* in respect of their subsequent application (14 A. 513, 11 A. 486, 13 A. 356, A.W.N. 1890, 142, *R.*) and it was none the less *res judicata* because the finding as to the personal liability of the defendants was not embodied in the decree. UTTAM ISHLOK RAI v. RAM NARAIN RAI, **A.W.N. 1906, 44 = 3 A.L.J. 171 = 28 A. 365.** (7 A. 606. *R.*)

(76)—*S.* 13, *Civ. Pro. Code*, 1882, Res judicata—*Suit for sale on a mortgage—Compromise by which mortgagee accepted a simple money decree—Second suit for sale barred.*—A suit for sale on a mortgage was compromised on the terms that the mortgagee should accept a simple money decree for the amount of the mortgage-debt, and such a decree was accordingly passed. This decree not being satisfied, the mortgagee again sued for sale of the mortgaged property. *Held* that the suit was barred. PIARI LAL v. NAND RAM, **A.W N. 1908. 265 = 5 A.LJ.. 732 = 31 A. 19 = 1 Ind. Cas. 561.** (33 C. 849, *F*; 26 A. 223, A.W.N. 1905, 152, *D.*)

(77)—*Consent decree—Effect.*—A decree by compromise is as binding on the parties thereto and their privies as the decree obtained on contest. NICHOLAS V. ASPHAR, **24 C. 216.** (*In re South American and Mexican Co.*, L.R. 1895, 1 Ch. 37, *The Bellcairn*, L.R. 10 P.D. 161, 18 M. 1, 13 M.I.A. 497, *R.*)

(78)—*Evidence Act, s.* 13—*Previous judgment* inter partes *determining question at issue*—Res judicata—*Act* VIII *of* 1859, *s* 2.—Plaintiff in the present suit instituted in 1874, had sued the defendant in 1872 for alienating a piece of land alleged to belong to the gaddi of a Dhurmsala to which plaintiff claimed to be the apparent successor. A decree having been then made in favour of the plaintiff, he again sued the same defendant for making another alienation of a portion of the same land. It was held that the previous judgment of 1872 was a fact and a relevant fact (Indian Evidence Act, s. 13) on the issue between the parties whether the land belonged to the gaddi or not. The judgment therefore was relevant and cogent evidence that the property in question belonged to the gaddi and not to the defendant

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

by acquisition. It was not therefore open to the defendant to again raise the defence that the land did not belong to the gaddi, the issue as to the ownership of the property having become *res adjudicata* between the parties. LACHMAN GIR v. LAHAR SINGH, **70 P.R. 1875.**

(79)—*S.* 13—*Civ. Pro. Code*, 1882—Res judicata—*Manager of trust property must set out his title in an ejectment suit.*—Plaintiff filed a suit to eject defendant in possession of a room used as a temple in a house belonging to the plaintiff. The plaintiff's title to the property was not set out in the plaint, and no question was raised whether the whole of the property was not the subject of a religious trust. He got a decree in the Court of first instance, but the Appellate Court came to the opinion that the house was impressed with a religious trust, and that the plaintiff's claim should have been based upon his right as manager. The plaintiff was offered an opportunity of altering his claim as manager under the will of the person who established the trust. That offer was not accepted and the Appellate Court dismissed the suit. The plaintiff subsequently brought another suit, as manager under the will of the owner of the house who established the trust, to eject the defendant from the room and to get an account of the profits and emoluments which the defendant had received as manager. *Held*, that the second suit was barred as *res judicata*, for the plaintiff in both the suits was asserting a purely personal right in his own personal interest, and it was a right which might and ought to have been put forward in the first suit. HARGOVAN RAMJI v. MULJI HARJIVAN, **11 Bom. L.R. 921 = 34 B. 416 = 4 Ind. Cas. 241.**

(80)—*Claim by a scheduled creditor against the insolvent after his discharge—Held*, that a suit by the creditor of an insolvent in respect of debt entered in the schedule prepared in the insolvency proceedings of which he was well aware, was barred as *res judicata*. J.B. PENHEAROW v. PARTAB SINGH, **76 P.R. 1899 = 24 P.L.R. 1900, Notes of Judgments.**

(81)—*Procedure—Fresh suit for portion of claim disallowed--Extra-judicial advice—Small Cause Court — Jurisdiction — Chief Court—Powers of interference.*—A portion of the plaintiff's claim having been decreed, and the remaining portion disallowed, the plaintiff on the advice of the Judge, brought a fresh suit for the disallowed portion. *Held*, on these facts (1) that defendant's answer of judgment recovered, would entitle him to a decree upon the production of the first record, for the cause of action was the same; (2) that the extra-judicial advice of the Judge had no effect whatever upon the right of the defendant. And with reference to the plaintiff's prayer for the exercise by the Chief Court of its discretionary powers under

***Res Judicata*—continued.**

—2.—Adjudications—*continued.*

s. 28 of Act XI of 1865, *held* that the said discretion must be exercised on general principles in regard to established rules, and the Court had no power, upon a suggestion or a doubt of a possible failure of justice, to alter orders duly and formally made upon evidence heard. MOKURDAR MULL v. KHODABUX, **14 P.R. 1866, Civ. Ref.**

(82)—*Suit to set aside decree*—Res judicata *Review*—Where a suit seeks the reversal of a former decree between the same parties on the allegation of the falseness of a fact which the former decree establishes as true, the suit cannot lie. The plaintiff's remedy is by way of review of judgment in the previous suit. MALAKSHAHBAZ v. MOWAZ, **31 P.R. 1868.**

(83)—*Suit to set aside a decree on the ground of fraud—Sole question raised in the suit already decided in proceedings under s.* 108 *of the Code of Civil Procedure*—Res judicata.—In a suit to set aside a decree, as having been obtained against the plaintiff by fraud, substantially the only ground relied upon was that the suit had been improperly instituted against the plaintiff as of full age, when, in fact, he was a minor. This had been decided against the plaintiff in earlier proceedings between the parties under s. 108 of the Code of Civil Procedure. *Held* that the suit was not maintainable. NIDAR MAL v. RAUNAK HUSAIN, **A.W.N. 1907, 191=4 A.L.J. 668=29 A. 608.** (29 A. 212, *F.*; 21 C. 395, *D.*)

(84)—*Suit to set aside deed of relinquishment —Dismissal of suit for default after partial enquiry—Subsequent suit by defendant to enforce the deed—Applicability of rule of—Civ. Pro. Code, ss.* 13 *and* 372—*Suit based upon registered deed of release—Limitation Act, arts.* 49 *and* 116, *applicability of.*—The plaintiff in the suit alleged that he was desirous of publishing translations of certain Sanskrit religious books and that the defendant agreed to act as the Honorary Secretary in respect of the business of the publication. The publication became a lucrative business and was conducted entirely by the defendant as manager on behalf of the plaintiff. Subsequently, a deed of relinquishment was executed, by which the defendant acknowledged the plaintiff's title in the business and by which certain mutual agreements were entered into between them with regard to the accounts of the business. The defendant, however, declined to make over the stock of the business. Hence the present suit by plaintiff, for delivery to him of the books and publications in the possession of the defendant. The defendant contended that the deed of relinquishment was executed *benamee* and that the plaintiff's suit was barred by limitation. Prior to the institution of the plaintiff's suit, the defendant had brought a suit against the plaintiff for a declaration that the deed was *benamee*. The suit was, however, dismissed, after the examination of the present defendant as plaintiff in that suit in

***Res Judicata*—continued.**

—2.—Adjudications—*continued.*

consequence of a report by his counsel that he had no instructions in the case, on a subsequent day to which it had been adjourned. The present plaintiff, therefore, contended that the defendant in consequence of the dismissal of the suit brought by him, was estopped from impugning the validity of the release deed. *Held*, the deed of relinquishment was in effect a contract and the acknowledgment that the property in the books and publications belonged to the plaintiff contained therein, implied that the property in suit was the property of the plaintiff. Hence the document fell under art. 116 and not under art. 49 and was not, therefore, barred. *Held* further, that the issue raised in the suit on behalf of the defendant had previously been an issue raised by him in the prior suit, *i.e.*, as to whether the deed of relinquishment was or was not a *benamee* transaction. The matter in issue in this suit was directly and substantially in issue in the previous suit between the same parties. The question was heard and finally decided within the meaning of s. 13, Civ. Pro. Code, because the defendant having had an opportunity to prove his case failed to prove it. Consequently, the defendant was precluded from setting up the plea that the deed of relinquishment was not real but *benamee* and the provisions of s. 373, Civ. Pro. Code, availed him nothing (19 C. 159, 15 I.A. 186=16 C. 173, 2 C.W.N. 337=25 I.A. 102, *D.*; 6 B. 482, 8 A. 283, 23 W.R. 58, 10 M. 272, 13 M. I.A. 160, 12 C. 563, *R.*) But the Court having found, on the evidence in the case, that the plaintiff did not prove his case that the business was commenced by him with his funds, gave a decree for the plaintiff, for an account of the stock in trade of the business without costs. ROMA NATH DAS v. MOHESH CHUNDER PAL, **9 C.W.N. 679.**

(85)—*Land Acquisition Act* (I of 1894), *decision as to person entitled to compensation in proceedings under, effect of.*—The question, in this case, was with reference to the binding nature of a decision as to the rights of persons, who claimed compensation in a previous proceeding under the Land Acquisition Act, conducted on a reference made by the Collector owing to disputes between the said persons. *Held*, that an adjudication as to the right of persons claiming the compensation in accordance with the provisions of the Land Acqusition Act (X of 1870), concluded the question between the same parties was decided by the Judicial Committee and there is nothing in the present Act (I of 1894) to warrant its being held differently in regard to similar adjudications made under it. CHOWAKARAN MAKKI v. VAYAPPARATH KUNHI KUTTI ALI, **29 M. 173.** (20 M. 69, *D.*)

(86)—*Application under Administrator-General's Act*, s. 63—*Civ. Pro. Code*, 1877, s. 13. —An application by petition under s. 63 of Act II of 1874 is a suit within the meaning of s. 13 of the Civ. Pro. Code (X of 1877) and is barred by the diposal of a similar former application in the same matter, though the order

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

passed is capable of being reviewed. ELIZA SMITH v. THE SECRETARY OF STATE, **3 C. 340.**

(87)—*Relief granted in former suit possible only upon certain findings—Subsequent suit, claim in, to be decided upon same findings —Applicability of rule of—Dismissal of suit for non-joinder after trial—Limitation Act, s.* 14, *applicability of—Dispossession caused by removal of decree, whether, would give fresh cause of action—Limitation Act, arts.* 93, 142. —A, the purchaser of a three-fourths share in a certain village, sued to recover possession of the lands. P objected to the suit on the ground that he was the prior purchaser of the lands and that the suit was barred by limitation. The questions for decisions were, whether P was barred, by the rule of *res judicata*, from setting up his title to the lands and whether s. 14 of the Limitation Act could save the suit from limitation. *Held*, in a former suit between the parties concerning a portion of the same village the question of the genuineness of the sale deed to P was gone into by the Court of first instance and the Court of first appeal. Both the Courts found that the sale to P was antedated and a forgery and that the sale to A was true and supported by consideration. The High Court, on appeal, adopted these findings in granting a relief which was possible only on such findings. Therefore, it was not open for P in this suit to plead that his sale-deed was not antedated and not a forgery. *Held*, also, that the dismissal of a former suit between the parties about the same lands on the ground of non-joinder of parties was not for a cause of a like nature with defect of jurisdiction, under s. 14 of the Limitation Act. The dismissal of the suit was based on findings arrived at by the Court. The Courts were able to, and did, entertain the suit. Consequently, the finding of the former suit could not save the present suit from limitation. Further, art. 142 of the Limitation Act applied to the suit. The plaintiff could not treat his second dispossession, *i. e.*, under the order of the Court in the first suit above referred to, restoring possession to P as giving him a fresh cause of action. Therefore, the suit was barred by limitation (5 B. 382, *F.*; 1864 W.R. 43, 8 W.R. 373, 22 B. 733, *R.*) Art. 93 of the Limitation Act would not apply to a suit for possession of immoveable property though the defendant pleads that the deed whereon the suit is based is a forgery. NARAYANAN CHETTY v. KANNAMMAL ACHI, **28 M. 338.** (16 M. 311, 16 B. 186, *F.*) [*R.*, 6 C.L.J. 621.]

(88)—*Property sued for but excluded from decree for want of certificate under Pensions' Act —Subsequent suit for such property not barred by s.* 43, *Civ. Pro. Code—Intentional relinquishment or omission to sue.*—In a previous suit by the plaintiffs, the present claim was expressly included by them, and after a decree in their

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

favour by the Chief Court, the present defendant applied for and obtained a review on the ground that, under s. 4 of the Pensions' Act (XXIII of 1871), the Court was precluded from entertaining the suit which related to the property in the present suit, in the absence of a certificate under the Pensions' Act from the Deputy Commissioner authorising such suit being tried. On the authority of the certificate subsequently obtained, the present suit was instituted for the property excluded by the Chief Court from its decree. It was argued for the defendant that there was, in point of law, an omission to sue, because the plaintiffs had failed to obtain a certificate under s. 6 of the Pensions' Act, without which the Court was prohibited, by s. 4 of the Act, from entertaining a suit for the property claimed. The Commissioner proceeded upon the view that it was owing to want of ordinary diligence in complying with the law that the plaintiffs were not 'entitled to make' the present claim in the former suit, and that, therefore, they must be treated as having omitted to sue for it. But, the Chief Court was of opinion that, as they actually did sue for it, and as even if they had not done so, they were under no obligation either to postpone the claim which they were at the time entitled to make, or to relinquish what they might afterwards become entitled to sue for, and, as in the previous suit it was decided that the Court could not then entertain the claim, it was impossible to accept the proposition that, in the previous suit, the plaintiffs either omitted to sue for or intentionally relinquished the claim now made. MUHAMMAD RUSTAM ALI KHAN v. NAWAB MUHAMMAD AZMAT ALI KHAN, **64 P.R. 1882.**

(89)—*Civ. Pro. Code, s.* 13, *Expl.* IV—Res judicata—*Suit for mesne profits by purchaser of equity of redemption, dismissal of—Subsequent suit by same person for same relief—Whether maintainable.*—A suit brought by the purchaser of the equity of the redemption of a mortgage on the allegation that the mortgage-debt had been paid by the mortgagor before sale, against the mortgagee for mesne profits of the land for the harvest subsequent to the purchase, had been dismissed on the ground that no cause of action had arisen as redemption had not been effected. *Held*, in a subsequent suit by him against the mortgagee for the same relief after redemption, that the claim was *res judicata* under s. 13, Expl. IV of the Civ. Pro. Code, as the previous suit was between the same parties and for the same matter as in the subsequent suit, and the plaintiff was not allowed to withdraw his claim with permission to sue again, and as the former decision not having been appealed against, became final and barred the subsequent suit. PRABH DYAL v. DEVI DAS, **69 P.R. 1883.**

(90)—Res judicata—*Civ. Pro. Code (Act X of* 1877), s. 13, *Expl.* IV—*Previous suit between same parties, erroneous dismissal of—Subsequent*

Res Judicata—continued.

——2. —**Adjudications**—*continued.*

suit for same relief barred.—It is equally opposed to the intention of s. 13 of the Civ. Pro. Code, to allow a decision that a suit is barred by a positive rule of law, to be treated in a subsequent suit as not binding the parties to that decision, as it is to allow a decision upon any question of fact which was directly and substantially in issue in a former suit to be so treated. Where a suit by landlords to recover possession of their lands from their tenants, has been dismissed by a Court of first instance on the erroneous ground that a previous decision has made the matter *res judicata*, the landlords are barred from bringing a fresh suit for the same relief, such dismissal being a final decision of matter directly and substantially in issue between the parties, within the meaning of s. 13 of the Civ. Pro. Code. Expl. IV, and the same question cannot be again tried between the parties otherwise than by an appeal from the first Court's decision. UMRA v. DITTA, **95 P.R. 1883.**

(91)—*Civ. Pro. Code, s.* 13, *Expl.* III, *and s* 373—*Dismissal of suit "in present form," effect of.*—A suit by an auction-purchaser of immoveable property in execution of a decree having been dismissed "in the present form" on account of the non-production of the sale certificate by the plaintiff, *held* that such dismissal was a decision of the suit in the sense of s. 13, Expl. III, that the use of the words "in the present form" did not amount to the permission to sue again contemplated by chap. XXII of the Civ. Pro. Code, and that such dismissal was a bar to a fresh suit. GANESH RAI v. KALKA PRASAD, **5 A. 595 = A.W.N. 1883, 140.** [*Diss.*, 8 A. 282; *Expl.*, 11 A. 187, F.B.; *R.*, 9 A. 155.]

(92)—*Execution of decree—Decision of objections raised by judgment-debtor.*—In answer to an application for execution of a simple money decree, obtained against her deceased husband, the widow objected that the property sought to be taken in execution was in her possession by consent of the heirs of her husband in lieu of dower; but this objection was not pressed, and was disallowed, and no appeal was preferred from the order disallowing it. *Held*, that the same objection could not be raised again at a subsequent stage of the execution of the same decree. ABADI BEGAM v. ABDUL GHAFFAR, **A.W.N. 1906, 70 = 3 A.L.J. 198.** (24 A. 282, *F.*; 12 A.W.N. 238, *D.*)

(93)—*Plaintiff not paying into Court expenses of commission as ordered—Dismissal of suit—Nature of order of dismissal—Civ. Pro. Code,* 1882, *Ch.* VII—*Fresh suit on the same cause of action*—Res judicata—*Civ. Pro. Code,* 1882, *s.* 13.—Where a suit is dismissed because of the failure of the plaintiff to pay into Court, as ordered by it, the expenses of a commission which he had applied for, the order of dismissal is not one passed under any of the provisions of Ch. VII of the Civ. Pro. Code for want of attendance of the parties, but must be considered

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

to be a decision of the suit on the merits, both parties being present. Such an order is only open to appeal in the regular course of procedure, and another suit on the same cause of action is barred by the rule of *res judicata.* RAM GULAM SINGH v. HARNANDAN SINGH, **A.W.N. 1885, 168.**

(94)—*Ss.* 13, 258, *Civ. Pro. Code,* 1882—*Application under s.* 258, *Civ. Pro. Code,* 1882, *to have adjustment out of Court recorded—Dismissal on merits—Subsequent suit to recover money paid out of Court*— Res judicata.—A judgment-debtor applied under s. 258, Civ. Pro. Code, 1882, to have an adjustment out of Court recorded. The Court dismissed the application on its merits, and that order was upheld in appeal. The judgment-debtor thereafter brought the present suit, to recover the money alleged to have been paid by him by way of adjustment out of Court. *Held*, that the provisions of s. 11, Civ. Pro. Code, 1908 (=s. 13, Civ. Pro. Code, 1882) applied and that the suit was barred as *res judicata.* MANURATH SINGH v. RAJ KUMARI AND RAM SINGH, **U.B.R. 1909, 2nd Quarter, Civil Procedure, 31.** (11 I.A. 37, 13 W.R. F.B. 69, 21 C. 437, 5 M. 397, 18 M. 26, *R.*)

(95) — *Purchase* pendente lite — *Civ. Pro. Code, s.* 13 — *Res judicata.* — A purchaser, *pendente lite*, is bound by the decree passed against the persons through whom he claims, and cannot, in a fresh suit, claim to go behind the decree, on the ground, that it was wrong in so far as it included the property he had purchased. HUKM SINGH v. ZAUKI LAL, **6 A. 506 = A.W.N. 1884, 177.**

(96)—*Adjudications held to be no* res judicata —"*Former suit*" —*S.* 13, *Civ. Pro. Code,* 1882. —The expression "former suit" in s. 13 of the Code means a previously instituted suit and cannot apply to a suit instituted subsequently to the suit in which the bar is pleaded. GHAMANDI LAL v. BHANA MAL, **57 P.R. 1895.**

(97)—*Civ. Pro. Code (Act X of* 1877), *ss.* 10, 12—Res judicata *Suit dismissed for default no bar to subsequent suit for same subject-matter.*—A suit which was dismissed for default under s. 110 of Act VIII of 1859, was held to be no bar with reference to s. 12 or s. 13 of the Civ. Pro. Code, to the institution of a subsequent suit by the same plaintiff against the same defendants and relating to the same subject-matter. It was no bar with reference to s. 12 because it was *not pending* at the date of the institution of the second suit, nor was it a bar with reference to s. 13, as the matter in issue in it was not finally decided between the parties within the meaning of that section, inasmuch as the Court could, on the application of the plaintiff, have altered the decision than passed. GULABA v. RAI SINGH, **104 P.R. 1883.**

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—2 —Adjudications —*continued.*

(98)—*Refusal to consider a question.*—Where the Court refused to consider a question at all, there is no adjudication of it, and so, the matter is not really *res judicata.* DROBOMOYI GUPTA v. C. T. DAVIS, **14 C. 323.** [*R.*, 3 O.C. 273.]

(99)—*Matter substantially in issue in previous suit, refusal by Court to decide, whether amounts to final determination within s.* 13, *Civ Pro. Code.*—This was a suit for declaration denying the right of occupancy of the defendant in certain land. Defendant contended that, as his right to an occupancy tenure was expressly challenged by the plaintiff in a former case, and was put in issue, it must be assumed to have been decided against plaintiff, notwithstanding that the Court expressly left the question undecided. *Held* that the contention was unsustainable inasmuch as, though the point was substantially in issue, it was never decided at all. BAGO v. DIWAN, **25 P.R. 1884.** (45 P.R. 1879, 84 P R 1880, *R.*)

(100)—*Refusal to consider issues—No* res judicata.—Where the Court refused to consider a question at all, there is no adjudication of it, and so the matter is not really *res judicata.* KOKAN MAL v. MIR ALAM, **51 P.R. 1891.**

(101)—Res judicata—*Matter pleaded as constituting* res judicata *not "heard and finally decided" in the former suit—Civ. Pro. Code,* s. 13, *Explanation* II.—A plea of *res judicata* cannot be maintained where the issue pleaded as constituting *res judicata,* though raised in a former suit, were not adjudicated upon by the Court in that suit. YAKUB ALI v. DHANPAT, **A.W.N. 1892, 238.** [*Dist.*, 3 A.L.J. 198=A.W.N. 1906, 70.]

(102)—*Effect of appeal from judgment containing finding of lower Court—Finding not gone into by Appellate Court—Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2; *Act* X *of* 1877, *s.* 13, *Expln.* 4.—When the judgment of a Court of First Instance upon a particular issue is appealed against, that judgment ceases to be *res judicata,* and becomes *res sub judice*; and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of Appeal. NILVARU v. NILVARU, **6 B. 110.** [*F.*, 11 A. 148=A.W.N. 1889, 42, 5 C.L.J. 653, 1 S.L.R. 171; *R.*, 9 B. 75, 15 B. 370; *D.*, 4 N.L.R. 98.]

(103)—*Civ. Pro. Code, s.* 13—Res judicata—*Finally decided.*—N and U were brothers. N died first and his share of the property was enjoyed by his wife. After the death of U, his sons hypothecated their interest in the property to the defendant. The grandsons of U instituted a suit in 1865 against the defendant for a declaration that their shares of the property were not liable for the decree obtained by the defendant against their father. The suit was

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—2.—Adjudications—*continued.*

dismissed in 1866. In that suit, the grandsons of U, the plaintiffs stated that N's wife was in possession of her share of the joint property. N's wife died. Then the plaintiffs again instituted the present suit against the defendant claiming to be entitled to the whole of the estate of N as his heirs. The defendant pleaded that the suit was barred by *res judicata* and contended that N was joint with U and N's property also was affected by the decree of 1866. *Held* that the suit was not barred by *res judicata* inasmuch as the question whether the father of the plaintiffs (the judgment-debtor in the previous suit) had acquired then any interest in the property of N, was not heard and finally decided in that suit. NATHU SINGH v. BHUPAT RAM, **A.W.N. 1883, 190.**

(104)—*Civ. Pro. Code, s.* 13—Res judicata—*Question in issue but not heard and finally decided in a previous suit.*—The appellants sued their vendor and the respondent for the possession of the property purchased by them under a sale deed. The respondent contested the suit on several grounds, one of which was his right of pre-emption. The Court framed an issue to the effect whether the respondent was a proprietor and could in that suit claim the right of pre-emption. The Court decided that the respondent should sue separately for pre-emption, as the matter could not be decided in that case. The respondent then brought a a suit for pre-emption against the appellants, who urged that this suit was barred by the provisions of s. 13 of the Code of Civil Procedure and was *res judicata. Held,* that the question whether the respondent had a right of pre-emption in respect of the property was not heard, and finally decided in the former suit and that, therefore, the present suit was not *res judicata.* SHAMBHU NATH v. AMBIKA PRASAD, **3 O. C. 273.**

(105)—*Erroneous decision of question of law—Re-trial of the same question.*—The erroneous decision, by a competent tribunal, of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question in a subsequent suit according to law. (5 M. 304, 11 M. 396, 28 M. 517, 22 B. 669, 32 C. 749, *R.*) The Court cannot, of course, allow the correctness of the decree given in the former suit to be questioned in the latter suit, on the ground that the former suit was decided under a mistake of law; nor can it pass a decree, the effect of which would be to set at naught, in whole or in part, the decree in the former suit. MANGALATHAMMAL v. NARAYANASAWMY AIYAR, **17 M.L.J. 250=30 M. 461.** (26 M. 104, 29 M. 235, 32 C. 749, *R.*) [*F.*, 18 M.L.J. 548=4 M.L.T. 233; *R.*, 20 M.L.J. 20=6 M.L.T. 313=3 Ind. Cas. 701.]

(106)—*Alternative finding, whether operates as* res judicata.—A sold to C 47 *bighas* of land. B sued to pre-empt 23 *bighas* on the allegation

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——2.—**Adjudications**—*continued.*

that A owned only that extent of land. In the course of inquiry, it was found that, even according to B's allegation, A's share was about 28 *bighas*. In the final judgment, the finding was:—"Whether B's allegation was true or C's allegtaion was true, the suit must fail:"—*Held*, that the finding could not operate as *res judicata* in a subsequent suit between B and C as to the extent of A's share. HARPAL SINGH v. SHEO MANGAL, **14 Ind. Cas. 161.**

(107)—"Res judicata"—*Question of law.*—An error committed by a competent tribunal in deciding on a question of law, which was directly and substantially in issue between the parties to a suit, does not compel the Court to repeat its error on every subsequent occasion when the same question arises between the parties. PARTHASARADI v. CHINNA KRISHNAN, **5 M. 304** [*Diss.*, 15 A. 327, 1 C.W.N. 687, 28 C. 318, 8 O.C. 37; *Not F.*, 14 C.P.L.R. 109; *F.*, 22 B. 669, 28 M. 517=15 M.L.J. 466, 30 M. 461=17 M.L.J. 250; *Appr.*, 11 M. 393; *R.*, 31 B. 128, 32 C. 749=9 C.W.N. 466=1 C. L.J. 176, 22 B. 669, 14 M. 312, 2 O.C. 261, 26 B. 25=3 Bom. L. R. 450, 44 P.R. 1908; *D.*, 15 M. 327, 29 M. 225=16 M.L.J. 136.]

(108)—*Civ. Pro. Code*, 1882, s. 13—Ex parte *judgment not final decision.*—An *ex parte* judgment is not a final decision within the meaning of s. 13, Civ. Pro. Code. SELLATHAMMAL v. OLIVER, **9 M.L.J. 60.** (18 M. 164, *D.*; 7 C. 23, 8 C. 23, 8 C. 275, *F.*)

(109)—Ex parte *decree, Non-execution of—Effect—Admissibility in subsequent suit against defendant—Decree whether binding on question common to both suits*—Res judicata—*Civ. Pro. Code*, s. 13, *Expl.* IV.—If a defendant does not think it worth while to contest the suit but allows the plaintiff's evidence and the judgment passed upon it to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself. An *ex parte* decree, if it was never executed, cannot be held to have become final within the meaning of Expl. IV to s. 13 of the Civ. Pro. Code, as it remained open to the defendant to have it set aside. But the decree is admissible in evidence against the defendant in a subsequent suit between the same parties on a question common to that and the former suit, and it is not enough for the defendant to say that he absented himself from the trial of that question. He must at least show grounds which would have justified the Court in setting aside the *ex parte* decree, had he applied for that, or that owing to some fraud, or some irregularity in the proceedings, it should not be treated as binding on him. MUSSAMMAT MEHARI v. GUNDA SINGH, **78 P.R. 1883.**

(109-*a*)—Ex parte *decree, Non-execution of—Whether bar to subsequent suit between same parties—Civ. Pro. Code*, s. 13, *Expl.* IV.—An *ex parte* decree which was never executed cannot bar a subsequent suit between the same parties, as the Court which passed the *ex parte* decree could have altered it. HASAN MUHAMMAD v. SHAH MUHAMMAD, **78 P.R. 1883, Note.** [*R.*, 78 P.R. 1883.]

(110)—Res judicata—*Withdrawal of former suit—Permission of Court.*—A suit is not barred by the principle of *res judicata* because, in a former case between the same parties, and on the same cause of action, the plaintiff, after the evidence had been recorded, obtained the Court's permission to withdraw the case, with permission to bring another suit. SREEMOTEE MONA BIBEE v. OOMED ALI, **16 W.R. 276.** (12 W.R. P.C. 43, *D.*)

(111)—*S.* 13, *Civ. Pro. Code*, 1882—*Mere filing of an appeal—Effect—Appeal dismissed on ground of limitation alone—Effect—Pendency of proceedings by way of appeal—English Law—Law in India.*—The mere filing of an appeal does not vacate or annul the judgment appealed against. A judgment still liable to appeal, which has not yet been appealed from or an appeal which is actually pending, cannot operate as *res judicata*, during the interval preceding the appeal or while the appeal is actually pending. (5 C. 246, 11 A. 148, *R.*) Where an appellate Court dismisses an appeal on the ground of limitation alone, the appellant is not in a better position than one who is heard but fails on the merits. In such a case the decision of the lower Court on the points actually decided binds the parties to the suit. (6 B. 110, 7 C. 381, 8 C. 631, 22 B. 216, *D.*) In English Law even the pendency of proceedings by way of appeal is no answer to a pleading of estoppel by judgment, though it may be ground for applying for a stay of proceedings For India Explanation IV to s. 13, Civ. Pro. Code (1882), lays down a different rule. RAM CHANDRA NARAIN, **4 N.L.R. 98.**

(112)—*Remand—Appeal from order of remand—Effect of order in appeal*—Res judicata.—An order of High Court, on appeal from an order of remand, setting aside the order of remand, being merely of an interlocutory kind, cannot have the effect of *res judicata* upon any point that may be urged in appeal on the merits. Any affirmance in such order, of the lower appellate Court's findings on the merits must be considered merely as an *obiter dictum.* DEOKISHEN v. BANSI, **8 A. 172, F.B.=A.W. N. 1886, 35.** [*R.*, 14 A. 348, 15 A. 413, 10 O.C. 350.]

(113)—*S.* 13, *Civ. Pro. Code*, 1882—Res judicata—*Rival suits—Same judgment in both suits—One appeal sufficient.*—When two suits are filed by two persons in respect of the same subject-matter (*e.g.*) for pre-emption, against the same defendant, and they are impleaded in each other's suit, and the same issues are fixed in each and the suits are heard together and disposed of by one judgment and decree, it is not necessary for the party, against whom the decree is passed, to file an appeal in each

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——2.—Adjudications—*continued.*

case. It is sufficient for enabling the Court of appeal to give a binding decision with respect to any matter common to the cases, if that party appeals in his own suit, though such matter has been decided adversely to him in the other suit also. The adverse decision, in the other suit not appealed against, does not preclude the Court of appeal from entering into the question in each party's appeal. JUGAL KISHORE v. CHAMMO, **151 P.L.R. 1905, F.B.=85 P.R. 1905.** (83 P.R. 1888, 10 A. 123, 16 C. 233, 23 P.R. 1897, 31 P.R. 1898, 8 P.R. 1904=104 P.L.R 1903, *R.*) [*R.*, 57 P.R. 1907, 88 P.R. 1908.]

(114)—*Civ. Pro. Code, s.* 13 — *Two suits decided by same judgment—Appeal in one suit, if barred by decision in the other suit—"Former suit," what is—Hearing two suits together —Irregularity.*—A Mahomedan died leaving two widows. Each of them brought a suit, for the recovery of her dower, from the estate of the husband, making the other a party defendant. One of the widows, M, having claimed certain houses to be her exclusive property, and the other, J, denying it, an issue was raised in each of the suits as to whether those houses belonged to the estate of the husband, so as to be liable for the dowers claimed, or, were the separate property of M. The two suits were, with the consent of the parties, tried together and decided by one and the same judgment, though two separate decrees were made, the Court holding that the houses were M's property. J appealed only from the decree in her suit, and it was contended on behalf of M, that the judgment in her suit, not having been appealed from, became final, and was a bar to the trial of the issue as to the ownership of the houses in the appeal preferred by J, in her suit. *Held, per Ghose, C.J.*, agreeing with *Harington, J.* (*Rampini, J., contra*). That there was no separate judgment in M's suit to operate as a bar by way of *res judicata* to the trial of the appeal in J's suit. (16 C. 233, *Rel. on*; 11 A. 148, 24 M. 350, *R.*) The two suits ought not to have been heard together. The proper procedure indicated. MARIAMNESSA BIBEE v. JOYNAB BIBEE, **10 C.W.N. 934=4 C.L.J. 149=33 C. 1101.** [*Diss.*, A.W.N. 1908, 211=4 M.L.T. 172; *F.*, A.W.N. 1907, 245=4 A.L.J. 587=29 A. 730.]

(115)—*Civ. Pro. Code, Act* XIV *of* 1882, *ss.* 13, 158—*Dismissal of previous suit for non-production of succession certificate.*—The dismissal of a previous suit on the same cause of action, on the ground that no succession certificate was produced, is not a decree under s. 158 of the Civ. Pro. Code. The non-production is an omission which precludes the Court from entering into the merits at all. The dismissal therefore does not operate as *res judicata*. PETHAPERUMAL CHETTI v. MURUGANDI SERVAIGARAN, **18 M. 466=5 M.L.J. 189.**

(116)—*Suits between different parties—Nature same—Evidence same—Appeal to High Court in one suit and to District Court in others—Effect of decision in High Court—Mere guidance to Judge.*—Three cases brought by three parties claiming shares in the same land as against a zemindar were tried together. In one, the amount being beyond the limit, the appeal lay to the High Court; in the two others, the appeal lay to the Judge. The two cases before the Judge were postponed to await the decision of the High Court. After such decision, the Judge on that "precedent" decided the other two cases. *Held*, that though the decision of one case was not a pre-adjudication binding in law on the other two claimants, yet it would go far to guide the Judge in his finding on the facts. G. GREGORY v. HURREE KISHORE ROY, **3 W.R. 2.**

(117)—*Adverse finding against party—Decree not based on such finding— In subsequent suit, such finding not* res judicata.—Where, in a suit by a creditor against the debtor's brother, the latter pleaded, among other contentions, that he had become divided from his deceased brother and the Court held that that plea was not right, though it dismissed the suit as against him on the ground that he had not benefited by the loan, in a subsequent suit between the parties the decision in the prior suit on the question of partition was not *res judicata*. SURYABHAN v. ISHWAR, **7 C.P.L.R. 139.** (11 C. 301, 13 C. 17, 18 C. 650, *F.*)

(118)—Res judicata — *Non-suit.*—This suit was brought at a time when the present defendant had been unsuccessful in the lower Court in a separate suit involving the whole of the property claimed, which suit had been decided in the Civil Court in the plaintiff-appellant's favour, and while the appeal was still pending in the High Court. By the decision of the High Court above alluded to, the position of the parties was reversed, and a decree was given in favour of the present defendants. *Held*, that the lower Court was wrong in non-suiting the plaintiff in this case, and that the case should have been allowed to proceed subject to the eventual decision of the separate appeal in the other case, as the present plaintiff's position (which he lost by the decision of the High Court) might be again restored to him by the Privy Council. With reference to the peculiar state of the parties, the case was, by consent ordered to be restored to the file of the lower Court pending the decision of the Privy Council. GUNPUT LOLL v. KHEDOO LOLL, **1 W.R. 365.**

(119)—*Civ. Pro. Code (Act* V *of* 1908), *s.* 11 —Res judicata — *Different subject-matter.* — Two houses A and B were purchased under a sale deed, dated 15th June, 1881. There was a previous litigation between the same parties in respect of the house A, in which it was decided that the house A belonged beneficially to M and not to S. The present suit was brought in respect of the house B: *Held*, that the decision in the previous suit did not operate as

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res judicata, inasmuch as the question of title to the house B was never determined, nor was it in dispute in the previous litigation. KHALIK YAR KHAN v. MOBARIK BEGAM, **7 Ind. Cas. 388.**

(120)—*Civ. Pro. Code*, 1882, *ss.* 13 (=*s.* 11) 43 (=*O.* II, *r.* 2, *new Code*)—Res judicata.—Where a suit for setting aside an order made in one district, for sale of plaintiff's interest in property therein, was dismissed, *held*, that it did not bar another suit to obtain relief against an order in another district for the sale of property therein belonging to him, or of other property not included in the order of sale against which the former suit was directed. RADHA PRASAD SINGH v. LAL SAHAB RAI, **13 A. 53 =17 I.A. 150, P.C.=5 Sar. 600.** [*R.*, 15 A. 359, 16 A. 390, 24 B. 251, F.B., 10 C.W.N. 40.]

(121)—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 11—Res judicata—*First suit between the parties deciding on merits, but failing on account of non-payment of deficiency in Court-fee—Second suit for trial on the same merits—Practice.*—In a previous suit between the parties, there was a decision on the merits; but the suit failed on the ground that the plaint had been undervalued and the plaintiff had refused to pay the additional Court-fee. A subsequent suit having been brought between the parties for determining the same issues, the decision in the first case was pleaded as *res judicata*: *Held*, that, the failure of the first suit on non-payment of additional Court-fees was sufficient by itself for the dismissal of the previous suit; and that, therefore, the findings on the issues on the merits not having been necessary for the decision of the suit, could not have the force of *res judicata*. IRAWA LAXMANA MUGALI v. SATYAPPA SHIDDAPPA MUGALI, **12 Bom. L.R. 766.**

(122)—*Ss.* 13 *and* 43, *Civ. Pro. Code*, 1882—*Partners suing for specific sum of money—Previous partnership suit wherein adjustment of accounts effected by Amin.*—Where some partners, parties in a previous partnership suit, brought a suit for the recovery of the amount due to them under an Amin's adjustment, in the previous suit, *held*, by *Norris* and *Bannerjee*, *JJ.* (*Rampini*, *J.*, *contra*), that the suit was not barred. DHANI RAM SAHA v. BHAGIRATH SHAHA, **22 C. 692.**

(123)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13—*Former suit*—Res judicata—*Proceeding under Land Acquisition Act* (I *of* 1894), *does not bar subsequent suit.*—A decision in a proceeding under the Land Acquisition Act, cannot be treated as a decision in a former suit, so as to operate as *res judicata* with reference to the property other than that to which the enquiry under that Act related. BASANT DEO v. KESHAL DEO, **2 Ind Cas. 853.** (12 C. 484= 42 I.A. 188, 24 A. 112, *D.*; 34 C. 466, 20 M. 269, 7 C. 406=9 C.L.R. 117, *R.*)

(124)—*Decree in prior suit allowing interest —Interest claimed in subsequent suit for arrears*

***Res Judicata*—continued.**

— 2.—Adjudications *—continued.*

—Res judicata.—There was no decision in the previous litigation between the parties to this suit on the question of the plaintiffs' title as assignee of the Government Revenue. There was no previous adjudication of the defendant's liability to pay interest on the arrears and there was, therefore, no bar of conclusiveness such as *res judicata* precluding the agitation of that question in the present suit. (*Per Bannerji*, *J.*, *Aikman*, *J.*, *dissenting.*) CHANDI PRASAD v. MAHARAJAH MAHENDRA MAHENDRA SINGH, **23 A. 5=A.W.N. 1900, 177.**

(125)—*Claim for future mesne profits—Judgment silent thereon*—Res judicata—*Civ. Pro. Code*, *s.* 13—*Interest*—*S.* 211, *Civ. Pro. Code.*—Where in a suit for possession of immoveable property with past and future mesne pofits, possession is decreed with past profits, and the decree is silent as to future profits, the claim for the latter must be held to have been refused, but such constructive refusal applies only to profits accrued up to the date of the decree, and not to those which thereafter accrued before delivery of possession. A suit for such profits would not be barred under s. 13, Civ. Pro. Code. RAMABHADRA v. JAGANATHA, **14 M. 328=1 M.L.J. 171.** [*Overruled*, 15 M.L.J. 462, F.B.; *F.*, 32 C. 118; *Diss.*, 21 A. 425, F.B.; *R.*, 25 B. 115.]

(126)—*S.* 13—*Civ. Pro. Code*, 1882 — Res judicata — *Suit for possession not barred by previous suit by the same plaintiffs for mesne-profits.*—A suit for possession is not barred, by a suit previously instituted by the same plaintiffs for mesne-profits. (31 M. 405 11 M. 151, *F.*, 11 M. 210, *R.*) The right to mesne-profits may exist without any right to possession, and the cause of action need not necessarily be one and the same. MUTHUKARUPPA KOTHAN v. SITHA VEERAYYA CHETTY, **5 M. L.T. 220.**

(127)—*Finality of decision—Civ. Pro. Code*, (*Act* X *of* 1877), s. 13.—Where, in a prior suit between the same parties, with respect to the same land, the lower Courts decided the suit on the question of title as well as possession, but the High Court, on appeal, decided the case on the question of possession alone, without entering into that of title, *held*, the question of title was still open between the parties and not barred under s. 13 of the Civ. Pro. Code, as the decision, in the previous suit, of the lower Courts, on the question of title, could not be said to be *final*. GUNGA BISHEN BHUGUT v. ROGHOONATH OJHA, **7 C. 381= 9 C.L.R. 34.** [*Appl.*, L.B.R. 1893—1900, 544; *R.*, 3 O.C. 273, 25 B. 115, 5 C.L.J. 653; *D.*, 4 N.L.R. 98.]

(128)—*Civ. Pro. Code*, 1877, *ss.* 331 *and* 332 —*Specific Relief Act*, *s.* 9—Res judicata.—The investigation, under s. 331 of Civ. Pro. Code, before its amendment, was to proceed as in a suit under s. 9 of the Specific Relief Act; only there was an appeal from the decree under

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—2.—**Adjudications**—*continued.*

s. 332. The question tried in such a suit was only one of possession and, notwithstanding the decree, the parties may proceed to try the title in a subsequent suit. CHINNASAMI PILLAI v. KRISHNA PILLAI, **3 M. 104.** [*R.*, 14 B. 627.]

(129)—*Decision in pre-emption suit that no real sale took place—Whether bars adjudication upon that point in subsequent suit by vendee for possession against vendor—Right of one of two or more defendants to appeal from a decree adversely affecting him, even in cases whether plaintiff's claim is unsuccessful.*—The decision in the pre-emption suit that no real sale had taken place is no bar to an adjudication upon that point in a subsequent suit by the vendee for possession against the vendor, though both the latter were co-defendants in the pre-emption suit. (3 A. 152, *F.*) In certain cases it may be open to one of two or more defendants to appeal from a decree which adversely affects him, even in a case when the plaintiff's claim is unsuccessful. But the question 'who may appeal' is determinable by the commonsense consideration that there can be no appeal when there is nothing to appeal about. DHIAN SINGH v. MUSSAMMAT BELAS KAUR, **42 P R. 1912 = 123 P.W.R. 1912 = 154 P.L.R. 1912 = 16 Ind. Cas. 127.** (9 C.W.N. 584, *R.*)

(130)—*Mortgage — Decree for redemption—Fresh suit again for redemption if barred.*—In this suit for redemption of a mortgage, the defendant pleaded that a previous suit in which redemption of the same mortgage had been decreed to the plaintiff was a bar to the present suit. *Held* that the second suit was not barred by reason of the previous suit. (86 P.R. 1877, *F.*) NATHU SINGH v. RURA, **14 P.R. 1881.** (86 P.R. 1877, *R.*) [*F.*, 93 P.R. 1908, F.B. = 164 P.L.R. 1908; *R.*, 100 P.R. 1905 = 16 P.L.R. 1906; *D.*, 43 P.R. 1907.]

(131)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Redemption—Second suit for—Conditional decree in first suit not given effect to.*—Where a mortgagor brings a suit for redemption and obtains a conditional decree, but, omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption, unless the decree lays down that, if he fails to fulfil these conditions, the property will be sold or he will be debarred of all his rights to redeem. NAKTA RAM v. CHIRANJI LAL, **7 A.L.J. 185 = 5 Ind. Cas. 269 = 32 A. 215.**

(132)—*Mortgage—First suit by second mortgagee for sale—Discharge of first mortgage by second mortgagee under his decree—Second suit by second mortgagee to sell property mortgaged to first mortgagee—Civ. Pro. Code, s. 13, explanation* II.—When a second mortgagee sued for sale of property mortgaged to him and offered, and was allowed by the decree, to redeem a prior mortgage, and realised his mortgage money by sale of the property

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—2.—**Adjudications**—*continued.*

mortgaged to him, *held* that a second suit by him, to sell the rest of the property under the first mortgage, which was discharged by him, was not barred by the rule of *res judicata* as laid down in explantion II of s. 13 of the Civ. Pro. Code. AJUDHIA PRASAD v. HAR DAYAL, **3 A.L.J. 541 = A.W.N. 1906, 249.**

(133)—*Civ. Pro. Code*, s. 13—Res judicata—*Mortgage—Redemption suits*—*Held*, by the Full Bench, following the principle of *stare decisis*, that it is open to a mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption. DHANPAT MAL v JHAGGAR SINGH, **164 P. L.R. 1908, F.B = 93 P.R. 1908 = 133 P.W.R. 1908.** [*F.*, 100 P.R. 1909.]

(134)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Suit for redemption of mortgage and also on title—Question of title excluded from consideration—Dismissal of suit—Subsequent suit on the strength of lease and title, whether sustainable.*—A brought a suit for redemption of a mortgage and based his suit also on his title as Jenmi. The question of title was excluded by the Court from consideration, and the suit was dismissed, the Court having found that the property was held only under a lease. The present suit was then brought on the strength of the lease and also on title. The lease was not proved, and as to title the lower appellate Court found the claim was barred as *res judicata*. *Held*, the fact that A prayed for relief on title in the previous suit for redemption makes no difference, as the Court has excluded the question from consideration, and treated the suit solely as one for redemption of mortgage, and that the present claim based on title is not barred as *res judicata*. KUNDUR CHIRUKANDAN v. MANNATH KANDI CHATHU, **7 M.L.T. 354 = 5 Ind. Cas. 262.**

(135)—*Ss.* 13, 43, *Expl.* II, *Civ. Pro. Code*, 1882—Res judicata—*Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Suit not barred.*—The dismissal of a previous suit for redemption upon an alleged mortgage is no bar to another suit for redemption on another mortgage in respect of the same properties, under the provisions of ss. 13 and 43, Civ. Pro. Code, 1882. RAM SAHAI v. AHMADI BEGAM, **8 A.L.J. 47 = 9 Ind. Cas. 53.** (29 M. 153, *F.*)

(136)—*Suit for redemption—Dismissal for non-payment of mortgage-money before suit—Second suit for redemption on full payment not barred—Transfer of Property Act* (IV *of* 1882), *ss.* 92, 93.—A decree in a suit for the redemption of a usufructuary mortgage, not being a conditional decree for redemption under s. 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage-money at a time authorised by the deed, cannot

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, where the deed has expressly authorised redemption on payment of the mortgage-money in a particular month in any future year after due date, and the mortgagor has tendered the whole of such money in that month between the dismissal of the first suit and the institution of the second. DONDH BAHADUR RAI v. TEK NARAIN RAI, **21 A. 251 = A.W.N. 1899, 50.** [*R.*, U.B.R. 1897—1901, Vol. II, 582, 3 O.C. 371, 24 A. 44 = A.W.N. 1901, 194, 7 A.L.J. 185; *D.*, 25 M. 300.]

(137)—Ex parte *decree ordering repayment of money due under mortgage—Subsequent redemption suit.*—An *ex parte* decree obtained by the mortgagee, for the recovery of the amount due under the mortgage, does not bar a subsequent suit by the mortgagor to redeem the property, on the ground that the mortgage amount has been paid off from the usufruct. LAKSHAMAYA v. APPADU, **7 M. 111.**

(138)—Samudayam, *uralers and tenants*—Samudayam *a mortgagee in possession.*—In previous litigation between the *samudayam*, the uralers, and the tenants, the opinion was expressed in judgments of the High Court, that the position of the *Samudayam* was that of a mortgagee in possession. But, as it appeared that such opinion was not expressed as to the construction of the document, it was held not to be *res judicata* when the question of the proper construction of the document arose. KRISHNAN v. VELOO, **14 M. 301, F.B.** [*F.*, 14 M. 312.]

(139)—Res judicata—*Civ. Pro. Code*, 1877, s. 13—*Sale subject to mortgage.*—In execution of a decree against the purchaser of a certain property subject to a mortgage, such property was attached and sold, and the balance of the sale proceeds, after satisfaction of the decree, was paid over to him. In two suits brought by the mortgagees against the mortgagors, the purchaser above-mentioned, and the auction-purchaser, for the interest on the mortgage which was payable annually, it was decided that the purchaser was primarily and personally liable for the same, as he had received the balance of the sale proceeds. The purchaser having subsequently refunded the sale proceeds into Court, *held* in a subsequent suit by the mortgagees to recover the principal and interest by sale of the mortgaged property, that whatever might have been the rights and relations of the parties so long as the sale proceeds remained with the purchaser, they underwent a change when such proceeds were refunded, and the "*ratio decidendi*," of the previous decisions having ceased to exist, the mortgagee was not precluded, from claiming in the first instance the sale of the mortgaged properties, by the previous decision that the purchaser was primarily and personally liable. RATAN RAI v. HANUMAN DAS, **5 A. 118 = A.W.N. 1881, 139.**

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

(140)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13—*Finally decided*—Res judicata.—Where, in a previous suit by the plaintiff for possession of certain mortgaged lands, the first Court found that there had been no default in payment of interest, a condition precedent to the plaintiff's right to possession, and that full consideration had not been paid, and, on appeal, the Divisional Judge held that there had been no default in payment of interest, and dismissed the appeal *in limine*, but also remarked in the judgment that the plea of consideration (want of consideration) for the mortgage did not seem sound—*Held*, that the trial of the question regarding the alleged failure to pay consideration was not barred by *res judicata*. SULTAN v. HAKIM RAI, **10 P.L.R. 1902.**

(141)—Res judicata—*Abatement of suit—Fresh suit—Civ. Pro. Code*, 1859—*Civ. Pro. Code*, 1877, *s.* 371.—Property which had been previously mortgaged was sold in execution of a money decree against the mortgagor. The mortgagee, subsequent to this sale, brought a suit upon the mortgage, against the mortgagor and the auction-purchaser. The purchaser having died in the meanwhile, no steps were taken to make his heirs or representatives parties to the suit in his place. The decree was passed and the mortgagee purchased the property in execution. He sued now to recover possession of the property from the representative of the purchaser at the former execution sale. *Held* that the previous mortgage suit was not a bar to the present suit against the defendant, the representative of the purchaser in execution of the money decree, as the present suit was under the Procedure Code of 1859, which did not contain the express provision which is to be found in the Code of 1877, which provides that when a suit abated, as regards the defendants or one of the defendants, no fresh suit could be brought on the same cause of action. NISTARINI DEBI v. BROJO NATH MUKOPADHYA, **10 C.L.R. 229.**

(142)—*Partition suit — Incidental determination of question of partition in previous suit for possession*—Res judicata.—Where the previous suit brought to establish the plaintiff's sole right to a certain land, which the defendant also claimed as his share obtained by partition, was dismissed, the Court holding that no partition had taken place, *held* that a second suit for partition of the field, including the land for which his former suit had been instituted, was not barred by the previous suit. SHIVRAM v. NARAYAN, **5 B. 27.**

(143)—*Civ. Pro. Code*, 1882, s. 13—Res judicata—*Dismissal for want of cause of action—Partition of mahal—Refusal by Revenue Court to partition—Suit to establish right—Jurisdiction of Civil Court.*—A applied to the Revenue Court for the partition of a village. B objected to it on the ground that he was entitled to the entire *mauza* by the right of primogeniture. A was therefore referred to the Civil Court for the

Probate—continued.

—8.—**Revocation of Grant**—*continued.*

Probate, at the last Will of the testator, so far as regards all property in respect of which a grant of probate is necessary, and it must also recognize the executor to whom probate has been granted by the Probate Court. A grant of probate is not in the nature of a summary proceeding, to be contested by a regular suit in the Civil Court. It must only be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary Civil jurisdiction. Under the Succession Act X of 1865, jurisdiction in matters of probate is given only to the District Court and the High Court. Therefore the former has jurisdiction to revoke probate, where it is proved that the making of the document propounded as a Will, or of any part of it, has been procured by fraud or coercion. Persons who seek to question a Will, must prove an interest to entitle them to a *locus standi* in Court, and the objection for want of interest should be taken at the earliest stage of the proceedings. MAYHO v. WILLIAMS, **2 N.W.P. 268.** [*Appr.*, 4 C. 360=4 C.L.R. 175; *R.*, 6 C. 460, U.B R. 1897—1901, II, 533.]

(15)—*Will—Validity—Right to oppose grant of probate--Recorder'sCourt--Errors of procedure —Jurisdiction—Revision.*—A person who is not the next of kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate, or dispute the validity of the will. [*R.*, 6 C. 429.] The mere fact that there may be errors of procedure of a serious character in a trial before a Recorder does not justify the High Court in saying that in pronouncing against the validity of a will upon an investigation which actually took place, the Recorder did so otherwise than in the exercise of jurisdiction vested in him. The case is therefore not one in which the High Court has any power of interference. *In the matter of* MEE TSEE, **15 W.R. 351.**

(16)—*Party cognisant of proceedings in action for probate or letters of administration, and not objecting to grant, right of, to re-open whole matter—Withdrawal of* caveat, *after suit partly contested, order for grant of probate made on—Effect on party cognisant of proceedings.*—If a party is cognisant of proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings re-opened. It is only in exceptional cases, under certain circumstances and upon certain conditions, such a party will be allowed to re-open the whole matter. (*Newell* v. *Weeks*, 2 Phil. 224 , *Ratcliff* v. *Barns*, 2 Sw. and Fr. 486, 5 B. 638, *R.*) An order for grant of probate, though made upon a withdrawal of the *caveat* filed in the proceedings after the case was partly contested, is binding on a party who is cognisant of the proceedings and chooses to stand by. (*Wytcherley* v. *Andrews*, L.R. 2 P. and D. 327, *D.*) *In the goods of* BHUGGOBUTTY DASI, **27 C. 927=4 C. W. N. 757.**

(17)—*Will—Probate—Revocation—Minor—Estoppel by conduct--Probate andAdministration Act* (V *of* 1881), *s.* 50.—Though an infant has a right to apply, after he comes of age, for revocation of Probate, obtained by consent, where he was not cited in the Probate proceedings, yet he may be barred by acquiescence and delay for a long time, or, by subsequent ratification of the disposition of the Will, from putting the executor to the proof of the Will in solemn form, or from contesting its genuineness. If the Court thinks that Probate should be revoked, then it ought to give the executor an opportunity of proving the will in solemn form in the presence of the petitioner, without having fresh proceedings instituted in the matter of Probate. NALINISUNDARI GUPTA v. BIJOY KUMAR ROY CHOWDHURY, **11 Ind. Cas. 277.**

(18)—*Will of contested genuineness—Letters of administration with copy of Will, whether equivalent to probate.*—There was no judicial finding by the lower Court that the Will, the genuineness of which was contested in this case, was a true and genuine one ; nor was there any proof, in solemn form as required by law. Even if it be admitted that the letters of administration with copy of the Will annexed, that had been granted in this case on the renunciation of the executors named in the Will, were equivalent to probate, it could not be deemed to be sufficient to prove the Will itself. The case was therefore sent back for the Judge to find as to the genuineness or otherwise of the Will. TEEN COWREE DOSSEE v. HUREEHUR MOOKERJEE, **8 W.R. 308.** [*R.*, 2 B.L.R. 11.]

(19)—*Revocation of probate on the ground of grantee's immoral conduct—Succession Act, s.* 234—*Course to be adopted under such circumstances.*—That the grantee of probate of a *mahant's* will, under which he became the head of the religious institution, had, since taking charge of the office, taken to an immoral course of conduct, resulting in his exclusion from the community of *mahants*, would be no ground for a revocation of the probate under s. 234 of the Succession Act. [*R.*, 26 B. 792.] *Obiter* :—The proper course to take for depriving such a person of his office would be to bring a suit under the Religious Endowments Act, or any other suit, for a declaration that he had disqualified himself and if, in that suit, a decree was obtained and duly certified to the Court which granted probate, that Court would, no doubt, direct the revocation of the probate. *In the matter of the petition of* MOHUN DASS v. LUTCHMUN DASS, **6 C. 11=6 C.L.R. 265.**

(20)—*Revocation of probate—Procedure by Court—Burden of proof—Succession Act* (X *of* 1865), *s.* 234.— Upon an application under

Probate—continued.

——8.—**Revocation of Grant**—*continued.*

s. 234, Succession Act, for revocation of probate of a will alleged to be made by the applicant's husband, upon the grounds that no citation was published, that the applicant was a minor living under the care of the grantee of the probate and having no opportunity of understanding his *mala fides* and improper acts, and that the will was spurious and forged, the Court ought to give her an opportunity of proving her ignorance of the prior proceedings, order a new trial as to the *factum* of the will, and not dismiss the petition after throwing the burden of proving the entire case on the applicant. DINTARINI DABI v. DOIBO CHUNDER ROY, **8 C. 880.** [*D.*, 2 P.L.R. 1902.]

(21)—*Revocation of probate, proceedings for—Costs.*—The costs in a proceeding for revocation of probate should be assessed as in a miscellaneous proceeding. GARABINI DASSI v. PRATAP CHANDRA SHAHA, **4 C.W.N. 602.** (4 C.W.N. 600, *R.*)

(22)—*Will contested—Probate—Proof—Notes of evidence—Inofficious Will—Onus of Proof—Will disinheriting heir.*—Where there is contention about a will, the proceedings should take, as nearly as may be, the form of a regular suit as if brought by the person propounding the will; and where the Judge grants probate, he should take down the evidence of the witnesses in the language in ordinary use in proceedings before the Court, and not mere memoranda of the evidence. Where a will is inofficious in character disinheriting an heir, it is not merely incumbent upon the party propounding the will to prove it affirmatively, but the proof of it lies completely upon him. It is not enough in such cases to bring the testator on the stage with the will ready made and with pen and ink in hand to prove the attachment of his signature to it. There must be proof of circumstances that the testator not merely signed the will, but that he knew what he was doing, that he was making a will, and that he did all that he did, with his eyes open. SARODA SOONDEREE DOSSIA v. MUDDUN MOHUN SHAHA BHAJUN, **24 W.R. 162.** [*R.*, 6 C.L.R. 176.]

(23)—*Probate—Waste by executor—Surety—Right of surety to be discharged—Revocation of probate—Appeal—Probate and Administration Act* (V *of* 1881), *s.* 86.—In probate cases a surety seeing the person for whom he is surety wasting the estate while he is powerless to interfere by suit, not being a beneficiary in the estate, should, upon general equitable principle, have the right of being discharged from his liability as regards future transactions. The surety is entitled to protection against the executor, if it be shown that the latter is wasting the estate, and thereby rendering the former liable on his surety-bond. The course to be adopted, on waste by the executor being established by the surety, is to call on the executor to furnish other security, and, on his doing so, to discharge the original surety in respect of future waste. Should the executor fail to furnish other security, the probate should be revoked and the surety discharged. (19 B. 245, 29 C. 68, *R.*) An order to revoke probate, if security is not furnished, is appealable. S. 86 of the Probate and Administration Act does not mean that only those orders which are appealable under s. 588 of the Code of Civil Procedure can be appealed. SHAHABUD-DIN v. FAZAL DIN, **89 P.L.R. 1902=52 P.R. 1902.** (11 C.L.R 589, 17 C. 48, 21 C. 539, 29 C. 68, *R.*) [*R.*, 8 P.R. 1906.]

Copy—Proof—Admissibility—Probate granted in Australia—Secondary evidence—*See* WILL—GENERAL, 11 Ind. Cas. 261.

——9.—**Miscellaneous.**

(1)—*Order of Recorder of Rangoon—Final decree—Original civil jurisdiction.*—An order of the Recorder of Rangoon rejecting an application for probate is a final decree passed by him in the exercise of original Civil jurisdiction. ESOOF HASSEM BOOPLY v. FATIMA BIBI, **24 C. 30=1 C.W.N. 8.**

(2)—*Court Fees Act*(VII *of* 1870), *sch.* II, *art.* 1—*Application for probate.*—An application for probate of a Will comes under the provision made by law for common applications and petitions in sch. II, art. 1 of Act VII of 1870, and such an application does not require a stamp proportionate to the value of the property covered by the Will. *In the matter of* JUDDONATH SHADHOOKHAN, **15 W.R. 40.**

(3)—*Suit for probate—Caveators assailing whole of Will on ground of undue influence—Probate granted—Objection to particular clause of Will in subsequent suit.*—In a suit for probate, on the caveators assailing the whole of the Will on the ground of undue influence, the Probate Court, overruling that objection, granted probate. It is not competent for the caveators, in a subsequent suit, to show that any particular clause in the Will has been inserted through undue influence. NUZHATUDDOWLA ABBAS HOSSEIN v. MIRZA KURRATULAIN, **31 C. 186.** [*Reversed*, 33 C. 116, P.C.=32 I.A. 244=1 C.L.J. 594=9 C.W.N. 938=7 Bom. L.R. 876 =2 A.L.J. 758=15 M.L.J. 336.]

(4)—*S.*58, *Succession Act* (X *of* 1865)—*Application for probate of will wherein pencil alterations made before execution — Photographic facsimile of will attached to probate — Practice.*—On an application for probate of a will wherein the testator had made certain pencil alterations before execution, the Court directed that a photographic facsimile of the will, taken in the presence of the Registrar and of the executors, be attached to the probate, as the pencil alterations were likely to fade away in course of time. The provisions of s. 58, Act X of 1865, do not apply to this case. *In the goods of* BROUGHTON, **29 C. 311=6 C.W.N. 477.**

(5)—*Burden of proof.*—Whenever circumstances exist, which excite the suspicion of the

Probate—continued.

——9.—Miscellaneous—*continued.*

Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document. SHAMA CHARN v. KHETROMANI, **2 Bom. L R. 568=27 C. 521=4 C. W.N. 501=7 Sar. 638.**

(6)—*Proof of will — Execution — Mental capacity of testator.*—For the purpose of a valid will it is necessary that the testator should be of sound mind. Thus, he who propounds a will undertakes to satisfy the Court not only that the testator made it but also that he was of sound and disposing mind. Very slight proof of this mental capacity is ordinarily necessary where the proof of the factum is regular. But there is no presumption of law in favour of soundness of mind : and the Court, in each case on the evidence given by both sides, ought not to affirm that a document is the will of a competent testator. unless it believes that it really is so. NAWALMAL v. DHANU, **5 Bom. L.R. 327.**

(7)—*Revocation of—Summary proof of will—Proof in solemn form, when not grantable--Hindu widow—Locus standi—Probate and Administration Act*, 1881, *s.* 50.—Though ordinarily upon summary proof of a will (proof in "common form" in England), the Judge ought, upon objection, to have the will regularly proved, proof in solemn form *per testes* will not be required on the application of one who had had notice, or had been aware of the previous proceedings before the grant of probate issued, and had then abstained from coming forward. (5 B. 638, *R.*) [*Appr.*, 18 C. 45.] The widow of a Hindu testator, though there are sons living, has yet sufficient interest in the estate to entitle her to come in under s. 50 of the Probate and Administration Act and to call upon the executor to prove the will in solemn form *per testes.* BRINDA CHOWDHRAIN v. RADHICA CHOWDHRAIN, **11 C. 492.** [*D.*, 4 C.W.N. 602, 2 P.L.R. 1902; *R.*, 10 C.L.J. 263, 12 C.W.N. 808=8 C.L.J. 489.]

(8)—*Estoppel by probate.*—Where the controversy is between the heirs claiming adversely to the will and a person who claims a beneficial interest under the will, the grant of probate does not create an estoppel. MIRZA KURRATULAIN v. NAWAB NUZHAT-UD-DOWLA, **7 Bom. L.R. 876=9 C.W.N. 938=1 C.L.J. 594, P.C.=33 C. 116=15 M.L J. 336=2 A.L J. 758 =32 I.A. 244=8 Sar. 855.**

Application for by executor—Application for letters of administration by his legal representative.—*See* CIV.PRO. CODE. 1908, O. XXII, r. 1, 36 C. 799=3 Ind. Cas. 995.

Probate proceedings — Appeal— Court-fee.—*See* COURT FEES ACT. 1870, sch. II. arts. 1, 11, 9 M.L.T. 314=21 M.L.J. 481=9 Ind. Cas. 538.

Probate—concluded.

——9.—Miscellaneous—*concluded.*

Of whole will does not become ineffectual by degrees—*See* EXECUTOR, 1 Ind. Cas. 248.

Supersedes guardianship order—*See* GUARDIANS AND WARDS ACT, 1890, s. 17, cl. (2), 15 C.W.N. 558.

The devisee under the will of a deceased Hindu living in the United Provinces need not take out Probate before applying for Succession-Certificate— *See* SUCCESSION CERTIFICATE ACT, 1889, s. 1, cl. 4, 2 A.L.J. 126.

Grant of—for portion of a will—Application for probate — Will of an illiterate person — Insertion of provisions without testator's knowledge—*See* WILL (GENERAL), 1 C.L.J. 109.

See WILL (ATTESTATION), 3 N.W.P. 32.

Probate and Administration Act (V of 1881).

[REP., IN PT., ACT VII OF 1889. REP. IN PT. AND AM. ACT XII OF 1891. AM., ACT VI OF 1889, SS. 11 TO 17 ; AM., ACT II OF 1890, S. 16; AM., (IN LOWER BURMA), ACT VI OF 1900, Ss. 47, 59, 60, 62, 64, 69. AM., ACT VIII OF 1903, S. 3. S. 156. REP., ACT IX OF 1908. DECLARED IN FORCE—IN THE SONTHAL PARGANAS (S. 154). REG. III OF 1872, S. 3; AS AMENDED BY REG. III OF 1899, S. 3; IN BRITISH BALUCHISTAN, REG. I OF 1890, S. 3, IN UPPER BURMA (EXCEPT THE SHAN STATES), ACT XIII OF 1898, S. 4.]

See ADMINISTRATOR.

See EXECUTOR.

See LETTERS OF ADMINISTRATION.

See PROBATE.

(1)—*Provisions of Civ. Pro. Code inconsistent with those of Probate and Administration Act—Procedure.*—If the provisions of Civ. Pro. Code are inconsistent with those of the Probate and Administration Act, those of the Code must prevail, as it is the later enactment. ESOOF HASSHIM BOOPLY v. FATIMA BIBI, **24 C. 30=1 C.W.N. 8.**

(2)—*Reference to English practice.*—The provisions of Act V of 1881 differ very materially from the law in England. So reference to English practice is hardly a guide here. SURAT SUNDARI BARMANI v. UMA PROSAD ROY CHOWDHRY, **31 C. 628=8 C.W.N. 578.**

(3)—*Unsigned and undated will—Grant of Letters or Probate.*—Probate or Letters of Administration may be granted even though the will is unsigned and undated. GOPALDAS v.MT. BANDAN, **15 C.P.L.R. 101.** (24 B. 8, *F.*)

(4 and 5)—*Scope of Act--Repeal.*—The Probate and Administration Act, 1881, being a law made

Probate and Administration Act (V of 1881) —*continued.*

by an authority in India, is subject to the powers of repeal or amendment granted to the local legislature by s. 5 of the India Councils Act, 1892. LAXMI v. ABA, **10 Bom. L.R. 924 = 32 B. 364.**

(6)—*Will—Document by a* shebait *appointing another* shebait.—Where the *shebait* of an endowed property executed a document appointing another person as a *shebait* for the purposes of carrying out the *sheba* and other rites after the death of the former: *Held*, that it was not a will and probate of such a document could not be applied for. CHAITANYA GOBINDA PUJARI ADHICARI v. DAYAL GOBINDA ADHICARI, **9 C. W.N. 1021 = 32 C. 1082.** [*R.*, 1 Ind. Cas. 216; *D.*, 10 C.L.J. 644 = 3 Ind. Cas. 380.]

(7)—*Suit by executor or donee under will—Probate of will not necessary condition precedent to filing of suit.*—A donee or executor under a will to which Act V of 1881 applies is not precluded from filing a suit as such donee or executor by reason of his not having taken out probate of the will. THAKURAIN v. RAMCHARAN, **A. W. N. 1895, 87.** [*F.*, 18 A. 260.]

(8)—*Co-heir — Partition suit—Suit against administrator.*—A co-heir cannot sue the administrator for partition of the estate when letters of administration have been obtained to the estate of an intestate—but must prosecute his claim in the manner provided by the Probate and Administration Act. MA HMYIN v. MA OHN GAING, **U.B.R. 1902-1903, Vol. II, Civil, Probate and Administration, 1.** [*R.*, 2 U.B.R. 1902--1903, Probate and Administration, 3 U.B.R. 1910, 4th Quarter, Civil 61.]

(9)—*Step-son—Rights of succession—Practice in granting Letters of Administration.*—Step-son succeeds to the estate of the step-mother (save in the case of certain ancestral property of hers) in preference to the collateral blood relatives. Merits of parties to be considered in granting letters-of-administration. NGA SON v. MA NYO, **U.B.R. 1897-1901, Vol. II, 531.** (U.B.R. 1897—1901, 66, *F.*)

(10)—*Ownership of property by married couples—Devolution—Letters of administration whether and when can be granted to any person other than survivor of married couple—Proper person to administer estate.*—Under the Burmese Buddhist Law respecting the ownership of property by married couples, and the devolution of such property on the death of one of them, the widow or widower, as a general rule, is the proper person to administer the estate of the deceased. Though an absolute rule must not be laid down that in no circumstances should letters of administration be granted to any other person, as, for instance, a step-daughter of the widower, it would require very special reasons to justify such a grant. Where a widower is in possession of the estate as the natural and proper representative of the deceased widow, any person who claims a share of the estate can sue him for it, and the fact, that letters of administration have not been issued, is no obstacle to such a suit. NE WIN v. MA AUNG GALE, **4 L.B.R. 293.**

(11) Locus standi *of a legatee, having only a life interest in the income of fractional portion of the testator's estate, to apply for Probate or Letters of Administration with the will annexed--Amendment of application for Probate to one for grant of Letters of Administration.*—A testator left by will the income of a portion of his immoveable property, for life, to his two widows. As to the rest of his property, he died intestate. One of the widows applied for Probate of the will, the execution of which was not in dispute. The applicant was not named as executrix in the will. *Held*, that (1) the applicant, being neither an executrix in the will nor by necessary implication, was not entitled to get Probate: (2) Under both Indian Law and English practice, universal legatees are entitled to Letters of Administration with the will annexed and not to Probate: (3) A legatee, who has bequeathed only a life interest in the income of a fractional part of the testator's property, is not, as such, entitled to ask either for Probate or for Letters of Administration with the will annexed and, under these circumstances a prayer for grant of Probate cannot be altered to one for obtaining Letters of Administration. (4) The grant of Probate does not give the grantee possession of the property to which it relates, but only the right to sue for its possession. MEHAR CHAND v. MUSSAMMAT LACHHMI, **15 P.W.R. 1907.** (22 W.R. 874, and 7 B.L.R. 563, *D.*; 15 M. 360, 19 C. 582, *R.*)

(12) — *Revocation of Probate — Omission of special citation — Burden of proof.* — If the person, on whom a citation ought to have been served, had knowledge of an application for probate, mere omission to serve a special citation on him will not, in itself, be a sufficient ground for revoking the grant of a probate; the burden of proving the existence of such a knowledge lies on the person alleging it. The person applying for revocation of a probate need not prove that no notice was served on him and that he had no knowledge of the application for probate or of proceedings thereunder. Mere omission, on the part of a grantee of a probate to file an inventory or account is not a sufficient ground for revoking a probate, unless the omission was wilful or without reasonable cause. When a District Judge is satisfied that a summary grant of probate should be recalled for want of special citation, he should call upon the applicant for the grant to prove his right in solemn form but should not revoke the grant directly. PREMCHAND DAS v. SURENDRA NATH SAHA, **9 C.W.N. 190.** [*F.* & *R.* 10 C.L.J. 263 = 3 Ind. Cas. 178.]

(13)—*Act V of 1881—"Just cause for revocation of probate"—Absence of special citation—*

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Minority of the person complaining of absence of such citation.—In proceedings in which probate of a will is granted, the mere absence of a special citation, is not, when the person, to whom a citation has not been issued, is otherwise aware of the proceedings, "a just cause" for revocation of probate. The fact that the person, who complains of absence of such citation, is a minor, would not make any difference. NISTARINY DABYA v. BRAHMOMOYI DABYA, **18 C. 45.** [*D.*, 2 C.W.N. 100; *R.*, 10 C.L.J. 263.]

(14) *Appearance of signatures—Neither party applied to have originals transmitted or to have photographs taken of them—Evidence in favour of Will.*—Where the genuineness of a will, alleged to have been executed by a deceased testator, two days before his death, was in question, the High Court, considering it to have been proved by the evidence that the alleged testator was incapable, by reason of illness, of signing the will as firmly as it purported to be signed, and finding that the signatures were not genuine, reversed the decree of the first Court, which had granted probate. Though on appeal, there was no view of the signatures, neither party having applied to have the originals transmitted or to have photographs taken of them, their Lordships found that the evidence did not warrant the conclusion that on the day on which the will purported to have been executed, the testator physically and mentally was unable to execute it; and that there was sufficient evidence to establish the genuineness of the will and the capacity of the testator to make it, and that the evidence for the defence was not sufficient to destroy the petitioner's case on neither of of these points. BAMA SUNDARI DEBI v. TARA SUNDARI DEBI, **19 C. 65=18 I.A. 132, P.C.=6 Sar. 66.** [*R.*, 27 B. 626, Rat. Un. Cr. C. 779.]

(14-*a*)—*Person claiming under the will of Hindu, right of, to sue without taking probate.*—From the fact that the Probate and Administration Act, 1881, contains no provision similar to those contained in s. 187 of the Indian Succession Act, which are to the effect that a right as executor or legatee under a will cannot be established in any Court without obtaining probate of the will, it must be presumed that, save where the Hindu Wills Act, 1870, extending the said s. 187 to Hindus, is in force, it is not obligatory on a person claiming under the will of a Hindu to obtain probate of the will before instituting his claim. KANHAIYA LAL v. MUNNI, **18 A. 260=A.W.N. 1896, 44.** (17 C. 272, A.W.N. 1895, 87, *F.*) [*F.*, 2 N.L.R. 123; *R.*, 2 O.C. 33.]

(15)—*See* ACT II OF 1874, s. 31, 21 C. 732.

(16)—*See* CIV. PRO. CODE, 1908, s.50, 30 C. 1044.

(17)—*See* CONTRACT ACT, 1872, s. 16, sub-s. (3), 5 O.C. 307.

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(18)—*See* ENGLISH LAW, 31 C. 628=8 C. W.N. 578.

(19)—*See* LETTERS PATENT, HIGH COURT, 1865—N.W.P., s. 10, 17 A. 475=A.W.N. 1895, 104.

(20)—*See* MAHOMEDAN LAW—WILL, 1 Bom. L.R. 715=24 B. 8.

(21)—Practice in testamentary matters before Act V of 1881—*See* PRACTICE AND PROCEDURE, 5 B. 638.

(22)—*Scale of costs for awarding pleader fees in proceedings under.*—*See* PRACTICE AND PROCEDURE, 10 Bom. L.R. 1197=33 B. 256.

(23)—Judgment of Court of Probate, a judgment *in rem*—Proceedings under—Previous decision under Guardians and Wards Act VIII of 1890, if *res judicata*—*See* RES JUDICATA—ADJUDICATIONS, 16 M. 380=3 M.L.J. 121.

(24)—*See* SUCCESSION CERTIFICATE ACT, 1889, ss. 4, 17, 17 M. 14.

(25)—*S.* 2—"*Sikh,*" *a* "*Hindu*" — *S.* 331, *Act* X *of* 1865 — *Brahmos whether Hindus* — *Unorthodox practice* — *Effect.* —The meaning of the term "Hindu" in the old and new Acts discussed. A Sikh is included in the term Hindu as used in Act V of 1881. So probate of the Will of a deceased Sikh testator can, under that Act, be granted. (15 I.A. 87, 6 I.A. 15, 9 M.I.A. 195, 2 Morley's Digest, 22, *R.*) In s. 331, Act X of 1865, the term "Hindu" is used in the same wide sense as in the earlier enactments, and includes "Sikhs". A Sikh or Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he was born. Lapses from orthodox practice in matters of diet and ceremonial observances cannot have the effect of excluding from the category of "Hindu" in Act V of 1881, one who was born within it, and who never became otherwise separated from the religious communion in which he was born. BHAGWAN KOER v. BOSE, **31 C. 11, P.C.=30 I.A. 249=7 C.W.N. 895=5 Bom. L.R. 845=13 M.L.J. 381=184 P.R. 1903=135 P.L.R. 1903=8 Sar. 543.**

(26)—*S.* 2—"*Hindu*" *whether includes Sikhs* —*Alteration after execution of will—Right to question validity of trusts in a will by Probate Court.*—On a comparison of the Acts passed by Legislature regarding intestate and testamentary succession and administration the term "Hindu" in this section must be meant to include "Sikhs." A person born a Sikh or a Hindu and so long as he does not renounce Hinduism or Sikhism, does not cease to be so because he indulges in practices as to eating and living reprobated by other Hindus or Sikhs or professes to be a Brahmo. An alteration in

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a will even if made after execution does not invalidate it if attested by the testator. The question of validity of trusts contained in a will cannot be decided by a Probate Court. BABU JAGENDRA CHANDRA BOSE v. RANI BHAGWAN KAUR, **63 P.R. 1900.** [*R.*, 39 P.R. 1903.]

(27)—*Ss.* 2, 4 — *Instrument purporting to be will, probate not grantable of, where no property passes under.*—On an application by the executors under the will of a testator who was a member of an undivided Hindu family, the properties concerned having passed by survivorship to the other members of the joint family, *held*, having regard to the definition of a will in the Probate and Administration Act, s. 2, probate should not be granted of such a document in the form of a will which admittedly deals with no property of the testator and where, under s. 4 of that Act, nothing could pass to the executor. The mere fact of guardians having been appointed by such a document is not sufficient of itself to bring the document within the Act or to render probate necessary. BUKTHAWAR v. MULL SOWCAR, *In re* **23 M. 133.**

(28)—*S.* 3—*Probate—Will--Document intended to take effect partly in the life-time of the executant and partly after the executant's death.* —There is no objection to one part of an instrument operating in *praesenti* as a deed and another in *futuro* as a will. SETH CHAND MAL v. LACHMI NARAIN, **A.W.N. 1900, 1=22 A. 162.**

(29)—*S.* 3—*Grant of probate to trustees as executors according to tenor.*—The mere circumstance that the property is left by the will to trustees, without words referring to them as executors, would not prevent those persons being granted probate as executors according to the tenor, if, among the duties to be discharged by them under the will, there are included such duties as executors have to perform; but that should appear from the will. N. APPACUTTY MUDALI v. MUTHUKUMARAPPA MUDALI, **16 M.L.J. 558=30 M. 191.**

(30)—*S.* 3— *Nuncupative will by Hindu—Probate.*—It is more in accordance with the intention of the legislature and spirit of the law that probate should issue, although the Will is an oral Will by a Hindu. GOKUL CHAND v. MANGALSEN, **25 A. 313=A.W.N. 1903, 63.** (24 B. 8, *F.*)

(31)—*S.* 3—*Will—Probate—Tamliknama—Dedication of property for religious purposes.*—*Held*, that a document to the following effect does not fall within the definition of "*will*" as given in s. 3 of Act V of 1881, and therefore its probate cannot be granted under that Act: (*a*) That it dedicates to the worship of Sri Thakurji certain houses: (*b*) That the executant states that he will himself manage the property and arrange for the worship during his life-time; (*c*) That after his death a Committee of three persons, of whom petitioner is one, will become managers in his stead. BHAGAT RAM v. SIDHU, **142 P.W.R. 1911=12 Ind. Cas. 595=55 P.L.R. 1911=5 P.R. 1912.** (32 C. 1082, *F.*)

(32)—*S.* 3, *Act* V *of* 1881 (*Probate and Administration*)—*S.* 3, *Act* IX *of* 1875, (*Indian Majority*) —*Proceedings of Residents of Native State in British Indian Courts.*--The words "any other person" in s. 3 of Act V of 1881 when read with s. 3, Act IX of 1875, must mean any other person not domiciled in British India. The words in s. 3, Act V of 1881 are express, and the limit of the period of disability is for the purpose of the Act, fixed at 18 years, not merely for persons domiciled in this country (British India) but for any other persons whether they be aliens or not. Application of a person above 16, but below 18 years of age, and residing in a Native State (according to the law of which he would be a major), to a British Indian Court for Letters of Administration, is not allowable. *In the goods of* SRINARAIN MOHTA, **21 C. 911.**

(33)—S. 3—*See* HINDU LAW—ADOPTION, 27 M. 30.

(34)—S. 3—*See* WILL—FORM OF WILL, 22 A. 162.

(35)—Ss. 3, 4, 23 and 77—Right of Hindu son to obtain Letters of Administration to the joint ancestral estate of his undivided father.—*See* COURT FEES ACT, 1870, s. 19 [1-(1)], 6 M. L.T. 286, F.B.=19 M.L.J. 591=4 Ind. Cas. 1064=33 M. 93.

(36)—*Ss.* 3, 5, 12—*Executor who has obtained order for grant but not taken out probate if may represent estate in suit—Intermeddling with estate—Lunatic, not found—Representation—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 463. —An executor who obtained an order for the grant to him of probate but took no further steps to complete the grant and who in no way intermeddled with the estate cannot properly represent the estate in a suit brought against it. A decree purporting to have been passed against such an executor does not bind the estate. The provisions of the Civ. Pro. Code (Act XIV of 1882) with respect to representation of lunatics not being exhaustive a guardian *ad litem* should be assigned to a defendant who is of unsound mind although not so found. LAKSHYA DAYA v. UMA KANTA CHAKERBUTTY, **14 C.W.N. 256=2 Ind. Cas. 818.**

(37)—*Ss.* 3, 7—*Will—Executor—Executor by appointment.*—The Probate and Administration Act, 1881, does not prohibit the appointment of an executor to the will by an executor thereof. MOOSA HAJI v. HAJI ABDUL, **5 Bom. L.R. 639.**

(38)—*Ss.* 3 *and* 7—*Executor by implication —Bequest to an idol—Right of* shebait *to tak out probate.*—Where a testator had bequeathe the bulk of his estate for the *sheba* of a *thakur*

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and made certain other dispositions in regard to the rest of the property: *held*, on the construction of the will, that his wife, whom he had appointed *shebait*, having been confided with the execution of the will, was executor by implication, and as such entitled to take out probate of the will. KRIPAMOYEE DASSI v. MOHIM CHANDRA DUTT, **10 C.W.N. 232.** (6 C.W.N. 310, *R.*) [*D.*, 6 C.L.J. 453.]

(39)—*S.* 4—*Person other than executor or administrator, when could sue for debts due to estate.*—Collusion between the administrator and the debtor is one of the cases, in which parties interested in an estate are allowed to sue both the administrator and the debtors of the estate, for the recovery of a debt due to the estate, such a case being considered an exception to the general rule under s. 4 of the Act. MAUNG BWA v. MA THI, **3 L.B.R. 192.** (10 C. 713, *R.*)

(40)—S. 4—*See* CIV. PRO. CODE, 1908, s. 11, 4 Ind. Cas. 483.

(41)—S. 4—Mahomedan will—Probate—*See* MAHOMEDAN LAW—WILL, 37 C. 839=8 Ind. Cas. 655.

(42)—S. 4—*See* PARTIES TO SUIT—GENERAL, 12 B. 621.

(43)—S. 4—*See* NOS. 27, 35, *supra.*

(44)—Ss. 4, 12, 59, 88 and 90—*See* MAHOMEDAN LAW—WILL, 9 C.W.N. 938, P.C.=1 C.L.J. 594=2 A.L.J. 758=15 M.L.J. 336=7 Bom.L.R. 876=33 C. 116=32 I.A. 244.

(45)—*Ss.* 4, 64, 71—*Letters of administration to husband's estate, application by widow for—Hindu Joint family—Limitation Act* (XV *of* 1877), *sch.* ii, *art.* 178—*Limitation—Issues, omission to frame—Remand—Civ. Pro. Code, s.* 566.—I and G were two brothers. I died on the 23rd June 1881, and his widow applied to the District Judge under s. 64, Act V of 1881, for letters of administration to the estate of her deceased husband. G's sons lodged a caveat under s. 71 of the Act, alleging that the family was joint and that under s. 4 of the Act letters of administration could not be granted to her in respect of I's estate. The District Judge did not frame any issues in the case and fixed a date for the reception of evidence and, after receiving the evidence on that date, dismissed the widow's application, holding that it was barred under art. 178, sch. ii of Act XV of 1877. *Held*, that art. 178, sch. ii, Act XV of 1877, has no reference to an application by which a miscellaneous proceeding (as opposed to a regular suit) is instituted, and which is not made under the Code of Civil Procedure. *Held*, therefore, that the widow's application was not time-barred. *Held* further, that the petitioner being the widow of the deceased, the devolution of whose estate was governed by the Mitakshara law, would be entitled to the whole of her husband's estate if he died in separation from his brethren, to his self-acquired property only if he died in union with them, and to no portion of his estate if he died in union with them and left no self-acquired property. *Held*, further, that, as no issues had been framed and the parties might have been prejudiced by this omission, the case should be remanded under s. 566, Civ. Pro. Code. BICHANA v. HIRA LAL, **4 O.C. 224.**

(46)—S. 5—*See* NO. 36, *supra.*

(47)—*Ss.* 6 *and* 7—*Application for probate by universal legatee—Executor by implication—Maintainability of application.*—An application was made for probate of the will of the deceased by the universal legatee under a will. Under ss. 6 and 7 of the Act, probate could be granted only to an executor appointed by the will, expressly or by necessary implication, whereas this applicant was merely an universal legatee and there were no words in the will, from which it could be gathered that he was to do any acts, falling within the office of an executor, such as to pay the debts of deceased and generally to administer the estate. He was, therefore, not an executor, by necessary implication, usually known as an "executor according to the tenor" and so not entitled to probate. RADHAKISAN MARWARI v. MT. SONA BAI, **1 N.L.R. 164.** (25 C. 65 and 26 B. 571, *R.*)

(48)—*Ss.* 6, 18, 19, 84—*Probate only to executor—Universal legatee—Probate granted by mistake, effect of—S.* 18—*Mortgage by such a person—Permission of Court not obtained—Probate under forged will—Payment by person to whom probate of forged will was granted—Revocation of probate—Right to be re-imbursed out of estate.*—Under s. 6 of the Probate and Administration Act, probate can be granted only to an executor appointed by the will, and an universal legatee is only entitled under s. 19 to a grant of letters of administration with the will annexed. Probate granted to an universal legatee by mistake is invalid from the first, and the person to whom such grant was made cannot be constituted an executor so as to be empowered to exercise any of the powers conferred on executors under the Act. A mortgage executed, without the Judge's permission, by a person to whom probate was granted by mistake, is bad. Where a Will was declared to be a forgery, and therefore *void ab initio*, any acts done by a person under any title created by that Will, must be held to be void in law. [*R.*, 3 C.L.J. 422=10 C.W.N. 673=33 C. 713; *D.*, 10 C.W.N. 422.] Any lawful payments made by a person to whom probate of a forged Will was granted but subsequently revoked, may be re-imbursed out of the estate of the deceased under s. 84 of the Probate and Administration Act. (3 Bingham, 20, *R.*) PUNDIT PRAYRAG RAJ v. GOUKARAN PERSHAD TEWARI, **6 C.W.N. 787.** [*D.*, 10 C.W.N. 422.]

(49)—*S.* 7—*Will, construction of—Executor, appointment of, by implication.*—Where the material portion of the Will of the deceased was as follows:—"After my demise, the

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shebait shall exercise all the powers which I possess. He shall manage, protect and improve the *debutter* estate. He shall be able, if necessary, to let on hire, taking agreement as a *shebait*. He shall be able to realise all money due to the idol by suit, amicable settlement or in any other safer way and, if it be necessary, shall sue for protecting the immoveable properties. In order to help the *shebaits* of the idol by giving them sound advice after my death, I appoint these gentlemen (naming them) as "*osees*." *Held* that the *shebait* was appointed executor of the will by necessary implication within the meaning of s. 7 of the Probate and Administration Act, and that the persons appointed as *osees* were merely co-adjutors or overseers. BROJO CHANDER GOSWAMI v. RAJ KUMAR ROY, **6 C.W.N. 310.** [*R.*, 10 C.W.N. 232 ; *D.*, 6 C.L.J. 453.]

(50)—S. 7—*See* NOS. 37, 38, 47, *supra.*

(51)—*Ss.* 7 *and* 19—*Universal or residuary legatee—Grant of Probate or Letters of Administration.*—Where a Hindu testator did not appoint any executor in his will but after bequeathing a portion of his estate to charitable purposes, bequeathed the rest to his wife, *held* that the widow is not entitled to probate as an executrix appointed by implication under s. 7 of the Act, but may be entitled to letters of administration with the will annexed under s. 19 as a universal or residuary legatee. A Probate Court is incompetent to enquire into the capacity of the testator to dispose of his property by will or the validity of the provisions contained in the will. SAIN DAS v. MUSSAMMAT SAHIB DEVI, **130 P.R. 1892.**

(52)—*Ss.* 9, 85—*Executor, application for probate by—Discretion of Court.*—S. 9 of the Act provides that when several executors are appointed, probate may be granted to all simultaneously or at different times. If the applicant is an executor named by the Will and is under no legal incapacity to act, the Court has no option but to grant him probate. S. 85 of the Act enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration, but no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. PRAN NATH GHOSE v. JADO NATH BHATTACHARJI, **20 A. 189=A.W.N. 1898, 14.** (21 C. 195, *R.*)

(53)—*Ss.* 11, 91, 102—*Probate action—Successful objector if entitled to costs out of estate as of right -Executor or administrator purchasing property from legatee at auction-sale —Validity—Right to perform religious ceremonies given to executors, if survives in their heirs on death—Prospective trustee, purchase by —Validity--Administrator* de bonis non, *if bound to take account from predecessor—Liability to account on failure—Suit for accounts against executor—Limitation—Limitation Act* (XV *of* 1877), *s.* 10, *sch.* II, *art.* 120—*Delay—Acquiescence.*—A beneficiary, who successfully resists an attempt by another beneficiary to prove a false will, is not as a matter of right entitled to be paid his costs out of the estate. The costs are in the discretion of the Court and may be directed to be paid out of the estate of the deceased in a suitable case. S. 102 of the Probate and Administration Act does not justify a contrary inference. An executor cannot, as a general rule, be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets. Such a purchase is treated as a breach of trust, without inquiry whether transaction was beneficial or not. The position, however, is somewhat different when the executor or administrator purchases from a legatee. Such a purchase may be a perfectly justifiable one, though, if challenged in proper time, a Court of Equity will enquire into it, ascertain the value that was paid by the trustee and threw upon him the *onus* of proving that he gave full value and that all information was laid before the *cestui que trust* when the property was sold. The purchase at an execution sale of a legatee's interest by the administratrix *durante minoritate* was in this case upheld as not made in contravention of s. 91 of the Probate and Administration Act. A sale is not to be avoided merely because, when entered upon, the purchaser had the power to become the trustee of the property purchased. It is immaterial whether the purchaser subsequently does in fact become the trustee or not. The true test to be applied in such cases is, has the purchaser used his position in such a way as to render it inequitable that the sale should be upheld. The right to perform certain religious ceremonies, conferred by the will exclusively on the executors passed on the death of one of them to the remaining executors, and was not transmitted to the heir of the deceased executor. Upon the death or termination of authority by operation of law of an administrator *durante minoritate*, it is the duty of the executor or other person who succeeds him in the administration to recover and take possession of the unadministered assets of the deceased, to call upon his predecessor or his personal representative to render account of the estate and to recover damages, if necessary, for waste and misappropriation by his predecessor, and if required, by the institution of appropriate judicial proceedings. If he fails to do so, he must be held liable to the extent to which the estate would have been benefited if he had faithfully performed his duty. In order to see whether s. 10 of the Limitation Act applies to a suit against an executor, it must be determined, first, whether, upon the terms of the will, there was a trust under which the property had become vested in the executors for a specific purpose, and, secondly, with reference to the frame and scope of the suit, whether its purpose was to follow in the hands of the trustee or his legal representative property which had become vested in trust for a specific purpose.

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An executor as such is not an express trustee for a legatee (25 B. 429, *F.*). A suit for accounts, pure and simple, against an executor, cannot be treated as a suit against a trustee for the purpose of following trust property. (5 C. 910, *F.*). Such a suit would be governed by art. 120 of sch. II of Act XV of 1877. How far delay on the part of the person interested, in instituting a suit, for accounts against an executor, may disentitle him to relief in equity, apart from the law of limitation, discussed. BARADA PROSHAD BANERJEE v. GAJENDRA NATH BANERJEE, **13 C.W.N. 557=9 C.L.J. 383=1 Ind. Cas. 289.** [*R.*, 7 M.L.T. 123.]

(54)—*S.* 12—*Executor under Muhammadan's Will, bound to take out probate.*—The provisions of the Probate and Administration Act imply that all classes of executors are to be placed on the same footing with regard to the necessity of taking out probate. S. 12 of the Act shows clearly that the idea at the bottom of the scheme of the Act was that a will was not to be considered established until probate had been taken out. The Act read as a whole clearly establishes that probate is necessary in all cases. Consequently, an executor under a Muhammadan's will cannot, since the coming into force of the said Act, claim to represent the estate until he has taken out probate. FATMA v. SHAIK ESSA, **7 B. 266.** [*R.*, 2 O.C. 33.]

(55)—S. 12—*See* NOS. 36, 44, *supra.*

(56)—Ss. 12, 59—*See* RES JUDICATA—ESTOPPEL BY JUDGMENT, 21 B. 563.

(57)—*Ss.* 13 *and* 33—*Administration—Letters of administration granted to minors under the guardianship of their father.*—Under Act V of 1881, Letters of Administration cannot be granted to minors under the guardianship of their father. JAI LAL SINGH v. HARI SINGH, **A.W.N. 1908, 257=5 A L.J. 736.**

(58)—*Ss.* 16, 50, 69—*Will—Revocation of probate—Just cause—Absence of citation—Compulsory citation—Discretionary citation—*Onus *of proof.—Per Scott, C J., and Batchelor, J.*—A purchaser from an heir of a portion of the property of a deceased person has a *locus standi* to come in and allege that the will of the deceased is a forgery and should be revoked. Under the Probate and Administration Act, there are compulsory citations and discretionary citations. A case of a compulsory citation is to be found in s. 16 of the Act, which provides that "when a person appointed an executor has not renounced the executorship, Letters of Administration shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship." A case of a discretionary citation is to be found in s. 69 of the same Act, which says that it shall be lawful for the Judge, if he thinks fit, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or Letters of Administration. Where the compulsory citation has been omitted, the grant of letters of administration with the will annexed would be defective on the face of it, because the will is the act of the deceased himself and provides for the persons who shall administer the estate; in such a case, the grant being defective should be revoked as soon as the defect comes to the notice of the Court. Where, however, citation has been discretionary and a person who may be interested in disputing the genuineness of the will is not cited and probate is granted *ex parte*, the mere absence of citation does not invalidate the grant, because the will may be a perfectly genuine will and the opposition of the person who ought to have been cited might, if it had been put forward, have proved ineffective; in such a case, although the omission to cite is not in itself a sufficient cause for revocation of the probate, it affords a good reason for inquiring into the genuineness of the will alleged, and the Court ought to frame an issue whether the will propounded is the will of the deceased, and to come to a finding upon that issue. *Per Batchelor and Rao, JJ.*—The *onus* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court, that the instrument so propounded is the last will of a capable testator. If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed. Where a will is prepared and executed under circumstances which raise a suspicion of the Court, it ought not to be pronounced for, unless the party propounding it adduces evidence which removes such suspicion and satisfied the Court that the testator knew and approved of the contents of the instrument. The *dicta* in *Tyrell* v. *Painton* and *Bary* v. *Butlin*, do not lose any of their force by reason of the circumstance that the executors had, on a former occasion, in *ex parte* proceedings, obtained probate behind the back of persons vitally interested in disputing the will. DIGAMBAR KESHAVA SHROTRI v. NARAYAN VITAL ASHETEKAT, **13 Bom. L.R. 38=9 Ind. Cas. 354.**

(59)—*S.* 17—*Application for probate by official trustee—Intention to renounce expressed in a letter—Subsequent retraction—Effect.*—Where the official trustee merely wrote a letter to a certain person intimating his intention of renouncing probate, but, subsequently, that intention was withdrawn before the matter came before the Court and no such renunciation was ever directly made before the Court, nor was any writing intimating such renunciation was filed in Court, it was held that there was no formal renunciation in that case, and that the official trustee was not precluded from applying for the probate. *Held*, also, there

Probate and Administration Act (V of 1881) —*continued.*

was nothing in the Official Trustees Act prohibiting the official trustee from being appointed as an executor and acting as such. *In the goods of* MANICK LAL SEAL, **35 C. 156**

(60)—*S.* 18—*Hindu Wills Act—Indian Succession Act—Executor—Executorship, acceptance or renunciation of—Probate—Letters of Administration with Will annexed.*—An executrix, in answer to a citation under s. 16 of Act V of 1881, calling upon her either to accept or renounce her executorship, stated that she was already acting as executrix and administering the estate, and that she did not consider it necessary at that stage to take out probate, having applied for a certificate under the Succession Certificate Act (VII of 1889). *Held* that this was not such an acceptance as was contemplated by s. 18 of Act V of 1881, the language of which is the same as that of s. 195 of the Indian Succession Act, and that, on the executrix declining to prove the will, the District Judge was right in granting Letters of Administration with the will annexed to the sole residuary legatee. MOTIBAI v. KARSANDAS NARAYANDAS, **19 B. 123.**

(61)—S. 18—*See* No. 48, *supra.*

(62)—*S.* 19—*Construction of document—Will —Residuary legatee.—Held* that a bequest of future interest accruing on the testator's estate between the date of the will and the testator's death was a specific bequest, though the amount might be unascertained, and that neither such a bequest nor a provision that the furniture, metal utensils and "*jumla asbab*" contained in a certain house should, after the death of two ladies, become the joint property of certain persons named in the will, could place those legatees in the position of residuary legatees entitled, within the meaning of s. 19 of Act No. V of 1881, to ask for Letters of Administration to the estate of the testator. CHUNNI LAL v. MOTI LAL, **A.W.N. 1901, 108.**

(63)—*S.* 19—*Will—Probate— Letters of Administration— Legatee's right to administer estate when some executors willing to act—Fitness of executors—Applications for Probate—Parties —Legatee impugning executor's good faith should be made party.*—A legatee cannot be allowed to administer the estate of a testator, unless all the executors refuse to act. The Court should not consider whether the executors who are willing to act are fit and proper persons for the grant of Probate. (21 C. 195, *Rel. upon.*) Although a legatee has no title to administer the property, he should be brought on the record of a Probate case, as an interested person to safeguard his interests where he impugns the good faith of the executors. MUSSAMMAT KARIMAN v. MUSSAMMAT MASITI, **24 P.L.R. 1912=29 P W.R. 1912=13 Ind. Cas. 171.** (21 C. 539, *F.*)

(64)—*S.* 19, *Act* VI *of* 1889 *is retrospective.* —S. 19, Act VI of 1889 is retrospective in its operation. PREONATH KARAR v. SURJA COOMAR GOSWAMI, **19 C. 26.**

Probate and Administration Act (V of 1881) —*continued.*

(65)—*S.* 19—*Universal legatee, entitled to Letters of Administration, and not to Probate.* —Under the Probate and Administration Act, a universal or residuary legatee is entitled to Letters of Administration with the will annexed. The Legislature intended that they are to be excluded from Probate. *In the goods of* SHOSHEE BHUSAN BANNERJEE, **19 C. 582.** (7 B.L.R. 563, *Not F.*) [*F.*, 73 P.L.R. 1908= 15 P.W.R. 1907; *R.*, 1 N.L.R. 164.]

(66)—S. 19—*See* NOS. 48, 51, *supra.*

(67)—Ss. 19, 59—*See* RES JUDICATA—ESTOPPEL BY JUDGMENT, 20 C. 838.

(68)—Ss. 21, 41—Legatee interested in only a portion of testator's property — Grant of Letters of Administration for the whole property—*See* WILL—CONSTRUCTION, 8 Ind. Cas. 695.

(69)—*Ss.* 22, 41, 50, 85—*Application for probate by person appointed executor by will—Applicant not legally incapable — Discretion of Court—Just cause.*—Ss. 22, 41 and 85, Act V of 1881, give the Court discretion to grant any one of the persons entitled to the estate of an intestate, or to a third party, Letters of Administration, or to make an order refusing to grant any application for Letters of Administration. But the Act nowhere provides for any such discretion being exercised in the case of an application for probate by an executor named in the will and considered qualified by the testator to act as such. A Court acting under the Probate and Administration Act has no discretion to refuse an application for probate by such executor (he not being legally incapable, and the genuineness of the will not being disputed), on the ground that, in its opinion, he is not a fit and proper person to be entrusted with that office. [*F.*, 20 A. 189= 18 A.W.N. 14.] Under the Act, probate can only be revoked for "just cause" and unfitness or incompetency of an executor does not fall within the meaning of just cause as explained in s. 50; so that apparently an executor, however, unfit or incompetent he may be, cannot, be removed by the Court from his post, though he may be removed for certain specified reasons; *e.g.*, his omission to exhibit an account of the assets which have come into his hands. But this refers expressly to the revocation of a probate after it has been granted, and can have no application to the conduct of the executor before the probate is granted, and much less to the conduct of a person occupying the position of a manager. HARA COOMAR SIRCAR v. DOORGAMONI DASI, **21 C. 195.**

(70)—*S.* 23—*Letters of Administration— Grant to deceased's admitted wife—Opposition by person claiming to have been married to deceased—Claim denied—Question of marriage should be fought out in a separate suit.*—Letters of administration were granted in a case to A, who was admittedly a wife of the deceased and who was entitled to a portion of the deceased's

Probate and Administration Act (V of 1881) —*continued.*

estate. The grant was opposed by B, who also claimed to have been married to the deceased, but whose marriage was denied. There was not sufficient evidence on the record to prove the marriage of B with the deceased: *Held*, that the question of B's marriage with the deceased should be fought out in a regular suit, and that the Letters of administration were properly granted to A under s. 23 of the Probate and Administration Act. DENGETTI NARAINAMAH v. GUTHULA RAMANAH, **12 Ind. Cas. 883.** (5 L.B.R. 78, 3 Ind. Cas. 719, *F.*)

(71)—*S.* 23—*Object of granting letters of administration—Right of younger daughter of deceased Burman Buddhist to letters of administration during the life-time of mother—Agreement of parties, whether can change personal law.*—In the case of one of a Burmese Buddhist married couple dying, it can rarely, if ever, be necessary that letters of administration to the deceased's estate should be granted after the period of limitation for the recovery of debt owing to or by the deceased has expired. An younger daughter of a deceased Burman Buddhist is not, during the life-time of her mother, a proper person to be granted letters of administration to the estate of her deceased father, especially where the application was made 18 years after the death of the father. If a child of Burmese Buddhist parent has a right to prevent his or her surviving parent from wasting the one-half of the property in which the parent has only a life-interest, the proper method of enforcing such right is by a regular suit. Procedure under the Probate and Administration Act cannot be used for such purposes. If a person was not, in fact, governed by the Burmese Buddhist Law of inheritance, the agreement of the parties cannot make such law applicable. MA PE v. MA THEIN YIN, **4 L.B.R. 287=14 Bur. L. R. 280.**

(72)—*S.* 23—*Grant of Letters of Administration on intestacy—Gift for maintenance—Nature of gift.*—Letters of Administration can be granted under s. 23 of the Act, only when there has been an intestacy. It cannot be said that a gift for maintenance is necessarily a gift of a life-estate, and that at the death of the donee there is an intestacy as regards the estate of the original devisor. MOHIM CHANDRA MOULIK v. SARAJUBALA GUPTA, **9 C.L.J. 576=1 Ind. Cas. 140.**

(73)—*S.* 23—*Questions to be determined by Court—Dispute as to heirship—Question whether property was left by deceased.*—An application for letters of administration should not be refused on the ground that there is a dispute as to whether the petitioner is the heir of the deceased or not, and that it is not for the Probate Court to decide whether the property was left by the deceased or not. Those are the questions which the Court has to decide. KALIDAS MUKHERJEE v. NRITYA GOPAL MUKHERJEE, **7 Ind. Cas. 1.**

Probate and Administration Act (V of 1881) —*continued.*

(74)—*S.* 23—*Letter of administration, Application for—Creditor of estate—Rule for the distribution of the estate of an intestate.*—Rules for the distribution of an intestate's estate referred to in s. 23, Probate and Administration Act must be taken to mean the ordinary and obvious rights of succession and inheritance. MA PA v. MA PE, **L.B.R. 1893—1900, 622.** (21 C. 164, *R.*)

(75)—*S.* 23—*Dispute as to heirship—Dispute as to title of deceased to property mentioned by petitioner—Court to decide questions.*—In an application for letters of administration, question of title of the deceased to the properties mentioned by the petitioner is not a matter which is to be dealt with by Court at all. As regards the questions as to whether the petitioner is the nearest heir to the deceased, that is a matter which should be settled by the Court. DURGA DAS MISSER v. RADA RAMAN MISSER, **7 Ind. Cas. 1.**

(76)—S. 23—*See* NO. 35, *supra.*

(77)—*Ss.* 23, 41—*Court's power to direct that somebody else, having no present interest in the estate should be associated with applicant in the grant of Letters of Administration.*—S. 41, Act V of 1881 applies to a case where, for some just cause, the person who is legally entitled to Letters of Administration ought to be superseded, and the grant made to another person. There is no authority for saying that it is in the power of the Court, acting under s. 41, to direct that somebody else, who has no present interest in the estate, should be associated with the person who under s. 23, is legally entitled to Letters of Administration. ANNAPURNA DASI v. KALLYANI DASI, **21 C. 164.** [*R.*, L.B.R. 1893—1900, 622.]

(78)—*Ss.* 23, 41—*Letters of Administration —Rival claimants.*—Under s. 23 of the Probate and Administration Act, administration of an estate of an intestate may be granted to any person who would be entitled to the whole or any part of the deceased's estate. In proceeding under this section the Court is bound to ascertain whether the person who asks for letters of administration is so entitled. But, under s. 23 of the Probate and Administration Act, it is incumbent on the Court, before granting letters of administration to find that the person to whom he grants the letters is entitled to the whole or part of the deceased's estate. Until this is ascertained, the Court has no power under that section to grant letters to a person who claims to be so entitled. It would have been not only lawful but expedient if the question of the relative rights of the contesting parties had been determined in these proceedings. In order to entitle a person to letters of administration under s. 23 of the Probate and Administration Act, he must be shown to have an interest in the estate. It is not sufficient that he may possibly have an interest. MA THI v. SHWE HLWA, **1 L.B.R. 284.** (29 I.A. 17, 21 C. 697, *Cited.*)

Probate and Administration Act (V of 1881) —*continued.*

(79)—*Ss.* 23, 50, 98—*Buddhist Law of Inheritance among Hindoo-Buddhist, of Arakan and Chittagong.*—S. 23 of the Act prescribes to whom a grant is to be made of letters-of-administration of the estate of a deceased intestate. The person primarily entitled to the grant is the person who, according to the rules for the distribution of such estate, would be entitled to the whole or any part of such estate. S. 50 does not specify such failure to furnish security as one of the just causes for which a grant may be revoked or annulled, though the compulsory powers given by s. 98 might perhaps be so used as to bring the case within reach of the fifth clause of s. 50, *prima facie*, as a Buddhist, deceased who was a Hindu Buddhist would come under the Buddhist law of the country at large, and the burthen of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance. Whether there is any foundation for alleging a difference of rules except on account of deceased's coming from India and his wearing Hindu dress and following possibly some Hindu habits, there is no distinct evidence to show. But as a Buddhist, the presumption no doubt is that there would be no legal impediment, as in the case of a Hindu, to his taking a Buddhist woman to wife. MA TIN v. DOOP RAJ BARNA, **U.B.R. 1892—1893, Vol. II, 608.**

(80)—*Ss.* 23, 64—*Hindu, death of, leaving widow who survived over 30 years—Application for letters of administration, when no estate left to be administered.*—It is, no doubt, not necessary for the Probate Court to decide what assets are likely to come to the hands of a petitioner for letters of administration, but it is also the duty of the Court in granting letters of administration to consider whether there is any estate whatever to be administered. (3 C.W.N. 635, 9 C.L.J. 116, *Rel. on*; 6 C.W.N. 345, *D.*) Where the object of the life not appeared to be, not to administer the estate of the deceased, a Hindu, who had died so long ago as 1875 and was survived by his widow in possession till 1907, but really to obtain a declaration of heirship so as to fortify the successful party in any regular suit that may be instituted, the High Court *held* that no grant should be made, although objection on this ground was taken for the first time upon appeal from the order of the District Court granting letters of administration. LALIT CHANDRA CHOWDHURY v. BAIKUNTHA NATH CHOWDHURY, **14 C.W.N. 463=5 Ind. Cas. 395=15 C.L.J. 305.**

(81)—S. 24—*See* WILL—GENERAL, 31 C. 885=8 C.W.N. 821.

(82)—*S.* 25, *Probate and Administration Act—Grant of probate of part of a will.*—S. 25, Probate and Administration Act, is an enabling section. There is nothing in it to prevent a Court from following the rulings of the Courts in England as to the grant of probate of part of a will. Following the principles of English Law, probate can be granted of a portion of a will. Where the contents of a lost will are not completely proved, probate can be granted to the extent to which they are proved. (*Sugden* v. *Lord St. Leonards*, L.R. 1 P.D. 154, *Woodward* v. *Goulstone*, 11 App. Cas. 469, *F.*) KEDAR NATH MITTER v. SAROJINI DASI, **26 C. 634=3 C.W.N. 617.** [*R.*, 1 C.L.J. 109.]

(83)—*Ss.* 30, 34 *and* 53—*Civ. Pro. Code*, s. 499—*Application for grant of Letters of Administration—Nazir ordered to take possession of property—Nazir administrator*, pendente lite—*Claim to property in the hands of administrator, dismissal of—Appeal, maintainability of.*—A certain person, as guardian of a minor, made to a District Judge an application under s. 30 of the Act for Letters of Administration with the will of the testator annexed. The District Judge ordered the Nazir to take possession of the property after taking an inventory of the same. Accordingly the Nazir took possession of some of the movable property. Subsequently, under s. 34 of the Act, the Nazir was appointed administrator *pendente lite* and no complaint was made against this order by the appellants. The appellants made an application to the District Judge for restoration to them of some of the property in the hands of the administrator, which was refused. *Held*, the appellants might have appealed against, or applied for revision of, the order directing the Nazir to take possession of the property. If the Nazir was in wrongful possession of their property, they had their remedy against him according to law. *Held*, also, that, assuming that an appeal lay against the present order, which was doubtful, it was not one that could be interfered with on appeal. KASHI NATH SINGH v. SHEOSHANKAR PANDE, **A.W.N. 1905, 127.**

(84)—*Ss.* 31 *and* 32—*Administrator-General's Act* (II *of* 1874), *s.* 17—*Administrator-General taking possession without prior order of Court—Conflict between Administrator-General and Court of Wards—Nominee of Court of Wards, if can be appointed Administrator—Zamindaries.*—The Court of Wards, as such, cannot be appointed Administrator. There is nothing, however, to prevent this Court, in certain circumstances, *e.g.*, in this case, where the testator wished the minor's estate to be entrusted to the Court of Wards, from appointing the nominee of the Court of Wards (in most instances the Manager) Administrator of the testator's estate, with the will annexed, under s. 31 of the Probate and Administration Act.—*Held*, on the facts of this case, that the Administrator-General's taking possession of the estate of the testator was illegal. NRITTYA GOPAL BISWAS v. ADMINISTRATOR-GENERAL OF BENGAL, **10 C.W.N. 241.**

(85)—S. 32—*See* NO. 84, *supra.*

(86)—*S.* 33—*Minor wife—Letters of Administration for the use and benefit of—Husband*

Probate and Administration Act (V of 1881) —*continued.*

grant to.—The husband of a minor wife, before he applies for the grant of letters of administration to him, for the use and benefit of the minor, must get himself duly appointed guardian, for the purpose of applying for such grant as such assigned guardian. *In the goods of* SREEMUTTY NEROJINI DABI, **11 C.W.N. 697=34 C. 706.**

(87)—S. 33—*See* NO. 57, *supra.*

(88)—*Ss.* 33, 34—*Administrator* pendente lite —*Civil Procedure Code* (*Act* XIV *of* 1882), *s.* 492—*Procedure--Practice.*—When an application is made under s. 33 of Probate and Administration Act, 1881, to grant letters of administration for the use and benefit of a minor, the appropriate provision of law which the Judge should follow is that contained in s. 34, which gives the special powers intended by the legislature in such cases and which may render immaterial the decision of such issues as would be entitled by an application under s. 492 of the Code of Civil Procedure. The special provisions of s. 34 of the Act indicates the intention of the legislature that the Act itself should be looked to for the powers necessary for the proper custody of property pending the progress of proceedings under that Act, instead of leaving the Court to the enforcement of provisions contained in the Code of Civil Procedure which were not enacted for such special purpose and which are not so indubitably applicable. MADHAVRAO v. MANEKLAL, **2 Bom. L. R., 797.**

(89)—*Ss.* 33 *and* 64—*Oral Will—Letters of administration—Application by wife— Contest by cousins.*—Where one Mussammat H applied for administration as guardian of one M.L. in whose favour she alleged the deceased had left oral will, and the cousins of the deceased contested on the ground that the will was false, that M.L. was illegitimate, that Mussammat H was the concubine of the deceased and prayed that they should be granted letters of administration, *held* that even supposing the legitimacy of M.L., Mussammat H is not a fit person to be appointed a guardian of the minor M.L. or administratrix of the estate of the deceased. RAHIM BAKHSH v. GHULANI, **65 P.R. 1893.** [*R.*, 91 P.R. 1907; *Obs.*, 28 P.R. 1909=182 P.L.R. 1908=170 P.W.R. 1908.]

(89-*a*)—*S.* 34—*Mahomedan Law.*—Where the plaintiffs as heirs-at-law had entered caveat in an application by the executor for the probate of an alleged will of the deceased, and the application was set down as a contentious cause and the executor appointed administrator *pendente lite, held* that the plaintiffs, who, as heirs under Mahomedan Law, were entitled to a two-third share in the property left by the deceased, even if the will was not established, had the right to maintain a suit for administration by the Court against the administrator *pendente lite*, even though the probate proceedings have not been determined. MEERZA KURATUL-AIN BAHADUR v. BROUGHTON, **1 C.W.N. 336.**

Probate and Administration Act (V of 1881) —*continued.*

(90)—*S.* 34—*Administration* pendente lite—*Necessity for appointment.*—An administrator *pendente lite* will be appointed under s. 34 of the Act, only when the Court is satisfied that such appointment is necessary to preserve and protect the estate, while the litigation is pending, and unless such necessity is made out, the estate should not be subjected to the cost and encumbrance of such an administration. BHUBAN MOHINI DEBI v. KIRAN BALA DEBI, **13 C.L.J. 46=9 Ind. Cas. 215.** (10 C.L.J. 263, *R.*)

(91)—S. 34—*See* NO. 83, *supra.*

(92)—*Ss.* 35, 43, 62—*Application by mother for probate of son's will—Mother not appointed executrix—Right of mother to probate—Letters of Administration —Proof of execution of will.*—A mother applied for probate of her son's will. The mother was not appointed executrix. She was, however, given by the will some property for paying certain debts of the deceased. The application was opposed by the son's widow. The will was proved by the attesting witnesses. The District Judge granted probate to the petitioner. *Held*, that the direction to the petitioner that out of certain property she should pay certain debts was not enough to show any intention on the testator's part that for the general purpose of administration she should be executrix. The petitioner was not entitled to probate, but could apply for letters of administration with the will annexed. The petition had to state all the assets which were likely to come to the petitioner's hands, not merely such part of them as she chose to name. *Held*, also that before letters of administration with the will annexed were granted, there must be strict proof of the execution of the will. It is not enough for witnesses to say that they saw the testator sign the will and that he was in his senses. It must also be proved that the testator understood the contents of the paper to which he was putting his signature, and for this purpose, it should be shown that the will, if not written by himself, was read over to him. KUPPAYAMMAL v. AMMANI AMMAL, **22 M. 345.** [*R.*, 6 C.L.J. 453.]

(93)—*S.* 37—Mohunt *of* math—*Death—Application by claimant to office for letters of administration — Trust estate — Beneficiary—* Shebait *and idol, relation of.*—A *mohunt* is not the owner of the property of the *math* and on his death a person claiming to be his successor in office cannot apply under Act V of 1881 for letters of administration in respect of the *math* property. S. 37 of the Act is intended to apply only to property in which the deceased person had ownership, so as to constitute it a portion of his estate, although he held it in trust. MOHUNT JIB LAL GIR v. MOHUNT JAGA MOHAN GIR, **16 C.W.N. 798=16 Ind. Cas. 453.** (12 C. 375, *D.*)

(94)—*Ss.* 37 *and* 45—*Dedication of property by Will to idol—Trustee with power of appointing successor - Non-appointment by trustee—Grant*

Probate and Administration Act (V of 1881) —*continued.*

of letters of administration — Administration in respect of debutter property—"Beneficiary." — Where an executrix, who was constituted *shebait* in respect of certain properties dedicated to an idol by the testatrix, died without appointing a successor in accordance with the power given in the Will, *held*, that, under s. 45 of the Probate and Administration Act, letters of administration might be granted to the sister's son of the testatrix, in respect of the debutter property, as some portion of the estate of the testatrix remained to be administered on account of the non-appointment of the *shebait*. It was held in the case that the sister's son of the testatrix was, in the absence of nearer heirs, entitled to the grant of letters inasmuch as the original grant in respect of the debutter property might have been made to him. Where property is dedicated to an idol, it would be a "beneficiary" in the sense in which the word is used in s. 37 of the Probate and Administration Act, and administration of the property could be granted to some person on behalf of the idol, as the management could not be undertaken by itself. RANJIT SINGH v. JAGANNATH PROSAD GUPTA, **12 C. 375.**

(95)—*Ss.* 39 *and* 50—*Will—Letters of Administration — Revocation*—Locus standi—"*Person having interest in estate of deceased.*"—A person, disputing the right of a deceased testator to deal with certain property as his own, cannot be properly regarded as having an interest in the estate of the deceased, and has no *locus standi* to apply for revocation of the Letters of Administration. SRI GOBIND PRASAD v. LALJHARI KUER, **2 Ind. Cas. 402=14 C.W.N. 119.** (17 C. 48, *F.*)

(96)—*S.* 41—*Application by executor's son—Discretion.*—A testator bequeathed, by will, the whole of his property to an idol and appointed his wives and son executrics and executor, who, however, did not take out any probate, but the son mortgaged the property. After the property was sold in execution of a decree on the mortgage, the testator's grandsons, under the guardianship of their mother, applied for probate of the will. *Held*, they, being not executors, were not entitled to probate, and the case was not a fit one for grant of probate under s. 41 of the Probate and Administration Act; the mother being a pardanashin lady, the father, the defaulting executor, would manage the whole business. NARENDRA KUMAR PRAMANICK v. CHARU CHUNDER PRAMANICK, **7 C L. J. 558=12 C.W.N. 747.**

(97)—*S.* 41, *grants under.*—Grants under s. 41, Probate and Administration Act, are made for the protection and preservation of the estate of deceased persons. These are made in the exercise of the discretionary powers of the Court, and not as recognising any legal interest of the grantees in the estate of the deceased persons. *In the goods of* KAMINEYMONEY BEWAH, **21 C. 697.** [*F.*, 10 C.W.N. 1085; *Cited*, 1 L.B.R. 284.]

Probate and Administration Act (V of 1881) —*continued.*

(98)—S. 41—*See* NOS. 68, 69, 77, 78, *supra.*

(98-*a*)—S. 43—*See* NO. 92, *supra.*

(99)—*S.* 45—*Death of executor before entire administration—Administration* de bonis non. —Under the will of a Hindu, duly proved, devising property to his adopted son, the estate of the testator vested in his wife appointed as executrix therein. On the executrix dying *intestate* and without having fully administered the trusts of the will, administration of another sort known as administration *de bonis non* was held to become necessary. (See s. 45 of Act V of 1881). So, where the son sued to recover rents due to the estate, neither as representing the executrix, nor as the administrator *de bonis non* of the testator, his suit failed on the ground that the estate of the testator was absolutely unrepresented. NARASIMMULU v. GULAM HUSSAIN SAIT, **16 M. 71.**

(100)—*S.* 45—*Grant of effects unadministered—Long lapse of time—Presumption that estate has been administered—Property held as* shebait, *if part of estate.*—A testator died in 1884, leaving a will, whereby he appointed his widow executrix, and bequeathed the whole of his ancestral and self-acquired properties to her. The will contained a further direction that the widow shall perform the *sheba* of certain *thakurs*, of which the testator was a *shebait* and that, after her death, "he who may remain as my heir, as *shebait*, shall perform the *sheba* . . . . . from the income of the estates of the *debsheba.*" The widow took out probate in 1885 and died in 1902. Upon an application by the reversioner for Letters of Administration, the District Judge held that, as the last-mentioned direction in the will contemplated some administration after the death of the widow, the petitioner was entitled to take out Letters of Administration; *held*, that the order of the District Judge was erroneous. The Court may properly presume, in the absence of anything to the contrary and after this long lapse of time, that the estate has been administered. The direction as to *sheba*, upon which the order was based, did not relate to the testator's own property. CHANDI CHARAN MANDAL v. BANKE BEHARI MANDAL, **10 C.W.N. 432.**

(101)—S. 45—*See* NO. 94, *supra.*

(102)—*S.* 47—*Letters of Administration* de bonis non *to widow of the deceased—Un-administered estate.*—Where Letters of Administration to the deceased's estate were granted to the widow, limited during the minority of her infant son, and the son died before attaining majority, and before the estate was fully administered, Letters of Administration *de bonis non* to the estate of the deceased husband may be granted to the widow under s. 47 of the Probate and Administration Act, and her being the heir to the son's estate is no bar to such grant. *In the goods of* GIRIS CHANDRA MITTER, **6 C.W.N. 581.**

Probate and Administration Act (V of 1881) —*continued.*

(103)—*S.* 50—*Revocation of probate—Proof in solemn form.*—A will was proved by an executrix in common form, without issuing citation to the next reversioner. She was the sole legatee under the will. On her death, her heir took possession of the property as heir: *Held*, that the heir of the executrix may be ordered to prove the will in solemn form in the presence of the next reversioner. In default, the probate was revoked. *In the goods of* GOPI MOHUN BYSACK AND *In the matter of the petition of* NEMAI CHAND BYSACK, **5 C.L. J. 560.**

(104)—*S.* 50—*Oral will—Grant of Letters of Administration--Its revocation as regards a portion of the deceased property on the ground of an oral will.*—P, a *Saraugi*, died after a short illness of plague, leaving a shop and haveli and other property, and a grant of Letters of Administration was made in favour of M. Afterwards, J and others, alleging themselves to be managers of a Saraugi temple, applied for revocation of the said grant, on the ground that P, before his death, had bequeathed the shop and haveli to said temple.—*Held*, that, as the oral will was established, the grant of Letters of Administration was rightly revoked under para. 3 of s. 50 of Act V of 1881 *qua* the *shop* and *haveli*. MANGTU v. JOWALA MAL, **8 P.W.R. 1908.**

(105)—*S.*50—*Revocation of Probate or Letters of Administration—Issues in such proceeding—Practice—Just cause—Hindu widow, order against, binds reversioner.*—Where an application was made for revocation of Letters of Administration, with the will of the deceased annexed, and it was prayed that the will should be proved before the applicant: *held*, that, until the applicant made out a case for revocation, the question of the genuineness of the will could be gone into. English practice and practice of mofussil Courts in India distinguished; *held*, further, that a previous application for revocation by the widow of the deceased having failed, that decision bound a reversioner and the latter's application for revocation could not succeed except on proof that the previous proceeding had been collusive and fraudulent. DURGAGATI DEBI v. SOURABINI DEBI, **10 C. W. N. 955=33 C. 1001.** (9 M.I.A. 539, 604, 11 C. 186, *R.*)

(106)—*S.* 50—*Revocation of probate—Suit to set aside probate—Civ. Pro. Code*, 1882, *sch.* IV, *part E, form* 115—*Invalidity of will—Irregularity in grant of probate—Motion on notice—Rule* nisi.—When it is sought to revoke a grant of probate on the ground of the invalidity of a Will, the proceedings should be initiated by a regular suit, using the form of plaint given in the Civ. Pro. Code, sch. IV, part E., No. 115, and not by motion on notice. When it is sought to revoke the grant of probate of a valid Will on the ground of some irregularity in making the grant, the proceedings should be by motion on notice and not by a rule *nisi*. *In the goods of* HARENDRA KRISHNA MUKERJEE, **5 C.W.N. 383.** (5 C.W.N. 377, *R.*)

Probate and Administration Act (V of 1881) —*continued.*

(107)—*S.* 50 — *Revocation of letters of administration — Presumptive heir* — Locus standi.—A presumptive reversioner is entitled to apply for revocation of letters of administration under s. 50 of the Probate and Administration Act. BEPIN BEHARI SHAHA v. MANODA DASI, **6 C.W.N. 912.** (28 C. 441, *R.*; 8 C. 570, 21 C. 539, *Rel. on.*) [*F.*, 3 Ind. Cas. 178.]

(108)—*S.* 50—*Purchaser of properties from heir of deceased person*—Locus standi.—If the heirs of a deceased person can make an application for revocation of the letters of administration of a will alleged to have been executed by the deceased, the purchaser of the estate of such person from his heirs has a *locus standi* to make an application for the same purpose. LALIT MOHAN BHUTTACHARJEE v. NAVADIP CHANDRA KAPARIA, **28 C. 587.** (4 C. 360, 20 C. 37, *R.*)

(109)—*S.* 50— *Citation on minor—Minor represented by applicant as guardian—Proceeding defective—Revocation, application for--Applicant acting in concert with another.*—Where an applicant for probate of a will took out citation upon a minor, who was represented by the applicant herself has guardian. *Held*, that the proceedings to obtain the grant were defective in substance, and the grant should be revoked. The fact that the petitioner for revocation of probate was acting in concert with somebody else could not take away the right which she otherwise possessed of applying for revocation. SHOROSHIBALA DEBI v. ANANDAMOYEE DEBI, **12 C.W.N. 6.** [*R.*, 3 Ind. Cas. 178=10 C.L.J. 263.]

(110)—*S.*50—*Probate--Revocation—Just cause —Useless or inoperative—Executors—Omission to submit accounts.*—The grant of probate is decisive only of the genuineness of the will propounded, and the right of the executors thereby appointed to represent the estate of the testator. It in no respect decides any question as to the disposing power of the testator or to the existence of any disposable property. The words "become useless and inoperative" in Explanation 4 to s. 50 of the Probate and Administration Act, 1881, imply the discovery of something which if known at the date of the grant would have been a ground for refusing it. A mere omission on the part of the executors to submit accounts to the Court is no ground for revocation of grant of probate. B.G. TILAK v. SAKWARBAI; GANESH v. SAKWARBAI, **4 Bom. L.R. 637=26 B. 792.**

(111)—*S.* 50—*Probate — Revocation — Just cause--Failure to exhibit the inventory or account —Account false in material respects.*—Under s. 50, sub-clause (5), of the Probate and Administration Act, 1881, mere failure to file the accounts within the specified time is not sufficient, but it must be established that the personto whom the grant was made has wilfully

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and without reasonable cause omitted to exhibit the inventory or account. Also, it is not sufficient that the inventory or account, should be incorrect, but it must be untrue in material respects. GOKULDAS v. PURSHOTTAM; **4 Bom. L.R. 979.**

(112)—*S.* 50—*Will—Delay in taking probate —Probate taken on necessity arising—Application for revocation of probate—" Just cause."*— On an application for revocation of probate made twelve years after the grant of probate, the High Court held the terms of the will to be reasonable and the evidence sufficient to establish the will, considering the difficulty of establishing a will eighteen years after its execution, the persons competent to give the best evidence having died; it also held that the "just cause" had not been shown by the applicants, for revocation. The Judicial Committee, under the circumstances of the case affirmed that decision, and pointed out that the delay in taking out probate (application for probate having been made only six years after the testator's death) was accounted for by the fact that, until the date of application for probate, there was no very urgent necessity for relying upon the will. KALI DAS CHUCKERBUTTY v. ISHAN CHUNDER CHUCKERBUTTY, **31 C. 914, P.C.=9 C.W.N. 49.**

(113)—*S.* 50—*Just cause—Omission to cite proper party—Revocation of Letters.*—Where an application was made by a person for grant of Letters of Administration and the petition made no mention of the existence of the brother of the deceased who was his partner in his business and no citation was issued to the brother before the grant of the Letters, *held* that they must be revoked on the ground that the proper citation was not issued. *In the goods of* GANGA BISSEN MUNDRA, **2 C.W.N. 607.**

(114)—*S.* 50, *application of—Revocation of probate where there has been no defect of jurisdiction.*—The Official Trustee of Bengal applied to the High Court in its testamentary and intestate jurisdiction for grant of probate, as being a person appointed by the will of the testator. The Court had jurisdiction over the subject matter, and the only question then to be decided was, whether the Official Trustee was the person entitled to apply for such probate. It was decided that the Official Trustee could do so, and an order was accordingly made for the issue of probate. But upon an application under s. 50, the Probate was revoked, on the ground that the Court had wrongly decided that the Official Trustee was entitled to apply for probate. *Held*, since there has been no defect of jurisdiction, so as to bring the matter within the scope of s. 50, the probate is not capable of being revoked, even assuming the order of the Court was erroneous. OFFICIAL TRUSTEE OF BENGAL v. KUMUDINI DASI, **37 C. 387=6 Ind. Cas. 973.** (35 C. 156, *R.*)

(115)—*S.* 50—*Whether purchaser from widow can set aside probate—Right of appeal.*—A transferee from the widow (who is the next heir of the deceased) may, where a will has been set up and proved at variance with his interest, apply for the revocation of the probate of the will, under s. 50 of the Act. An application under s. 50 of the Act is considered to be a suit, and an order dismissing such application on the ground that the applicant had no *locus standi* to bring the suit is appealable to the High Court. SHEIKH AZIM v. CHANDRA NATH NAMIDAS, **8 C.W.N. 748.**

(116)—*S.*50—*Execution of will by a person near death, evidence as to.*—On a question of fact, raised in 1887, whether an alleged testator had or had not been able to duly execute his will, as he was said to have done during his last illness, the judgment of the District Court in the affirmative was restored. On a consideration of conflicting evidence as to the mental capacity of the testator, and as to the genuineness of a signature, the judgment of the High Court which would have revoked the probate granted in 1882, was reversed. ROMESH CHUNDER MURKERJI v. RAJANI KANT MUKERJI, **21 C. 1, P.C.=6 Sar. 340.**

(117)—*S.* 50—*Revocation of grant of letters of administration—Fresh application not barred.*— Where a grant of letters of administration made by a District Judge had been revoked under s. 50 of the Act, it was *held* that the Judge had nevertheless jurisdiction to entertain a fresh application for the same purpose, when the cause of revocation was removed. BRIJ LAL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **20 A. 109=A.W.N. 1897, 213.**

(118)—*S.* 50—*Limitation Act* (1908), *sch.* II, *art.* 95—*Relief not claimed distinctly on the ground of fraud—Executor—Suit without probate—Decree Limitation from the date of testator's death—Fraud in the performance of contract no ground for rescission—Partnership —Fresh arrangement—Novation—Suit for an account on the footing of continuance of original partnership—Suit not maintainable—Contract Act, s.* 241—*Probate—Revocation of grant.*— Art. 95, Limitation Act (1908), has no application where, on the face of the plaint, no equitable relief is claimed on the ground of fraud (16 B. 186, 25 C. 49, *R.*). An executor is capable of instituting a suit without obtaining probate, although he may not be able to proceed as far as decree without taking probate. Fraud in the performance of a contract, apart from its making, is no ground for rescission and restoration of the parties to the position in which they were before the contract was entered into. Property left by a deceased partner and used in the business is a loan under s. 241, Contract Act. Where an order has been made that probate should issue to an executrix, but no probate has been taken out, the Court has no jurisdiction to revoke a grant which has never been issued. A testator appointed his widow as the guardian of his minor children and executrix (by tenor) of his will. On his death the widow consented to

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the retention of the testator's share in a partnership business by the surviving partners and subsequently to a transfer of the same to a joint stock company. In an action brought by one of the testator's sons as administrator against the surviving partners, for an account of all the assets of the testator at the time of his death retained and employed by the defendants in their business: *Held*, dismissing the suit, that the testator's widow was perfectly competent as his executrix to enter into the arrangement, which was a novation with the surviving partners, so as to bind the estate, and that the suit against the partners on the footing of a continuance of the partnership was not maintainable. JAMSETJI v. HIRJIBHAI, **15 Bom. L.R. 192=37 B. 158**

(119)—S. 50—*See* EVIDENCE ACT, 1872, s. 41, 31 C. 357=8 C.W.N. 197.

(120)—*S.* 50, *Expl.* (4) — "*Just cause,*" *meaning of—Executor's mismanagement.*—The words "*just cause*" as explained in s. 50, are exhaustive. They are not illustrative merely. Mismanagement by an executor does not come within the purview of cl. 4, s. 50 of the Act. ANNODA PROSAD CHATTERJEE v. KALIKRISHNA CHATTERJEE, **24 C. 95.** [*R.*, 26 B. 792=4 Bom. L.R. 637, 28 M. 161.]

(121)—*S.* 50, *Expl.* (4)—*Revocation of grant* — "*Just cause,*" *mal-administration if* — *Quarrels between co-administrators, making grant useless and inoperative, if ground, for annulment.*—Mal-administration is not under s. 50, Expl. (4) of the Act a just cause of revoking probate (24 C. 95, *F.*). The words "become useless and inoperative" in s. 50, Expl. (4), of the Act imply the discovery of something which if known at the date of the grant would have been a ground for refusing it, *e.g.*, the discovery of a later will or codicil or a subsequent discovery that the will was forged or that the alleged testator was still living (26 B. 792, *Appr.*). One of two joint administrators applied for the revocation of the grant to the other, on the ground that, in consequence of quarrels between them, it had become impossible to carry on the administration and the grant had in this way become inoperative and useless: *Held*, that this was no ground for revoking the grant. GOUR CHANDRA DAS v. SARAT SUNDURI DASSYA, **16 C.W.N. 880=15 Ind. Cas. 44=40 C. 50.**

(122)—S. 50—*See* NOS. 58, 69, 79, 95, *supra.*

(123)—Ss. 50, 59—Effect of grant of probate —*See* WILL—CONSTRUCTION, 8 A.L.J. 1063.

(124)—*Ss.* 50, 64, 83—*Need for care in issuing citations and scrutinizing claims for letters-of-administration— Grounds for revoking grant of letters.*—In s. 50 of the Probate and Administration Act, which says that letters-of-administration may be revoked or annulled for just cause, the explanation is that "just cause" among other things is, first, that the proceedings to obtain the grant were defective in substance; and, second, that the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case. The provisions of the Act are liable to be abused in Burma unless the Courts are careful to insist on satisfactory proof being given of the claims set up under it. MA THET v. MA MYIT, **U.B.R. 1892—1896, Vol. II, 610.**

(125)—*Ss.* 50, 69—*Party's "interest" entitling her to apply for revocation—Claim for maintenance, no such interest.*—Where the testator's adoptive father had died leaving two widows authorising both of them to adopt, and the testator was adopted by one of them, and died leaving an infant widow, *held* in an application for revocation of the probate of the Will, by the other widow who was entitled to maintenance from the husband's estate, that the right to maintenance could not be affected by the Will in question whatever its provisions might be; that the Court might look at the Will to see if it affected the claim to maintenance, that in this case the Will, on being looked at, was found not to affect the right in any way whatever, and that, therefore, the applicant had no such interest in the estate of the deceased as entitled her to make an application under s. 50 of the Probate and Administration Act (V of 1881). GARABINI DASSI v. PRATAP CHANDRA SHAHA, **4 C.W.N.602.** (11 C. 492, *D.*; 17 C. 48, 17 M. 373, *R. & F.*) [*R.* 12 C.W.N. 808=8 C.L.J. 489.]

(126)—*Ss.* 50, 78—*Competency of District Judge to call on executor to furnish security, after grant of probate.*—It is only when a Judge grants probate, that he may direct that a person, to whom the grant is made, should give security under s. 78, Act V of 1881. If, upon an application made under s. 50 of the Act, for revocation of probate, the probate is revoked and a new executor or administrator is appointed, it is open to the Judge to direct that security should be given by such executor. After the grant of probate, a District Judge has no authority to call upon the executor to furnish security. GIRIBALA DASEE v. BIJOY KRISHNA HALDAR, **31 C. 688=8 C.W.N. 663.**

(127)—*Ss.* 50, 83—*Application for probate—Special citation, issue of* —*Ss.* 443, 647, *Civ. Pro. Code*, 1882.—Where on the death of a testator, leaving him surviving a childless minor widow entitled to maintenance and residence under his will, an application was made for probate of the Will of the deceased, under ss. 50 and 83, Probate and Administration Act, by two of his brothers appointed executors, the Court ordered that a special citation should issue to the widow, and directed that it should be served personally on her and also on her father with whom she occasionally resided. *In the goods of* AMRITA LAL MULLICK, **27 C. 350.**

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(128)—*Ss.* 50, 83—*Application or revocation of grant of letters-of-administration— Refusal of Court to grant revocation on preliminary ground that appellants were not prepared to take out administration themselves—Duty of Court to enquire into matters and to deal with the application on the merits.*—S. 50 of the Probate and Administration Act specifies the grounds upon which a grant may be revoked, (4 C. 566, *R.*) The duty of the Court under s. 83 of the Act is to make enquiry into the questions before it, which have been properly raised under s. 50. Recourse to the provisions of the Act being optional, the Courts must not attempt to render it compulsory by indirect means. There is no reason whatever why, when administration is not compulsory and the interference of the Court is not obligatory, estates should not be left to be dealt with in the same fashion as they always have been in the past under the personal law of those interested in them if the latter, who alone are concerned, so please. MUSSAMMAT DROPTI v. MA THA DWE, **U. B. R. 1897—1901 Vol. II, 533.**

(129)—*Ss.* 50, 86—*Grant, revocation of—Creditor's right to contest—Will propounded in fraud of creditors—Order holding applicant has right if appealable — Interlocutory order.*—Where, 8 years after the death of B, one of his sons L obtained letters of administration with a copy annexed of an alleged will left by B, which, if genuine, would deprive another son S, who had meanwhile become heavily involved in debt, of a very large share of his inheritance: *Held*, that the creditors of S were entitled to apply for revocation of the will, their application being based on the ground that the probate had been obtained in fraud of creditors. (8 C.W.N. 748, 17 C. 48, 10 C. 19, 28 C. 441, *R.*)—*Semble* :—No appeal lay from an order of the Trial Judge holding that the creditors had *locus standi* to contest the will, the same being merely interlocutory. LAKHI NARAIN SHAW v. MULTAN CHAND DAGA, **16 C.W.N. 1099=15 Ind. Cas. 686=17 C.L.J. 230.** (8 C.W.N. 748, 17 C. 48, 10 C. 19, 28 C. 441, *R.*)

(130)—*Ss.* 50, 87—*Revocation of probate—Practice and Procedure—'High Court' meaning of—Jurisdiction—Motion on notice—Rule* nisi—*Forged Will.*—To revoke a grant of probate on the ground of forgery, the proper course is to make an application under s. 50 of the Probate and Administration Act and not by suit (4 C. 360, *F.*) The 'High Court' in s. 87 of the Probate and Administration Act is not merely confined to the appellate jurisdiction of that Court, but includes its original jurisdiction, and under that section, the High Court exercising its original jurisdiction has concurrent jurisdiction with the District Judge for the purposes of exercising all powers provided by the Act. Proceedings for setting aside probates on the ground of forgery should be initiated by motion on notice and not by rule. The procedure by rule *nisi* should be confined to applications which are urgent and where relief in the shape of an injunction is required. *In the goods of* MOHENDRA NARAIN ROY, **5 C.W.N. 377.**

(131)—*Ss.* 50, 98—*Power of District Judge to commence revocation proceedings on his own motion—Scope of Judge's duties—Inventory and account.*—A District Judge has no power to commence proceedings to revoke a probate under s. 50, Act V of 1881, on his own motion. To permit the District Judge to take action under s. 50 of the Act, of his own motion, would lead, in many cases, to unjust consequences, *e.g.*, even if the action fails the cost must fall on the executor or administrator, *i.e.*, on the estate, there being no ordinary plaintiff, who can be condemned in costs, if his case fails. Under s. 98, Act V of 1881, the District Judge has no power to institute a judicial enquiry by an audit of the inventory and account at the expense of the executor or administrator; nor can such an authority be implied from the provisions of the Civ. Pro. Code, as to the appointment of a Commissioner to examine accounts. All that the District Judge has to do under that section is to see that the inventory and account *prima facie* satisfy the requirements of the section, *i.e.*, that the inventory appears on inspection to be a free true estimate of all the property, credits and debts, and that the account in inspection appears really to be a true one showing the assets and their disposal. To ascertain this, the inventory and account should be passed under some examination by the Judge's staff so as to detect manifest mistakes or omissions. If such were discussed the papers would not satisfy the section, and for this purpose, the section empowers the Judge to extend the time to the executor or administrator to amend the account. The fact that the testator enjoined on his executor to prepare accounts annually does not enlarge the Judge's power and empower him to exact an account annually, although it would authorise a person interested to take action against the executor. S. 98 does not give a Judge power to call for a revised account, if an account has already been exhibited as required by the section and has been accepted as *prima facie* true; but if it appears that the account is materially untrue, the Judge may take action under its fourth sub-section. When once an account has been fulfilled and accepted shortly after the expiry of a year from the grant of probate, the Judge has no power to call for further accounts of subsequent years. **Surat Sundari Barmani v. Uma Prosad Roy Chowdhry, 31 C. 628=8 C. W.N. 578.**

(132)—*Ss.* 51, 52, 86—*Scope of Act—Repeal.*—The probate Act being a law made by an authority in India is subject to the powers of repeal or amendment granted to local legislature by s. 5 of the Indian Councils Act, 1892. LAXIMI v. ABA, **10 Bom. L.R. 924=32 B. 634.**

(133)—*Ss.* 51, 78—*Jurisdiction of District Court—Surety.*—A District Court, after once

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having taken a bond with sureties, has jurisdiction to take a *second bond*, with fresh sureties, if necessary. RAJ NARAIN MOOKERJEE v. FULL KUMARI DEBI, **29 C. 68=6 C.W.N. 7.** [*Approved* 52 P.R. 1902=89 P.L.R. 1902; *Not F.* 31 A. 56=6 A.L.J. 19=1908 A.W.N. 288.]

(134)—S. 52—*See* NO. 132, *supra.*

(135)—S. 53—*See* NO. 83, *supra.*

(136)—Ss. 53, 86—*See* APPEAL—MISCELLANEOUS, 21 C. 539.

(137)—*Ss.* 55, 83—*Application for revocation of probate.*—S. 55 and not s. 83 of the Probate and Administration Act is applicable to an application for revocation of probate. PRATAP CHANDRA SHAHA v. KALI BHANJAN SHAHA, **4 C.W.N. 600.**

(138)—*S.* 56—*Judgment-debt, no property.*—The judgment debt of the deceased is not property moveable or immoveable within the meaning of s. 56 of Act V of 1881. *In re* KAUR HIRA SINGH, *Deceased*, **126 P.R. 1893.**

(139) — *Ss.* 56, 57 — *Testator subject to Baroda State—Will executed at Baroda—Disposition of immoveable property in British India—Jurisdiction of Court in British India—Discretion of Court under s.* 57 *when to be exercised—Will—Disposal of immoveable property in British India—Test of validity of will.*—S. 56 of the Probate and Administration Act, 1881, gives jurisdiction to the District Judge to grant probate of a Will, if it appears from the petition of the applicant that the testator had, at the time of his death, any property, moveable or immoveable, within the jurisdiction of the Judge. This provision is general and is quite irrespective of the place where the will was executed, or of the nationality of the testator, or of the place of his domicile. Where, therefore, an application for probate was made to the District Judge of Belgaum, in respect of a will executed at Baroda by a person who was a subject of that State, but disposing of immoveable property situated in Belgaum in British India: *Held*, that the District Judge had jurisdiction to grant probate under this section. The discretion vested in the Judge under s. 57 of the Probate and Administration Act, can be exercised only when, between Courts of different districts in British India, there is a question as to which of such Courts can most justly or conveniently grant probate; and it cannot be exercised where there is no Court of concurrent jurisdiction in British India to which the applicant can apply for probate. The validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of wills in British India. BHAURAO v. LAKSHMIBAI, **20 B. 607.**

(140)—*Ss.* 56, 57—*Letters of Administration, grant of—Deceased dying outside the jurisdiction and leaving no property in the jurisdiction—Discretion of the District Judge.*—The lower Court refused to grant letters of administration

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on the double ground that deceased died outside its jurisdiction and that he left no property at any place under its jurisdiction. The applicant contended that there was some property (*e.g.*, earthen pots and such other articles) within its jurisdiction but the District Judge was led to suspect from the trifling nature of this property that the articles were advisedly kept there for the purpose of creating evidence: *Held*, that the District Judge had properly exercised his discretion, vested in him by ss. 56 and 57 of the Probate and Administration Act, 1881. BAI MANCHA v. BAI GANGA, **1 Bom. L.R. 666.**

(141)—S. 57—*See* NOS. 139, 140, *supra.*

(142)—S. 59—Admissibility of prior unprobated will — *See* WILL—REVOCATION; 6 M. L.T. 116.

(143)—S. 59—*See* NOS. 44, 56, 67, 123, *supra.*

(144)—S. 62—*See* No. 92, *supra.*

(145)—*S.* 64—*Letters of administration—Object of asking for letters—Practice—Procedure—Court Fees Act, s.* 19.—When a caveator files a petition objecting to the grant of letters and concluding with a prayer that letters may be granted to him, this does not constitute a sufficient application for letters within the meaning of s. 64 of the Act. It may have been the practice in District Courts to grant Letters of Administration to objectors who asked for grants to themselves in preference to the claimant, but in view of the provisions of the s. 19 (1) of the Court Fees Act, as amended by Act XI of 1899, it seems clear that no order entitling a petitioner to letters should be made until the petitioner has filed in Court a valuation of the property in the form set forth in the 3rd Schedule and the Court is satisfied that the fee mentioned in No. 11 of the 1st Schedule has been paid on such valuation. It is clear therefore that when an objector asks for letters himself he should be required to put in a petition setting out the facts required in s. 64 of Act V of 1881 with a proper valuation of the estate. MAUNG PO v. MAUNG KYA ZAING, **1 L.B.R. 178.** [*R.*, 4 L.B. R. 291.]

(146)—S. 64 — *See* NOS. 45, 80, 89, 124, *supra.*

(147)—S. 66 — *Probate—Application not subscribed by the applicant.*—Where an application for probate was not subscribed by the applicant in the manner provided for by s. 66 of Act No. V of 1881, it was *held* that this defect was fatal to the application, and also that it was too late in appeal to return the application for amendment. MATHURA v. DHORANDHAR SINGH, **A.W.N. 1894, 55.** (A. W.N. 1893, 166, *R.*)

(148)—*S.* 67—*Probate—Application for probate not verified by an attestor of the Will.*—The provisions of s. 67 Act V of 1881, are imperative and an application for probate made under that

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Act which is not verified in the manner prescribed by s. 67 must be treated in the same manner as a plaint which has not been verified in accordance with law BINDRABAN CHAND v. UMRAO CHAND, **A.W.N. 1893, 166.**

(149)—*S.* 69—"*Interest*" *meaning of—Reversioner's right—Sister's right to object in the presence of widow and daughters—Letters of Administration, application for—Enquiry as to extent of estate.*—A Christian died leaving a widow and two daughters. The widow applied for grant of Letters of Administration to herself in respect of the deceased's estate. The sisters of the deceased objected: *Held*, that the sisters had no right to object in the presence of the widow and daughters of the deceased. The word "interest" in s. 69 of the Probate and Administration Act cannot cover the case of a mere reversioner. An interest that has not arisen is properly not an interest, nor a right; it is nothing more than a bare expectation of a future right. (21 C. 539, 10 C.L.J. 263=3 Ind. Cas. 178, *D.*) In an application for Letters of Administration, it is quite outside the scope of inquiry to determine the limits of the estate. MRS. R. SHARKEY v. MRS. JERRY ALLARD, **70 P. L. R. 1912=78 P.W.R. 1912=13 Ind. Cas. 433.**

(150)—*S.* 69—"*Interest in the estate of the deceased*" *meaning of—Right of judgment-creditor to oppose grant of probate arises when.*—The words "claiming to have any interest in the estate of the deceased" in s.69, mean "claiming to have any interest in the property left by the deceased." A judgment creditor of a brother of the deceased whose natural heirs are his brothers, is a person claiming an interest in the estate of the deceased, and as such, has a *locus standi* in opposing the grant of probate of the will of the deceased, on the ground of fraud, for, but for the will, which has been set up, he, in execution of his decree, could have attached the share of his judgment-debtor in that property. KISHEN DEI v. SATYENDRA NATH DUTT, **28 C. 441.** (6 C. 429, 10 C. 19, *R.*) [*D.*, 6 C. W. N. 912; *R.*, 10 C.L.J. 263=3 Ind. Cas. 178.]

(151—155)—S. 69—*See* NOS. 58, 125, *supra.*

(156)—*Ss.* 69 *and* 71—*Application for probate of the will of a Hindu widow—Objections by husband's reversioners on the ground that widow had no power to dispose of husband's property by will, validity of.*—An executor by implication applied for the probate of the will of a deceased Hindu widow. Certain persons, alleging themselves to be the reversionary heirs of her husband objected to the grant of the probate, mainly, on the ground that the widow had no power to make a will disposing of the property of her husband. *Held*, the objectors, not being persons claiming to have any interest in the estate of the testatrix, within the meaning of s. 69 of the Probate Act, had no right to intervene and challenge the will set up. Their claim, as reversionary heirs, of the husband of the testatrix, was outside, and independent of, the will. If the widow affected to dispose of the property by her will, and had no power to do so, the objectors were not hurt. If the property was theirs, they could bring a suit to recover it BAISTAB CHARAN SHAHA v. GANGA SAGAR SAHA ROY, **1 C.L.J. 258.**

(157)—*Ss.* 69, 86—*District Judge admitting person as caveator, order of—Appeal, s.* 588, *cl.* 2, *Civ. Pro. Code.*—S. 86 of the Probate and Administration Act makes the Code of Civil Procedure applicable to orders passed under that Act. [*F.*, 4 O.C. 84, 4 C.W.N. 602, 26 B. 792; *R.*, 52 P.R. 1902, 14 C.W.N. 119.] So, an order of the District Judge admitting a person as a caveator under s. 69 of the Probate and Administration Act is appealable under s. 588, cl. 2, Civ. Pro. Code. ABHIRAM DASS v. GOPAL DASS, **17 C. 48.** [*F.*, 4 O.C. 84, 4 C.W.N. 602, 26 B. 792; *R.*, 52 P.R. 1902.]

(158)—*S.* 71—*Probate or Letters of Administration—Objection to application—Caveat—Form of caveat.*—Under the Code of Civil Procedure opposition to the claim made in a plaint is made by a written statement on the part of a defendant; consequently opposition to an application for probate or Letters of Administration should be made in the form of a written statement framed, signed and verified in the manner laid down in Civ. Pro. Code. No caveat is necessary where an application for probate or letters of administration has already been made. The form of caveat provided for in s. 71 of the Probate and Administration Act is one which, as s. 70 of the Act shows, may be lodged at any time after the death of a person by any one who claims to be interested in the estate of the deceased. The object of the provision for such form of caveat is to enable such person to ensure that no grant of probate of any will of the deceased or of letters of administration to his estate, shall be granted without notice to him. MOOTHOO COOMARASAWMY PILLAY v. JANIKI AMMALL, **1 L.B. R. 212.**

(159)—S. 71—*See* NOS. 45, 176, *supra.*

(160)—*Ss.* 76, 83—*S.* 375, *Civ. Pro. Code.*, 1882 (=O XXII, *r.* 3, *new Code*)—*Proof of will—Grant of probate merely on consent—Agreement or compromise* re *the issue of genuineness of will in probate proceedings.*—In a proceeding for the probate of a will, the will must be proved either in common form or *per testes*; if the proceeding is contentious, it must be proved in solemn form.—Unless the will is proved in some form, no grant of probate can be made merely on the consent of parties. The only issue in a probate proceeding relates to the genuineness and due execution of the will. The Court must itself be satisfied by admissible evidence that a will propounded is the will of the testator. Though a contentious proceeding for a probate takes under s. 83, Act V of 1881

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as nearly as may be, the form of a suit, an agreement or compromise, as regards the issue of genuineness of the will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of s. 375, Civ. Pro. Code, 1882 (*Evans* v. *Saundery*, 30 L.J.P.D.A. 184, *D.*; *Norman* v. *Strains*, 6 P.D. 219, *Roadmight* v. *Carter*, 3 Sw. and Tr. 421, *R.*) MONMOHINI GUHA v. BANGA CHANDRA DAS, **31 C. 357=8 C W N. 197.** (9 B. 241, 21 B. 335, *F.*) [*R.*, 6 C.L.J. 453.]

(161)—*S.* 77—*Letters of administration—Inventory of estate, Period allowed by law to administrator to furnish.*—According to the form of grant of letters-of administration prescribed by s. 77 of the Act, the Administrator is bound to make and exhibit an inventory of the property and credits within six months from the date of the grant. The Administrator is allowed by the law six months from the date of grant of the letters-of-administration, within which period he is bound to make and exhibit in Court a full and true inventory. He may, if he pleases furnish the inventory at any time within six months but he is not bound to do so till the last day. The time may be extended by the Court but cannot be curtailed. If the legislature had intended to leave the time for furnishing an inventory entirely to the decision of the Court, it would have been unnecessary to mention the period of six months at all. M.S.M.M. SATHAPPA CHETTY v. RANGAMA, **L.B.R. 1893—1900, 444.**

(162)—S. 77—*See* NO. 35, *supra.*

(163)—*S.* 78—*Act* IX *of* 1872 (*Indian Contract Act*), *s.* 129—*Administration—Surety--Continuing guarantee.*—When a person becomes surety, that an administrator will duly get in and administer the estate of a deceased person, this is not a continuing guarantee within the meaning of s. 129 of the Indian Contract Act, 1872. Such a surety cannot, of his own free will, withdraw from his suretyship. KANDHYA LAL v. MANKI, **A.W.N. 1908, 288=6 A.L.J. 19=31 A. 56=1 Ind. Cas. 143.** (28 M. 161, *F.*; 29 C. 68, *Diss.*)

(164)—*S.* 78—*Administration-bond—Surety—Charges of mismanagement and waste against administratrix—Suit by sureties to be discharged from liability--Continuing guarantee, revocation of—Contract Act, s.* 130.—First defendant was an administratrix of her husband's estate. Plaintiff stood surety under s. 78 of Act V of 1881. The plaintiff sued 1st defendant and the other co-sureties, for discharge of his obligation from suretyship, as to future transactions of 1st defendant, on the ground that the 1st defendant mismanaged and wasted the properties, or, in the alternative, that she might be ordered to discharge certain claims against the estate and complete the administration. *Held*, that the surety to an administration-bond is not entitled to the relief of discharge from his liability, either by way of an application in the Probate Proceedings or by a separate suit, since the granting of such relief might defeat the object, for which an administrator is required to find sureties to an administration-bond. *Held*, also, that the special contract of suretyship entered into by a surety to an administration-bond is not governed by s. 130 of the Contract Act. SUBROYA CHETTY v. RAGAMMAL, **28 M. 161=14 M.L.J. 482.** (29 C. 68, *Not F.*; 19 B. 245, *F. & Appr.*) [*F.*, 31 A. 56=6 A.L.J. 19=A.W.N. 1908, 288=5 A.L.J. 349.]

(165)—*S.* 78—*Application for Probate of a Will—Executor may be called upon to furnish security before granting probate—Amount of security—Discretion of Judge.*—The petitioner applied for Probate of a will executed by her husband appointing her the sole executrix. The District Judge granted Probate, but demanded security for Rs. 20,000 with two sureties in the same amount each. *Held*, that, under s. 78 of the Act, the District Judge has a discretion vested in him to demand security even from an executor. Security is only required to guard against malpractices; and security is enough if it affords reasonable protection against malpractices which require time to be carried out. Security for three or four months' income is a sufficient safeguard against serious or continuous mismanagement. MAHAMAYA DEBI CHOWDHURANI v. GANGAMOYI DEBI CHOWDHURANI, **1 C.L.J. 180.** [*R.*, 6 C.L.J. 453.]

(166)—S. 78—*See* NOS. 126, 133, *supra.*

(167)—*Ss.* 78 *and* 102—*Expense in administering estate—Consideration to surety for the due administration is such expense within s.* 102 *and a first charge against the estate.*—The point for decision in this case was whether the estate of a deceased person was liable for the amount agreed to be paid as consideration to a person for his standing as surety for the due administration of the estate. *Held*, the consideration for inducing compliance with the Court's order, demanding security, must be included in the expenses of obtaining Letters of Administration within the purview of s. 102 of the Probate and Administration Act and must, therefore, be regarded as a first charge against the estate. The result of holding otherwise would be that, where security cannot be obtained gratis, Letters of Administration would not be granted and the estate might be wasted. IMAM BAKSH v. PURAN MAL, **31 P. R. 1906=133 P. L. R. 1906.** (1 P.R. 1889, F.B., 31 C. 253, *D.*)

(168)—*Ss.* 79, 86—*Appeal—Order re-assigning bond—Probate and Administration Act* (V *of* 1881), *ss.* 79, 86—*Revisional power exercised when no appeal lies.*—No appeal lies from an order assigning a bond under s. 79 of the Probate and Administration Act. But if the order is passed without jurisdiction, it can be revised and set aside by the High Court of its own motion at the same hearing. There is no provision in the Probate and Administration Act, empowering a District Judge to re-assign a bond

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while the first assignment is still in force. *Semble* :—If there had been a condition in the bond that the assignment should be void, if the assignee failed to comply with certain requirements, a re-assignment might be possible. SEIKH KALIMUDDIN v. MUSSAMMAT MAHURNI. **15 C.L.J. 382 = 16 C.W.N. 662 = 13 Ind. Cas. 690 = 39 C. 563.** (2 C.L.R. 589, 17 C. 48, *R.*; 28 C. 149, *Diss.*)

(169)—S. 81—Interest of the caveator—*See* SUCCESSION ACT, 1865 s 250, 12 Bom. L.R. 366 = 6 Ind. Cas. 523 = 34 B. 459.

(170)—*Ss.* 82, 92—*Effect of s.* 92, *so far as it relates to executors—One of several executors appointed in the will, taking out probate, act of —Effect.*—The effect of s. 92, Act V of 1881, so far as it relates to executors, is this, that where several executors obtain probate, and the will directs them all to act together, none of them can act singly ; but the section is not intended to disqualify, by reason of any such direction in the will, one of several executors who alone has obtained probate, the others having either renounced or refused to accept office. Where out of several executors appointed in a will, and jointly authorised to alienate any property for payment of debts and to borrow money for improving and preserving the testator's estate, one only takes out probate, and then renews a settlement of accounts signed by the testator on the same terms as to interest, *held*, such executor may take out probate when the other co-executors have refused to do so. The act of the testator being valid, it is binding on his estate. SATYA PRASHAD PAL CHOWDHRY v. MOTILAL PAL CHOWDHRY, **27 C. 683.** (19 I.A. 221, *D.*)

(171)—*S.* 83—*Letters of administration—Form of proceedings in cases where there is contention—Effect of grant of probate or letters—Objectors' rights not prejudiced.*—S. 83 of the Probate and Administration Act provides that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a suit according to the provisions of Civ. Pro. Code; consequently District Courts should follow the procedure of Chapter XI of the Code in such cases. In a proceeding, the object of which is to determine whether the applicant has the first claim to be clothed with the right to represent the deceased, the question of what the estate consisted of, and whether the property which the applicant alleged to be the estate did in fact belong to the deceased at the time of his death, and the fact that the property was in the objector's possession are not matters which should be gone into. It is not the province of the Court to go into questions of titles, and the grant of probate or of letters of administration would not prejudice in any way the objector's rights if the property really belonged to him, and not to the deceased. (4 C. 1, 8 C.L.R. 287, *F.*) The grant of probate or letters of administration only perfects the representative character of the grantee to the property which did in fact belong to the deceased at the time of his death, and enables the grantee to sue in a regular suit for property which he alleges to have belonged to the deceased at his death, although others claim it as theirs. MAUNG YE GYAN v. MA HMI, **1 L.B.R. 155.** [*Expl.*, U.B.R. 1910, 4th Qr., 69.]

(172)—*S.* 83—*Application for probate—Contentious proceeding—Rules governing.*—Contentious proceedings in an application for probate under the Act are governed by the Code of Civil Procedure. SANT LAL v MOHER SINGH, **44 P.R. 1893.**

(173)—*S.* 83—*Letters of administration—Contested application—Procedure.*—The only procedure recognized by law for obtaining letters of administration in the Court of a District Judge, as regards cases covered by the Probate and Administration Act V of 1881, is by application under Chapter V of the Act, and, when such application is contested, the procedure prescribed by s. 83 of the Act is to be followed. A District Judge refused to try issues laid down by his predecessor in the matter of a contested application for letters of administration, on the ground that to try the issues so fixed "would amount to trying the whole case as a regular suit." The High Court on appeal remanded the issues to the lower Court for disposal according to law with reference to s. 83 of Act V of 1881. Act V of 1881 provides that, in the matter of letters of administration to the estate of a deceased person, the person who desires to have such letters of administration granted to him shall make an application to the Court. It provides what that application shall contain, how it is to be signed and verified, and allows the District Judge, if necessary, to examine the application in person. It further provides for the issue of a citation calling on persons having interest to come in and see the proceedings, thus providing a method by which a person who opposes the grant of letters of administration may be heard. Finally, by s. 83, the Act provides that where there is any contention, the procedure shall take as nearly as may be the form of a suit according to the Civ. Pro. Code, the applicant for letters of administration being treated as the plaintiff and the party who opposes the grant being treated as the defendant. The meaning of these words clearly is, not that when there is any opposition the Judge should refuse to proceed further and should refer the parties to a regular suit, but that the procedure in all further proceedings on the application before the Court, shall be according to the form of a suit between the petitioner as plaintiff and the opposite party as defendant. Under Act V of 1881, the proceedings are not by suit, but are distinctly directed to be by application, and s. 83, as shown above, does not direct that a regular suit should be instituted, but that the procedure on the hearing of the opposed application should be after the manner prescribed

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by the Civ. Pro. Code, for the trial of a suit. CHIRANJI LAL v. BANSIDHAR, **A.W.N. 1893, 162.**

(174)—S. 83—*See* CIV. PRO. CODE, 1908, O. IX, r. 9, 14 C.W.N. 924=7 Ind. Cas. 126=12 C.L.J. 185.

(175)—S. 83—*See* NOS. 124, 127, 128, 137, 160, *supra.*

(176)—S. 84—*Ses* NO. 48, *supra.*

(177)—S. 85—*See* SUCCESSION ACT, 1865, ss. 332, 190, 1 L.B.R. 193.

(178)—S. 85—*See* NOS. 52, 69, *supra.*

(179)—*S.* 86 — *Letters of administration, application for—Order of District Judge in proceedings under Act* V *of* 1881—*Appeal.*—The appellant applied for letters of administration in respect of the estate of her deceased husband. The District Judge ordered that the Court fees payable on such letters of administration in respect of the said estate must be fixed before any further proceedings on the application could be taken. The appellant appealed from this order. *Held*, that s. 86. Act V of 1881, only allows an appeal to the High Court in cases in which an appeal is allowable under the Code of Civil Procedure; that the order of the District Judge was not such an order, and that it was not appealable. KADIR JAHAN BEGAM v. UDIT NARAIN, **4 O.C. 84.**

(180)—*S.* 86—*Appeal—Revision—Order of a District Judge that he has jurisdiction to entertain an application for letters of administration under.*—*Held*, that an order of a District Judge, deciding that he has jurisdiction to entertain an application made to him for letters of administration under Act V of 1881, is neither subject to an appeal under s. 86 of the Act inasmuch as it is not an order made by him by virtue of the powers expressly conferred upon him by the Act, nor to a revision under s. 70 (*a*) of Act XVIII of 1884. because no revision is competent from such an interlocutory decision of a subordinate Court. SHIB DIT SINGH v. DEVINDAR SINGH, **94 P.W.R. 1910=70 P.R. 1910=7 Ind. Cas 710=123 P.L.R. 1910.** (51 P.R. 1899, *F.*; 20 C. 245, 20 C. 539, 27 C. 5, *R.*)

(181)—*S.* 86—*District Judge—Remuneration—Nazir—Appeal.*—An order passed by a District Judge granting remuneration for preparing a list of the property left by a deceased person to which the Court is moved to grant letters of administration falls with the provisions of s. 86 of Probate Act and is appealable. MADHAWRAO v. NAZIR, **2 Bom. L.R. 798.**

(181-*a*)—*S.* 86—*Order reducing security—Circumstances—Applicability.* — An order under s. 86 of the Act reducing the amount of security taken from an administrator is appealable. The Court's power to reduce the amount of security required of an administrator should not be exercised in a case where letters of administration as originally granted are intact and have not been modified or revoked. SULTAN SINGH v. NIDHAN SINGH, **31 P.R. 1899.**

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(182)—S. 86—*See* APPEAL—MISCELLANEOUS, 27 C. 5.

(183)—S. 86—*See* NOS. 129, 132, 136, 157, 168, *supra.*

(184)—*Ss.* 86, 90 "*hereby*" *meaning of—Order permitting disposal of immoveable property,*—The word "hereby" in s. 86 means "by the whole Act." and not merely by the chapter in which the section appears. An order of a District Judge granting permission to the executor or administrator, for the disposal of immoveable property, under s. 90, is appealable. UMA CHARAN DAS v. MUKTAKESHI DASI, **28 C. 149=5 C.W.N. 443.**

(185)—*S.* 87—*High Court—Jurisdiction to grant probate and letters of administration—Original side—Property not situate within jurisdiction—"High Court" meaning of, in s.* 87, *Probate and Administration Act* (V *of* 1881)—*Practice—Rule* 740 *of High Court rules.*—The High Court (of Calcutta) has jurisdiction to grant probate or letters of administration on the Original Side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal. Under s. 87 of the Probate and Administration Act, the High Court has jurisdiction to grant probate, though any portion of the property is not situate within the limits of its original jurisdiction; and r. 740 of the High Court does not override the express provisions of s. 87, giving the High Court concurrent jurisdiction. The expression "High Court" mentioned in s. 87 is not merely confined to the appellate jurisdiction of the High Court, but includes original jurisdiction. NAGENDRA BALA DEBI v. KASHIPATI CHOWDHURY, **37 C. 224=5 Ind. Cas. 1003.** (5 C.W.N. 377, *F.*)

(186)—S. 87—*See* NO. 130, *supra*

(187)—S. 88—*See* NO. 44, *supra.*

(188)—*S.* 89—*Interpretation of—Malicious prosecution, suit for—Survival of cause of action.*—It is unnecessary to go into English cases upon the question whether or not the cause of action survives to the legal representative of a deceased plaintiff, for malicious prosecution. S. 89, Act V of 1881, governs suits for malicious prosecution. Such suits, on plaintiff's decease, survive to his legal representative. The exception to s. 89 of the Act ought to be construed strictly. "Personal injury not causing death to the party," in s. 89 refers only to physical injuries and does not include injury caused by malicious prosecution. KRISHNA BEHARI SEN v. THE CORPORATION OF CALCUTTA, **31 C. 993=8 C.W.N. 745.**

(189)—S. 89—Pre-emption—Right survives to executors or administrators on pre-emptor's death — *See* MAHOMEDAN LAW—PRE-EMPTION—GENERAL, 13 Bom. L.R. 1040=36 B. 144=12 Ind. Cas. 720.

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(190)—S. 89—*See* MALICIOUS PROSECUTION, 31 C. 406=8 C.W.N. 329.

(191) — *S.* 90 — *Will giving power to sell, — Power to mortgage.* — Where a Will gave the executor power to sell the property to pay off debts incurred by the testator or if the property was a losing concern, the executor had power under s. 90 of Act V of 1881 to mortgage the property in case of necessity. PURNA CHANDRA BAKSHI v. NOBIN CHANDRA GANGOPADHYA, **8 C.W.N. 362.** (3 C.W.N. 515, *D.*: 23 C. 908, 3 C.W.N. 483, *R.*) [*F.*, 3 C.L.J. 260.]

(192)—*S.* 90—*Permission to administrator to alienate—Estate fully administered—Widow as executrix—Life estate—Maintenance.*—S. 90 of the Act has no application where the estate has been fully administered, all the debts collected and all legacies paid It cannot be said, where the widow is herself the administratrix, that the estate is charged with her maintenance, and that, therefore, till her death, the estate is not fully administered. LAKSHMI NARAIN CHATTERJEE v. NANDA RAN DEBI, **9 C.L.J. 116=3 Ind. Cas. 287.** (3 C.W.N. 635, *F.*) [*F.*, 14 C.W.N. 463.]

(193)—*S.* 90—*Amendment Act* (VI *of* 1889), *s.* 14—*Powers of sale of executor under. nature of.*—Under s. 90 of the Probate and Administration Act (V of 1881), as amended by the Amending Act (VI of 1889), s. 14, an executor has merely the ordinary powers of sale that an owner would have in so far as they are not limited by the Will and such powers are therefore subject to the usual rules of equity. SHRI BEHARILALJI v. BAI RAJBAI, **23 B. 342.** [*D.*, 37 C. 362.]

(194)—*S.* 90—*Lease for more than 5 years.*—A lease by an administrator for more than five years is not void but only voidable at the instance of any person interested in the property. As between the lessor and the lessee, it is good. SHUBADRA DASSYA v. CHANDRA KUMAR NAG, **8 C.W.N. 54.** [*R.*, 3 C.L J. 260]

(195)—*S.* 90—*Executor — Restrictions imposed by will—Mortgage—Void—Voidable—Restitution—Beneficiaries, consent of.*—R died in 1888, having previously executed a will, by which he directed that "if it became necessary to borrow more than Rs. 1,000 or to alienate any property of a greater value, to grant any *pattah* for any greater amount, then it might be done with the consent of N, or failing him with the consent of D and the widows of the testator." During the time the widows were in possession as executrixes, they executed a mortgage for Rs. 35,000 in favour of the plaintiffs, without the assent of N and without the leave of the Court. The probate granted to the widows, which was to last during the minority of one of the sons of the testator, was subsequently revoked and a fresh probate granted to that son. The mortgagees thereupon, instituted the present suit, which was dismissed by the Subordinate Judge, on the ground that the mortgage was not valid and

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binding on the estate, because it was not assented to by N, whose consent was, under the direction of the will, essential to the validity of the transaction. The plaintiffs, thereupon, appealed to the High Court. *Held*, that N was neither an executor by implication nor a mere overseer, but was a person, whose assent, the testator intended, should be obtained to validate certain classes of transactions, as the testator had confidence in his judgment and integrity. It was open to the testator to impose restrictions upon the powers and discretion of an executor and if, in practice, such restrictions proved injurious to the actual administration of the estate, it was equally open to the executor to apply for suitable directions to the Court. *Held*, also, upon a proper construction of s. 90 of the Probate and Administration Act, that the phrase "power to dispose" included any disposition by way of sale, mortgage, charge, exchange or lease and might also include a gift. As the executrixes executed the mortgage in spite of the restriction in the will without the assent of N and without the leave of the Court, their act must be taken to be one in contravention of the provisions of cl. 2, S. 90 of the said Act. An executor has power to mortgage the property of the testator, unless prohibited by the terms of the will. (23 C. 908, 3 C.W.N. 483, 8 C.W.N, 362, *F.*; 3 C W.N. 515, *Expl.*) An alienation by an executor or administrator without leave of the Court, where such leave is necessary under s. 90 of the Probate and Administration Act, is not void but merely voidable (8 C.W.N. 54, *F.*). No person, who is entitled to void a transaction ought to be allowed to do so, in such a manner as to enable him to recover property, which would otherwise be lost to him, and at the same to keep the money or other advantages which he has obtained under it. (22 M. 289, 25 A. 59, 15 B.L.R. 350, 9 A. 340, 24 C. 668, 18 A 373, 29 C. 473, 30 C. 539, 26 A. 342, 9 W.R. 108, 11 B.L.R. 460, 8 M. 92, 5 B. 450, 2 C. 341, *R.*) The maxim that "he who seeks equity must do equity" is applicable to a defendant as well as to a plaintiff; and a party, who seeks to avail himself of an equitable defence, must stand the test as well as one who appears as plaintiff in a case. If a mortgage is effected by an executor with the written consent of every beneficiary, it may fairly be regarded as in substance a mortgage by the beneficiaries themselves. THE EASTERN MORTGAGE AND AGENCY CO. LD. v. REBATI KUMAR RAY, **3 C L.J. 260.** [*R.*, 14 C.W.N. 451, 6 C.L.J. 490, 13 C.W.N. 557=9 C.L.J. 83=1 Ind. Cas. 289.]

(196)—S. 90—*Declaratory suit — Mortgage executed by the mother as administratrix to the estate of her father, if binding on her sons—Reversionary heirs, if and when bound by acts of their mother in regard to the property of their maternal grandfather—Mortgage created without permission of the Court, if voidable—Benefit to the estate—Debt of the owner of the*

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property, repayment of—Avoidance of mortgage transaction, except upon equitable terms, if allowed.—An alienation by an administrator, without leave of the Court, where such leave is necessary under s. 90 of the Probate and Administration Act (V of 1881), is not void but merely voidable, and consequently no person who is entitled to avoid the transaction ought to be allowed to do so in such a manner as to enable him to recover property which would otherwise be lost to him and at the same time to keep the money or other advantages which he has obtained under it (3 C.L.J. 260, *F.*) Where plaintiffs seek for a declaration that a mortgage executed by their mother as administratrix to the estate of their maternal grandfather in order to repay a loan taken by the maternal grandfather is not binding upon them as reversioners, but do not offer to pay up the mortgagee, they are not entitled to avoid the transaction unconditionally, although the mortgage may be voidable by them under s. 90 of the Probate and Administration Act. CHARU CHANDRA PAL v. KALIDAS CHANDRA, **13 C. L.J. 447.**

(197)—*S.* 90—*Application by administratrix for leave to mortgage—Estate fully administered —Leave unnecessary.*—An application by the widow and administratrix for leave to mortgage certain properties left by the deceased after the estate had been fully administered and when there were no debts or legacies of the deceased to be paid, should not be granted. Such applications could be granted only for the purpose of administration, and not after the estate has been fully administered. After the administration is at an end, the widow who had obtained letters of administration ceases to be administratrix, and remains in possession of the properties not as administratrix but as widow and heiress. She can sell or mortgage the properties without the leave of the Court, for purposes for which a widow can sell or mortgage. The idea that 'once an administrator always an administrator' is wrong and is opposed to practice. *In the goods of* NURSING CHUNDER BYSACK, **3 C.W.N. 635.** [*F.*, 9 C.L.J. 116.]

(198)—*S.* 90—*Order under s.* 90, *Act* V *of* 1881—*Alienation by Hindu widow with the permission of Judge — Effect — Limitation.*—An alienation of immoveable property by a Hindu widow, who has obtained letters of administration in respect of the estate, with the Judge's sanction, is valid as an absolute alienation irrespective of the existence of legal necessity, by virtue of the provisions of s. 90, Probate and Administration Act. A suit to set aside an alienation by a Hindu widow, will be governed by art. 13, Limitation Act, even though, without necessity, if the same were made under an order of the District Judge under s. 90, Act V of 1881. KANIKHYA NATH MUKERJEE v. HARI CHURN SEN, **26 C. 607.**

(199)—*S.* 90—*Scope—Order of High Court Judge on an application under s.* 90, *Act* V *of* 1881—*Letters Patent, cl.* 15—*Appeal.*—S. 90 does not give the Court power to intervene in the administration of the estate in the hands of the executor, save so far as to judge whether, under the circumstances brought before it, it may seem right that he should have power under the Court's order to act in contravention of a restriction imposed in the will by disposing of any immoveable property specified in the order, in a manner permitted by the order. S. 90 is not intended to be invoked on the application of persons other than an executor or administrator. The permission is to be granted to him to assist him, if he needs such an assistance, in carrying out the administration of the estate. An order, on an application under s. 90, Probate and Administration Act, passed by a single Judge at the instance of the beneficiary, in a case in which there is no restriction on the power of the executor to sell, is without jurisdiction. Such an order is appealable under s. 15, Letters Patent. *In the goods of* INDRA CHANDRA SINGH, **23 C. 580.** (9 C. 482, P.C., *Appl.*)

(200)—*S.* 90—*Deed of transfer by executors of a will under s.* 31, *Act* II *of* 1874—*Effect—Executor's power of disposition.*—A transfer of the interest of the executors of a will in the estate of the deceased, by them, to the Administrator-General, under the provisions of s. 31, Act II of 1874, confers on the Administrator-General only such powers of disposition as the executors themselves possessed. An executor's power of disposition is controlled by the testator. S. 90, Probate and Administration Act, does not make an executor's power to dispose of property of the deceased dependent upon the permission of the Court, except where such restriction is imposed by the will. *In the goods of* NUNDO LALL MULLICK, **23 C. 908.** [*F.*, 3 C.L.J. 260 ; *R.*, 8 C.W.N. 362.]

(201)—S. 90—'Person interested' —Mahomedan reversioner—*See* CUSTOMS - PUNJAB —WILL, 14 P.R. 1912=96 P.W.R. 1912.

(202)—S. 90—*See* HINDU LAW — JOINT FAMILY, 9 C.W.N. 923.

(203)—*S.* 90, *cl.* 2—*Restriction—Power of executor to dispose of immoveable property—Specific Relief Act* (I *of* 1877), *s.* 21—*Contract to perform which permission of Court is necessary, cannot be specifically enforced.*—S. 90, cl. (2) of the Probate Act does not provide that the restriction, to be imposed on the power of an executor to dispose of immoveable property by the will, should be an express restriction in so many words. Restriction may be either express or implied. Where a will contained these provisions: "The executors shall be competent, in order to pay off my debts, to contract other debts, or to mortgage any property left by me; and on taking into consideration the state of the debts and of the properties, if they think the best means to pay off the debt would be to sell any property or to grant a *patni* lease or to settle it on permanent rent, in that case, they shall be competent to pay off the debt

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by selling Tappa H. and Tappa K : " *Held*, that, although there is no express restriction, there is a very strong implication that the testator never intended to give authority to the executor to grant any permanent lease of property other than the two Tappas mentioned in the will, and that the testator intended to restrict the power of the executor, so far as sale and lease were concerned, by confining it to the two specified Tappas. Where the defendant had agreed to grant a permanent lease to the plaintiff, but it appears that she the defendant has no power to execute the deed, without the permission of the District Judge: *Held*, that the contract as it stands is, from its nature, such that the Court cannot enforce its specific performance, to quote s. 21 of the Specific Relief Act. SATIS CHANDRA CHATURDHURIN v. JNANADA SUNDARI CHAWDHURANI, **1 Ind. Cas. 364.**

(204)—S. 90, cls. (3) and (4)—Administrator acting in excess of his powers in entering into compromise - Effect—*See* COMPROMISE—MISCELLANEOUS. 14 C.W.N. 451=5 Ind. Cas. 236=11 C.L.J. 346.

(205)—*S.* 90 (4)—*Act* VI *of* 1889—*Meaning of "any other person interested in the property."* —The words "any other person interested in property" in s. 90 (4), must mean any person interested in the property independently of the executor whose alienation he seeks to avoid. JOGOBANDHU DEY PODDAR v. DWARIKA NATH ADDYA, **23 C. 446.**

(206)—S. 90—*See* NOS. 44, 184, *supra.*

(207)—S. 91—*See* NO. 53, *supra.*

(208)—*S.* 92—*Civ. Pro. Code*, s. 231—*Execution of decree—One of several joint decree-holders not competent to give a full discharge for the amount of the decree—Executors.—Held*, that one out of several joint decree-holders is not competent to give a valid discharge for the amount of the joint decree, and his position in this respect is not affected by the fact that he and his fellow decree-holders are co-executors. LACHMAN DAS v. CHATURBHUJ DAS, **A.W.N. 1906, 16=3 A L J. 49=28 A. 252.** (26 A. 318, 334, *F.*)

(209)—S. 92—*See* NO. 170, *supra.*

(210)—*S.* 98—*S.* 15, *Act* VI *of* 1889—*Meaning of certain expressions.*—The Court cannot, under s. 98, Probate and Administration Act, go on from time to time directing executors to deliver accounts. The power given under that section can be exercised only once. The words in the section "from time to time appoint" relate to an extension of the period within which the inventory is to be exhibited. The words "from time to time appoint," cannot mean, in the earlier part of the section, that the Court can go on again, and again, calling on executors to furnish an inventory. The words in the latter part of the section "from time to time appoint," relate to an extension of time for putting in the account, and does not authorise the Court to go on calling upon the executors to exhibit accounts from time to time, as often as the Court thinks fit. The words "an account" mean one account, and not a series of accounts. MOHESH CHANDRA BHUTTACHARJEE v. BISWA NATH BHUTTACHARJEE, **25 C. 250=1 C.W.N. 646.** [*R.*, 8 C.W.N. 578=31 C. 628.]

(211)—*S.* 98—*Sanction to prosecute—No finding if omission to file account intentional or accounts intentionally false.*—The executor to an estate did not file any accounts while he continued as executor. After the probate was revoked, the Judge called upon him to produce his accounts within a certain time given. As he failed to comply with this order, his prosecution was sanctioned under s. 98 of Act V of 1881 for an offence under s. 176, I.P.C. The sanction was kept in abeyance on his then filing the accounts, and was subsequently restored when the Judge, on examining the accounts, suspected their genuineness. *Held* that the sanction was not good in law, and that the Judge was not right in making the order depend on the examination of the accounts themselves. The Judge ought not to have made the order sanctioning the prosecution under s. 176, I.P.C., without an enquiry whether the omission to produce the accounts was intentional or the accounts filed were intentionally false. *Quære*:—Whether the District Judge had no authority in law to call upon the executor, after his functions as an executor had ceased, to file the accounts which he might have been compelled to produce during his executorship, as enjoined by s. 98 of the Probate Act, and whether therefore the order calling for the accounts after the Probate had been revoked, and the order sanctioning the prosecution by reason of accounts not having been produced within the proper time were unauthorised. NABA CHUNDRA CHOWDHURY v. TRIPURA CHARAN CHOWDHURY, **2 C.W.N. 597.**

(212)—*S.* 98—*Succession Certificate Act*, VII *of* 1889.—The procedure under Probate and Administration Act relates to the granting and revocation of probates and letters of administration and matters connected therewith; the administration of an estate is not provided for under the Act, and this can only be done in a regular suit brought for the purpose. The object of procedure under the Act is merely in the first place to have a representative of the deceased appointed in whom the rights to the property of the deceased shall be vested, and next to give power to revoke an appointment under certain circumstances. If the holder of a probate or letter is misappropriating the estate, the only remedy is to bring a regular suit for its administration by or under the orders of the Court. The fact that s. 98 of the Act gives an executor and an administrator six months within which to file an inventory, and one year within which to file an account, is no bar to any person

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having an interest or claim to the deceased's property bringing such a suit against the executor or administrator before such times expire. Probates and letters of administration are not the same as certificates under the Succession Certificate Act. In a certificate under the latter Act the particular debt must be set out in order to entitle the holder to sue for such debt, but in a probate and in letters of administration debts are not set out, and the production of one or the other is sufficient and is, under s. 59 of the Probate and Administration Act, conclusive that the holder at the time represents the deceased, and is entitled to his estate in the province in which the grant was made. If a person applying for probate or letters of administration fails to include any property of the deceased in his valuation, Chapter III-A of the Court Fees Act, contains provisions showing the consequences which may happen, and the courses open. KARIM BUX v. KING-EMPEROR, **2 L.B.R 161.** [*Expl.*, U.B.R. 1910, 4th Qr., 69].

(213)—S. 98—*See* NOS. 79, 131, *supra.*

(214)—S. 102—*See* NO. 53, *supra.*

(215)—*S.* 104—*Scope of—Applicability to the case of creditor holding decree against the estate—His rights under s.* 52, *Civ. Pro. Code*, 1908.—S. 104 of the Probate and Administration Act merely lays down a rule of procedure that must be followed by an executor or administrator, and is not applicable where a creditor, who has obtained a decree against the estate of a deceased person, applies for the execution of such decree. (22 M. 194, *F.*; 12 B.L.R. 287, 10 C. 929, *R.*). S. 52, Civ. Pro. Code, 1908, lays down the rights of such a creditor. MIN DWE v. C.A.P.C. SHUNMUGAM CHETTY, **6 L.B.R. 158=18 Ind. Cas. 510.**

(216)—S. 104—*See* ACT II OF 1874, s. 35, 25 C. 54.

(217)—S. 104—*See* EXECUTION OF DECREE —EXECUTION BY OR AGAINST REPRESENTATIVES, 22 M. 194.

(218)—*Ss.* 105, 108—*Direction in will for payment of debts—Specific legacy, mortgage by holder of—Decree against heirs for debts of the testator—Charge on property given in legacy.* —A decree in favour of a creditor to the estate of a deceased testator is a mere money-decree, and has not the effect of creating a charge upon the property (9 C. 406, *R.*); a direction in the will for the payment of the testator's debt is only a general direction to pay up all his debts out of the estate, and does not create any charge thereupon. A purchaser in execution of such a decree cannot claim a valid charge upon the property as against a mortgagee from the specific legatee. A mortgage created by a specific legatee before the debts of the deceased testator are paid off, is not altogether invalid in law. AMBIKA CHARAN DUTT v. MUKTA KISHORI, **2 C.L.J. 138=10 C.W.N. 38.**

(219)—S. 108—*See* NO. 218, *supra.*

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(220)—*S.* 113—*Effect of dealing with bequeathed property—Assent to bequests—Divesting of executor's interest—Mortgage by guardian —Necessity.*—An executrix, appointed under her husband's will, mortgaged the properties bequeathed to her sons, describing herself as the guardian of the minors. *Held* that her dealing with the property showed that she, as an executrix, assented to the bequests, and the effect of her so assenting was to divest her of all interest therein as executrix. *Held* also that there was no sufficient proof in that case to warrant the Court to hold that the mortgagee advanced the money to the guardian of the minor, believing honestly in the existence of a reasonably credited necessity. VIJAYARANGAM PILLAI v. DEVAKIAMMAL, **2 M.L.T. 343.** (6 M.I.A. 393, *Appl.*)

(221)—S. 114—Sale of Government securities effected by administrators not *qua* administrators, but as heirs of a Hindu widow—*See* ADMINISTRATOR, 19 C. 26.

(222)—*Ss.* 128, 130, 131—*Demonstrative legacies, interest whether allowable on.*—S. 128 of the Act provides that the legatee is entitled to the produce of a specific legacy and ss. 130 and 131 entitle legatees to interest on general legacies. The absence, however, of a distinct provision in regard to payment of interest on demonstrative legacies, does not imply an intention to disallow interest in such cases. As regards the matter of interest, demonstrative legacies are to be viewed as of the nature of the general legacies, and, therefore, as carrying interest at 6 *p.c. per annum* from the expiry of one year from the death of the testator, such interest being payable out of the income or profits from which the principal amount of the legacies has been made payable. CHINNAM RAJAMANNAR v. TADIKONDA RAMACHUNDRA RAO, **29 M.155.**

(223)—S. 130—*See* NO. 222, *supra.*

(224)—S. 131—*See* NO. 222, *supra.*

Probate & Administration Act (VI of 1889.)

[REP. IN PT., ACT XII OF 1891; (AS TO BURMA), ACT XIII OF 1898, S. 18; ACT II OF 1899; ACT XI OF 1899; S. 4; ACT V OF 1902, S. 9; S. 8 SUPERSEDED BY ACT VIII OF 1903, S. 2; (1) DECLARED IN FORCE IN THE SONTHAL PARGANAS, REG III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3; IN UPPER BURMA, EXCEPT THE SHAN STATES (EXCEPT s. 21), ACT XIII OF 1898, S. 4.]

(1)—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 90 (4), 23 C. 446.

(2)—S 15—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 98, 25 C. 250=1 C.W.N. 646.

(3)—*S.* 19—*Retrospective effect of.*—Between 1881 and 1889, neither an executor nor an administrator had power to sell real property without the sanction of the Court; but s. 19 of Act VI of 1889 made valid all invalid alienations that had been effected from 1881 onwards. RAJANI NATH MUKHOPADHYAYA v. RAMANATH MUKERJEE, **3 C.W.N. 483.**

Probate Duty.

See COURT FEES ACT, s. 19-*d*, 23 C. 980=1 C.W.N. 31.

Probate Proceedings.

Costs and expenses of—Primary liability of the residuary estate—*See* COSTS—COSTS OUT OF ESTATE, 21 B. 75.

Procedure.

See PRACTICE AND PROCEDURE.

See U. P. ACT XVII OF 1876, s. 74, 2 O C. 359.

No one has a vested right in—*See* EXECUTION OF DECREE — EXECUTION BY OR AGAINST REPRESENTATIVES, 9 Ind. Cas. 800.

Procedure, Chota Nagpur Landlord and Tenant Act.

See BEN. ACT I OF 1879.

Procedure Codes, Construction of.

See STATUTES, CONSTRUCTION OF.

(1)—*Procedure Codes — Construction.*—The widest possible construction should be put upon Codes of Procedure as distinguished from substantive law. GOBINDA RAM MONDAL v. BHOLANATH BHATTA, **16 C. 432.**

Procedure, Landlord and Tenant Act.

See BEN. ACT VIII OF 1869.

Proceedings.

(1)—*Act* I *of* 1868 (*General Clauses*), s. 6—*Meaning of "proceedings."*—The word "proceedings" in s. 6, as applied to a suit, means the suit as an entirety, that is to say, down to the final decree. SATGHURI v. MIJIDAN, **15 C. 107.** [*R.*, 16 C. 267, F.B.]

(2) — The word "proceedings" is a very general one; it is not limited to proceedings connected with civil suits; but includes proceedings other than the civil proceedings, and civil proceedings other than suits. When applied to suits, it may be used to mean the suit as a whole, or it may be used, and often is used, to express the separate steps taken in the course of a suit the aggregate of which makes up the suit. DEB NARAIN DUTT v. NARENDRA KRISHNA, **16 C. 267, F.B.**

(3)—*Act* X *of* 1877 (*Civ. Pro. Code*), s. 3.—*"Procedure" —"Proceedings" meaning of.*—The word "procedure" in the Civ. Pro. Code of 1877, s. 3, has not the same meaning as "proceedings" in s. 6 of Act I of 1868. "Procedure" implies the machinery by which proceedings are conducted; and this, after decree, is provided by the New Code, although the proceedings may have been instituted under the Old Code. *Per Garth C. J.* RUNJIT SINGH v. MEHERBAN KOER, **3 C. 662=2 C.L.R 391, F.B.** [*R.*, 4 C. 825=3 C.L.R. 593.]

Proceedings include appeals from decrees—*See* ACT I OF 1868, s. 6, 13 C. 86.

Proceedings of Legislative Council.

See STATUTES, CONSTRUCTION OF, 31 C. 628=8 C.W.N. 578, 22 C. 1017, F.B.

Proceeds of Sale.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS—PROCEEDS OF SALE, RIGHT TO.

Process.

See RESISTANCE TO CIVIL PROCESS.

See SUMMONS.

(1)—*"Process" meaning of the term—Commission, cl.* 1, *s.* 20—*Court Fees Act,* VII *of* 1870.—A commission issued to an Amin to make a local investigation is not a "process" within the meaning of s. 20 of the Court Fees Act. Process has a well-understood meaning within which such a commission cannot be included. JAGAT KISHORE ACHARJEA CHOWDHRY v. DINA NATH CHUCKERBUTTY CHOWDHRY, **17 C. 281.**

(2)—*Respondent being a Hindu woman of rank—Service on her Dewan.*—Where, by the custom in India, the respondent (being a Hindoo woman of rank) could not be personally served with an Order of Revivor, the Judicial Committee allowed service to be substituted on her Dewan, or chief servant. CLARK v. MULLICK, **2 M.I.A. 263 and 268=3 Moo.P.C. 252=Morton, 430=1 Sar. P.C.J. 188.**

(3)—*Civ. Pro. Code,* 1859—*Summons to party as witness—Service on pleader.*—A summons under s. 165, Civ. Pro. Code, 1859, requiring a party to a suit to give evidence in it may be served on his pleader. SHIVRUDRAPPA v. KASHINATH VISHNU, **6 B H.C. A.C. 141.**

(4)—*Appeal—Notice—Service on pleaders.*—Service upon pleaders would be good service on their employers, so far as notice of appeal is concerned. ISHUR DUTT MUNDUL v. SHIB PERSHAD THAKOOR, **15 W.R. 290.**

(5)—*Service of notice of appeal—Respondent residing in Foreign territory—Service by post.*—If a respondent resides at a place in Foreign territory, notice of appeal should be forwarded to him by post under a registered cover; and if the respondent does not appeal, a verified statement should be put in to show that the said respondent is at present residing at that place in the Foreign territory, or has been living there recently. SONATUN BUKSHEE v. GOPAL CHUNDER SHAMUNTO, **15 W.R. 31.**

(6)—*Appeal — Appellant's inability to trace respondent — Notice of appeal not served—Procedure—Analogy of s.* 57, *Civ. Pro. Code.*—Where a defendant special appellant was unable to serve notice of appeal on the plaintiff respondent within the time allowed by the Court, because he could not trace him (respondent) in the place given as his place of residence when he commenced the suit and in his petition of appeal to the Zillah Court, *held* that the appeal should not fail by reason of the plaintiff having given a wrong address, and that the case ought to be dealt with by analogy to the procedure in

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the case of summons under s. 57, Civ. Pro. Code. *In the matter of* BEDHOO KOOLANEE v. BONOMALEE GURAIN, **11 W.R 496.**

(7)—*Nazir's report—Service of process—Evidence—Admissibility.*—Where the report of a Nazir in the matter of service of a process is admitted as evidence in both the Courts below without any objection, *held*, that no objection could be taken for the first time in special appeal before the High Court in respect of its admissibility as evidence on the ground that it is no legal evidence. MOKOONDONATH BHADOORY v. SHIB CHUNDER BHADOORY, **19 W. R. 102.**

(8)—*Civ. Pro. Code*, 1882, *ss.*79, 80, 82—*Notice of appeal—Refusal to receive—Copy not affixed—No service*—Ex parte *decree—Effect.*—When the respondent refuses to sign the acknowledgment of service endorsed on the original notice, it is the duty of the bailiff, under s. 80, Civ. Pro. Code, to affix a copy of the notice on the outer door of the house in which the respondent ordinarily resides and then return the original to the Court with a return endorsed thereon or annexed thereto stating that he has so affixed the copy and the circumstances under which he did so. When no such return is made, there is no due service. A decree passed *ex parte* under such circumstances is not legal and must be set aside. MARUTI VALAN UMAJI v. VITHU, **16 B. 117.**

(9)—*Rent suit—Application for re-hearing after attachment in execution—Limitation*—Where in execution of a decree in a rent suit, the judgment-debtor's property is attached, and he applies for a re-hearing on the ground that notice was not served in the first instance when the suit was commenced, the Court should not enter into the question of service of notice without first determining whether the application for re-hearing was made within proper time. *In the matter of* PEAREE MOHUN DUTT v. PRANKRISTO ROY, **11 W.R. 310.**

(10)—*Act* VIII *of* 1859, *ss.* 235, 239, 240—*Attachment—Alienation—Service of process.*—Where an attachment of land is made by a written order under s. 235, Act VIII of 1859, the three conditions in s. 239 must be fulfilled, *viz.* (1) the written order must be read aloud at some place on or adjacent to such land, (2) it must be fixed up in some conspicuous part of the Court house, and (3) it must be fixed up in the office of the Collector of the Zillah in which the land is situated, in order to render any private alienation of the property attached null and void under s. 240. INDRA CHANDRA BABU v. THE AGRA AND MASTERMAN'S BANK, **1 B.L.R. S.N. 20 (*a*)=10 W.R. 264.** [*Not F.*, 83 P.R. 1898.]

(11)—*Talabana—Act* XXIII *of* 1861, *s.* 2.—The omission by a plaintiff to deposit talabana required by the Court in a case pending for some time was held not to warrant the dismissal of the suit, inasmuch as the Court had

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not fixed a period for the deposit as it was bound to do under s. 2, Act XXIII of 1861. LALA PARSADI LAL v. LALA AMBIKA PARSAD, **3 B.L.R. App. 25=11 W.R. 290.**

(12)—*Act* VIII *of* 1859, *s.* 273—*Right of judgment-debtor to claim discharge from arrest—Evasion of process—Concealment of property.*—Mere evasion of process by the judgment-debtor cannot, unless it could be connected with concealment of property, afford a valid ground for withholding the protection of the Court. So, the mere fact of a judgment-debtor having for a long period wilfully evaded service of process by flight into foreign territory, cannot empower the Court to refuse to grant the protection order which it can grant under s. 8 of Act XXIII of 1861. FRAMJI RUSTAMJI v. YOUNG, **49 P. R. 1875.**

This circular requests that processes forwarded by the Calcutta Court of Small Causes be served in accordance with the instructions which accompany the processes. **Civ. Cir. No. 24 dated 23rd August 1870, 14 W.R. Civ. Cir. 11.**

This circular draws attention to Rule of the High Court, Original Jurisdiction, regarding charge for serving processes of other Courts. **Civ. Cir. No. 25, 23 W.R. Rules and Ors. of H.C., p. 2.**

Duty of serving officer towards personal service of—Substituted service, when proper—*See* CIV. PRO. CODE, 1908, O. V, rr. 17, 19, 20 (1), 21 M. 419.

See PENAL CODE, s. 186, 2 B.L.R.F.B. 21=10 W.R. Cr. 43.

Process, Execution in Presidency towns of Mufassal Act.

See ACT XXIII OF 1840.

Process Fees.

(1)—*Pauper—Process fee not leviable.*—Process fees are not chargeable in pauper proceedings. **Anonymous, 4 P.R. 1873.**

(2)—*Appeal—Notice to respondent—No period fixed for payment of process fees—Dismissal of appeal—Civ. Pro. Code* (*Act* X *of* 1877), *s.* 557.—Where the Lower appellate Court had not fixed a period within which the Appellant was to deposit process fees for issuing notice to the respondent, it was not competent to that Court to dismiss the appeal under s. 557, Civ. Pro. Code, (Act X of 1877). PARSRAM v. KHARATI, **13 P.R. 1880.**

For summoning witnesses—*See* ADJOURNMENT, A.W.N. 1886, 220.

Procession.

(1)—*Processions—Public streets — Right of every member of public to conduct processions.*—The right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of

Procession—*continued.*

the streets by the public, and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. Every member of the public, and every sect, has a right to use the public streets in a lawful manner, and it lies on those who would restrain the exercise of such right to show some law or custom having the force of law depriving him of the privilege SADAGOPACHARIAR v. RAMA RAO, **26 M. 376.** [*Affirmed*, 30 M. 185=17 M.L.J. 240=4 A.L.J. 333=9 Bom. L.R. 663=11 C.W.N. 585=5 C.L.J. 566=34 I.A. 93, P.C.; *F.*, 6 M.L.T. 285; *R.*, 26 M. 554, F.B., 1 Ind. Cas. 716=32 M. 478, 32 M. 527=19 M.L.J. 467, 19 M.L.J. 617.]

(2)—*Right to conduct religious procession along public road—Suit to enforce right—Maintainability—Special damage.*—A Civil action to enforce a right to conduct a religious procession along a public road cannot be maintained without the plaintiff alleging any personal loss or damage caused to him. KAZI SUJAUDIN v. MADHAVDAS, **18 B. 693.** [*Appl.*, 34 B. 571; *R.*, 11 Bom. L.R. 372=2 Ind. Cas. 494, 19 M.L.J. 617=32 M. 478=1 Ind. Cas. 478.]

(3)—*Procession, right to go in—Public street—Magisterial order prohibiting procession, whether gives a cause of action.*—Where the orders of the Magistrate prohibited procession in a public street, *held*, that the Magisterial orders furnished a good cause of action for a suit by a member of the public for declaration and injunction regarding his right to go in procession. MUTHAYYA REDDI v. SUDALAIMUTHU NADAR, **20 M.L.J. 119=5 Ind. Cas. 902=8 M.L.T. 114.**

(4)—*Public highway—Religious processions—Right of public to use highway for processions—Customary right of a particular sect to use a highway in derogation of the rights of another sect—Special damage—Maintainability of suit—Performance of ceremonies entitling one sect to use highway to the exclusion of another sect.*—The right to go in procession through streets attended with music, &c., is a natural right inherent in every subject of the state, and no user is necessary to the creation of such right. The adherents of any particular religious sect cannot prevent the adherents of another religious sect from carrying on a religious procession, or from assembling for public worship in public streets, on the ground that such worship had not hitherto been carried on, or that it was opposed to religious feelings (26 M. 554, *D.*; 2 M. 140, 5 M. 304, 6 M. 203, 26 M. 376, 30 M. 185, *R.*) The performance of any religious rites or ceremonies by any sect or class of persons does not entitle them to appropriate a public street or any portion thereof for their religious processions or worship. Though no action lies for the obstruction of a religious procession along a highway in the absence of special damage, yet where an order has been passed by a Magistrate, restraining such procession from passing through a public street, at the instance of one party, the other party is entitled to bring a suit for declaration of their rights. KANDASAWMY MUDALI v. SUBRAYA MUDALI, **1 Ind. Cas. 716=19 M.L.J. 617.** (2 B. 457, 18 B. 693, *D.*; 30 M. 15, *R.*)

(5)—*Dharmakarta's discretion to arrange for procession—Omission of street in procession.*—In a suit by certain persons against the Dharmakartas of a temple where the plaintiffs claimed that the procession of an idol should be carried through their street according to custom and contended that the Dharmakartas had no discretion in the matter, and the defendants pleaded that they had a discretion in the matter and that they acted in good faith in accordance with the wishes of a majority of the worshippers, *held, per Sir Arnold White, C.J.*—that the plaintiffs had to prove that there was a special custom excluding discretion on the part of the defendants, and that they had not proved such a custom. *Per Davies, J.*—The defendants had not shown that they had any authority to divert the idol's procession from its ordinary route, that they could take the idol to new places, only so long as they took it to the old ones. NAGALINGAM PILLAI v. RAMACHANDRA TEVAR, **11 M.L.J. 215.**

Rival religious sects—Marching in procession with music on highway—Presumption of dedication—*See* HIGHWAY, 8 Ind. Cas. 175=20 M.L.J. 879.

Right to take idol in—*See* RES JUDICATA—PARTIES, 4 A.L.J. 333, P.C.=30 M. 185=17 M.L.J. 240=1 M.L.T. 204=11 C.W.N. 585=5 C.L.J. 566=9 Bom. L.R. 663.

Order of District Magistrate fixing route for—During the Moharram—*See* REVISION—GENERAL, A.W.N. 1891, 178.

Along public highway—Right of private persons to stop procession—Liability for damages for obstruction—*See* RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY, SUITS CONCERNING, 1 M.H.C. 50.

Suit to enforce right to conduct religious procession, maintainability of—*See* RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY, SUITS CONCERNING, 2 B. 457.

Right to carry—Through a public way—*See* RIGHT OF WAY, 19 M.L.J. 467=32 M. 527=4 Ind. Cas. 870=6 M.L.T. 285.

Suit, right of—Obstruction to procession—Worshipper—Special damage—*See* TORT, 20 M.L.J. 367=6 Ind. Cas. 780=8 M.L.T. 131.

Process-Servers Act.

See BEN. ACT V OF 1863.

Proclamation.

Queen's, of 1st November 1858—*See* BURDEN OF PROOF—GENERAL, A.W.N. 1897, 129.

Proclamation—*concluded.*

Proclamation No. 2833 of 1905—*See* JURISDICTION—GENERAL, 5 C.L.J. 550=34 C. 636, *on review from*, 34 C. 223=5 C. L J. 192.

Proclamation, irrescindable by subsequent proclamation—*See* KHOT, 1 Bom. L.R. 19=23 B. 518.

Proclamation of Sale.

See CIV. PRO. CODE, 1908, O. XXI, rr. 54, 66, 67, 90.

See SALE—SALE IN EXECUTION OF DECREE.

(1)—*Civ. Pro. Code*, 1882, *ss.* 244, 287—*Appeal.*—In course of execution of a decree, it became necessary for the Court to ascertain the incumbrances to which the property of the judgment-debtor ordered to be sold was liable. The Court held these to amount to a sum of Rs. 4,600, and entered the same in the sale proclamation. The judgment-debtor appealed to the District Judge on this question who disallowed the appeal as not maintainable. *Held* that the appeal was valid, as undoubtedly the matter was one relating to the execution of the decree, and between the parties to the suit, under s. 244, Civ. Pro. Code, from which an appeal lay to the Judge. MOHAN LAL v. IBU HASAN, **A.W.N. 1886, 167.**

Of sale under Act XI of 1859—Irregularity in the description of the share of the estate to be sold—Inadequacy of price in consequence, evidence regarding—*See* BEN. ACT XI OF 1859, ss. 5, 6, 33, 9 C.W.N. 343, F.B.=1 C.L J. 14 =32 C. 502.

Revenue sale—Non-specification of share in, when a material irregularity—Proof of inadequacy of price as result of non-specification of shares in—*See* BEN. ACT XI OF 1859, ss. 6, 33, 9 C.W.N. 487=32 C. 542.

Adjournment of sale without fresh proclamation with consent of judgment-debtor—Objection to sale by another attaching creditor for want of proclamation—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, 24 M. 311.

Non-compliance of provisions under ss. 87, 88, and 89, Crim. Pro. Code—Suit for restitution of property sold—Maintainability of—*See* CRIM. PRO. CODE, ss. 87, 88 and 89, A.W.N. 1905, 102=2 A.L.J. 348=2 Cr. L.J. 247.

See EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1888, 151.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 6 O.C. 76.

Execution sale—Material irregularity in proclamation of sale—Substantial injury—Presumption—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 7 C. 730=9 C.L.R. 341.

Objection by judgment-debtor to contents of, after sale—Witness, resummoning of—*See* SALE—SALE IN EXECUTION OF DECREE, MISCELLANEOUS, 4 O.C. 379.

Produce of Land.

(1)—*N.W.P. Rent Act* (XII *of* 1881), *s.* 56—*Trees, if "produce of land."*—Trees are not "the produce of the land" within the meaning of s. 56 of the N.W.P. Rent Act XII of 1881. BECHAI LAL v. TIKA, **A.W.N. 1884, 135**; KHAMAN SINGH v. BALA BAKSH, **A.W.N. 1884, 152.**

Suit for share of—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 31, 7 Ind. Cas. 390=8 M.L.T. 281.

Suit for share in produce of immoveable property—Jurisdiction—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 11 Bom. L.R. 1330=34 B. 171=4 Ind. Cas. 830.

Production of Documents.

See CIV. PRO. CODE, 1908, O. XI.

(1)—*Summons—Requiring party to suit to produce documents—Nature of summons.*—A summons to a party to produce documents must be a written one describing the nature of the documents; a verbal order to the pleader is insufficient and is not such a summons as is contemplated by law. DOORGAMONEE DOSSEE v. BENODE MONEE DOSSEE, **W.R. 1864, 164.**

(2)—*Production of documents with plaint—Ground for non-production.*—Plaintiffs must, on the presentation of their plaints, produce in Court the originals of the document relied on by them in support of their claim. When a plaintiff can satisfy the Court at the hearing that some document on which he desires to rely was not presented with the plaint, because he was ignorant of its existence at the time, the Court will probably allow it to be received as evidence. CAMPBELL v. KEITH, **1 Hyde 287**= S.C. RITCHIE STEWART & CO. v. GLADSTONE, WYLLIE & CO., **1 Ind. Jur. O.S. 125.**

(3)—*Documents not filed with plaint—Acceptance by lower Court—Rejection by Appellate Court—Duty of Appellate Court.*—An Appellate Court must not reject those documents of the plaintiff in a suit which had been accepted by, and formed the basis of the decree of the lower Court, solely on the ground of their not having been filed with the plaint. MOHABEER DOSS v. LALLA ROY, **1 W.R. 12.**

(4)—*Civ. Pro. Code*, 1859, *s.* 39.—Under s. 39 of the Civ. Pro. Code, 1859, the plaintiff was bound to produce, at the time the plaint is filed, all the documents on which he relied. PREMSOOKH CHUNDER v. RAJ KISTO MITTER, **1 Hyde 145=Anonymous, 1 Ind. Jur. O.S. 14.**

(5)—*Suit for confirmation of title—Possession—Evidence*—Onus *of proof.*—In a suit for confirmation of title by a person, asserting possession without evidence of title, against a *bona fide* purchaser for value and without notice from one who is the ostensible owner of the property and in whose name the property stands, it is for the plaintiff to make out his title and not for the defendant to prove his. LEKHRAJ ROY v. MUTTY MADHUB SEN, **14 W.R. 95**

Production of Documents—*continued.*

(6)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 39—*Script to refresh memory of witness—Necessity for being filed with plaint.*—Where a memorandum or script is presented to a witness by the plaintiff in a case for the purpose of refreshing his memory and not as evidence in itself, it need not have been filed along with the plaint. RAMJI MADAUJI v. RANGAYYA CHETTI, **1 M. H.C 168.**

(7)—*Civ. Pro. Code,* 1859, *s.* 39.—The plaintiff sued to recover certain jewels, and one of her witnesses being examined by her counsel with a reference to a list of the jewels which was in his possession the defendant's counsel objected to the document being referred to at all, as it had not been filed with the plaint in compliance with s. 39 of Act VIII of 1859: *Held* that s. 39 of Act VIII of 1859 referred only to promissory notes, bills of exchange, and such documents as are in their nature the very essence of the case. KAMENEE DOSSEE v. HURROMONEY DOSSEE, **Bourke O.C. 91 = Cor. 151.** MANOORAM SHAW v. HURRYPERSAUD ROY, **Bourke, O.C. 162.**

(8)—*Reception of document after presentation of plaint—Court's discretion.*—Under Act VIII of 1859, the Court has a discretion to receive, in evidence, documents not filed with the plaint. Mr. F. A. LOPEZ v. Mr. J. H. DRIBERG, **W.R. 1864, Act X. 67.**

(9)—*Document not filed with plaint—Receipt in evidence subsequently—Receipt of document without stamp.*—A Court can receive a document in evidence from the plaintiff, not filed with the plaint, on being thoroughly satisfied that the document is, in every respect, *bona fide* and worthy to be relied on. The pottah, being on plain paper, does not render it invalid. ATTA OOLLAH MUNDLE v. SUKEEOODDUN TIRUPDAR, **W.R. 1864, 271.**

(10)—*Civ. Pro. Code,* 1859, *s.* 39—*Production of document at time of filing plaint—Non-production of copy of document—Dismissal of suit—Restoration.*—In a suit on a promissory note, the note was produced when the plaint was filed, and marked by the Officer of the Court, but the Judge refused to admit it in evidence at the trial, because a copy of the note was not in the Court papers, and the plaintiff's counsel was not able to explain the omission. In the result he dismissed the suit, as there was no application to withdraw. *Held* that (i) that the Judge was wrong in not having received the note in evidence, as it was "produced in Court by the plaintiff, when the plaint was presented:" (ii) that there is nothing in s. 39 of the Code which would justify the Judge in refusing to receive the note in evidence, because he "examined the record and found no copy of the note was filed with the papers," and because the plaintiff's counsel was unable to explain the omission; and (iii) that the plaintiff was not bound to withdraw from the suit under the circumstances; as he was entitled to put the note in evidence the Judge ought to have received it, and (iv) that the suit should therefore be restored for trial on the merits. THOMPSON v. JEHANGIR HORMASJI, **3 B.H.C. O.C. 66.**

Production of Documents—*continued.*

(11)—*Lower Court's omission to hear witnesses—High Court to consider evidence and form independent opinion—Documents, when to be filed.*—The Additional Principal Sudder Ameen before whom this case came on after a number of witnesses had been examined by his predecessor, allowed, at a late stage, after most of the witnesses had been examined, a very great quantity of documents to be filed and placed on the record, without any explanation of their being tendered at that late stage, and also without any enquiry whether they were relevant or otherwise. On the whole, the suit had not been in any respect tried or dealt with in conformity with the directions of the Civ. Pro. Code, and the High Court thought it fit and competent to them to come to a conclusion upon the evidence observing that the Court below had also seen the most part of it only in paper and the case had been protracted through a period of about two years. OPENDRO NARAIN GHOSE v. BAJPAYEE RAJAH-KESHUP CHUNDER DEB, **6 W.R. 25.**

(12)—*Civ. Pro. Code, ss.* 59, 63, 138, 139—*Rejection by Appellate Court of documents admitted by lower Court.*—Where certain documents were allowed by the District Munsiff, during the trial of a suit, to be filed by the plaintiff, and the District Judge, on appeal, refused to consider them, on the ground that they were not filed with the plaint, nor entered in a list annexed to the plaint, and that the Munsiff had not given any reasons for admitting them, *held*, that the Judge was bound to consider them, once they had been admitted in evidence by the Court of first instance. MEENAKSHI v. VELU, **8 M. 373** [*F.*, 22 B. 173, 8 C.L.J. 147 = 12 C.W.N. 312; *R.*, 6 C.L.J. 621, 13 C.W.N. 797 = 10 C.L.J. 33.]

(13)—*Single auction-sale of lands in several lots—Certificates of sale to be regarded as several certificates for purposes of registration, Civ. Pro. Code, ss.* 59, 63—*Production of certificate.*—The lands that were purchased by the plaintiff in this case at an auction-sale were put up for sale in four lots although they were included in a single certificate of sale. For the purposes of the registration of the certificate, it was held that, though it was one instrument in form, it should be regarded as four separate instruments of certificate of the four several lots, each of which was admittedly the subject of a distinct contract of sale, and of a less value than Rs. 100. *Held* also with regard to the plaintiff not having produced the registered certificate when the plaint was presented, as required by s. 59 because there was no doubt of its existence at the time of the institution of the suit, that the lower Courts should not have refused their consent to its being given in evidence as required by s. 63. DEVIDAS JAGJIVAN v. PIRJADA BEGUM, **8 B. 377.** [*F.*, 12 C.W.N. 312 = 8 C.L.J. 147; *R.*, 6 C.P.L.R. 55, 13 C.W.N. 797 = 10 C.L.J. 33 = 2 Ind. Cas. 946].

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Production of Documents—*concluded.*

Civ. Pro. Code, 1882, s. 174—Witness attending on summons but refusing to produce document not punishable under—Scope of section—Punishment for refusal to produce document provided by the s. 175. I.P.C.—*See* WITNESS—DEFAULTING WITNESSES, 12 B. 63.

Professional Misconduct.

Solicitor—What amounts to—Right to be heard on matters relating to—*See* CONTEMPT OF COURT, 16 C.W.N. 386, P.C.

Professional Tax.

(1)—*Municipal tax—District Municipalities Act* IV *of* 1884). *ss.* 49, 50, 53, 101—*Wrongful assessment—Suit to recover money illegally levied — Small Cause Court—Jurisdiction.*—When professional tax has once been paid in one Municipality and subsequently for the same period, the tax is collected under protest a second time by another Municipality, the taxpayer is entitled to sue the latter Municipality for a refund of the money wrongfully collected from him. The suit will lie in the Civil Courts, and if the amount is within the pecuniary limits of a Small Cause Court, such a suit will lie in the Small Cause Court. TUTICORIN MUNICIPALITY v. SOUTH INDIAN RAILWAY, **13 M. 78.** [*R.*, 24 M. 205; *D.*, 19 M. 10.]

See MAD. ACT I OF 1884, s. 103, 8 M.L.J. 164.

Officer on tour—Liability to profession tax—*See* MAD. ACT I OF 1884, s. 190, 22 M. 145.

District Court situated outside Municipality—Pleader practising in it—*See* MAD. ACT IV OF 1884, 18 M. 183.

See MAD. ACT IV OF 1884, 21 M. 5.

See MAD. ACT IV OF 1884, ss. 3 and 60, 4 M.L.T. 477.

Income less than Rs. 30 a month —Legality of levying profession tax—*See* MAD. ACT IV OF 1884, s. 53, sch. A, Proviso 4, 24 M. 644.

What amounts to an exercise of profession—*See* MAD. ACT IV OF 1884, s. 55, 17 M. 453.

See MAD. ACT IV OF 1884, ss. 55, 56, 60, 262, 15 M. 153.

Profits.

Attachment of—Of vatan, removal of, on Collector's certificate—*See* BOM. ACT III OF 1874, s. 10, 4 B. 426.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 28 C. 483.

Profits a prendre.

(1)—*Distinguished from license.*—A *profit a prendre* is a right to remove and appropriate any part of the soil belonging to another, or anything growing upon or attached to the soil for the purpose of the profit to be gained from the property thereby acquired, *i.e.*, for example, a right to take gravel, stone, trees, and so forth. A right to collect fees from pedlars and others who come to sell their wares and to bury their dead, by way of remuneration for the claimant's services as *takiadar* of a grave-yard, and a permission given to him to take any fruit that he could find on the trees therein, is not a *profit a prendre*, but is merely a license. SAIYAD WAJID ALI SHAH v. MUSAMMAT UMRAI BIBI, **1 A.L J. 621.**

Profits a prendre—*concluded.*

What are—*See* U.P. ACT II OF 1901, s. 4, 6 A.L.J. 400=31 A. 342=2 Ind. Cas. 223.

See INAMDAR, 1 Bom. L.R. 499.

Provisions of statutes, the Crown how far affected by—S. 26 of the Limitation Act is not applicable to the Crown—Rights of pasturage claimed as against Government—Profits a prendre, rule of English law regarding—Acquisition by custom or prescription—*See* LIMITATION ACT, 1908, s. 26, 14 B. 213.

Profits, Suit for.

(1)—*Mortgagor and mortgagee—Mortgagor failing to put mortgagee in possession—Claim for profits—Lambardar.*—Where a mortgagor, also *lambardar*, failing to put the mortgagee in possession, realizes the profits of the mortgaged share, he cannot, on suit by the mortgagee for profits, plead want of actual possession in the latter; to allow this plea would be to allow the mortgagor to take the benefit of his own wrong. If the profits sought in the suit were profits arising from a share of a co-sharer, to whom the *lambardar* had before suit and in good faith paid them away, the suit against him for such profits might be met by the plea that payment had been made to the person in possession. NEEL KUNTH v. MUSSUMAT ROUSHUN, **2 Agra Rev. 6.**

(2)—*Suit by putteedar against lumbardar—Suit for share of profits—Limitation—Act* XIV *of* 1863, *s.* 2.—A suit by the *putteedars* against the *lumbardar* to recover their share of the profits of the estate, in which the plaintiffs state various acts of the *lumbardar* in taking the land and the profits of the land, and appropriating them to his own use, withholding from the plaintiffs their due share, is a suit by co-sharers for their share of the profits, and the limitation applicable to such a suit is three years and not one year. SHEIK KHOJAYE v. MAHOMED TAQUEE, **2 Agra Rev. 11.**

(3)—*Partnership—Participation in profits.*—It is a fallacious argument that, because a man is interested in the profits of a partnership, he is therefore a partner. Participation in profits does not of itself constitute a partnership. The true question is not whether the person sought to be made liable participated in the profits, but whether the trade has been carried on by persons acting on his behalf. There is no rule of law which imposes partnership liability on a person who advances money to others for carrying on their business and in return secures to himself a share of the profits which may arise from the employment in the business of the

Profits, Suit for—*continued.*

money so advanced by him. RAJA PRATAP CHANDRA SINGH BAHADUR v. MOLLWO, MARCH AND CO. **3 B.L.R.A.C. 238=12 W.R. 56** [*Affirmed*, 10 B.L.R. 312, P.C.=18 W.R. 384.]

(4)—*Profits, suit for, against co-sharer—Co-sharer in undivided patti, responsibility of, for share of profits to another co-sharer.*—The defendant was the proprietor of half of a 5 biswa patti and the plaintiff was the mortgagee from him of the other half of the patti. There had been no division of tenants between the parties and either of them could have collected the whole of the rent due from tenants. The plaintiff sued to recover a certain sum alleged to be due from the defendant on account of her share of the profits for three years. The defendant pleaded that he had not collected more than his share and that he was not responsible for the rent which the plaintiff had failed to collect. *Held*, that the plaintiff was entitled to half the total profits of the 5 biswas calculated on the amount realized. The fact that the defendant did not obstruct or prevent her collecting was no reason for holding that he was entitled to retain the whole of the amount he had collected, inasmuch as it did not exceed half the total rental of the patti for the three years. PARBATI v. KUAR BODHI SINGH, **4 O.C. 363.**

(5)—*Profits, suit for share of—Account, suit for—Small Cause Court, jurisdiction of—Act* IX *of* 1887, *sch.* II, *art.* 31—*Appeal—Civ. Pro. Code*, s. 586.—*Held*, that a suit for a share of the profits of an estate against the co-sharers is one for an account and is excepted from the cognizance of a Court of Small Causes under art. 31, sch. II, Act IX of 1887, in which the words "for an account" include a suit in which an account is expressly asked for as well as suits in which there must be an account, like suits in which a share of profits is claimed. GOVINDE v. MATHURA, **5 O.C. 130.**

(6)—*Profits, suit for a share of—Rendition of accounts, suit for — Rent Act (Oudh)*, 1886, s. 108, *cl.* (15).—In a suit under cl. (15), s. 108 of the Oudh Rent Act, 1886, the main question was whether the suit was for "a share in the profits" or for "the rendering and settlement of accounts in respect of those profits." The parties were the co-sharers in a *patti* and collected the rents separately and paid the revenue separately. The plaintiff claimed for arrears of rent and profits, and the settlement of accounts for the years running from 1306 to 1309 Fasli. He gave details showing the gross rental, his own share, what he had realized and the balance due to him. He prayed for the following reliefs:—(*a*) that an order be passed for the rendition of accounts and (*b*) that on the accounts being made up his claim may be decreed. *Held*, that if a plaintiff claims a share of the profits, whether he asks for a settlement of accounts or not, as a necessary preliminary to ascertaining what his share really is, that is a suit for a share of the profits, and that the only case for a settlement of accounts would be where the plaintiff asked for a settlement of accounts pure and simple, and did not claim a money decree as the result. *Held* therefore, that the plaintiff's suit was a suit for his share of the profits. BHAIYA BRIJ RAJ SINGH v. RAM PARGHAT, **7 O.C. 84.**

(7)—*Suit for profits and for such relief as the Court might deem proper—Small Cause—Remand — S.* 562, *Civ. Pro. Code—Order carried out by original Court—Right of appeal*, s. 588 (28), *Civ. Pro. Code—Power of Chief Court on appeal.*—*Held*, that a claim for six years' profits and for such other relief as the Court might deem proper is a Small Cause; and appeal against the decree lies to the District Judge and not to the Divisional Court. The District Judge on appeal remanded the suit under s. 562, Civ. Pro. Code, 1882. On appeal against this order in the Chief Court under s. 588 (28) it was objected that inasmuch as the appellant had submitted to the remand order and allowed the Court below to pass a decree which had become final before the appeal was filed in the Chief Court his appeal could not be heard. *Held*, following P. R. 89 of 1891 F.B and 17 of 1899 that the objection was untenable. *Held*, further, that the order remanding the case under s. 562 Civ. Pro. Code was wrong on the ground that the original Court had not decided the case on a preliminary point. *Held*, also, that on appeal under s. 562, Civ. Pro. Code, the Chief Court has the power to go into the merits upon which a preliminary point is decided but where the original Court has disposed of the suit upon a point other than preliminary and the appellate Court disagrees with it and remands the case under s. 562 the Chief Court can set aside the order and direct the lower Appellate Court to try the appeal. MEHR KHAN v. RAM NATH, **P.L.R. 1900, p. 314.**

Sir land not included in Rent-roll—Suit for profits of such land—*See* U.P. ACT XVIII OF 1873, s. 14, 1 A. 656.

See U.P. ACT XVIII OF 1873, s. 93 (*h*), A.W.N. 1881, 107.

Suit by co-sharer for profits—Limitation—*See* U.P. ACT XVIII OF 1873, ss. 93 (*h*) and 94, A.W.N. 1881, 71.

See U.P. ACT XVIII OF 1873, ss. 93 (*h*), 206, A.W.N. 1881, 27.

See U.P. ACT XVIII OF 1873, s. 209, 2 A. 239.

See U.P. ACT XII OF 1881, s. 93, A.W.N. 1882, 208.

See U.P. ACT XII OF 1881, s. 93 (*h*), A.W.N. 1884, 349, A.W.N. 1899, 62.

See U.P. ACT XII OF 1881, ss. 93 (*h*), 189, A.W.N. 1884, 45.

See U.P. ACT XII OF 1881, ss. 93, 207, 208, A.W.N. 1888, 74.

Profits, Suit for—*concluded.*

Suit for profits—Conduct of lambardar—Burden of proof—*See* U.P. ACT XII OF 1881, s. 209, 8 A. 61=A.W.N. 1886, 1.

By co-sharers against lambardar—*See* U.P. ACT XXII OF 1886, s. 108, cl. (15), 4 O.C. 1.

Jurisdiction—*See* U.P. ACT II OF 1901, ss. 164, 197, 9 Ind. Cas. 848.

See CO-SHARERS—GENERAL, 20 A. 73=A.W.N. 1897, 197.

Suit for—By one sharer against co-sharer who has mortgaged his share—Joinder of co-sharer and his mortgagee as parties—*See* CO-SHARERS—SUIT BY CO-SHARERS, 9 O.C. 142.

Lambardar and co-sharer—Suit for profits—*See* CO-SHARERS—SUIT BY CO-SHARERS, 3 A. 186.

See CO-SHARERS—SUIT BY CO-SHARERS, 17 A. 423=7 A.W.N. 1895, 18, 16 A. 28, F.B.=A.W.N. 1893, 214.

Suit for—*See* HINDU LAW—JOINT FAMILY, A.W.N. 1899, 206.

U. P. ACT XVIII OF 1873, s. 93, cl. (*h*)—Suit for profits—Interest—*See* INTEREST—SPECIAL CASES, 1 A. 261.

See JURISDICTION—CAUSES OF JURISDICTION, 6 N.W.P. 47.

See JURISDICTION OF CIVIL COURTS, A.W.N. 1881, 56.

See JURISDICTION OF REVENUE COURT, 2 Agra 302, 3 N.W.P. 112, 1 Agra Rev. 52.

Suit by co-sharer for recovery of his recorded share of profits from lambardar—Limitation—*See* LAMBARDAR, A.W.N. 1892, 45.

See PRE-EMPTION — MISCELLANEOUS, 19 A. 261, F.B.=A.W.N. 1897, 44.

Suit for, of immoveable property—Jurisdiction—*See* PROVINCIAL SMALL CAUSE COURTS' ACT, 1877, sch. II, cl. 31, 8 Ind. Cas. 270.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 21 B. 248.

Presumption arising from receipt of, as between tenants-in-common—*See* TENANCY-IN-COMMON, 7 Bom. L.R. 252=29 B. 300.

***Pro forma* Defendant.**

Execution of decree—Mesne profits—Not liable for—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWER OF COURT, 5 C.L.R. 305.

Joined as plaintiff—Added plaintiff—"New plaintiff"—*See* LIMITATION ACT, 1908, s. 22, 8 C.L.J. 286=13 C.W.N. 186=35 C. 1065=5 M.L.T. 91.

See RES JUDICATA—PARTIES, 12 C. 580, F.B.

Prohibited Degrees.

See ACT IV OF 1869, s. 19, 12 C. 706.

Projection.

(1)—*Indian Easements Act*, 1882—*Projection for purpose of ornamentation.*—There can be no prescriptive right to projection, which has been erected merely for the purpose of ornamentation. NRITTA KUMARI DASSI v. PUDDOMONI BEWAH, **30 C. 503=7 C.W.N. 649**. (3 B.L.R. O.C. 18, 47, *R.*) [*R.*, 29 M. 511=16 M.L.J. 281.]

Projection, of a balcony, into a private street and construction in defiance of the orders of the Municipality, can be removed by the Municipality—*See* BOM. ACT VI OF 1873, s.33, 5 Bom. L.R. 48=27 B. 221.

Of a beam, over the land of another, construction can be made over the land which overhangs the beam—*See* EASEMENT, 6 Bom. L.R. 356=28 B. 428.

Promise.

A promise to pay a time-barred debt is valid. The same principle applies to pay such a debt with interest. GANESH v. VISHNU, **9 Bom. L. R. 1164=32 B. 37.**

See LIMITATION ACT, 1908, s. 19, 1 B. 590=P.J. 1877, 74.

Promisee.

Who are included under—*See* CONTRACT ACT, 1872, ss. 2 (*c*), 37, 38 and 67, 4 M.L.T. 335.

Promises *de futuro*.

Representations relating to promises *de futuro* are binding as a contract and not as an estoppel—*See* EVIDENCE ACT, 1872, s. 115, 6 Bom. L. R. 428=28 B. 399.

Promissory Notes.

See NEGOTIABLE INSTRUMENTS — PROMISSORY NOTES.

(1)—*Promissory note—Maker managing member of a joint Hindu family—Endorsement—Whether negotiation or assignment—Other members of the joint family not liable to the endorsee even though consideration for the pro-note binding on family—S.130—Transfer of Property Act.*—The endorsement of a promissory-note entitles the endorsee to sue only the maker and after his death his legal representatives. The endorsement cannot avail as a transfer of an actionable claim under s. 130 of the Transfer of Property Act. SEETHARAMA CHETTY v. SESHIAH CHETTY, **M.W.N. (1912) 1011=17 Ind. Cas. 417.**

(2)—*Promissory note—Execution in favour of minor— Minor subjecting himself to no detriment—Validity.*—A promissory note payable on demand executed in plaintiff's favour when he was a minor is not void so as to disentitle him to institute a suit on it, when he did not subject himself to any detriment by

Promissory Notes—*concluded.*

accepting it. SATHRURAZU v. BASAPPA, **24 M.L.J. 363 = M.W.N. 1913, 415 = 18 Ind Cas. 968 = 13 M.L.T. 325.** (30 C. 539, *D.*; 33 M. 312, 24 M.L.J. 352, *R.*)

(3)—*Promissory-note, suit on— Execution admitted—Undue influence of plaintiff and immorality of defendant pleaded—Burden of proof—Consideration—Contract Act, s.* 16—*Interest up to date fixed for payment—Negotiable Instruments Act* (XXVI *of* 1881), *s.* 79.—In a suit on a promissory-note, the defendant—a young man of 25 or 26—admitted the execution of the pro-note but contended that (1) the plaintiff had obtained the note by the exercise of undue influence (2) a major portion of the consideration had not been paid by plaintiff, and (3) whatever consideration was paid by plaintiff was paid for animmoral purpose: *Held*, that, as there was nothing on the face of the pro-note or in the evidence to indicate that the bargain was an unconscionable one, or to show that the plaintiff was in a position to dominate the will of the defendant, the *onus* lay upon the defendant to prove the pleas of undue influence and immorality. Under s. 79 of the Negotiable Instruments Act, a plaintiff is entitled to interest at the stipulated rate from the date of the institution of the suit till the date fixed for payment. GHAZAFFAR HUSSAIN v. MAHABIR PRASAD, **17 Ind. Cas. 309.**

Proof.

See BURDEN OF PROOF.

See EVIDENCE.

(1)—*Daughter's son, adoption of—Custom among Jats.*—According to the general custom in the Punjab, an adoption of a daughter's son is valid among the Jat caste, and the mere circumstance that no instance of such an adoption amongst Jats of a certain *got* in a particular district could be adduced, was not sufficient to establish affirmatively that the custom of that *got* differed from the general custom. BHUPA v. UTAM SINGH, **61 P.R. 1880.** [*Appl.*, 33 P.R. 1886, 43 P.R. 1886, 159 P.R. 1890; *R.*, 34 P.R. 1883, 172 P.R. 1883, 107 P.R. 1891, 50 P.R. 1893, F.B., 19 P.R. 1895, 47 P.R. 1910 = 116 P.L.R. 1910; *D.*, 69 P.W.R. 1910.]

Verbal admission of sum due on account—*See* ACCOUNTS—MISCELLANEOUS, 13 C.L.R. 266, P.C = 10 I.A. 74.

See BUDDHIST LAW—ADOPTION, 1 L.B.R. 273.

Statement in written statement not proof—*See* CIV. PRO. CODE, 1908, O. XVI, r. 20, 9 B. L.R. 215 = 17 W.R. 550.

See EVIDENCE—MISCELLANEOUS, 1 C.W. N. 682.

Ancient documents—Of—Custody—*See* EVIDENCE ACT, 1872, s. 90, 9 C.L.R. 425.

Lunacy—Degree of proof—*See* LUNATIC, 18 M. 472.

Proof—*concluded.*

Person not bound to keep proof of matters which the law says he need not prove—*See* NEGOTIABLE INSTRUMENTS—HUNDIS—GENERAL, 25 P.W.R. 1910 = 24 P.L.R. 1910 = 5 Ind. Cas. 891.

Of purchase with notice—*See* NOTICE, 1 L.B.R. 160.

Pleading and proof — Variance—Practice—*See* PLEADINGS, 25 A. 256, F.B. = A.W.N. 1903, 18.

To correspond with allegations in the pleadings—*See* PLEADINGS, 4 C.L.J. 370 = 11 C.W.N. 85.

Proof of Age.

Age of assured—Onus of proof—*See* INSURANCE, 20 B. 99.

Property.

(1)—*Rent—Property — Moveable property—Bengal Act*, VIII *of* 1859—*Bengal Act* X *of* 1859.—For the purposes of Acts VIII and X of 1859, rent comes within the terms "property" and "moveable property." MAHESCHANDRA CHATTAPADHYA v. GURUPRASAD ROY, **5 B.L. R. 155 = 13 W.R. 401.** (1 B.L.R.A.C. 177, *D.*)

(2)—*Actionable claim—Transfer of Property Act*, *s.* 6.—Under the Transfer of Property Act, property includes an actionable claim. RUDRA PERKASH MISSER v. KRISHNA MOHAN GHATUCK, **14 C. 241.**

(3)—*Certificate - Act* XXVII *of* 1860—*Magistrate taking property under s.* 404—*Act* XXV *of* 1861—*Custody of property—Reg.* V *of* 1799—*Delivery of property to holder of certificate on security.*—Where a Magistrate, on a representation from H, who alleged himself to be a cousin of the deceased, refused to deliver the latter's property to his widow who held a certificate under Act XXVII of 1860, and she, having had her appeal to the Sessions Judge dismissed, moved the High Court under s. 404 of the Crim. Pro. Code, *held* (1) that the High Court had no jurisdiction to deal with the matter under s. 404 of the Crim. Pro. Code, (Act XXV of 1861) or otherwise, (2) that the property which was taken by the Magistrate ought to have found its way into the care or custody of the Civil Court in the manner contemplated by s. 7, Reg. V of 1799; (3) that the Civil Court ought to treat the property as being practically in its temporary care, and (4) that the property might be delivered to the widow on her furnishing proper security for the purpose of indemnifying H. CAZEE ABID HOSSEIN v. MUSSUMAT REAZUN, **15 W.R. 302.**

(4)—*Produced at criminal trial—Order for disposal of—Property as to which no offence appears to have been committed—Crim. Pro. Code, s.* 517.—An order altering the possession of property which has been produced at a criminal trial or enquiry can only be made under s 517 of Crim. Pro. Code. Such an order can only be passed as to property regarding which an offence

Property—*concluded.*

appears to have been committed. When, however, the order does not distinguish between property as to which an offence appears to have been committed, and property as to which no offence appears to have been committed, the order must be treated as a nullity. The Civil Court has no power to revise an order made by a Criminal Court, but if the Civil Court finds such an order to have been made without any legal authority, it may treat the order as of no binding force. RUSSEL BUX v. PARAAG, **L.B.R. 1893—1900, 318.**

See ATTACHMENT BEFORE JUDGMENT, 17 A. 82=A.W.N. 1895, 14.

Power of appointment given to testatrix by will of her husband if "property" within the meaning of Court Fees Act—*See* COURT FEES ACT, 1870, sch. I, item II, 25 M. 515.

Property, meaning of the term—*See* HINDU LAW- WILL, 10 C.L.J. 355=3 Ind. Cas. 642 =37 C. 128=14 C.W.N. 18.

Possession under decree since reversed—Restitution of property with mesne profits, order for—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 14 C. 484.

Mercantile—Whether pre-emption obtains in case of sales of—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 111 P.R. 1906.

Right of every person to use his property as he thinks fit, irrespective of others' susceptibilities, without infringing the law of the land and rights of others—*See* PUBLIC NUISANCE, A.W.N. 1908, 64=5 A.L.J. 147=7 Cr. L.J. 381=30 A. 181.

Right to, and right to rent, insepara ble—*See* RIGHT OF SUIT — LANDLORD AND TENANT, SUITS CONCERNING, 6 M.H.C. 363.

Propinquity.

Texts or precedents absent under the Dayabhaga Law—Theory of, and natural love and affection as propounded by Vignaneswara and writers of orthodox school of Hindu law to be resorted to.—*See* HINDU LAW—INHERITANCE, 12 C.W.N. 511=35 C. 721.

Proprietary Dues.

Suit for—Inamdar—Small Cause Court—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 M. 146.

Proprietary Estates' Village Service Act.

See MAD. ACT II OF 1894.

Proprietary Right.

(1)—*Proprietary rights, dispute as to—Settlement — Possession without title — Ancestral property.*—Where the Revenue authorities have made a settlement with the parties whose proprietary rights are in dispute on the ground of possession without title, it is still necessary for the Court to see how that possession was

Proprietary Right—*concluded.*

obtained ; if that possession had devolved upon the parties with whom the settlement was made from their ancestors, their respective rights in the property in dispute must be determined with reference to the *status* of the family at the time of the settlement. TARINEE DOSSEE v. CHUNDER NATH DUTT, **9 W.R. 376.**

(2)—*Landlord and Tenant—Denial of landlord's title—Title found unquestionable—Rent —Proprietary title.*—Where plaintiff's cause of action is the denial by defendants of his proprietary title, and both Courts have found that title, to be unquestionable, he need not be sent back to the first Court on a technical ground. To tell the plaintiff to bring a fresh suit for a kubooleut would be simply to promote litigation unnecessarily between the parties. MOULA BUKSH KHULIFA v. KENA MUNDUL **20 W.R. 261.**

(3)—Dakhilee *and* uslee *village—Proprietorship.*—The proprietorship of a *dakhilee* village may remain in the hands of one or two or more parties, whereas the proprietorship of an *uslee* village may remain in the hands of different proprietors altogether with separate rights and interests. SYUD ABDUL ALI v. MULLICK SUDDEROODEEN AHMED, **14 W.R. 493.**

(4)—*Proprietary rights, claim to—Enjoyment of* Kan *and* Kumki *rights — Admission of— Absence of assertion of proprietary title by predecessor-in-title — Acts of enjoyment not referable to* kumki *rights — No proprietary right.*— Where the predecessors-in-title of the plaintiff never asserted any claim of proprietary rights over the suit lands, but, on the other hand, admitted, that they possessed only *kan* and *kumki* rights over them. *Held*, that the plaintiff could not sustain his claim to proprietary right, even though he might be able to prove certain acts of enjoyment not ordinarily referable to *kumki* rights. CHERA SHANKARANARANAPPAYA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **9 M.L.T. 218=9 Ind. Cas. 329.**

See ABSENTEE, 34 P.R. 1874.

Relief on the ground of, claimable in the alternative, with a claim under a prescriptive right—*See* ALTERNATIVE CLAIM, 4 C.L.J. 367.

Suit for declaration of—Cause of action—Limitation—*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 12 O.C. 320= 4 Ind. Cas. 159.

See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 9 W.R. 426.

Prosecution.

Order to prosecute for offence not committed —Material irregularity — Revision—*See* CIV. PRO. CODE, 1908, s. 115, 8 A.L.J. 537.

An agreement to stifle a, is void in law—*See* CONTRACT ACT, 1872, s. 23, 6 Bom. L.R. 73 =28 B. 326.

Prosecution—*concluded.*

Stifling of—What is—*See* HINDU LAW—DEBTS, 3 A.L.J. 506=A.W.N. 1906, 212=28 A. 718.

Dismissal of complaint without issue of process if amounts to—*See* MALICIOUS PROSECUTION, 15 C.W.N. 917.

When commences—Complaint made, but no process issued—Effect—*See* MALICIOUS PROSECUTION, 37 C. 358=6 Ind. Cas 877.

Stifling of— Non-compoundable offence — Consideration for agreement—Void—*See* PUBLIC POLICY, 6 N.L.R. 148.

Prospectus.

See COMPANY — ARTICLES OF ASSOCIATION AND LIABILITY OF SHARE-HOLDERS, 1 B. 320.

Prostitute.

(1)—*Landlord and tenant—Lodgings let to a prostitute.*—A landlord cannot recover the rent of lodging knowingly let to a prostitute who carries on her vocation there. GAURINATH MOOKERJEE v. MADHUMANI PESHAKAR, **9 B.L.R. App. 37=18 W.R. 445.**

(2)—*Succession — Prostitutes of Lahore — Muhammadan Law.*—In matters of succession the parties are governed by Muhammadan Law. MUSSAMMAT JIWAN v. MUSSAMMAT KAREM-UN-NISSA, **148 P.R. 1889.**

(3)—*Prostitute — Succession to her property* —Stridhan - *Outcaste, status of—Hindu prostitute, by what law governed.*—The *stridhan* property of a Hindu woman who has adopted the life of a prostitute passes upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal School of Hindu Law. The term *stridhan* under the Bengal School of Hindu Law, has no technical meaning; "that alone is *stridhan* which a woman has power to give, sell or use independently of her husband's control." (5 I.A. 1, 1 C. L.R. 318, *R.*) When a person becomes an outcaste, he is not, in the contemplation of Hindu law, civilly dead for all purposes, and the tie of relationship which connected him with his kindred by blood is not completely severed. The rites which are directed to be performed by his kindred when he becomes an outcaste, are intended to emphasise the complete exclusion of the outcaste from all social and religious performances. A woman, by the mere fact of lapse into prostitution, does not cease to be a Hindu or to be subject to the rule of Hindu Law. HARI LAL SINGH v. TRIPURA CHARAN RAY, **17 C.L.J. 438, F.B. =17 C.W.N. 679=19 Ind. Cas. 129=40 C. 650.**

Application by mother of illegitimate child to have the child removed from the custody of the father and placed under her custody—Mother being a—*See* ACT IX OF 1861, A.W.N. 1887, 239.

See ACT IV OF 1869, s. 11, 3 B.L.R. App. 9.

Prostitute—*concluded.*

Public policy—Landlord and tenant—House let to—Rent, suit for—*See* CONTRACT—ILLEGAL CONTRACTS, 102 P.L.R. 1904.

Lease of house to prostitute—Public policy contravened — Agreement immoral—*See* CONTRACT ACT, 1872, s. 23, A. W. N. 1908, 285= 6 A.L.J. 7=5 M.L.T. 55=31 A. 58=1 Ind. Cas. 52.

Letting house for — Suit for rent—When recoverable—*See* CONTRACT ACT, 1872, s. 23, 2 P.R. 1898.

Of Lahore—Succession—No special custom —*See* CUSTOMS — PUNJAB—INHERITANCE, 22 P.R. 1891.

See CUSTOMS — PUNJAB—INHERITANCE, 52 P.R. 1893.

Adoption by—*See* HINDU LAW—ADOPTION, 36 C. 824=3 Ind. Cas. 996.

Prostitute, adoption by, of a girl—*See* HINDU LAW—ADOPTION, 4 Bom. L.R. 116=26 B. 491.

Property of — Stridhan—Succession—Sons, chaste and unchaste daughters—*See* HINDU LAW—INHERITANCE, 9 Ind. Cas. 657.

Hindu Law — Succession to property of a prostitute—Her prostitute sister, preferential heir—*See* HINDU LAW — INHERITANCE, 12 M. 277.

Succession to properties of — *See* HINDU LAW—INHERITANCE, 3 Ind. Cas. 374=11 C. L J. 124.

Succession to the estate of a Hindu—*See* HINDU LAW—INHERITANCE, 10 C.W.N. 1085.

Ramjini prostitutes—Adoption of dancing girl—Custom—Training up a girl as a—Meaning of "Nochi,"—*See* HINDU LAW—INHERITANCE, 6 Ind. Cas. 210.

Rent—Suit for rent of houses let to prostitute—Immoral contract—Contract Act, 1872, s. 23—*See* RENT, SUIT FOR, 65 P.R. 1904.

Prostitution.

(1)—*Hindus—Practices of prostitution.*—In the case of Hindus, there are strong grounds for maintaining that practices of prostitution are related to worship in the temples, and meet with countenance from the law. But even in the case of Hindus great difficulties have been felt by Courts of Justice in admitting the validityof transactions for furtherance of prostitution. GHASITI v. UMRAO JAN, **21 C. 149, P. C.=20 I. A. 193=6 Sar. 370.** (4 B. 545, *R.*) [*R.*, 26 M. 176=12 M.L.J. 264.]

Guardianship of minor—Prostitution a disqualification to custody—*See* MAHOMEDAN LAW—GUARDIANSHIP, 1 A. 598.

Protection of Judicial Officer's Act.

See ACT XVIII OF 1850.

Protection Order.

(1)—*Insolvency—Protection order—Receipt of dividends — Cancellation of protection order by Bankruptcy Court—Suit by creditor for balance of debt—Limitation.*—In November 1864, S. filed a petition in the Bankruptcy Court of Ludianah praying that a composition might be effected with his creditors on his making over half the amount of his pension of Rs. 600 *per mensem* for the liquidation of his debts. His property was accordingly attached and prior to its sale, all the creditors with the exception of three, whose claims, in the aggregate, amounted only to a small sum, had agreed to allow S. to retain the possession and the use of his property and were willing to accept whatever sum was fixed upon by Court for the liquidation of their claims. Treating the application as one under s. 36 of the Bankruptcy rules, the Court passed a decree fixing the monthly instalments payable by the bankrupt in order to give effect to the arrangement come to between him and his creditors, and directing that Rs. 350 *per mensem* out of the petitioner's pension be vested in the hands of the Official Assignee to be rateably distributed among his creditors according to the schedule of debts filed with the case. The bankrupt having executed an agreement not to alienate his property, the Court gave him an order of protection stating the conditions of his discharge to be that he should not alienate property hypothecated to the Court. The agreement and protection order were both silent as to the pension. The bankrupt's property was then sold and dividends paid rateably to the creditors, including the plaintiff. On the Pensions Act coming into force, the Judge, of his own motion, raised the question as to the validity of the attachment of the bankrupt's pension. On the Judge summoning and examining the bankrupt, he stated that he was desirous of availing himself of the provisions of s 12, Act XXIII of 1871, and said that he would pay his creditors the amount he had heretofore allowed them through the Court and refused to pay into Court regularly a fixed portion of his pension. The Judge of the Ludianah Court on 7th August 1872 passed an order said to amount to one revoking the discharge. In 1873, one of the creditors, the present plaintiff petitioned the Bankruptcy Court to cancel the protection order. The Judge considered his order of 1872 sufficiently indicative of his intent that the bankrupt's certificate and protection order should be thereby cancelled, but, being of opinion that he had omitted to distinctly specify such cancellation in the order, summoned the bankrupt to appear, and, overthrowing his objections, he recorded an order expressly to the effect that the bankrupt was no longer under the protection of the Court and that the certificate of protection should be considered as cancelled. The present suit brought by the above creditor for the balance due on his bond of 1862 was opposed as barred by the fact that the defendant was adjudicated insolvent in 1869, the debt having been inserted in the schedule, but it was held that the defendant's adjudication as

Protection Order—*concluded.*

an insolvent and the acceptance by the plaintiff of his dividend would not preclude him from suing for the balance of the debt, and his suit would therefore be maintainable in the Civil Court. *Held* also that the period during which the claim was under the consideration of the Insolvent Estates Court did not run against the plaintiff. LALU MAL v. SULTAN SIKANDER, **36 P.R. 1875, F.B.**

Protection, Private Fisheries.

See BEN. ACT II OF 1889.

Provident Fund.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, A.W.N. 1897, 88.

Deduction from pay for Provident Fund and Mutual Assurance Fund—Personal estate—Right of Official Assignee—*See* INSOLVENCY—MISCELLANEOUS, 10 B. 313.

Provident Funds Act.

See ACT IX OF 1897.

Provincial Insolvency Act (III of 1907).

See CIV. PRO. CODE, 1882, ss. 336 TO 359.

(1)—*Order appointing a receiver—Obstructing a Receiver—Contempt—Remedy of person claiming property as his own.*—Obstructing a Receiver in taking possession of the property of a person, against whom insolvency proceedings are pending, under the orders of the Court, is a contempt of the Court. The Receiver should not be resisted, and the person claiming the property as his by purchase may move the Court against the action of the Receiver. E. D. SASSON AND CO. v. MOOSAJI ESMAILJI LOTIA, **9 Ind. Cas. 485.**

(1-*a*)—*Right of Receiver to apply to Court for instructions for his guidance.*—A receiver appointed under Act III of 1907 is entitled to apply for and obtain directions from the Court whenever necessary. *Re* TIRATH DAS NATHUMAL, **6 S.L R. 286 = 19 Ind. Cas. 920.** (19 B. 660, *R.*)

(2)—*Ss.* 2 (*e*), 13 (2), 16 (3)—*Goods in possession of insolvent as commission agent—Receiver—Reputed ownership — Restoration of goods to true owner.*—As a commission agent has a disposing power, which he may exercise for his own benefit, over goods entrusted to him for sale, such goods are his property for the purposes of the Insolvency Act, and an *interim* receiver can take possession of them as his property in insolvency proceedings against him. (35 W.R. 2, *Rel. upon.*) But where the circumstances clearly indicate that the commission agent is not the "reputed owner" of the goods, his principal is entitled to a restoration of the goods. (27 W.R. 385, *R.*) The doctrine of reputed ownership implies that the owner has unconsciously allowed goods to remain in possession of the insolvent and so enabled him to get more credit in his business than he is entitled to. But where this is not the case,

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the goods will be restored to owner. *In re* MESSRS. KADIBHOY ISMAILJI LOTIA, **11 Ind. Cas. 14.**

(3)—*Ss.* 2, *sub-s.* 1, *cl.* (*g*), 47, 46, 16 (6), 13, 18—*High Court if may grant* interim *protection and appoint receiver pending appeal—Inherent jurisdiction—Civ. Pro. Code* (*Act* V *of* 1908), *s.* 151.—Where an appeal has been preferred against an order refusing the appellant's application to be declared an Insolvent, the High Court has power, in the exercise of its inherent jurisdiction as a Court of appeal, to make an *ad interim* order for protection of the appellant, and for the appointment of a receiver of his assets during the pendency of the appeal (3 A.L.J. 29, 3 C.L.J. 67, *R.*) As there appeared to be substantial points in controversy in the case, which required consideration, the High Court granted *ad interim* protection pending appeal to the appellant, and also appointed a receiver of his assets. ABDUL RAZAH v. BASIRUDDIN AHMED, **14 C.W.N. 586 =11 C.L.J. 435=6 Ind. Cas. 95.**

(4)—*S.* 3, *cl.* (1)—*Jurisdiction conferred on Small Cause Court after notice issued to objectors—Civil Procedure Code* (*Act* XIV *of* 1882), s. 360—*Notification conferring jurisdiction after repealing the section—Effect of.*—A petition in insolvency, addressed to a District Judge, was presented to a Judge of the Court of Small Causes, who ordered notices to be issued, and subsequently adjudicated the petitioner to be insolvent. The District Judge on appeal affirmed the order of the Judge of Small Cause Court. In neither Court was any plea as to jurisdiction taken. It was objected, before the High Court in revision, against the order adjudicating the petitioner insolvent, that, on the date on which the petition was presented to the Judge of Small Causes, no jurisdiction under s. 3, cl. (1) of the Insolvency Act III of 1907, had been conferred on him. Such jurisdiction was, however, conferred upon him a few days after the presentation of the petition, so that he possessed it on the date on which he directed notices to be issued and gave his final decision. Having regard to the very late stage of the case at which the objection was raised, and also to the fact that the petition was addressed to the District Judge who had jurisdiction, and that, at any moment after the jurisdiction had been conferred upon the Judge of Small Causes, the case could have been transferred to his Court, *held*, that the case had been properly entertained and decided by the Judge of Small Causes. DEBI PRASAD v. STANLEY RAY, **6 A.L.J. 483=2 Ind. Cas. 223.**

(5)—*Ss.* 3, 43, 46—*Bengal, N. W. P. and Assam Civil Courts Act* (XII *of* 1887), *ss.* 8, 20—*Additional District Judge, Jurisdiction of—Insolvency petition—Appeal.*—Where an additional Judge had, under s. 43 of the Provincial Insolvency Act, sentenced an applicant for insolvency to one month's simple imprisonment, the said officer having exercised the powers of a District Judge by virtue of an assignment of one of his functions by the latter officer under s. 8 of the Bengal N.W.P. and Assam Civil Courts Act, held that an appeal lay to the High Court, the Additional Judge not being, in this matter, subordinate to the District Court as contemplated in ss. 3 and 46 of the Insolvency Act. MAKHAN LAL v. SRI LAL, **9 A.L.J. 371=14 Ind. Cas. 162=34 A. 382.**

(5-*a*)—*S.* 4 (*c*)—*Fraudulent preference—Freedom of choice and free will*—On an application made by G, he was declared an insolvent. One of the creditors, T stated that another creditor M, had been given perference fraudulently and the lower Court ordered the amount paid to M to be made over to the receiver. It appeared that G used to supply certain provisions to a certain mess and was paid for them. On the complaint of certain creditors of his, especially M, it was arranged that the mess president should make payments directly to M out of the money due to G. Certain payments were thus made by the mess president to M about a month prior to the proceedings, and it was contended that it amounted to a fraudulent preference. *Held*, that the word 'preference' implied freedom of choice and a free will, and, in the present case, the power of payment had been taken out of the hands of the debtor and he had no choice in the matter, and there was no fraudulent preference within the meaning of s. 4 (*c*) of the Act. MAULA BAKHSH v. TEJA MAL, **11 A.L.J. 545.**

(6)—*Ss.* 4, 5, 6—*Matters to be decided by Court before order of adjudication—Ss.* 12, 14 *to* 16—*Procedure thereon—S.* 14—*Object is to obtain early information about the property and conduct of parties—The policy of the Act—Enquiry into the judgment-debtor's conduct and indebtedness not to be conducted at one and the same time.*—Where a petition is presented either by the debtor or a creditor, the Court has, under s. 15 of the Provincial Insolvency Act, to be satisfied with petitioner's right to present the petition. Ss. 4, 5, 6, lay down the matters to be decided by a Court before an order of adjudication is passed, and the further procedure is laid down in ss. 12 and 14 to 16 Matters of which strict proof is explicitly required by the Act are only those set out in s. 4 (1). The object of the provision is to obtain information, at as early a stage as possible, of the property and the whole conduct of the debtor in their relations to the insolvency proceedings. The policy of the Provincial Insolvency Act is not to enquire into the whole conduct of the judgment-debtor and the questions relating to his indebtedness at one and the same time. The matters to be decided at the time of adjudication are stated in the above sections, but besides those the Court can refuse to pass an order of adjudication on other grounds. Whether all the debts are real or not and whether property has been concealed or not are not questions that

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need be inquired into at the time of adjudication. BAVA JEER CHETTY v. BAVA RANGASAMI CHETTY, **2 M.W.N. 1911, 480=10 M.L.T. 433=22 M.L.J. 52=12 Ind. Cas. 618.** (15 C.W.N. 313, 32 A. 645, *R.*)

(7)—*Ss.* 4, 15—*Debtor's application for adjudication—Inability to pay debts, if must be proved.*—A debtor's application to be adjudicated an insolvent cannot be dismissed on the ground that he could not satisfy the Judge that he was unable to pay his debts. KALI KUMAR DAS v. GOPI KRISHNA RAY, **15 C.W.N. 990=12 Ind. Cas. 48.**

(7-*a*)—S. 5—*See* NO. 6, *supra.*

(8)—*Ss.* 5, 6, 13, 14, 15, 43, 44—*Petition in insolvency—Act of bad faith by petitioner—No ground for dismissing petition at preliminary stage—Distinction between Civ. Pro. Code,* 1882 *and Provincial Insolvency Act, pointed out.*—The question whether a petitioner in insolvency has or has not committed acts of bad faith is to be determined by the Court, not at the preliminary stage when the order of adjudication has to be made under ss. 15 and 16 of the Provincial Insolvency Act, but at the final stage when application is made for an order of discharge under s. 44. Therefore, a petition in insolvency cannot be dismissed under s. 15 of the Act on the ground that the conduct of the petitioner has not been satisfactory and that he has made a false statement in his petition, inasmuch as he has mentioned the name of a certain person as creditor in whose favour he had created a fictitious debt. The fundamental distinction between the provisions of the Civ. Pro. Code, 1882, and the Insolvency Act of 1907 is this: whereas, under the former law, before the petitioner could be adjudged an insolvent, his conduct in respect of his creditors and in relation to the disposal of his own properties had to be taken into account, under the latter Act, the order of adjudication follows almost as a matter of course upon the presentation of the insolvency application, and the question of the conduct of the petitioner becomes material only when he asks for an order of discharge. UDAI CHAND MAITY v. RAM KUMAR KHARA, **7 Ind. Cas. 394=12 C.L.J. 400.**

(9)—S. 6—*See* NOS. 6, 8, *supra*, and NO. 28, *infra.*

(9-*a*)—*S.* 6—'*Or*'—*Meaning — Judgment-debtor arrested or imprisoned—Application for insolvency—Place of arrest—Presentation not restricted to Court having jurisdiction over.*—Where a debtor has been arrested or imprisoned, he is not limited in the presentation of his insolvency petition to a Court having jurisdiction in the local area where he is in custody. The word 'or' in s. 6 of the Provincial Insolvency Act is used in the sense of giving an alternative choice. CHANSHAMDAS NEBHANDAS v. MUSSAMMAT VISHINDEVI, **5 S.L.R. 259=15 Ind. Cas. 830.**

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(10)—*Ss.* 6, 15—*Arrest in execution — Right to present application—Accounts not kept regularly—Relevancy of accounts to the order of adjudication—Right to be adjudged insolvent.*—The right of a debtor, who has been arrested in execution of decrees, to present a petition for insolvency, arises not under s. 6 (3) (*a*) but under s 6 (3) (*b*) by reason of his arrest in execution. The fact that an applicant asking to be adjudged an insolvent has not kept his accounts regularly is a matter which may be considered when he applies for his discharge. It is not relevant to the order of his adjudication. The words "for any other sufficient reason" in s. 15 (1) of the Provincial Insolvency Act only apply to the case of an insolvency petition presented by a creditor. (32 A. 645, 7 A.L.J. 835, 7 Ind. Cas. 39, *App. & F.*) When the Court finds that a person has a right to present a petition under s. (6) (3) (*b*), that he has committed an act of insolvency under s. 4 (*f*) in presenting it, and that he is unable to pay his debts, an order of adjudication should be made. *In the matter of* VITHALDAS KALIDAS, **9 Ind. Cas. 632.**

(11)—*Ss.* 6, 15, 16, 44 — *Petition of insolvency—Preliminary stage—Bad faith, act of—Dismissal of petition—Appeal—Party — Non-opposing creditor not to be made respondent—Right to apply in insolvency.*—It is not necessary for an appellant, who was a petitioner in insolvency, to add, as a party respondent to his appeal, a creditor mentioned in his petition, who did not appear in the Court below to oppose the application. At the preliminary stage contemplated by s. 15 of the Provincial Insolvency Act, it is not open to the Court to dismiss the petition on the ground that the petitioner had improperly alienated a portion of his property in lieu of dower. The question of bad faith or improper dealing with the property of an insolvent arises for consideration at a much latter stage of the proceedings. If the debtor applies for an order of discharge, it becomes obligatory upon the Court under s. 44 of the Provincial Insolvency Act to investigate whether or not he has been guilty of acts of bad faith. The contingencies mentioned in sub-s (3) of s. 6 of the Act are to be taken in the alternative, and if any one of them happens, the debtor becomes entitled to present an insolvency petition. SHEIKH SAMIR-UD-DIN v. KADAR MOYEE DASSI, **7 Ind. Cas. 691=12 C.L.J. 445.** (7 Ind. Cas. 394, 7 Ind. Cas. 39, 7 A.L.J. 835; *F.* 7 A.L.J. 602, 6 Ind. Cas. 870, *Not F.*)

(12)—*Ss.* 6 (1), 15, 16, 44, 45—*Insolvency petition, presentation, and admission of—Order of adjudication—Order of discharge—Fraud or other acts of bad faith by debtor, consideration of.*—*Held*, that, where an insolvency petition has been put before a Court by a debtor under Act III of 1907, the Court is entitled to dismiss the application, only when it is satisfied that the debtor had no right to present the petition under s. 6 (3) of the Act. *Held*, further, that the provisions about proof of the service of

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notice on the debtor, or of the alleged act of insolvency, or of the debtor's ability to pay his debts or of any other sufficient cause contained in s. 15 (1) of Act III of 1907, refer to cases where the insolvency petition is put in by the creditor. *Held*, also that, where a debtor has a right to present the petition, the Court is bound under s. 16 (1) to make an order of adjudication. Questions relating to alleged bad faith or fraud, etc., on the part of the debtor arise for decision only when the debtor applies for an order of discharge. HAMID ALI v. M. IHTISHAM ALI, **13 O.C. 94=6 Ind. Cas. 748.**

(13)—*S.* 6, *sub-s.* (2)—*Residence—Acts of bad faith.*—Under s. 6, sub-s. (2) of the Act, it is not necessary for the petitioner to reside for a long time at a place within the jurisdiction of the Court. The procedure laid down in the Provincial Insolvency Act is materially different from that laid down in the Code of Civil Procedure of 1882. ABDUL RAZAK v. BASIRUDDIN AHMED, **15 C.L.J. 457=14 Ind. Cas. 980=17 C.W.N. 405.**

(14)—*S.* 6, *sub-s.* 3 *and s.* 15 — *Debtor's petition—Grounds of refusal—Right to present when exists.*—The only ground recognised by s. 15, Provincial Insolvency Act, 1907, on which a debtor's application can be refused, is that the Court is not satisfied with the proof of the right to present the petition; and his right to present the petition depends on his being able to show the existence of one of the three alternative conditions prescribed by sub-s. 3 of s. 6 of the Act. DAULAT v. SAHEBLAL, **6 N.L.R. 145.**

(15)—*Ss.* 6 (3), 15 (1)—*Bad faith or misconduct on the petitioner's part—Prospects of paying the money borrowed.*—Where a large portion of the debts incurred by an insolvent was spent in litigation undertaken by his wife to recover a share of the estate left by her former husband, and where the creditors lent their money with their eyes open, expecting indemnification at the end of the litigation: *Held*, under the circumstances, that it could not be said the petitioner had no reasonable prospect of being able to re-pay the loans. *Quære*:—In opposing an insolvent's petition for adjudication under s. 16, is it open to a creditor to show merely that the debtor has not proved his right to petition under s. 6 (3) or can he allege and prove bad faith or misconduct to prevent the Court from granting such adjudication? V. C. T. A. R. SUBBIAH PILLAI v. ABDUL RASHID, **9 Ind. Cas. 462.**

(16)—*Ss.* 10, 16 — *Death of the insolvent, effect of—Order of adjudication—Vesting of assets—Distribution of dividends*—The death of an insolvent does not exempt the assets in the hands of a Receiver from distribution. By virtue of an order of adjudication, the whole property of the insolvent, *viz*, that which is in existence at the date of the order, and that which might be acquired subsequently, vests in the Receiver, and this transfer of interest to the receiver is not affected by the death of the insolvent. The legal aspect of the matter is that the natural existence of the insolvent is, for the purpose of dealing with and realizing his estate artificially continued in the Official Assignee, who can after such death deal with the estate as he could have dealt with, while the insolvent was alive. *In re* KHOJA IBRAHIM LALJI, **9 Ind. Cas. 633.** (7 B. 438, *F.*)

(17)—*S.* 13—*Insolvency—Execution of decree—Judgment-debtor in jail—Power of Insolvency Court to release him.*—When a judgment-debtor is arrested in execution of a decree and confined in jail, the Insolvency Court has no jurisdiction under s. 13, Act III of 1907, to order his release. E. D. SASSOON & CO., BOMBAY v. KISHEN CHAND, **30 P.L.R. 1910.** (8 M. 503, *R.*)

(18)—S. 13—*See* NOS. 2, 3, 8, *supra.*

(19)—*Ss.* 13 *and* 16—*Application for insolvency presented from jail—Effect of—Release of prisoner before adjudication.*—If a prisoner under arrest omits to express his intention to apply to be declared an insolvent and is then committed to prison under s. 55 of the Code of Civil Procedure, he cannot obtain his release from prison upon the mere admission of his subsequent petition of insolvency under s 13 of the Provincial Insolvency Act but, only upon the order or adjudication thereon under s. 16 (2) (*b*) of the Act. *In re* HAJI UMAR, **4 S.L.R. 47=7 Ind. Cas. 606.**

(20)—*S.* 14—*Examination of debtor necessary, even if witnesses are or are not present.*—Whether the witnesses are or are not present, it is incumbent on the Court to examine a debtor, having regard to the provisions of s. 14, cls. (2) and (3) of the Provincial Insolvency Act. After the Court has examined the debtor in the presence of the creditor, then it is for the Court to consider whether sufficient cause has been shown to grant time to the debtor to produce further evidence. BANARSI DAS v. BANARSI DAS, **9 A.L.J. 233=14 Ind. Cas. 416.**

(21)—S. 14—*See* NO. 8, *supra.*

(22)—*Ss.* 14 (3), 15 (1)—*Creditor alleging solvency of petitioner—Inquiry by Court—Sufficient cause for dismissing petition.*—If a creditor alleges that his debtor's petition is a mere sham and that the petitioner has ample means wherewith to pay his debts, the Court should allow the creditor to substantiate his allegations, and if he succeed in doing so, this would be "sufficient cause" to justify dismissal of the petition. What would be "sufficient cause" must depend on the circumstances of each case. P.L.T.A.L. ARUNACHELAM CHETTY v. MAUNG PO THIN, **9 Ind. Cas. 461.**

(23)—*S.* 15—*Proof of arrest in execution of money-decree—Courts bound to order adjudication—Acts of bad faith—When to be gone into.*

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Where a person states that he had been arrested in execution of a money-decree, the Judge is bound to make an order of adjudication and cannot go into questions concerning his bad faith, which could properly arise only when he applies for discharge. NGA NAIN v. MI BU, **U.B.R. 1911, 1st Quarter, 86=11 Ind. Cas. 745.** (15 C.W.N. 213, 12 C.L.J. 456, 32 A. 547, 645, *R.*)

(24)—*S.* 15—*Order of adjudication—Whether bars consideration of the question of final discharge.*—An order of adjudication under the Provincial Insolvency Act is no bar to a consideration of the question, whether the petitioner in insolvency should have his final discharge. GOPALAKRISTNA CHETTIAR v. MUTHUSAMI CHETTIAR, **12 Ind. Cas. 403.** (32 A. 645, 7 Ind. Cas. 39, 7 A.L.J. 835, 12 C. 400, 7 Ind. Cas. 394, 12 C.L.J. 445, 7 Ind. Cas. 691, *R.*)

(25)—*S.* 15—*Mother of the applicant possessed of property to which applicant is sole heir—Whether sufficient ground for dismissing the application.*—The fact that a person who applies to be adjudged an insolvent is the only son of his mother, who is possessed of a large property, is not a sufficient reason to dismiss the application. KHADIM HUSSAIN v. BABU BISHEN SINGH, **9 Ind. Cas. 633.**

(25-*a*)—*S.* 15—*Power to dismiss—Judge's duty—Adjudication, object of—Assets, distribution of.*—A Judge, before he dismisses an insolvency petition under s. 15, should indicate one of the grounds there set forth as that on which he purports to act. An adjudication ensures the distribution of the assets, if there are any, according to the equitable arrangement for which provision is made in the Act. If there are considerable assets, it would be most disadvantageous to the general body of creditors that there should not be an adjudication. PREONATH ROY v. NIBARAN CHANDRA SARKAR, **15 C.L.J. 631=15 Ind. Cas. 870.**

(25-*b*)—*S.* 15—*Debtor's application for insolvency not made* bona fide—*Adjudication, if may be refused.*—*Quære*:—Whether, if, upon the facts before the Court, it is clear to the Judge that the debtor applying for insolvency is not an insolvent, he is bound to adjudicate him an insolvent. SHEIKH GOLAM RAHMAN v. SHAIKH WAHED ALI, **16 C.W.N. 853=16 Ind. Cas. 470.** (32 A. 645, 15 C.W.N. 213, 15 C.W.N. 244, 15 C.W.N. 990, *R.*)

(26)—*S.* 15 (1)—*Grounds for dismissing petition—Acts of bad faith—Whether section exhaustive—Any sufficient cause.*—The last words of s. 15, sub-s. (1), refer only to cases of insolvency petition presented by a creditor. The words "that for any sufficient cause" are governed by the words "satisfied by the debtor"—that is to say, the cause referred to is cause to be shown by the debtor. Under the Insolvency Act of 1907, transfer of property by the debtor with intent to defraud his creditors, or reckless contracting of debts or giving unfair preference to any of his creditors or committing any other act of bad faith, are grounds for refusing an order of discharge, but not grounds for refusing to make an order of adjudication. Where, therefore, a petitioner for declaration of insolvency feigned ignorance about the existence of his account books and prevaricated about other matters, *held* that his petition could not be dismissed on these grounds, the object of the Legislature, by enacting the Insolvency Act, being to make it easier to obtain an order of adjudication. GIRWARDHARI v. JAI NARAIN, **7 A.L.J. 835=7 Ind. Cas. 39=32 A. 645.** [*F.*, 7 Ind. Cas. 691=12 C.L.J. 445.]

(27)—*S.* 15 (1)—"*Any other sufficient cause*"—*Applicant "able to pay his debts"—Court's power to dismiss petition.*—S. 15 of the Insolvency Act confers very wide powers upon Court, and authorizes it for "any sufficient cause" to dismiss the petition for a declaration of insolvency. The fact that the applicant is able to pay off his debts is a sufficient cause for the dismissal of his petition. RAM NIHORA MISIR v. RAM RUP MISIR, **4 Ind. Cas. 408.**

(27-*a*)—*S.* 15 (1)—*Grounds for dismissing petitions for insolvency.*—A person, who petitions to be declared insolvent, not unfrequently at some stage or another of the proceedings, endeavours to keep back a portion of his property or pretends that property which belongs to him does not belong to him. Action of this kind on the part of a debtor or the suspicion or belief that such action is contemplated by a debtor is not a good ground for dismissing a debtor's petition in insolvency. Such cases are distinguished from the cases in which the petitions are dismissed as having been presented for inequitable or collateral purposes. MUHAMMAD HUSAIN v. ILAHI BAKHSH, **10 A.L.J. 188=17 Ind. Cas. 92.** (32 A. 645, 15 C.W.N. 990, *R.*)

(27-*b*)—*S.* 15 (1)—*The words 'that for any sufficient cause' in sub-s.* 1, *whether governed by the words 'satisfied by the debtor'—Abuse of process of Court—Power of Court to dismiss petition on the ground of—What constitutes 'abuse of process of Court.'—Held*, that the words 'that for any sufficient cause' in sub-s. (1) of s. 15 of the Provincial Insolvency Act, are governed by the words 'satisfied by the debtor' in the same sub-section. (32 A. 547, 4 Bur. L. R. 17, *Diss.*; 32 A. 645, 15 C.W.N. 212, *R.*) A Court exercising jurisdiction under the Provincial Insolvency Act has power to reject or dismiss a petition by a debtor for his adjudication as an insolvent, if it considers that such petition is an abuse of the process of the Court. It is impossible to lay down any rule or general statement as to what is an abuse of process of Court. Nothing short of obvious fraud on the part of a debtor would render him liable to have his petition dismissed or rejected on the ground of its being an abuse of the process of Court. TIN VA v. SUBYA PILLAY, **6 L.B.R. 146, F.B.=18 Ind. Cas. 500.**

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(27-c)—S. 15—*See* NOS. 7, 8, 10, 11, 12, 14, 15, 22, *supra.*

(28)—*Ss.* 15, 6 (3) (*a*) (*b*) (*c*)—"*For any other sufficient reason*" *in s.* 15—*Creditor's petition —Acts of bad faith—When to be considered—Courts when bound to order adjudication.*—The words, "for any other sufficient reason" in s. 15, Act III of 1907, have reference to petitions presented by creditors. The Court is bound to make an order of adjudication, if the application is presented by the debtor and the Court is satisfied that he is insolvent and of the matters referred to in s. 6 (3) (*a*) (*b*) and (*c*). (15 C.W.N. 213, *Rel on.*; 32 A. 547, *Not appl.*; 21 B. 297, *R.*) The question whether a debtor has or has not committed acts of bad faith has to be determined by the Court, not at the preliminary stage when the order of adjudication has to be made, but at the final stage when, after the order of adjudication, an application is made for the order of discharge. MI EU v. NGA PO SAUNGH, **U.B.R. 1911, 1st Quarter, 84.**

(29)—*Ss.* 15, 16, *cl.* (2), (*b*), 36—*Adjudicating order—Opposition on the ground of fraudulent transfer—Grant of order—Remedies open to creditor.*—Where, in an appeal against an adjudicating order, it was contended that the result of the order was to prevent appellants from realizing their debt out of certain immoveable properties which, it was alleged, the insolvent fraudulently transferred to a relation a few days after his failure, and that the order should be set aside: *Held*, that the contention could not prevail. There is nothing in s. 36, Provincial Insolvency Act, which prevents an Official Receiver from seeking to recover any immoveable property which there is reason to suppose has been collusively transferred for the sole purpose of protecting it on behalf of the insolvent against his creditors. Under s. 16 (2) (*b*) of the Act, it is still open to the creditors to apply to the Court exercising jurisdiction in the matter for leave to commence a suit against the insolvent. ISMAILJI MOOSAJI v. MANGHANMAL WATOOMAL, **5 S. L.R. 80=12 Ind. Cas. 622.**

(29-*a*)—*Ss* 15, 46, 47—*Privy Council, leave to appeal to—Letters Patent, s.* 39—*Civ. Pro. Code*, 1908, *s.* 109—*Order of District Judge refusing to adjudicate debtor insolvent—Appeal to High Court, summary dismissal of, without considering evidence under O.* XLI, *r.* 11, *Civ. Pro. Code—Application for leave to appeal to Privy Council—Substantial question of law.*—By the provisions of ss. 46 and 47 of the Provincial Insolvency Act, it was not intended to interfere with any right of appeal to the Privy Council that might otherwise exist. Where a District Judge rejected a debtor's application for adjudication as an insolvent on the ground that there was an abuse by him of the process of the Court, and an appeal to the High Court was dismissed under O. XLI, r. 11, by a Divisional Bench without considering the evidence but upon a consideration of the judgment only of the District Judge. *Held*, that there was no concurrent finding of the Courts that there was an abuse of the process of the Court. That the question whether it was within the competence of the District Judge to dismiss the application on the ground stated, having regard to the provisions of s. 15 of the Insolvency Act, was a substantial question of law, and the case was one which ought to be certified as a fit one for appeal to the Privy Council under s. 109 (*c*), Civ. Pro. Code. CHATTRAPUT DUGER v. KHARAJ SINGH LUCHMIRAM, **17 C W.N. 752=17 C.L.J. 547 =40 C. 685.**

(30)—*S.* 16—*Insolvency of defendant—Receiver a party—Procedure—English precedents when to be referred to*—When the sole defendant to a suit for the recovery of a debt is adjudicated an insolvent, the proper course is to stay the suit and leave the plaintiff to prove his debt in the insolvency proceedings. When there is an action against two defendants and one becomes a bankrupt, it being a claim against both, the one who does not become bankrupt cannot be made liable unless the action goes on and the trustee in bankruptcy may be made a party. Judgment is not given against the trustee that he pay out of the estate, but judgment being against the other defendant, the plaintiff is at liberty to prove in the bankruptcy the amount of the claim established, and there the trustee is a party because it is necessary both as against the bankrupt's estate and the other defendant that the action should go on. Many of the provisions of the Indian Insolvent Act including s. 16 are taken from the English Bankruptcy Act, and where the provisions correspond, the decisions of the English Courts may properly be referred to as guides to the construction of the Indian Act. A decree under O. XXXIV, r. 6, is plainly a remedy within the meaning of s. 16 of the Indian Insolvency Act. MAMRAJ v. BRIJ LAL, **8 A.L.J. 1241=12 Ind. Cas. 587.**

(31)—*S.* 16—*Secured creditor—Landlord—Suit for arrears of rent--Declaration of insolvency in force at date of suit.*—A suit for arrears of rent against a tenant declared an insolvent and as against whom such declaration was in full force and effect at the date of the suit is not maintainable. So far as an ordinary suit for rent is concerned, a landlord is in exactly the same position as any other creditor, but he will have the right to distrain, notwithstanding the declaration of insolvency. RAGHUBIR SINGH v. RAM CHANDAR, **8 A.L.J. 1287=12 Ind. Cas. 927=34 A. 121.**

(31-*a*)--*S.* 16—*Concealment of property or the debtor-applicant's inability to satisfy the Court as regards inability to pay his debts—Not sufficient grounds for refusing adjudication.*—The facts that an applicant for insolvency has failed to satisfy the Judge that he is unable to pay his debts and that he has concealed some of his

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properties are not sufficient for the rejection of his application. BIDHATA DIN v. JAGANNATH, **9 A.L.J. 699=14 Ind. Cas. 570.**

(32)—*S.* 16 (2)—*Creditor's right to sue the surety of his debtor—Rights of surety.*—S. 16 (2) of the Act does not preclude a creditor from suing the surety of his debtor, even if the creditor deliberately refrained from proving his debt in the insolvency proceedings. Even the contingent liability of a surety who has not been called upon to pay, or has not in fact paid, forms a debt provable in the bankruptcy of the principal debtor. GOPAL v. GANPAT, **7 N.L.R. 122=11 Ind. Cas. 911.**

(33)—*S.* 16 (2)—*Arrest—Judgment-debtor—Competency of executing Court to imprison a judgment-debtor after he has applied to be declared insolvent—S.* 55 (3) *and* (4) *of Act* V *of* 1908.—*Held*, that, the pendency of insolvency proceedings neither takes away from the executing Court the power of committing the judgment-debtor to civil jail, nor is he entitled to get time to apply to be declared insolvent. The object of the provisions in cl. (3) of s. 55, Civ. Pro. Code, 1908, is to give the debtor time to apply, but if he has already done so and proceedings are going on, there would be no sense in giving further time. KISHAN CHAND v. E. D. SASSOON & CO., **83 P.W.R. 1910=7 Ind. Cas. 351=81 P.L.R. 1910.**

(34)—*S.* 16 (2)—*Release of judgment-debtor from prison — Whether can be ordered prior to adjudication—Creditor's right.*—Under s. 16, Provincial Insolvency Act, 1907, the Insolvency Court has no jurisdiction to direct the release, prior to an order of adjudication, of a judgment debtor who has been imprisoned, rightly or wrongly, in execution of decree by an executing Court. Prior to adjudication, the creditor's right against the person and property of the judgment-debtor remains unaffected. KISHEN CHAND v. E. D. SASSON & CO, **95 P R. 1910 =133 P.W.R. 1910=8 Ind. Cas. 319=190 P. L.R. 1910.** (8 M. 503, *R.*)

(35)—*S.* 16 (3)—'*Goods*'—*Heavy oil press—Whether covered by the term.*—A heavy oil press, worked by a kerosine oil engine, whose shafts and pulleys are bolted on to the posts of the house, though capable of removal by unscrewing the bolts, does not fall within the scope of the word 'goods' in s. 16 (3) of the Act. ON PE v. KUN TI, **6 L.B.R. 44=14 Ind. Cas. 447.** (3 Bom. L. R. 426, *F.*)

(35-*a*)—*S.* 16 (3) (5) — *Doctrine of reputed ownership—Applicability—Future goods—Contract to assign present goods and future goods in the place of present goods after sale—Equitable mortgage.*—Under the Provincial Insolvency Act, a secured creditor cannot lose his security under the doctrine of reputed ownership. (*Vide* s. 16, cls. 3 and 5.) Where, according to the terms of a deed, there was an assignment of present goods as a security for Rs. 9,000 and then a covenant to always keep in the shop tock to the extent of Rs. 9,000 re-placing sold

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goods by goods of equal value. *Held* (i) that the future goods were in substitution of the previously existing goods and that a covenant to assign them was clearly implied and (ii) that the case fell within the rule of *Holroyd* v. *Marshall* (10 H.L.R. 191), and that the contract to assign having become a complete assignment, the transaction amounted to an equitable mortgage and not a mere license. WYSE v. CHOWKSEY, **6 S L.R. 97.** (34 L.J. Ex. 212, 20 Ch. D. 758, 13 A.C. 523, L.R. 7 Q.B. 527, *R.*)

(36)—*S.* 16 (4)—*Property—Whether includes personal earnings—Earnings after adjudication and before discharge—Court's power to make order.*—The word 'property" in s. 16 (4), Act III of 1907, does not exclude personal earnings, over and above what is necessary for the debtor's adequate support. (19 B. 232, *R.*) The Court has power to make an order as to earnings after adjudication but before discharge. JAMNADAS v. VINAYAK, **7 N L.R. 19.**

(37)—S. 16—*See* NOS. 2, 3, 11, 12, 16, 19, 29, *supra.*

(37-*a*)—*Ss.* 16, *cls.* (2) *&* 34 (1)—*Execution of decree against the insolvent during pendency of insolvency proceedings — Exclusive right of the decree-holder to property attached and to money attached and sold before order of adjudication—Right of the decree-holder.*—S held a decree against M. Proceedings to have M declared insolvent were pending from February 21st 1911, to February 1st, 1912. S had notice of these proceedings. While the insolvency proceedings were going on, S. executed the decree and attached M's immoveable property which he put up to sale in January, 1912. He also attached in November, 1911, a sum of money which had been deposited in Court to the credit of M. The sale-proceeds were also deposited in Court. *Held*, (1) that S was entitled to get the sale-proceeds which were assets realised in the course of execution within the meaning of s. 34 of the Provincial Insolvency Act and were not the property of the judgment-debtor which could vest in the Receiver; (2) that the money attached in November 1911, remained the property of the insolvent, and S was not entitled to get it in preference to the Receiver. SRI CHAND v. MURARI LAL, **10 A.L.J. 252= 34 A. 628=16 Ind. Cas. 183.**

(38)—*S.* 16, *cl.* 6 *and ss.* 36, 46 (2) *and* (3)—*S.* 36 *governed by s.* 16, *cl.* 6—*Two years calculation from date of presentation of insolvency petition — Refusal to act under s.* 36 — *Not appealable under s.* 46 (2)—*Appealability under s.* 46, *cl.* 3 — *Transfer made less than two years before petition—Transferee not party to insolvency proceedings — Power of Court to interfere.*—S. 16, cl. 6, Provincial Insolvency Act, 1907, is applicable to s. 36 of the said Act, and the two years mentioned in s. 36 mean the two years before the date of the presentation of the insolvency petition. It is doubtful whether a refusal to act under s. 36 can be

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called an order under s. 36, within the meaning of s. 46 (2). The order, therefore, is not appealable as a matter of right, but may be appealed against under s. 46, cl. 3. A transfer made less than two years before the insolvency petition, *prima facie*, comes within the purview of s. 36, and there is no warrant for the view that, because the transferee is not a party to the insolvency proceedings, the Court should not enquire whether the transfer is one which should be avoided or annulled or not, or that the creditors should be referred to a suit for a declaration that the transfer is not binding upon them. BHAGWANT v. MUNIM KHAN, **6 N.L.R. 146.**

(39)—S. 18—*See* NO. 3, *supra.*

(39-*a*)—*Ss.* 18, 19, 20, 22 *and* 52—*Official Receiver—Order dismissing insolvency petition —Appeal against— Whether lies to the High Court—District Court, proper appellate forum —High Court—Power to treat appeal as revision —Refusal to exercise—Powers of Official Receiver—Same as those of District Court.—Held* that an appeal does not lie against an order passed by the Official Receiver appointed under the Provincial Insolvency Act, directly to the High Court. An appeal lies to the District Court under s. 22, Provincial Insolvency Act, against an order passed by the Official Receiver appointed under that Act. The right of appeal under s. 22 is not confined to orders comprised in ss. 18, 19 and 20, but extends to all orders of the Official Receiver. Cl. (2) of s. 52 also shows that the appellate power given to the Court extends to all orders of the Receiver. *Held*, also, that an appeal presented to the High Court directly cannot be treated as a petition for revision, because there was other adequate remedy open to the appellant. When empowered by the High Court under s. 52 of the Act, an Official Receiver has the same powers as the District Court, as regards the dismissal of petitions and adjudications of insolvency. CHIDAMBARAM CHETTY v. NAGAPPA CHETTY, **24 M.L.J. 73=16 Ind. Cas. 820.**

(39-*b*)—S. 19—*See* NO. 39-*a*, *supra.*

(39-*c*)—*S.* 20—*Receiver entering into arrangement without leave of the Court—Sale by officers of Court—Contract Act not applicable.* —The purchaser of property belonging to an insolvent cannot impugn the sale on the ground that the Receiver, who sold the property, entered into an arrangement with the purchaser for deferred payment of the purchase money without the leave of the Court. The Contract Act has no application to sales by officers of Court. SHWE WA v. SULLIVAN, **15 Ind. Cas. 368.** (5 L.B.R. 25, 6 A.L.J. 34, 13 C.W.N. 249, 5 M.L.T. 126, 9 C.L.J. 165, 11 Bom. L.R. 227, 36 C. 323, 19 M.L.J. 115, 1 Ind. Cas. 122, 36 I.A. 32, *R.*)

(39-*d*)—S. 20—*See* NO. 39-*a*, *supra.*

(39-*e*)—S. 22—*See* NO. 39-*a*, *supra.*

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(39-*f*)—*Ss.* 22, 46 *and* 52 (2)—*Limitation Act* (1908), *s.* 5—*Appeal to Court against act of receiver—No extension of time allowed—Appeal and review of judgment—Application against an act of receiver.*—S. 5 of the Limitation Act allows an extension of time only in cases of appeals, or applications for a review of judgment or for leave to appeal or any other application to which that section might be made applicable by any enactment or rule for the time being in force, and the application mentioned in s. 22 of the Provincial Insolvency Act is not such an application nor is it an appeal in the strict sense of the term. Time cannot, therefore, be extended for making an application to the Court against an act of the receiver, even when there is a sufficient cause for the delay. THAKUR PRASAD v. PUNNO LAL, **11 A.L.J. 603.** (34 A. 496, *D.*)

(39-*g*)—S. 24—*See* NO. 45-*a*, *infra.*

(40)—*Ss.* 24, 25, 27—*Application for approval of composition, before adjudication—Premature.* —Where, after the filing of an insolvency petition and before the order of adjudication, the debtors having arrived at a settlement with the creditors, a majority of the creditors signed a composition-deed vesting the whole of the estate of the debtors in trustees empowered to liquidate the debts and providing for the *ad interim* stay of the petition, and sought for the approval of Court under s. 27 of Act III of 1907. *Held*, that the application was premature, because the approval of Court is made dependent on the acceptance of the proposals by a majority in number and three-fourth in value of the creditors whose debts are proved, which can only mean proved after adjudication under ss. 24 and 25 *Re application of* ASSOMAL VERSIMAL, **4 S.L.R. 222.**

(41)—*Ss.* 24 *and* 26—*Application by a creditor to have his name entered in the schedule of creditors—Right of the scheduled creditors to make objections—Revision.*—Creditors, whose names are already in the schedule, are entitled to be heard, before the debt of a creditor, who comes in at the last minute under s. 24 (3) of the Act, is entered in the schedule. THE ALLAHABAD BANK, LIMITED, CAWNPORE v. MURLI DHAR AND OTHERS, **9 A.L.J. 577=34 A. 442=14 Ind. Cas. 589.**

(41-*a*)—*Ss.* 24, 33 *to* 39, 44 (2) (*c*) *and* 45 (2) —*Insolvent — Creditor holding two claims— Proof of one claim—Intention to deprive insolvent of benefits of the Act—Power of Court to refuse rateable distribution—Absence of such power.*—Where a creditor, holding two claims against an insolvent, proves only one of them and reserves the other for settlement after the discharge of the insolvent, with the result that the insolvent is deprived of the benefits intended to be given to him by the Act, and the lower Court excluded the creditor so far as concerned his decree for the proved item from the benefits of the conditions imposed on the discharge of the insolvent under s. 44 (2) (*c*):

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Held that it was not open to the Court so to penalise the creditor in view of the provisions for equal division of assets contained in ss. 33 to 39 of the Act. DESHMANAY v. TAYLOR, **6 S.L.R. 163.**

(41-*b*)—*Ss.* 24, 36—*Dower-debt—Transfer by a Mahomedan insolvent to his wife in lieu of dower debt—Proceeding to set it aside—The amount of dower-debt claimed, not proved—Application by wife to be entered in the schedule of creditors—She can prove true amount of dower.* —Within 2 years of his application for insolvency, the insolvent had made a transfer in favour of his wife ostensibly for Rs. 25,000, in lieu of her dower-debt. The receiver applied to have the transfer set aside, and in course of that proceeding it was held that the dower-debt of Rs. 25,000 was not proved. The wife then applied to be entered in the schedule of creditors claiming Rs. 25,000 as her dower-debt. *Held*, that it was not open to her to prove that her dower was Rs. 25,000, but it was open to her to prove the true amount due to her. UMRAO BEGAM v. AHMAD ALI KHAN, **11 A.L.J. 614.**

(42)—S. 25—*See* NO. 40, *supra.*

(43)—S. 26—*See* NO. 41, *supra.*

(44)—*S.* 27—*Not applicable to the Punjab Laws Act*, IV *of* 1872, *s.* 28—*General Clauses Act* (X *of* 1897), *s.* 6, *cls.* (*c*), (*d*) *and* (*e*).—*Held* that, as the provisions of s. 27 of the Punjab Laws Act, 1872, under which the Court was bound to give effect to a composition, is materially different from s. 28 of the Provincial Insolvency Act, 1907, under which the Court can impose conditions before accepting such a composition, and as the latter Act makes important alterations in the substantive rights of the parties; orders in connection with a composition deed, filed *before* Act III of 1907 came into force, should be made under the old law. (See s. 6 of the General Clauses Act, 1897.) SETH RADHA KISHEN v. BINJ RAJ AND OTHERS, **12 P.R. 1910=5 Ind. Cas. 806=162 P.L.R. 1910.** (11 P.R. 1910, *F.*)

(45)—S. 27—*See* NO. 40, *supra.*

(45-*a*)—*Ss.* 28 (2) 24 (1)—*Forward contracts —Claims under—Provable as contingent debts—Affidavits by several creditors—Duty of official receiver.*—The claims of the firms who held forward contracts were demands in the nature of unliquidated damages arising out of contract and the Act admits such claims (s. 28 (2).) They are also provable as contingent debts subject only to the proviso to s. 24 (1) (13 A.C. 358, *R.*) Where affidavits in proof of such debts are filed by different creditors, the Official Receiver, instead of accepting the affidavits of the other creditors without question, should have applied his mind to the matter and on the basis of these affidavits should have determined a uniform rate for the purpose of making a fair estimate or valuation of the contingent debts. *In re* MOSSAJI E. LOTIA, **5 S.L.R. 249=15 Ind. Cas. 825.** (25 Q.B.D. 529, *R.*)

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(45-*b*)—S. 33—*See* NO. 41-*a*, *supra.*

(46)—*S.* 34—*Execution of decree—Realization of assets by sale before adjudication of judgment-debtor as insolvent—Right of execution creditor to the money—Priority.*—Where an execution has proceeded further than attachment and the judgment creditor has realized assets by sale or otherwise, and the proceeds of the sale have been paid into Court before any adjudication order has been passed on the insolvency application of the judgment-debtor, the execution-creditor is entitled to the money in preference, to the *interim* receiver. BASARMAL AUATMAL v KHEMCHAND DARYANOMAL, **11 Ind. Cas. 433.** (29 B. 405, 7 Bom. L.R. 488. 17 Ch. D. 653, 50 L.J. Ch. D. 691, 44 L T. 691, 29 W.R. 575, *Rel. on.*)

(46-*a*)—*S.* 34—'*Realised,*' *meaning of.*—In order that money, attached in execution of a decree may be 'realized' under s. 34 of the Act, it must reach the Court which passed the decree and not when the Treasury officer retained it for transmission to the Court. DEBI PRASAD v. O.M. CHIENE, **9 A.L.J. 707=16 Ind.Cas. 84.**

(46-*b*)—S. 34—*See* NOS. 37-*a*, 41-*a*, 41-*b*, *supra.*

(46-*c*)—S. 35—*See* NO. 41-*a*, *supra.*

(47)—S. 36—*See* NOS. 29, 38, 41-*a*, *supra.*

(48)—*Ss.* 36, 46, *sub-s.* (2), 50—"*Aggrieved person,*" *who is—Appeal, right of—Transferee's right of appeal when transfer annulled—Jurisdiction of Court under s.* 36 *in respect of property situate outside jurisdiction — Auxiliary Court.*—An aggrieved person is a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something. Therefore, a person who claims to be the transferee of a property for valuable consideration and alleges that he has acquired title in good faith, is an aggrieved person within the meaning of sub-s. 2 of s. 46 of the Provincial Insolvency Act, if the Court has annulled the transfer made in his favour under s. 36, and is entitled to appeal from the order; and in such appeal the Receiver of the insolvent property is a proper party. A proceeding under s. 36 is not in the nature of a suit, and a Court can deal with the question of the validity of the transfer in respect of property situated outside its jurisdiction. A Court which has no jurisdiction cannot act as auxiliary to a Court which has jurisdiction. To make the provisions of s. 50 applicable, the Court in which the proceedings have been initiated as well as the Court which is invited to assist it, must both have jurisdiction in insolvency matters. Where a proceeding was instituted at Dacca under s. 36 in respect of property situated in Bhagalpore : *held*, that the Dacca Court should take action under s. 50 and

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transmit the petition to the Court at Bhagalpore to take evidence and transmit its finding to Dacca Court which will deal with the proceeding. LALIJI SAHAY SINGH v. ABDUL GANI, **7 Ind. Cas. 765=12 C.L.J. 452.**

(49)—*S.* 37—*Transfer to give preference—Mortgage in favour of a creditor discharging his debts—Debtor unable to pay his debts at the time—Annulment of transfer—Transfer of Property Act* (IV *of* 1882), *s.* 53.—A debtor, who was clearly unable to pay his debts, executed a mortgage of what appeared to be his whole valuable assets in favour of some of his creditors by which their own debts were discharged, some of these debts being on account of *hundis* which had not then become due. A portion of the mortgage-money was to be paid in cash to the debtor before the Sub-Registrar. Within three months from the date of the alienation, the other creditors applied that the debtor, be declared an insolvent Eventually, the debtor was declared an insolvent on this application: *Held* that the transfer was made with a view to give preference to some creditors over the others and should be annulled under s. 37 of the Insolvency Act. The terms of s. 53 of the Transfer of Property Act and the terms of s. 37 of the Insolvency Act are not identical. There is this material difference, that, in the case of transfers to be set aside under the provisions of s. 53 of the Transfer of Property Act actual fraud must be proved; whereas, under s. 37 of Insolvency Act, it is only necessary to show that a transfer has been made with a view to show preference to one creditor, to whom a debt may be validly due, over another creditor. BALMOKAND v. AYA SINGH, **18 P.W.R. 1912 =26 P.L.R. 1912=13 Ind. Cas. 68.**

(49-*a*)—S. 37—*See* NO. 41-*a*, *supra.*

(49-*b*)—S. 38—*See* NO 41-*a*, *supra.*

(49-*c*)—S. 39—*See* NO. 41-*a*, *supra.*

(50)—*S.* 43 *not applicable to proceedings under s.* 25, *the Punjab Laws Act*, IV *of* 1872 *—Alteration of law involving change in the nature of punishment—Acts of procedure—General Clauses Act*, X *of* 1897, *s.* 6, *cls.* (*c*), (*d*) *and* (*e*).—Where proceedings were begun against an insolvent under s. 25 of the Punjab Laws Act IV of 1872, under which certain acts of the insolvent rendered him liable to detention in the civil prison, and where, pending proceedings, the Punjab Laws Act was repealed by the Provincial Insolvency Act, III of 1907, and s. 25 of the former Act was substituted by s. 43 of the latter Act, under which the same acts of the insolvent rendered him liable to simple imprisonment in the criminal jail, *held*, that the proceedings should be continued, and punishment should be inflicted, if necessary, under the old Act, as if the new Act had not been passed. Whatever view may be taken of the general practice of the Courts to treat s. 6 of the General Clauses Act as not applying to Acts of Procedure, and whatever interpretation may be put upon he word 'procedure,' it is not capable of serious argument that a repealing Act, which substitutes imprisonment on the criminal side for the imprisonment on the civil side, is not calculated to affect the punishment. GANPAT RAI AND ANOTHER v. MALLA MAL AND ANOTHER, **11 P.R. 1910= 24 P.W.R. 1910=5 Ind. Cas. 804=163 P.L.R. 1910.** [*F.*, 12 P.R. 1910.]

(51)—*S.* 43 (*ii*)—*Imprisonment of insolvent—Offence committed on specific occasion—Evidence, nature of.*—An insolvent cannot be convicted for an offence under s. 43 of the Provincial Insolvency Act, unless he is shown by legal evidence to have committed an offence on some specific occasion. (17 C. 209, *R.*) An insolvent cannot be punished on the evidence given on behalf of the creditors when they were opposing his application for adjudication of insolvency, but that evidence ought to be recorded *de novo* after the charges are framed. NATHU MAL v. THE DISTRICT JUDGE OF BENARES, **7 A.L.J. 732=6 Ind. Cas. 870=32 A. 347.**

(52)—S. 43—*See* NOS. 5, 8, *supra.*

(53)—S. 44—*See* NOS. 8, 11, 12, 41-*a*, *supra.*

(54)—*S.* 44 (3)—*Points to be considered in granting discharge to insolvent—Reckless conduct of borrower—Effect.*—S. 44, sub-s. 3, is imperative and obliges the Court to refuse to grant an absolute order of discharge on proof of certain facts. A discharge cannot be granted, unless the insolvent satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible. If a person enters into trade possessing no property and relying entirely on making a profit in order to repay what he borrows for the trade and interest on that, as well as to provide for himself and the family, it cannot be said that he is not justly responsible for his debts, if a loss instead of a profit is the result of the trading. If a man borrows money, he is responsible for the payment of it, whether the man who lends him money is foolish or otherwise in lending it. No one is justified in incurring debts when he has no reasonable prospect of being able to discharge them. Under the Provincial Insolvency Act, the Court is enabled to confer on debtors the benefit of release from their debts, but this benefit was intended for the honest debtor, who by reason of misfortune is unable to pay his debts. It is not and could not have been intended for the reckless and careless borrower or the dishonest trader. The conduct of the seeker for the benefit of the Act, not the conduct of the creditors, is what has to be considered. R. M. P. KALLEAPPA CHETTY v. MAUNG KYWE, **5 L.B.R. 189=8 Ind. Cas. 950.**

(55)—S. 45—*See* NOS. 12, 41-*a*, *supra.*

(56)—*S.* 46—*Order made by District Court—Appeal—Divisional Court in the Punjab deemed to be the District Court—Punjab Government*

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Notification No. 889, *dated* 18*th November*, 1908.—By virtue of the Punjab Government Notification No. 889, dated 18th November 1908, for the purposes of s. 46 of the Provincial Insolvency Act, the Divisional Court in the Punjab is deemed to be the District Court. Therefore, an order made in the exercise of insolvency jurisdiction by an ordinary District Court is appealable to the Divisional Judge. The above notification mistakenly refers only to sub-s. (1) of s. 46, but it is intended to refer to and cover the whole section. MANSA v. NATHUMAL, **8 Ind. Cas. 485.**

(57)—*S.* 46—*Right of appeal taken away—Appeal allowed under s.* 353, *Civ. Pro. Code*, 1882—*Proceedings started prior to* 1907—*Whether right of appeal subsists—Remand order —Not set aside by review—Binding nature.*—Where certain insolvency proceedings commenced before the passing of the Provincial Insolvency Act, 1907, at a time when a right of appeal was given under s. 353, Civ. Pro. Code, 1882, and where such right was taken away subsequently by s. 46 of the Provincial Insolvency Act, 1907. *Held*, that, the right of appeal was not destroyed by the Provincial Insolvency Act, 1907. A right of appeal is not a mere matter of procedure and must be governed by law in force at the time when the proceedings in the original Court commenced. An order of remand, even though erroneous, continues to be in force until it is set aside by review or otherwise. SALIMMAMMA v. VALLI HUSSANABHA BEARI, **10 M.L T. 78.** (M.W.N. 1911, 143, 32 B. 337, *F.*)

8 (58)—*S.* 46 (4)—*Appeal—Exclusion of time for copy—Limitation Act* (IX *of* 1908), *ss.* 12, 29.—The Provincial Insolvency Act was intended to be and is, so far as matters governed by it are concerned, a complete Code in itself and retains its own limitation law. *Held*, that, in computing the period of ninety days prescribed for presenting an appeal to the High Court under the said Act, the time requisite for obtaining a copy of the order complained of cannot be excluded, and therefore an appeal from an order passed on 13th August 1909, and presented on 1st December 1909, is barred by time. JUGAL KISHORE v. GUR NARAIN, **8 A.L.J. 833.**

(59)—S. 46—*See* NOS. 29-*a*, 39-*f*, *supra*.

(60)—*Ss.* 46 (4), 47—*Appeal—Extension of time for copy—Limitation Act* (IX *of* 1908), *ss.* 12, 29—*Special law.*—The Provincial Insolvency Act, though it applies to a large part of British India, is a special law within the meaning of s. 29 of the Limitation Act, as it creates a special jurisdiction and deals with a very special branch of the law. The general provisions of the Limitation Act are applicable to suits and other proceedings under other Acts which prescribe special periods of limitation, but which are not intended to be complete Codes in themselves, and the words "affect or alter" relate only to the period prescribed and

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not to the way in which that period is to be computed. The general provisions of the Limitation Act are founded mainly upon equitable considerations which apply as much to periods of limitation prescribed by special Acts as to periods of limitation prescribed by the Limitation Act itself. The Provincial Insolvency Act is not a complete Code in itself. In order to ascertain the procedure to be followed in original, appellate, or revisional proceedings, one has to refer to the Code of Civil Procedure. The object of s. 47 appears to be to attract the provisions of the Code of Civil Procedure. There are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under those Acts and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed that such appeals are appeals under the Code of Civil Procedure, governed by Art. 156, sch. I of the Limitation Act, 1908. S. 46 (4) of the Insolvency Act does not seem to have been required, but whether required or not, it does not render the general provisions of the Limitation Act inapplicable. DROPADI v. HIRA LAL, **10 A.L.J. 3, F.B.=34 A. 496=16 Ind. Cas. 149.**

(61)—S. 47—*See* NOS. 3, 29-*a*, 60, *supra*.

(62)—S. 50—*See* NO. 48, *supra*.

(63)—S. 52—*See* NOS. 39-*a*, 39-*f*, *supra*.

Provincial Public Works Act.

See BEN. ACT II OF 1877.

Provincial Small Cause Courts Acts.

See REVISION — SMALL CAUSE COURT CASES.

See SMALL CAUSE COURT—MOFUSSIL, JURISDICTION OF.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT CASES.

Provincial Small Cause Courts Act (XLII of 1860).

[REP., ACT XI OF 1865.]

(1)—Suit for amount not exceeding Rs. 50—Defendant not residing within Court's jurisdiction—Power of District Munsif to take cognizance of suit—*See* JURISDICTION OF MUNSIF'S COURT, 2 M.H.C. 82.

(2)—*S.* 3—*Term "suit" applied to suit before Collector.*—The word "suit" in the proviso of s. 3 of Act XLII of 1860 referred to regular suits before a Collector under Act X of 1859, and not to summary proceedings under Regulation XXVIII of 1802 and s. 2 of Regulation V of 1822. ADIMULAM PILLAI v. KOVIL CHINNA PILLAI, **2 M.H.C. 22.**

(3)—*S.* 6—*Effect on jurisdiction of Military Courts of Requests.*—S. 6 of Act XLII of 1860 had not the effect of altering or interfering

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with the jurisdiction of the Military Courts of Requests constituted by the Statute 20 and 21 Vic., Chap. 66, s. 67. The Military Courts had concurrent jurisdiction in such matters. SHANMUGA v. MEDDLETON, **1 M.H.C. 443.**

(4)—*S.* 11—*Execution against person of debtor not necessary preliminary to proceeding against immoveable property.*— Execution against the person of a judgment-debtor is not a preliminary step necessary to entitle the judgment-creditor to proceed against the debtor's immoveable property under s. 11, Act XLII of 1860. The party obtaining the decree could have execution in the first instance either against the person or against the personal property of the judgment-debtor, but the proceeding under s. 11 was made conditional only upon the debtor's moveable property having been realized by a sale in execution. VENKATASAMY NAIK v. VATTAMALAY GOUNDAN, **2 M.H.C. 339.**

Provincial Small Cause Courts Act (XI of 1865).

[REP., IX OF 1887.]

(1)—*District Munsif, Small Cause Court Judge—Madras Act* IV *of* 1863—*Act* XI *of* 1865.—A District Munsif is a Small Cause Court Judge under Madras Act IV of 1863 within Act XI of 1865. WUMADAI RAJAH HARAJAI KUMARA VENKATA PERUMALRAJ BAHADUR, ZEMINDAR OF KARVATINUGGAR v. KANNIAPPAH, **4 M.H.C. 149.**

(2)—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 8 B. 230, 4 M.H.C. 331.

(3)—*See* HINDU LAW—MAINTENANCE, 2 B. 624, 2 B. 632, F.B.

(4)—*See* SUPERINTENDENCE OF HIGH COURT, 19 W.R. 306.

(5)—S. 3—*See* RANGOON SMALL CAUSE COURT, 6 B.L.R. 196=14 W.R. 331.

(6)—Ss. 5, 21—*See* APPEAL—ORDERS, 10 B. 370.

(7)—*S.* 6—*Suit for road and public works cess, nature of*—Res judicata.—A suit to recover road cess and public work cess, not being a claim for money on bond or other contract, but being one recoverable under a special enactment, does not fall under s. 6 of the Mofussil Small Cause Courts Act. The decision of a District Judge, in a suit for road cess, which was final on account of there having lain no second appeal to the High Court, inasmuch as the amount claimed was less than Rs. 100, would bar a second suit in which the amount claimed is more than Rs. 100. DAVID v. GRISH CHUNDER GUHA, **9 C. 183=11 C.L.R. 305.** [*R.*, 25 C. 571.]

(8)—*S.* 6—*Suit to refund money realised in execution of decree—Jurisdiction of Small Cause Court—Civ. Pro. Code,* 1882, *s.* 295 (=*s.* 73, *Civ. Pro. Code,* 1908)—*Civ. Pro. Code,* 1882, *ss.* 13, 43 (=*s.* 11, *O.* II, *r.* 2, *Civ. Pro. Code,* 1908)—Res judicata—*Splitting claims—Causes of action.*—A suit under s. 295 of the Civ. Pro. Code, 1882, to compel the defendant to refund monies received by him which should have been paid by the plaintiff, was not cognizable by a Court of Small Causes under Act XI of 1865. (9 M. 250, 7 A. 896, 7 A. 378, *R.*) Where the plaintiff in the above suit had previously brought a suit in which he sought to follow the property which had been sold under the defendant's decree, *held* that the present suit was not barred by ss. 13 and 43 of the Civ. Pro. Code, on the ground that the relief now sought might have been asked for in the former suit, because the nature of the suits on the causes of action are different. DOST MUHAMMAD v. AJUDHIA PRASAD, **A.W.N. 1890, 21.**

(9)—S. 6—*See* CIV. PRO. CODE, 1908, O. XXI, r. 63, 7 A. 152, F.B.=A.W.N. 1884, 349.

(10)—S. 6—*See* CONTRACT ACT, 1872, s. 72, 2 A. 671.

(11)—S. 6—*See* CONTRIBUTION, SUITS FOR—GENERAL, 5 M.H.C. 200.

(12)—S. 6—*See* GUARDIAN—MISCELLANEOUS, 37 P.R. 1889.

(13)—S. 6—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 3 B.H.C.A.C. 75.

(14)—*S.* 6 (3)—*Malicious prosecution—Jurisdiction—Construction.*—The phrase "actual pecuniary damage" as used in cl. 3, s. 6, Act XI of 1865, has reference to pecuniary loss to the plaintiff's property or estate. Therefore a suit for damages on account of alleged personal injury solely, without reference to actual pecuniary loss, cannot be entertained in a Small Cause Court. BHAIRAB CHANDRA CHUCKERBUTTY v. MAHENDRA CHANDRA CHUCKERBUTTY, **4 B.L.R. App. 59=13 W.R. 118.**

(15)—S. 6, cl. 3—*See* JURISDICTION OF CIVIL COURTS, 6 B.L.R App. 99=16 W.R. 84, Note.

(16)—*Ss.* 6 (3), 12—*Suit of a nature cognisable by a Small Cause Court—Compensation for personal injury—Actual pecuniary damage.*—Where part of the claim in a suit for compensation for malicious prosecution was in respect of a personal injury from which actual and ascertained pecuniary damage had resulted, the whole suit was, with reference to s. 6 (3) of Act XI of 1865, one of a nature cognisable by a Small Cause Court, and should have been instituted in such Court having local jurisdiction. DEBI SINGH v. HANUMAN UPADHYA, **3 A. 747.** (13 W.R. 434, 15 W.R. 171, *F.*) [*R.*, 10 A. 49.]

(17)—S. 8—*See* MAD. ACT III OF 1873, s. 27, 8 M.H.C. App. 10.

(18)—Ss. 8, 12—*See* CANTONMENT MAGISTRATE, 9 B. 454.

Provincial Small Cause Courts Act (XI of 1865)—*continued.*

(19)—S. 9—*See* MUNSIF, 11 W.R. 233.

(20)—S. 12—*See* NOS 16, 18, *supra.*

(21)—S. 18—*See* ARREST, 4 M.H.C. 145.

(22)—Ss. 19, 20—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 6, 7, B.L.R. Sup. Vol. 886=9 W. R. 175.

(22-*a*)—Art. 20, sch. II—Suit by unsuccessful claimant for value of his property sold in execution is a suit exempted from the jurisdiction of a Small Cause Court—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 63, 8 O.C. 281.

(23)—S. 20—Decree of Small Cause Court sent for execution to Subordinate Court—Latter not competent to question validity of decree—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 10 B. 65.

(24)—S. 20—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 24 W.R. 151, 3 C.L.R. 30, 3 C.L.R. 558.

(25)—S. 20—*See* SALE—SALE IN EXECUTION OF DECREE—SALE OF, 6 N.W.P. 129.

(26)—S. 20—*See* NO. 22, *supra.*

(27)—Ss. 20, 21—*See* DISTRICT JUDGE, JURISDICTION OF, 11 M. 130.

(28)—*S.* 21—*Review of a Small Cause Court judgment.*—Act XI of 1865 does not give to a Judge of a Small Cause Court any power to review his judgment except as provided by s. 21 of that Act. *In the matter of the petition of* TADIR HOSSEIN KHONDKAR, **6 B.L.R. 388.**

(29)—*S.* 21—*Practice—Notice of application—Review.*—An application for a review of judgment of a Mofussil Small Cause Court cannot be entertained where one of the provisions of s. 21 of Act XI of 1865 is not complied with, as, for instance, where the notice of an intention to apply at the next sitting of the Court for a new trial was not given. *In the matter of the petition of* PITAMBAR SADHU KHAN, **6 B. L.R. 390, Note.** [*R.*, 6 B L.R. 388.]

(30)—*S.* 21—*Application by decree-holder for payment of money deposited in Court by judgment debtor—"Process for enforcing decree"—Civ. Pro. Code, s.* 17, *Expl.* II—*Jurisdiction—Suit for money paid by mistake or coercion—Contract Act, ss.* 72 *and* 28—*Agreement limiting time for enforcement of legal rights—Validity of.*—In a suit for refund of certain over-charges paid to the defendant Company, an *ex parte* decree was passed. The defendant Company deposited the decree-amount in Court and applied through a pleader, not properly authorized, to set aside the decree. Plaintiffs applied for the payment of money so deposited, but, within 30 days of this application, the defendants, whose first application to set aside the decree was rejected as not properly authorized, put in a fresh application for the same purchase. On the Court granting this application and setting aside the decree, the plaintiffs objected in a revision petition to the High Court against this order on the ground that it was barred by the prior application. *Held*, that the prior application could be no bar as it was rejected on the ground that it was not the application of the defendants or their agent and that the application by the plaintiffs for payment of money deposited was of the nature of a process for the enforcement of the decree within s. 21 of the Mofussil Small Cause Courts Act so as to entitle the defendants to apply within 30 days of such application for retrial. In the above case, the overcharges having been paid at the defendant Company's head-office at Bombay, it was *held*, that the Small Cause Court at Agra in which the suit was brought had no jurisdiction to entertain the suit. In the above case, the receipt granted by the defendant Company for goods despatched contained a stipulation that no claim for overcharges would be entertained unless made in writing within 6 months of the date of delivery of the goods for transmission. *Held* that the stipulation was of the nature referred to in the Contract Act, s. 28, and that it could not be construed as postponing the accrual of the cause of action or limiting the time within which proceedings could be taken upon it. AMOLAK RAM v. THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY, **A.W.N. 1888, 59.**

(31)—Fresh plaint not to be required when new trial granted by Small Cause Courts, under s. 21, Act XI of 1865, Civ. Cir. No. 3, dated 19th December, 1865, **17 W.R.H.C. Rule and O. 2.**

(32)—S. 21—*See* PLAINT—AMENDMENT OF PLAINT, 110 P.R. 1882.

(33)—S. 21—*See* REVIEW—GENERAL, 60 P. R. 1881.

(34)—S 21—*See* REVISION—GENERAL, 102 P.R. 1886.

(35)—S. 21—*See* NOS. 6, 27, *supra.*

(36)—S. 22—*See* REFERENCE TO HIGH COURT, B.L.R. Sup. Vol. 457=5 W.R. S.C.C. 19.

(37)—S. 22—*See* REFERENCE TO HIGH COURT, 5 W.R. S.C.C. Ref. 19.

(38)—S. 22—*See* SUPERINTENDENCE OF HIGH COURT, 6 W.R. Mis. 26.

(39)—S. 23—No second appeal lies from decisions under—*See* CIVIL PROCEDURE CODE, 1908, s. 102, 3 Bom. L.R. 239=25 B. 625.

(40)—S. 25—*See* SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 3 B.L.R. App. 144=12 W.R. 311.

(41)—S. 32—*See* PRACTICE AND PROCEDURE, 3 B.L.R. A.C. 396=12 W.R. 432.

(42)—S. 53—*See* LANDLORD AND TENANT—EJECTMENT, 5 C. 195.

[REP., IN PT., ACT X OF 1888; ACT XII OF 1891, REP., IN PT., (IN AGRA), U.P. ACT

Provincial Small Cause Courts Act (IX of 1887).

XII OF 1901, S. 36. REP., ACT IX OF 1908, DECLARED IN FORCE—IN BRITISH BALUCHISTAN, REG. I OF 1890, S. 3; IN UPPER BURMA (EXCEPT THE SHAN STATES), ACT XIII OF 1898, S. 4.]

(1)—*Judgment—What it ought to contain.*—The law requires that a Judge of the Small Cause Court should set out in his judgment the points for determination. MUKKHATTUM PRATH POOVATHAM KANDI UMMACHA v. PURUSHOTHAMA DAS PRAJJI DASS SAIT, **7 M. L. T. 306=6 Ind. Cas. 682.**

(2)—Suit against Secretary of State for damages for non-realization of the amount due for an insured value-payable parcel—*See* ACT VI OF 1898, s. 34, 15 M.L.J. 226=28 M. 213.

(3)—*S.* 11, *arts.* 20, 35 (*j*)—*Wrongful attachment of crops—Objection to attachment disallowed without adjudication—Suit for recovery of price—Civ. Pro. Code* (V *of* 1908), *O.* XXI, *r.* 63.—Where, in execution of a decree, certain crops are attached, and the attachment is objected to by the plaintiff, but during the pendency of the objections the crops are sold, and the objections are subsequently dismissed without adjudication: *Held*, that a suit for recovery of the price of the crops cannot be entertained by a Court of Small Causes, inasmuch as the Court cannot give a decree without deciding whether the attachment is legal or illegal. The mere fact that the suit is limited to a claim for the price or value of the crops, which was handed to the decree-holders by the Court executing the decree, does not make the suit any the less a suit for illegal attachment within the meaning of art. 35, cl. (*j*) of sch. II of the Provincial Small Cause Courts Act. Where objections to an attachment are disallowed without adjudication, art. 20 of the Act does not apply to a suit for the price of the crops attached. RUP KISHEN v. SOBHI, **8 A. L.J. 187=9 Ind. Cas. 537.**

(4)—*S.* 15—*Suit for share in the offerings of temple—Cognizable by Small Cause Court—Suit under Rs.* 1,000—*No appeal—Punjab Courts Act*, XVIII *of* 1884, *s.* 70 (1) (*a*) *and* (*b*) —*Civ. Pro. Code*, 1908, (=*Civ. Pro. Code*, 1882, *s.* 584).—A suit for a share in the offerings and the profits of the *Jagir* attached to the Darbar Sahib, constituting the income thereof, is a suit of a Small Cause nature. (188 P.R. 1888, 81 P.R. 1889, 204 P.R. 1889, 84 P.R. 1892, *R.*; 21 B. 248, *D.*) Where the suit related to a sum of Rs. 657-6-10 only, *held*, that no appeal lay under s. 70 (1) (*b*) Punjab Courts Act, 1884. The fact that the pecuniary limit for interference under s. 70 (1) (*b*) in Small Causes is Rs. 1,000, while under the Code of Civil Procedure the pecuniary limit for second appeal in Small Causes is Rs. 500 only, does not extend the power to interfere under s. 70 (1) (*a*) beyond the limits prescribed by that sub-section. SARDAR ARUR SINGH v. DAYAL SINGH, **20 P.R. 1911=93 P.L.R. 1911=54 P. W.R. 1911=9 Ind. Cas. 579.**

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(5)—*Ss.* 15, 23, 25, *sch.* II, *arts.* 11, 15, 16—*Suit for recovery of money—Question of title—Jurisdiction.*—A suit for the recovery of money was brought in a Mofussil Small Cause Court alleging that the defendant, a Hindu widow, agreed to execute a sale-deed to plaintiff getting it attested by the reversioners, that, upon such draft sale-deed, she received a sum of Rs. 100 as earnest money, that she failed to obtain the signature of the reversioners and have the sale deed registered, and claiming for these reasons the earnest-money and other expenses for stamp paper etc. Upon the Court decreeing for plaintiff, a revision petition was presented contending that the money claim of the plaintiff involved a question and determination of title to immoveable property and that the Court should have, under s. 23 of the Provincial Small Cause Courts Act, returned the plaint to be presented to a Court having jurisdiction to determine title and that the suit also fell under cls. (11), (15) and (16) of sch. II to the Act. *Held*, that s. 23 is distinctly framed in optional terms giving discretion to the Court to act in the matter or not, that the suit as brought did not come under any of the arts. (11), 15 or (16) and that the Court could not, in revision, enter into the findings of fact by the lower Court. JAI DEVI v. MATHURA DAS, **A.W.N. 1888, 193.** [*R.*, 14 A. 413=A.W.N. 1892, 79.]

(6)—*Ss.* 15 *and* 32 *and art.* 8—*Suit for agricultural rent—Small Cause Court, jurisdiction of, not invested with authority to entertain such suits—Appealability of decree in such suits.*—A suit was instituted in the Township Court of Tavoy for Rs. 20, rent of paddy land. The only question for decision was whether an appeal lay from the decree of the Township Court. The following reference was made to a Bench of the Chief Court, Lower Burma. "Is a suit for rent of paddy land a suit of a nature cognisable by a Court of Small Causes in Lower Burma, outside Rangoon?" *Held*, though the Township Court had jurisdiction, as a Court of Small Causes, the effect of ss. 15 and 32 and art. 8 of the Act is that any Court constituted under the Act, and any Court invested with the jurisdiction of Courts under the Act, is precluded from exercising jurisdiction in suits for the recovery of rent, other than house-rent, unless the Judge of the Court has been expressly invested by the Local Government with the authority to exercise jurisdiction with respect thereto. The Judge of the Tavoy Township Court, not having been so invested and the suit not having been one for rent, could not take cognizance of the suit under its Small Cause jurisdiction. Consequently, an appeal lay against the decree in the suit. SEIN THAUNG v. SHWE KUN, **3 L.B.R. 47.** [*R.*, 3 L.B.R. 90.]

(7)—*S.* 15, *art.* 3, *sch.* II—*Suit against State Railways.*—A suit for damages for non-delivery of goods against a Government Railway Company does not fall within art. 3 and is not exempted from the cognizance of a

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

Small Cause Court. PUNJAB RAILWAY CO. v. SECRETARY OF STATE FOR INDIA, **97 P.R. 1894.** (17 C. 290, *Cited.*)

(8)—*S.* 15, *sch.* II, *art.* 8—*Landlord and tenant—Suit for rent and for sale of value of improvements made by tenant for rent due—Jurisdiction.*—Plaintiff as jenmi, alleging that the defendants held under a *verumpattam* tenure, sued to recover arrears of rent. He also prayed to have the improvements belonging to the defendants sold for such arrears. *Held* that if arrears are due on the one side and the value of improvements on the other the two items should ordinarily be dealt with as cross-demands arising under the same contract but giving rise to no ground for treating the suit otherwise than as a suit for rent. The suit was, therefore, triable by a Court of Small Causes. KARUNAKARA KURUP v. MUNIPERNAN, **24 M. 356.**

(8-*a*)—*S.* 15, *art.* 15—*Specific performance, suit for —Claim to recover money on fulfilment of a stipulated condition—Suit of a Small Cause nature.*—A suit to recover a sum of money on the fulfilment of a condition on which it was stipulated to be paid is not a suit for the specific performance of a contract so as to except it from the jurisdiction of a Small Cause Court. KONDUGARI SUBBIAH v. KAVUPATI VENKATASUBBIAH, **15 Ind. Cas. 352.** (19 M.L.J. 220, 5 M.L.T. 296, 1 Ind. Cas. 552, *D.*)

(9)—*S.* 15, *art.* 31—*Court of Small Causes, suit of nature cognizable by—Profits of bazaar, suit for share of—Second appeal—Civ. Pro. Code, s.* 586.—The plaintiff in his plaint described the suit as one to recover Rs. 30, "mesne profits" from April 1894 to March 1897 on account of a bazaar. He further alleged that, under a decree obtained by him against the defendant, his share in the profits was to the extent of two-thirds, that though he obtained possession of the bazaar under the decree, yet the defendant went on collecting the whole of the profits of the bazaar and never gave him his share of the same. The relief sought was " a decree for Rs. 30 on account of the income (munufa) of the bazaar from April 1894 to March 1897 at the rate of Rs. 10 a year." The subject-matter of the suit being less than Rs. 500, the question was, whether it was one of the nature cognizable in a Court of Small Causes, and as such, one in which under s. 586, Civ. Pro. Code, a second appeal would not lie. *Held*, that the suit being founded on the allegations that the parties to the suit were co-sharers in the profits of the bazaar, that the defendant had collected the entire profits and had not paid the plaintiff his share of the same, the suit was not one for profits wrongfully received by the defendant within the meaning of art. (31), sch. II, Act IX of 1887, but one for money had and received for the plaintiff, and was therefore one of the nature cognizable by a Court of Small Causes, in which no second appeal lay. ANRUDH SINGH v. AMARDAT SINGH, **4 O.C. 89.**

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(10)—*S.* 15 *and art.* (35) (1) *second schedule—Watercourse—Encroachment on land—Damages—Suit for.*—Where the plaintiff's claim for damages does not relate to any injury to his right in water but only for an encroachment on land over which a watercourse runs, it does not fall within the article and is, consequently, cognizable by a Small Cause Court. COLLINS v. TENBROKE, **71 P.R. 1896.** [*R.*, 134 P.R. 1906.]

(11)—*S.* 16—*Small Cause suit instituted and tried on the original side—Appeal—Reversal of decree—Jurisdiction of appellate Court—Civ. Pro. Code* (XIV *of* 1882), *ss.* 646-*A*, 646-*B.*—*Held*, that, where a Small Cause suit is tried by the Munsiff on the Original Side and his decision is reversed by the appellate Court, the High Court is bound to set aside the decree in appeal as having been passed without jurisdiction. (27 M. 478, *Dissented from*; 26 M. 176, 25 B. 417, *Appr.*) *Held*, also, that consent cannot give jurisdiction. COLLIPARA SEETAPATY v. KANKIPATI SUBBAYYA, **6 M.L.T. 121, F B.=33 M. 323=20 M.L J. 718.** (9 A. 191, P.C., 11 M. 26, P.C., *F.*)

(12)—*S.* 16—*Small Cause suit tried as ordinary suit by both the lower Courts, effect of—High Court's powers of interference—Civ. Pro. Code, s.* 646-*B.*—Where both the lower Courts tried a Small Cause suit as an ordinary suit, and the lower Appellate Court directed the plaintiff to pay the defendant's costs, the decree of the District Judge must, notwithstanding s. 16 of Act IX of 1887, be treated as effective, so as to enable the defendant to recover the amount of costs; and the High Court, in the exercise of its discretion, will decline to interfere in revision. S. 646-B of the Code is an enabling section and does not cut down the jurisdiction of the appellate tribunal. SRI RAJA SIMHADRI APPA RAO BAHADUR, MINOR, BY HIS GUARDIAN SRI RAJA RAMACHANDRA APPA RAO BAHADUR v. CHELASANE BHADRAYYA, **1 M.L.T. 414=30 M. 41.** (21 M. 239, 27 M. 479, 25 A. 135, *R.*)

(13)—S. 16 — *See* CIV. PRO. CODE, 1908, s. 20, 19 M. 477.

(14)—S. 16—*See* CIV. PRO. CODE, 1908, O. XLVI, r. 7, 27 M. 478.

(15)—S. 16—*See* REFERENCE TO HIGH COURT, 21. C. 249.

(16)—*Ss.* 16, 23—*Discretionary power of Court under, to return plaint to be presented to proper Court—Competency of latter Court to try suit.*—Under s. 23 of the Act, a Small Cause Court has discretionary power to decline to exercise jurisdiction in matters involving questions of title, which such Court cannot finally determine. The effect of the exercise of such discretion and the consequent return of the plaint to be presented to a Court having jurisdiction to

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

determine such title, is, to give the latter Court jurisdiction to try the Small Cause suit, so returned, as an original suit, notwithstanding anything in s. 16 of the Act. SUBBAROYADU v. GANGAYYA, **29 M. 329.**

(17)—Ss. 16, 23—Effect of order under s. 23—Suit for recovery of price of land sold—Jurisdiction of Small Cause Court.—*See* CIV. PRO. CODE, 1908, s. 16, 9 M.L T. 372.

(18)—*Ss.* 16, 32 (2)—*Extension of Small Cause jurisdiction—Subsequent transfer of suits filed on Original Side.*—On the extension of the Small Cause jurisdiction of a District Munsiff, certain suits filed on the Original Side of his Court before the extension, were transferred to the Small Cause side and disposed of as Small Cause suits. *Held*, that the effect of s. 32 (2) of the Act is that none of its provisions apply to a suit commenced in a Court before that Court has been invested with Small Cause jurisdiction. The consequence of the transfer of a regular suit into a Small Cause suit would be to deprive a party of a right of appeal which he had at the time he instituted his suit. In the Presidency of Madras, the investment of jurisdiction, in cases like the present, is the investment of an individual Judge with particular powers. Consequently, the transformation of the suits into Small Cause suits was not in accordance with law. HARI KAMAYYA v. HARI VENKAYYA, **26 M. 212, F.B.** [*F.*, 5 Bom. L R. 1008=28 B. 244, 29 M. 124=15 M.L.J. 491, 12 C.W.N. 167.]

(19)—*Ss.* 16, 32 (2)—*Civ. Pro. Code*, s. 646-*B*—*Institution of a suit before a Munsif exercising Small Cause Court powers up to a certain value—Trial by his successor invested with higher powers.*—Where a suit for recovery of a sum of Rs. 70 was instituted in the Court of a Munsif exercising Small Cause Court powers up to Rs. 50, and subsequently during the pendency of the suit the Munsif was transferred and the substantive Munsif who succeeded him had powers of a Small Cause Court up to Rs. 100. *Held*, that the suit should not be tried as if the powers of the Court remained the same as they were when the suit was instituted. MAHIMA CHANDRA SIRDAR v. KALI MANDOL, **12 C.W.N. 167.**

(20)—*Ss.* 16 *and* 33—*Suit of Small Cause nature tried as regular suit by Judge having Small Cause powers—Effect of such procedure.*—Where a Judge presiding over a Small Cause Court and also over a Court of ordinary jurisdiction tried a suit of Small Cause nature, by mistake, as a regular one, *held*, that the mistake did not alter the character of the suit. An appeal, therefore, would not lie from a decree in that suit, under s. 540 of the Civ. Pro. Code. NGA SHWE THA v. NGA PO, **U.B.R. (1907). Provincial Small Cause Courts' Act, 1.** (12 B. 486, 25 B. 417, *R.*)

(21)—*S.* 17—*Failure to deposit security—Application not maintainable under s.* 17—

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

Notice under s. 248, *Civ. Pro Code*, 1882—*Process in execution—Limitation.*—An application under s. 17, Provincial Small Cause Courts' Act, 1887, cannot be heard before the security required by the section is furnished. (13 M. 178, *R.*) Notice under s. 248, Civ. Pro. Code, 1882, is a process for enforcing the decree, and the process is executed when the notice is served (22 W.R. 5, *Appr.*), and, in consequence, the present application is barred. CHATURVEDULA SURYANARAYANA v. CHATURVEDULA RAMAMMA, **7 M.L T. 308=6 Ind. Cas. 400.**

(22)—*S.* 17—*Application for review—Deposit in Court—Security for performance.*—In the proviso to s. 17 of the Provincial Small Causes Courts Act, 1887, the words "at the time of presenting his application" govern and refer to both "the deposit of the amount in Court" and "the giving of security, etc.;" therefore, "deposit" or "security" is a condition precedent to the granting of the review. SOMABHAI v. WADI LAL, **9 Bom. L.R. 883.**

(23)—*S.* 17—*Application to set aside an* ex parte *decree—Provisions as to depositing decree amount or furnishing security whether mandatory or merely directory*—Petitioner had presented an application to set aside an *ex parte* decree against him, which was rejected on the ground that he had not complied with the provisions of s. 17 of the Provincial Small Cause Courts' Act, 1887, as to either depositing the decree amount in Court or giving security for the performance of the decree. It was to revise that order of rejection that the present petition was put in, on the ground that the provisions of the section should be regarded as directory and not mandatory. *Held*, the provisions contained in the section form a condition precedent and are to be strictly construed. Enactments regulating the procedure in Courts seem usually to be imperative and not merely directory. S. 21 of the Repealed Act of 1865 contained somewhat similar provisions to those in question and they were always regarded as mandatory. (5 B. H. C. 70, 14 W. R 42, *R.*) The contention for the petitioner may appear to find support in the decision of the Madras High Court in *Ramasawmi* v. *Kurisu*, (13 M. 178, *Doubted*); but that decision has been rightly dissented from by the Calcutta High Court in *Jogiahir* v. *Bishen Dayal Singh.* UMRAO JIWAN PATEL v. MUNNUMIAN MUSALMAN, **2 N.L.R. 23.** (18 C. 83, *F.*)

(24)—*S.* 17—Ex parte *decree, transfer of, for execution—Payment of decree amount into executing Court—Application to set aside*—Ex parte *decree made in Court passing decree, before entering satisfaction of decree, whether proper.*—An *ex parte* decree was passed by the Small Cause Court at X and transferred for execution to Court Z. The judgment-debtor paid the decree amount into Court Z on 3rd June, 1908, and applied to the Court at X on the 16th June, 1908, for setting aside the decree against him. The application was

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neglected on the ground, apparently that the decree had been satisfied and had ceased to exist, possibly on the ground that the deposit ought to have been made in Court X. The decree-holder took the money out of the Court on the 17th June, and the decree was then recorded as satisfied. *Held*, (1) the application for setting aside the *ex parte* decree was made when the decree was alive;—(2) the payment into the Court Z was no bar to the application made to the Court X, and must be treated as a compliance with the rule laid down in s. 17, Act IX of 1887;—(3) a deposit of the decree amount may be made even before the application is presented The words "at the time of presenting his application" are merely discretionary and not mandatory, the period being extendible at the discretion of the Court. RUGH NATH DAS v. DOCTOR PANNA LAL, **54 P.R. 1910=6 Ind. Cas 945=141 P.L.R. 1910.** (108 P.R. 1894, *R.*)

(25)—*S.* 17—*Review application—Deposit of decree amount—Condition precedent.*—Deposit of the decretal amount or tender of sufficient security for payment thereof is a condition precedent to the grant of a new trial. GOBIND v. MOHAN, **5 P.R. 1894.**

(26)—*S.* 17—*Deposit of decree amount—Provisions directory.*—The provisions of this section are directory and not mandatory. The time may be extended by the Court at its discretion. MUHAMMAD FAZAL ALI v. KARIM KHAN, **108 P.R. 1894.** [*R.*, 54 P.R. 1910.]

(27)—*S.* 17—*Civ. Pro. Code (Act* XIV *of* 1882), s. 108—'*Decree passed* ex parte,' *meaning of.*—S. 17 of Act IX of 1887 must be read with s. 108 of the Civ. Pro. Code. The term 'a decree passed *ex parte*' referred to in s. 17 of Act IX of 1887 can only mean a decree passed *ex parte*, against a defendant, within the meaning of s. 108 of the Civ. Pro. Code and does not include cases dismissed for default. MUSSUMMAT JAMINA BIBI v. SERI CHAND BHAGAT, **2 C.W.N. 693.** [*R.*, 4 L.B.R 17.]

(28)—*S.* 17—*Small Cause Court decree, application to set aside—Deposit of decretal amount, when to be made.*— In a Small Cause suit an *ex parte* decree was passed against the applicant. She applied to have it set aside, at the time of presenting her application she applied also for permission to deposit the amount of the decree, but as the record of the case had been sent to another district, the Court refused to receive the money and sent for the record. Sometime after the record was received, the applicant deposited the amount of the decree. The Court dismissed the application, because the amount of the decree was not deposited with the application. *Held* that if an applicant makes the deposit or gives the security when permitted or directed to do so, although the deposit is not made or the security is not given at the time of making the application, the provisions of s. 17, Act IX of 1887, are sufficiently complied with, and the deposit made by the applicant should have been accepted. A Court having accepted an application should either permit the applicant to make the deposit or give security at once, or, allow a reasonable time for doing so. RAGHUNANDAN v. BADAL, **3 O C. 296.**

(29)—*S.* 17, *application to set aside an* ex parte *decree—Subsequent deposit of decretal amount—Defect not cured.*—The deposit of the decretal amount or the furnishing of the security under s. 17 of the Act is a condition precedent to the entertaining of the application to set aside an *ex parte* decree. The defect is not cured by subsequently depositing the decretal amount. JAGANNATH v. CHET RAM, **3 A.L.J. 318=A.W.N. 1906, 93=28 A. 470.** [*F.*, 9 Bom. L R. 883, 5 A.L.J. 295=A.W.N. 1908, 141; *R.*, 6 Ind. Cas. 154.]

(29-*a*)—*S.* 17—Ex parte *decree—Application to set aside—Deposit of amount due under the decree—Amount of costs not deposited with the application—Compliance with the requirements of the section.*—A Court of Small Causes passed an *ex parte* decree for Rs. 190 and for costs amounting to Rs. 20-8. The decree-holder applied for execution of the decree and a notice was issued to the judgment-debtor to show cause why the decree should not be executed. In this notice, the amount due under the decree was shown as Rs. 190. The judgment-debtor then applied to set aside the *ex parte* decree and deposited Rs. 190 only along with his application. Rs. 20-8, the amount due for costs, however, was deposited later on: *Held*, that the provisions of s. 17 of the Provincial Small Cause Courts Act had been substantially complied with. LOCHI LAL v. MEWA RAM, **14 Ind. Cas. 242.** (28 A. 470, 3 A.L.J. 318, A.W.N. 1906, 93, *D.*)

(30)—S. 17—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, O. XXI, r. 89, 8 C.W.N. 355.

(31)—S. 17— Deposit or security imperative —Deposit made one year after *ex parte* decree —Limitation— *See* LIMITATION ACT, 1908, ss. 14, 18, 6 Ind. Cas. 154.

(32)—*S.* 17, *sub-s.* 1—*Application to set aside* ex parte *decree—Security not furnished with application but furnished within time limited by art.* 164 *of the Limitation Act for the application —Validity of the application.*—In execution of an *ex parte* small cause decree, some moveable of the judgment-debtor were attached. Within the time prescribed by art. 164 of the Limitation Act, the judgment-debtor applied to the Court, under s. 17, sub-s. 1 of Act IX of 1887, to set aside the *ex parte* decree, but the security mentioned in the proviso to that section was not deposited along with the application. The security was furnished, subsequently, and within the time limited for making an application under s. 17, sub-s. 1. *Held*, under the circumstances, the application might rightly be

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regarded as satisfying substantially the requirements of the law and ought to be acted upon by the Court. For, to hold otherwise would lead to the conclusion that the defendant ought to be punished for his diligence in presenting the application earlier than he need have done under the law. JEUN MUCHI v. BUDHIRAM MUCHI, **1 C.L.J. 43=32 C. 339.** (18 C. 83, *D.*)

(33)—S. 17, sub-s. (1)—Order of dismissal for default under s. 102, Civ. Pro. Code—Whether *ex parte* decree—*See* CIV. PRO. CODE, 1908, s. 2, O. IX, r. 8, 4 L.B.R. 17, F.B.

(34)—*S.* 23, *Finality of order.*—An order under s. 23 returning a plaint to be presented to the regular Courts, is final, and confers jurisdiction on the latter. MAHAMAYA DASAYA v. NITYA HARI DAS BAIRAGI, **23 C. 425.** [*F.*, 10 M.L.J. 313, 29 M. 329; *R.*, 35 P.L.R. 1902.]

(35)—*S.* 23—*Question of title—Return of plaint—Declaration of title—S.* 586, *Civ. Pro. Code*, 1882 (=*s.* 102, *present Code*)—*Appeal.*—Where a plaint, having been returned by the Small Cause Court under s. 23 of the Provincial Small Cause Courts Act, was presented to the Munsiff's Court together with a petition asking the Court to come to a decision on the question of title, but there was no prayer for declaration of title to the land, nor did the plaintiff offer to pay any further Court-fee: *Held*, that the question of title could not be decided finally in such a suit and that the lower appellate Court had no jurisdiction to make a declaratory decree for title. In such cases, a second appeal is precluded by s. 586, Civ. Pro. Code. RASH BEHARI PAL CHOWDHRY v. SRIDHAR BELAL, **6 C.W.N. 687.** (24 C. 557, *F.*)

(36)—*S.* 23—*Return of plaint by Small Cause Court for presentation to Court of original jurisdiction—Effect of order in conferring jurisdiction on latter Court.*—Where an order is passed by a Court of Small Causes returning a plaint under s. 23 of the Provincial Small Cause Courts Act for presentation to the Court having ordinary jurisdiction, the order is final and has the effect of giving jurisdiction to the said Court of ordinary jurisdiction. SHAMSHUDIN ROWTHEN v. ASA BIVI AMMAL, **10 M.L.J. 313.**

(37)—*S.* 23—*Second appeal—Civ. Pro. Code*, s. 586.—A suit for contribution for less than Rs. 50 was presented to the District Munsif's Court as an original suit and the Munsif returned the plaint and directed it to be presented as a Small Cause suit. Accordingly, it was presented as a Small Cause suit; and the District Munsif, acting under s. 23 of Act IX of 1887, directed the plaint to be presented on the original side of the Court as a question of title, which arose in the suit, had to be determined. The suit was then tried as an original suit. *Held*, that the High Court was precluded by the terms of s. 586, Civ. Pro. Code, from entertaining a second appeal. THE SECRETARY OF STATE v. R. FISCHER, **1 M.L.J. 166.**

(38)—*S.* 23—*Suit for rent—Question of title—Return of plaint—Jurisdiction of Court to try question of title—Appeal, Remand—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 562, 566 *and* 568—*Decision on a preliminary point.*—When in a suit for rent a Court of Small Causes returns a plaint under s. 23 of the Provincial Small Cause Courts Act to be presented to a Court having jurisdiction to decide the question of title in respect of property for the rent of which claim is made, the Court to whom the case is sent for disposal has simply to try the claim for rent, and decide whether the plaintiff was entitled to the relief sought or not. If the nature of the defence renders it necessary to decide a question of title the Court has to draw issues of fact on that point as may be necessary, and decide them incidentally. The jurisdiction of the Court is not barred, because the defence set up makes it necessary incidentally to decide a question of title as to the property the value of which exceeds the pecuniary jurisdiction of the Court. The decree passed by the Court is subject to procedure and appeal as in an ordinary suit. (23 C. 425, *R.*) When the Munsif decreed the claim for rent without deciding the question of title and the District Judge remanded the case to the Munsif under s. 562 of the Civ. Pro. Code without reversing the judgment of the lower Court on the issues decided by it as to the defendants' taking the house on rent from the plaintiff and the amount of rent due. *Held*, that the order of remand was illegal; the Munsif had not decided the suit upon a preliminary point but on the main issues, and the decision of the Munsif upon those issues had not been reversed. If in such cases the Appellate Court considers it necessary to try the question of title in order to decide the claim in dispute it can take action under s. 566 or s. 568 of the Civ. Pro. Code. MIRAJ-UD-DIN v. KARIM BAKSH, **35 P.L.R. 1902=43 P.R. 1902.** [*R.*, 2 P.R. 1908, 76 P.R. 1909.]

(39)—*S.* 23—*Question of "title"—"May"—Small Cause Court suit.*—A suit was brought in a Court of Small Causes upon a bond in which Rs. 501 was made payable by instalments, to recover Rs. 300 representing three unpaid instalments. The Court dismissed the claim on the ground that the plaintiff had failed to prove the execution of the bond. *Held* that the suit involved no question of "title" within the meaning of s. 23 of the Provincial Small Cause Courts Act (IX of 1887) and that the Court was therefore not bound by the provisions of that section to return the plaint. *Semble.*—The word "may" in s. 23 of the Provincial Small Cause Court's Act is not mandatory. FATMA v. BANDHU LAL, **A.W.N. 1889, 4.** (A.W.N. 1888, 193, *R.*)

(40)—*S.* 23—*Suit of nature cognisable by Small Cause Court.*—A cause is none the less a

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cause cognizable by a Court of Small Causes, because that Court exercised the discretion conferred on it by s. 23 of the Provincial Small Cause Court's Act No. IX of 1887, and returned the plaint to be presented to a Court having jurisdiction to determine the question of title raised therein. SADA SHANKAR v. BRIJ MOHAN DAS, **20 A. 480 = A.W.N. 1898, 129.** (24 C. 557, *F.*)

(41)—*S.* 23, (1)—*Question of title—Practice.*—Where in a suit heard by a Court of Small Causes any complicated question as to title to immoveable property is involved, it would be the wiser course to act under s. 23 of the Provincial Small Cause Court's Act (IX of 1887)—A Court of Small Causes cannot dismiss a suit otherwise within its jurisdiction merely because a question of title as to immoveable property incidentally arises. It can either return the plaint, under s. 23, to be presented to a Court having jurisdiction to determine title, or dispose of the suit on the merits. LALA SINGH v. MAHIPAL SINGH, **A.W.N. 1889, 149.**

(42)—*S.* 23—*Suit for rent—Determination of question of title—Plaint returned under s.* 23 *for presentation to proper Court for—No second appeal—Civ. Pro. Code* (1882), *s.* 586.—Where a suit for rent, in which the claim was below Rs. 500, was at first returned under s. 23, Provincial Small Cause Courts Act, for presentation to the Court having power to determine the question of title, and where it was presented to the District Munsif's Court and tried as a regular suit and an appeal was presented to the Sub-Court, *held*, that no second appeal lay. (6 C.L.J. 218, *R.*) The suit is of a Small Cause nature, the claim being one for rent. The fact that the suit was tried as a regular suit is immaterial, and the fact that a question of title was involved or decided is equally immaterial. MAPPILAKANDI AMAD KOYAN'S SON ENADIN v. KUNHIKUTTI'S SON KUNHIPERI, **10 M.L.T. 500 = 12 Ind. Cas. 957.**

(43)—S. 23—*See* CIV. PRO. CODE, 1908, s. 102, 15 M. 98.

(44)—S. 23—*See* NOS. 5, 16, 17, *supra* and NO. 190-*a*, *infra*.

(45)—*Ss.* 23 *and* 25—*Jurisdiction—Suit for sacrificial goat based on plaintiff's title as shebait to a temple, if may be decided by Small Cause Court.*—Where the plaintiff claiming to be the *shebait* of a goddess sued the defendant for damages for unlawfully taking away a goat sacrificed at the altar of the goddess. *Held*—that the question could be properly tried in a Small Cause Court, without any elaborate investigation into the general question of the title of the plaintiff as *shebait*. The plaint having been returned by the Small Cause Court for presentation to the proper Court, under s. 23 of the Small Cause Courts Act: *Held*—that the High Court had jurisdiction to revise that order, either under s. 25 of the Provincial Small Cause Caurts Act or under s. 15 of the Charter

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Act. *Quære*—Whether 'decide' in s. 25 means 'finally adjudicate'. UMESH CHANDRA PALODHI v. RAKHAL CHANDRA CHATTERJEE, **15 C.W.N. 666 = 10 Ind. Cas. 8.**

(46)—*Ss.* 23 *and* 25—*Order returning a plaint under s.* 23, *whether falls within s.* 25.—The order of a Court of Small Causes, under s. 23 of Act IX of 1887, returning a plaint, is not an order, made in a case decided by the Court of Small Causes, within the meaning of s. 25 of the Act, and therefore cannot be interfered with by the High Court, under the powers conferred upon it by that section. SUBAL RAM DUTT v. JAGADANUNDA MAZUMDAR, **13 C.W.N. 403 = 1 Ind. Cas. 288.**

(46-*a*)—*Ss.* 23, 25—*Question of title—Revision.*—Where, in a suit brought in a Small Cause Court, the defendant raises a question of title, it is expedient for the Court to return the plaint for presentation to a Court competent to decide such a question. Where the Judge of a Small Cause Court has decided a suit in a summary way, without determining the question of title one way or the other, his decision ought to be set aside by the High Court in revision. HIRA LAL v. MOHAMMAD SHARFAT ULLAH, **14 Ind. Cas. 2.**

(47)—*S.* 25—*Discretion of High Court—Circumstances empowering revision under s.* 622, *Civ Pro. Code.*—In enacting s. 25 of the Provincial Small Cause Courts Act (IX of 1887), the Legislature could not have intended to practically give an appeal on law and on facts from the decisions of Courts of Small Causes, which were final, subject only to the power given by that. Section 622, Civ. Pro. Code, should be taken as indicating the line of discretion to be exercised by the Judge in considering whether he should or should not apply s. 25 of the Act. SARMAN LAL v. KHUBAN, **16 A. 476 = A. W. N. 1894, 183, F. B.** (13 A. 277, 15 A. 139, *R.*) [*Diss.* 11 C.P.L.R. 91, 66 P.R. 1904 = 138 P.L.R. 1903; *R.*, 21 A. 89, 5 C.L.J. 413, 19 P.R. 1901 = 68 P.L.R. 1901, 113 P.L.R. 1903, 27 A. 192 = A.W.N. 1904, 227 = 1 A.L.J. 697, 6 A.L.J. 944 = 3 Ind. Cas. 817.]

(48)—*S.* 25—*Revision—Error of procedure—Substantial justice—Practice—Arbitration—Refusing to give evidence meaning of—Code of Civil Procedure* (V *of* 1908), *sch.* II, *s.* 7 (2).—It is not the practice of the High Court, under s. 25 of the Provincial Small Cause Courts Act, to interfere merely for the purpose of correcting procedure, where substantial justice has been done. The words "refusing to give their evidence" in sch. II, paragraph 7 (2) of the Code of Civil Procedure, are intended to refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him. A person, therefore, who elects not to produce any evidence, cannot be said to refuse to give evidence within the meaning of the enactment. JANAN v. NARAIN DAS, **8 A.L.J. 929.**

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(49)—*S.* 25—*Power of High Court in revision to disturb a finding of fact—Civ. Pro. Code, s.* 622.—Under s. 25, the High Court, in the exercise of its revisional jurisdiction, has got a wider power than that conferred by s. 622, Civ. Pro. Code, and can even disturb a finding of fact of the lower Court on substantial grounds. LT. COL. J. G. TURNER v. JAGMOHAN SINGH, **A.W.N. 1905, 77=2 A. L. J. 297= 27 A. 331.**

(50)—*S.* 25—*Construction of statutes—Provincial Small Cause Courts Act* (IX *of* 1887), *construction of—Summons in Small Cause Court—Fresh summons not issued—Mere irregularity—Contract Act* (IX *of* 1872), *ss* 69, 70—*Suit by co-sharer for share of expenses of repair of joint property.*—S. 25 of the Provincial Small Cause Courts Act (IX of 1887), must not be construed in a sense which would virtually give a right of appeal in every Small Cause Court case, and which would be inconsistent with the finality which the Legislature intended to attach to the judgments of Courts of Small Causes. The language of the above section is somewhat broadly expressed, a result which usually arises when the Legislature happens to employ a few words to express a meaning greater than those words can contain. [*R.*, 12 A. 277 F.B., =11 A.W.N. 81.] Where a witness was summoned on behalf of the defendant in a suit tried before a Court of Small Causes but service of the summons was not effected, *held* (1) that as the defendant had not applied for the issue of a fresh summons or of a warrant, the action of the Court in deciding the case without the evidence of that witness could not be regarded as a refusal to receive his evidence; and that, even if the Court erred in not issuing a fresh summons, the omission would only be an irregularity not questionable in revision without proof of substantial injustice affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civ. Pro. Code, 1882 (=s. 99, Civ. Pro. Code, 1908). One of two joint owners who chooses without the permission of his co-sharer to spend money on the joint property has no right to inflict the payment of any share of such expenses upon such joint owner, unless they fell within the purview of ss. 69 and 70 of the Contract Act. MUHAMMAD NIZAM-UD-DIN KHAN v. HIRA LAL, **A.W.N. 1890, 121.**

(51)—*S.* 25—*Interlocutory order of a Court of Small Causes not open to revision.*—Where a defendant pleaded limitation in a suit tried by a Court of Small Causes and asked the Court to dismiss the suit on that preliminary point, which the Court refused to do after hearing the parties: *Held*, that interference by revision under s. 25 of the Provincial Small Cause Courts Act was not allowable at that stage, as the words of the section refer to cases decided by a Court of Small Causes, and that such interference would be contrary to the object of the Act. MAUNG BA KYAW v. ME SAW, **9 Ind. Cas. 467.** (13 C.W.N. 403, 1 Ind. Cas. 288, *R.*)

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(52)—*S.* 25—*Revision—Civil cases*—Hundi, *suit on—Interest—Costs against unsuccessful party—Negotiable Instruments Act* (XXVI *of* 1881), *s.* 80.—Under s. 25 of the Provincial Small Cause Courts Act, the Chief Court allowed interest to the plaintiff on a suit on a *hundi* at the rate of 6 per cent. per annum from the date of *hundi* to the date of realization, and also costs of the suit which the Small Cause Court had refused. THAKAR SINGH v. ISHAR SINGH, **113 P.L.R. 1911.**

(53)—*S.* 25—*Revision.*—The Chief Court declined to interfere under s. 25, Provincial Small Cause Courts Act, where there was no reason to think that injustice had been done. *Held*, that it was not contemplated to allow appeals on points of law under s. 25. FAQUIR CHAND v. MUSSAMMAT BALKAUR, **68 P.L.R. 1901=19 P.R. 1901.** (79 P.R. 1888, 20 B. 250, 16 A. 476, *R.*) [*Cited*, 66 P.R. 1904.]

(54)—*S.* 25—*Revision—Mistake of law—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 75—*Bond payable by instalments.*—In the exercise of its revisional jurisdiction, under s. 25 of the Provincial Small Cause Courts Act, the Chief Court is not bound to interfere when a Small Cause Court has erred on a point of law, but it would interfere when a wrong decision on a question of law, *e.g.*, question of limitation, has resulted in a failure of justice. The Chief Court cannot decline to decide a law point raised merely because it is intricate and difficult, if the case itself is such that the Court's revisional action is necessary in the ends of justice. (19 P.R. 1901, 68 P.L.R. 1901, *Cons.*; 21 B. 250, 16 A. 476, 7 B. 342, 21 A. 89, *R.*) When a suit on a bond payable by instalments providing that the whole amount will become payable at once in case of default in payment of any instalment was dismissed by the Small Cause Court as barred by limitation under art. 75 of the Limitation Act and the plaintiff applied under s. 25 of the Provincial Small Cause Courts Act for revision of the order of dismissal and contended that art. 75 was not applicable to the case and there was waiver as regards the default of the first instalment. *Held*, that the Chief Court was competent to consider the legality or otherwise of the order. *Held*, also, that the order of the Small Cause Court was not contrary to law. (188 P.R. 1883, F.B., *F.*; 8 B. 561, *R.*) *Per Robertson, J.*—The Chief Court should not interfere in the exercise of its revisional jurisdiction under s. 25 of the Provincial Small Cause Courts Act except where a clear case of injustice resulting from a decree or order clearly not according to law has been made out. *Per Chatterji, J.*—It is not allowable in construing an Act to refer to the report of the Select Committee and the debates in the Legislative Council on the Bill which subsequently is passed into the Act. In an appeal it is the right of the appellant to obtain an adjudication, and one in his favour,

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If his grounds are made out, irrespective of the question whether substantial justice is or is not thereby dispensed in the case. A point of law or procedure may, in a particular case, work a great hardship, but in an appeal the Court is bound to give effect to it, without regard to the consequences. In cases of revision, it is quite otherwise. No party has the right to obtain an adjudication, and it is entirely within the discretion of the Court to interfere or not, as it thinks fit. It will not interfere to perpetrate an injustice, but only to promote the ends of justice. S. 622 of the Civ. Pro. Code is not a safe guide for the exercise of the revisional powers under s. 25 of the Provincial Small Cause Courts Act. SAYAD MIR SHAH v. ATAR SINGH, **138 P.L R. 1903.**

(55)—*S.* 25—*Revision.*—The Chief Court declined to exercise its powers under s. 25 of the Provincial Small Cause Courts Act, when there was no reason to think that injustice had been done. *Held*, that it was not contemplated to allow appeals on points of law under s. 25. HARDIAL v. KANSHI RAM, **113 P.L.R. 1903.**

(56)—*S.* 25 — *Appeal—District Judge.*— A Subordinate Judge holding Small Causes Court powers decided a suit under that jurisdiction. An appeal, against the decree, was preferred to the District Court, which set aside the said decree of the Subordinate Judge and remanded the case for a fresh trial in his ordinary regular jurisdiction: *Held*, setting aside the order of the District Court, that the proper course for the party aggrieved by the decree was to apply to the High Court, under s. 25 of the Provincial Small Causes Courts Act, 1887. DIWALIBAI v. SADASHIVDAS, **1 Bom. L.R. 836 = 24 B. 310.**

(57)—*S.* 25 — *Petition for revision—Three years after order—Bar of limitation—Limitation Act,* IX *of* 1908, *sch.* II, *art.* 181.—An application for revision under s. 25, Provincial Small Causes Court Act, 1887, presented more than three years after the date of the order complained against, is barred under art. 181, Limitation Act, 1908. BEHARI LAL v. KALU, **92 P.R. 1910 = 126 P.W.R. 1910 = 187 P.L.R. 1910 = 8 Ind. Cas. 318.**

(58)—*S.* 25—*Finding of fact—High Court's power of revision.—Held*, that a Provincial Small Cause Court's finding of fact can be set aside on revision under s. 25 of Act IX of 1887, if it is based upon ostensibly unreliable or no evidence, especially where it ignores the testimony of a witness of high social position. M. NAZIR AHMAD v. ABDUL HAMID KHAN, **89 P.W.R. 1910 = 7 Ind. Cas. 530.**

(59)—*S.* 25—*Suit cognizable by Small Cause Court, filed as original suit—Revisability under s.* 25—*Petition for revision unnecessary—Work done against defendant's will—Suit for contribution—Maintainability—S.* 70, *Contract Act* (IX *of* 1872).—Where a suit cognizable by a Small Cause Court was instituted as an original suit; the High Court has power to interfere with the decree in that suit under s. 25, Act IX of 1887, and no appeal lies against that decree. S. 25, Act IX of 1887, does not require an application before action is taken. A natural stream cannot be the joint property of the various riparian owners. Where a defendant did not want any work done for him and said so, and where the work (in this case, a work of irrigation on a natural stream of which the plaintiff and the defendant were riparian owners), was not done on his property or to save his property from destruction, the plaintiff would not be justified in doing the work, unless he intended to do it gratuitously. No suit for contribution can be brought against the defendant. s. 70, Contract Act not being applicable to such a case. MR. ROBERT FISCHER AND ANOTHER v. S. KANAKASABAPATHY MUDALIAR. **7 M L.T. 74 = 5 Ind. Cas. 742 = 33 M. 258 = 20 M.L.J. 722.** (18 M. 88, *D. & Expl.*).

(60)—*S.* 25—*Power of High Court to question whether application for review of judgment was rightly admitted.*—The High Court is not a Small Cause Court and is empowered by s.25, Act IX of 1887, to satisfy itself whether a decree of Small Cause Court is in accordance with law. In doing so, under that section, the High Court is entitled to go into the question whether an application for review of judgment was rightly admitted. NALLOO KOLLATTIRIAN v. GANAPATHY SETHURAYAN, **5 M.L.T. 73 = 19 M.L. J. 56 = 2 Ind. Cas. 488.**

(61)—*S.*25 -*Revision.*--Where a Munsif invested with the powers of a Small Cause Court tried a case not cognizable by such Court and passed a judgment in which he described himself as Judge, Small Cause Court and an application for revision against the judgment was filed under s.25 of the Provincial Small Cause Courts Act. *Held*, that the judgment was appealable and application for revision did not lie. SARMUKH SINGH v. HARDIT SINGH, **98 P.L.R. 1904.** (36 P.R. 1900, P.L.R. 1900 p. 400, 17 B. 43, *R.*)

(62)—*S.* 25—*Revision—Cause of action--Company—Suit by heir for dividends due on shares standing in the name of his ancestor—Succession certificate.— Necessity of, in case of survivorship.*—The plaintiff's father held certain shares in a registered company. On the death of his father he applied to the company for the shares to be transferred to his name. The company refused to do so unless the plaintiff obtained a succession certificate or letters of administration. The plaintiff filed a suit in the Small Cause Court for the dividends due on the shares. The Court decreed the claim and held that the plaintiff being the sole heir by survivorship under Hindu Law was not bound to take out letters of administration or a succession certificate. Against application for revision filed by the company it was contended that the judgment was correct and revision did not lie. *Held*, that the case was of general interest and

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the judgment should be revised. *Held*, also, that as under its Articles of Association the company was only bound to pay dividends to its registered share-holders the plaintiff had no cause of action entitling him to sue the company for dividends, the plaintiff's proper course, being to sue the company to have himself registered as a share-holder, if he elected not to produce a succession certificate or letters of administration. *Quære*:—Whether the plaintiff was bound to produce certificate of succession? DELHI AND LONDON BANK v. KULWANT SINGH, **46 P.L.R. 1904.=16 P.R. 1904.**

(63)—*S.* 25—*Small Cause Court decree wrong in law—High Court's power to interfere.*—Where the decree of a Small Cause Court (which includes the judgment) involves a substantial error of law, which, in the opinion of the High Court, has occasioned a failure of justice, the High Court has power to interfere under s. 25 of the Act. NILMANI MAITRA v. MATHURA NATH JOARDAR, **5 C.L.J. 413.** (21 A. 89, 16 A. 176, 23 B. 334, *R.*) [*R.*, 6 C.L.J. 527.]

(64)—*S.* 25—*Revision under—Plea of delay in presentation of an application for—, whether can be urged at the hearing and after the admission of the petition.*—An application, under s. 25 of the Provincial Small Cause Courts Act, to set aside a decree of the Small Cause Court might be dismissed on the ground of great delay in making it, even after it had been once admitted in the High Court. Inordinate delay can be brought to notice at the hearing and the Court can be asked not to interfere in consequence. ENG-KEAT v. THE BURMA RAILWAYS CO. LTD., **4 L.B.R. 361.**

(65)—*S.* 25—*Civ. Pro. Code.*, *s.* 622—*Powers of revision of the High Court.*—In this case, a Small Cause Court governed by Act IX of 1887 had a summons served on the defendant fixing the very next day for final disposal. The defendant did not appear and the suit was decreed *ex parte*. The defendant's application for setting aside the *ex parte* decree proving fruitless, she applied to the High Court, under s. 25 of the Act, for revision. The preliminary objection taken was that the application was not entertainable, the powers of revision possessed by the High Court being governed by s. 622, Civ. Pro. Code. *Held*, the powers possessed by the High Court, under s. 25 of the Provincial Small Cause Courts Act, are wider than those under s. 622, Civ. Pro. Code (16 A. 476, F.B., *F.*) and that, under the circumstances of the case, the decree of the Small Cause Court was liable to be set aside. MCCARRON v. F. WELTI, **27 A. 192 =A.W.N. 1904, 227=1 A.L J. 697.** [*R.*, 5 A.L. J. 295=A.W.N. 1908, 141.]

(66)—*S.* 25—*Revision—Powers of High Court—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 108 *and* 622—*Setting aside ex parte decree—Condition precedent.*—The powers of revision given to the High Court by s. 25, Small Cause Court Act are more extensive than those exercised by that Court under s. 622, Civ. Pro. Code. (A.W.N. 1907, 227, 21 A. 89, *R.*) The deposit of the decretal amount or the furnishing of the security is a condition precedent to the setting aside of an *ex parte* decree. Where none of these essentials has been complied with, the Court is bound to dismiss the application. The defect is not cured by subsequently depositing the decretal amount. NANHE MAL v. HAJAS, **5 A.L.J. 295=A.W.N. 1908, 141.** (3 A.L.J. 318, *F.*)

(67)—*S.* 25, *Act* IX *of* 1887 (*Provincial Small Causes Court Act*)--*S.* 622, *Civ. Pro. Code*, 1882--*s.* 15, *Letters Patent.*--When a Judge of the Small Cause Court has jurisdiction to determine a matter, the High Court cannot interfere either under s. 25, Act IX of 1887, or under s. 622, Civ. Pro. Code, or under s. 15. Letters Patent. CORPORATION OF CALCUTTA v. BHUPATI ROY CHOWDHRY, **26 C. 74=3 C.W.N. 70.** [*F.*, 16 C.W.N. 480.]

(68)—*S.* 25—*Jurisdiction of High Court—Revision—Refusing leave to amend plaint.*—In an action for the price of goods sold in the Court of Small Causes, the plaint was signed and verified on behalf of the plaintiffs by one Mumtaz Ahmad who held a power of attorney bearing a German stamp. In consequence of the invalidity of his power at the hearing, Mumtaz Ahmad asked leave to amend the plaint by changing the description into "Mumtaz Ahmad, agent of Messrs. Heydorn & Co." Leave was not granted and the suit was dismissed: *Held*, that, by refusing permission to amend the plaint, the Court had acted with such irregularity as called for the interference of the High Court in revision. HEYDORN AND CO. v. MUHAMMAD SHAFI, **9 A.L.J. 294=34 A. 348=14 Ind. Cas. 507.**

(69)—*S.* 25—*Finding opposed to evidence—Power of High Court to interfere in revision—Acknowledgment of payment by one trustee without actual receipt of money—Such acknowledgment not binding on the institution.*—Even if a finding of fact arrived at by the Lower Court is entirely opposed to the evidence, the High Court has no power to interfere in revision under s. 25 of Act IX of 1887. A mere acknowledgment of payment by one of the trustees who did not really receive the money cannot biud the institution. *In re* GANAPATHI PILLAI, **1 M. W. N. 1912, 181=15 Ind. Cas. 186.**

(69-*a*)—*S.* 25—*Power of interference—Discretionary—Joint family—Pronote in name of deceased member—Suit by surviving members.*—The power of interference by the High Court under s. 25 of Act IX of 1887 is only a discretionary power. where it appears that the decision of the Lower Court has done substantial justice between the parties, the High Court is not bound to interfere. Where a promissory note is taken in the name of one member of a Hindu family, on the death of that member, the survivor can bring a suit on the promissory note, though not on the principles of a family

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corporation, but of a partnership. GOPALA IYENGAR v. VENKATAKRISHNA IYENGAR, **M.W.N. 1912, 1227.**

(69-*b*)—*S.* 25—*Revision against decree of Small Cause Court—Grounds for discretion of High Court.—Held*, that s. 25 of the Small Cause Courts Act does not give any right of appeal on law or fact, and the powers conferred by the section are purely discretionary and not to be exercised, unless it appears that some substantial injustice has resulted from the decree of the Court of Small Causes. *Held, further*, that an error by a Small Cause Court on a question of limitation does not justify the interference of the High Court under the section. RAGHURAJ SINGH (RAJA) v. SAHIB DIN, **15 O.C. 319.**

(69-*c*)—*S.* 25 — *Limitation — Whether a good ground for revision.*—The question of limitation is one which may be entertained in revision under s. 25 of Act IX of 1887. SHEORAM v. BADRI DAS BEHARI LAL, **11 A. L. J.** 295. (16 A. 476, 17 A. 422, 6 A. L. J. 944, *R.*)

(69-*d*)—*S.* 25—*Revision—Civil cases—Small Cause Court judgment—Finding of fact.*—The plaintiff's suit was based on a document which was not a pro-note and did not purport to be an acknowledgment of debt. It was merely a receipt. A decree was passed on the mere statement of the plaintiff that the receipt was for money advanced as a loan. It appeared that the parties were at one time partners in a business, and it was impossible to make out whether the money was or was not really paid in the course of some transaction arising out of the firm's business. *Held*, that the suit must be dismissed, the case being a fit one for interference on revision. FAZAL HUSSAIN v. MRS. HOLMES, **133 P.L.R. 1913=139 P.W.R. 1913.**

(70)—S. 25 — *See* APPEAL — LETTERS PATENT, 27 M. 340.

(71)—S. 25—*See* CIV. PRO. CODE, 1908, s. 114, O. XLVII, rr. 1, 2, 4, 8, 38 P.L.R. 1904.

(72)—S. 25—*See* CIV. PRO. CODE, 1908, s.115, L.B.R. 1893—1900, 61.

(73)—S. 25—*See* CIV. PRO. CODE, 1908, O. XX, r. 4, 57 P.R. 1901.

(74)—S. 25—Power of High Court to exonerate defendant against whom decree has been passed and pass a fresh decree against another —*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, s. 141, 17 M.L.J. 62.

(75)—S. 25—*See* CONTRACT ACT, 1872, s. 65, 66 P.R. 1895.

(76)—S. 25—Lower Court refusing costs to successful party on insufficient grounds—Interference in revision - *See* COSTS—GENERAL, (1912) M.W.N. 366.

(77)—S. 25—Revision by High Court—Suit on accounts—Decree without best evidence, bad—*See* EVIDENCE ACT, 1872, s. 34, 63 P.R. 1897.

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(78)—S. 25—*See* HIGH COURT, JURISDICTION OF—N.W.P., A.W.N. 1892, 160.

(79)—S. 25—*See* JURISDICTION OF CIVIL COURTS, 5 O.C. 332.

(80)—S. 25—Order of a single Judge of High Court dismissing revision petition — Whether appeal lies—*See* LETTERS PATENT, HIGH COURT, 1865—MADRAS, s. 15, 6 M.L.T. 345 =3 Ind. Cas. 953.

(81)—S. 25—*See* LETTERS PATENT, HIGH COURT, 1865—MADRAS, art. 15, 23 M. 169, 27 M. 432.

(82)—S. 25—*See* LIMITATION ACT, 1908, arts. 61, 81, A.W.N. 1891, 102.

(83)—S. 25—Question of limitation erroneously decided by Small Causes Court—Interference of High Court—*See* LIMITATION ACT, 1908, art. 182, 6 A.L.J. 944=3 Ind. Cas. 817.

(84)—S. 25—Technical legal error—Substantial justice done by lower Court — Interference by High Court—*See* REVISION—GENERAL, 59 P.W.R. 1912.

(85)—S. 25—*See* REVISION—GENERAL, 15 A. 373=A.W.N. 1893, 122, 66 P.R. 1904.

(86)—S. 25—Suit filed on Original Side—Subsequent investment with Small Cause powers—Power to transfer suit to Small Cause side—*See* TRANSFER OF CIVIL CASES, 13 M. L.J. 438.

(87)—S. 25—*See* NOS. 5, 45, 46, 46 (*a*), *supra.*

(88)—Ss. 25, 27—*See* LETTERS PATENT—HIGH COURT, 1865—MADRAS, cl. 15, 17 M. 100 =3 M.L.J. 259.

(89)—*S.* 25, *sch.* II, *art.* 29 — *Review—Grounds—Erroneous decision as to jurisdiction —Discovery of important document—Revision —Power of High Court to interfere with an order rejecting petition for review—Small Cause suit—Claim to recover ascertained sum found due on taking partnership accounts.*—Although, in the case of a review by an ordinary Court, the High Court would very rarely interfere with an order rejecting an application for review, yet the revisional jurisdiction of the High Court is very much wider when the lower Court exercises Small Cause Court jurisdiction. It is sufficient ground for review that the Small Cause Court has erroneously *held* that a claim is not in the nature of a Small Cause. The fact that an important document, containing an admission of liability by the defendant, came to plaintiff's knowledge subsequently to the decision of the case, is a sufficient ground for review. Where a partnership has been already dissolved and accounts taken, and a book entry has been made for an ascertained sum of money found to be due by one partner to another, a claim to recover this sum is a Small Cause suit. FAIZ MUHAMMAD v. MUHAMMAD ZAKRIA, **195 P.L.R. 1911.**

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(90)—*S.* 26—*Revision—Pleadings disclosing no cause of action.*—The plaintiff sued in a Court of Small Causes for damages for non-acceptance of a dog, which he alleged the defendant had purchased from him. Neither in the plaint nor in his evidence did the plaintiff state what were the terms agreed upon as to delivery of the dog. *Held*, that inasmuch as the conditions of delivery were an essential part of the contract of sale no cause of action was disclosed by the plaintiff's pleadings, and that this was a good ground for an application in revision under s. 25 of Act No. IX of 1887. F. WILSON v. R. SAINT, **A.W.N. 1897, 138.**

(91)—*S.* 27—*Transfer by Small Cause Court of a decree to the regular side—Transfer* suo motu—*Appealability of order passed by the executing Court after the transfer.*—A Munsif exercising powers of a Small Cause Court cannot *suo motu* transfer an execution case to himself as Munsif exercising jurisdiction on the regular side. Under s. 223, an application by the decree-holder is required, and the Judge of the Small Cause Court cannot act without one. Once the transfer is made, an appeal follows in the ordinary course, notwithstanding s. 27 of the Provincial Small Cause Courts Act. JIWAN v. MUNSHI RAM, **3 P.L.R. 1905.**

(92)—*S.* 27—*Small Cause Court suit, trial of, as regular suit without returning of plaint for presentation to proper Court—Appeal from Munsif's decree in suit instituted as Small Cause Court suit and tried as regular suit.*—A suit was instituted in the Munsif's Court as a Court of Small Causes. The Munsif before delivering judgment formed the opinion that the suit was one excluded from the jurisdiction of a Court of Small Causes and directed that it be removed from the register of Small Cause suits and entered in the register of regular suits. He then tried the case as a regular suit and decreed the claim. *Held*, that the suit was tried, as a Small Cause Court suit and under s. 27 of Act IX of 1877, no appeal lay from the decree of the Munsif. KANDHAI GIR v. BHAGWANT GIR, **7 O. C. 144.**

(93)—S. 27—*See* No. 88, *supra.*

(94)—*Ss.* 27 *and* 35—*Order passed in execution of decree of Court of Small Causes, by Court not invested with such powers—Jurisdiction—Proceedings in suit instituted in Court having jurisdiction of Small Cause Court and continued when Court has ceased to have that jurisdiction.*—*Held* that an order, passed by a Court not invested with the powers of a Court of Small Causes in the execution of a decree passed by a Court invested with such powers, was not final under s. 27 of the Provincial Small Cause Courts Act. The object of the Legislature in enacting s. 35 of that Act was only to decide what Court should in a certain event dispose of a suit pending in a Court of Small Causes or a suit of the nature cognizable by a Court of Small Causes pending in a Court invested with the jurisdiction of a Court of Small Causes. There is nothing in that section which indicates an intention to confer the jurisdiction of a Court of Small Causes upon officers who have not been invested with that jurisdiction by the Local Government, or upon officers from whom that jurisdiction has been withdrawn. KAMTA PARSHAD v. MAHABAL SINGH, **6 O.C. 81.** (13 A. 324, 2 O.C. 143, *Diss.*)

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(95)—Ss. 27 and 35—Decree passed by Small Cause Courts—Attachment and sale of immoveable property—Decree sent for execution to Munsif—Appeal—Case where s. 27, Small Cause Courts Act, does not apply—*See* CIV. PRO. CODE, 1908, ss. 38, 39, 41, O. XXI, rr. 4, 5, s. 113, O. XLVI, r. 1, s. 24, 5 A.L.J. 612 = A.W.N. 1908, 254 = 31 A. 1 = 1 Ind. Cas. 553.

(96)—*S.* 31—*Suit for a share of mesne profits, whether cognizable by Court of Small Causes.*—Under s. 31, of sch. II of Act IX of 1887, a suit for the profits of immoveable property belonging to a person, which have been wrongfully received by another, is exempted from the cognizance of a Court of Small Causes. Thus, where a plaintiff alleges that the defendant had wrongfully received the plaintiff's share of the profits of immoveable property, the suit falls under art. 31, sch. II of Act IX of 1887, and as such is not cognizable by a Court of Small Causes. VENKOBA RAO v. MUTHU AIYAR, **18 M.L J. 88.** (17 B. 40, *R.*) [*D.*, 7 Ind. Cas. 390 = 1 M.W.N. 399 = 8 M.L.T. 281.]

(97)—S. 31—Ejectment decree—Claim for mesne profits after decree—Form of action—Damages for trespass—Limitation—*See* MESNE PROFITS — MISCELLANEOUS, 8 Ind. Cas. 162.

(98)—S. 32—*See* NOS. 6, 18, 19, *supra.*

(99)—*S.* 32 (1) (2)—*Small Cause suit instituted in Court of Munsif without Small Cause powers—Subsequent investment with Small cause powers—Trial of suit—Ordinary suit.*—The terms of s. 32 (2) of the Provincial Small Cause Courts Act are imperative and provide that nothing in the previous sub-section applies to suits instituted or proceedings commenced in Small Cause Courts before the date on which they were invested with that jurisdiction. Therefore, where a Small Cause suit was instituted in the Court of a Munsif without Small Cause powers, but such powers were subsequently conferred upon him; *held*, that the suit ought to be tried as an ordinary suit by the *Munsif*. DUNGAR v. NANHA, **227 P.L.R. 1911.** (5 A. 274, 13 A. 324, *D.*)

(100)—*S.* 32 (2)—*Jurisdiction — Pecuniary limit—Appeal.*—A suit in the nature of Small Causes Court suit was instituted in the Court of the Subordinate Judge who was invested with the jurisdiction of a Court of Small Causes to the extent of Rs. 50. The amount in dispute was Rs. 81-4-0; and therefore the suit was tried as a regular suit. Later, the jurisdiction of the Judge as a Court of Small Causes

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was raised to Rs. 100 ; and subsequently to this the suit was decided by him as a regular suit. The defendant appealed to the District Court but it held that no appeal lay on the ground that the suit was triable and must be taken to have been tried in the extended jurisdiction vested in the Subordinate Judge. *Held*, that the appeal lay to the District Court, since under s. 32 (2) of the Provincial Small Causes Courts Act, it was necessary that the Judge should, before the institution of the suit be vested with a Small Causes Court jurisdiction entitling him to hear the particular suit. SAMBHU v. RAM VITHU, **5 Bom. L.R. 1008 = 28 B. 244.**

(101)—*S.* 32 (2)—*Small Cause suit instituted in Court not having Small Cause Court powers —Suit registered and tried as a regular suit—Trial as a regular suit by Court having Small Cause Court powers—Appeal.*—A Small Cause suit was instituted in the Court of an officiating Munsif who had no Small Cause Court powers The suit was registered as a regular suit. But, that Munsif being transferred, it came on for hearing and was tried as a regular suit by the permanent Munsif, who, however, had the powers of a Small Cause Court. *Held*, that, the suit having been originally instituted in the Court of a Munsif, who had no Small Cause Court powers, it could not have been tried as a Small Cause suit by the permanent Munsif, unless it had been transferred to the Small Cause Court side by a formal order, and that, as it was tried as a regular suit, an appeal against the decree lay to the District Judge. JAGMOHAN LAL v. LAKHA, **9 Ind. Cas. 264.**

(102)—*S.* 33 — *Bombay Civil Courts Act* (XIV *of* 1869), *s.* 28 — *Jurisdiction — Pecuniary limit— Small Causes Court—Appeal—Practice.*—On the 24th October 1899, plaintiff filed a suit, to recover Rs. 49 as damages for breach of a contract, in the Court of Small Causes of the Subordinate Judge of Yeola, then presided over by a Subordinate Judge who was invested with Small Causes Court powers up to Rs. 50. On the 22nd November 1899, the defendant filed his set-off claiming Rs. 120 as damages under the same contract. In December 1899, the Subordinate Judge was succeeded by another Subordinate Judge who also had Small Causes Court powers up to Rs.50. The claim and the set-off were tried by him as one suit, it was registered as a regular suit : and the evidence was recorded as in a regular suit. The Subordinate Judge was, in the meanwhile, invested with Small Causes Court jurisdiction up to Rs. 200. He then decided the suit on the 5th April 1902, by a judgment which was written as in a regular suit: *Held*, (1) that the plaintiff's suit which was a suit, cognisable by a Court of Small Causes, and instituted at a time when the Court of the Subordinate Judge had already become invested with the jurisdiction of a Court of Small Causes, did not cease to be a suit cognizable by the Court of Small Causes or ceased to be so tried merely because the Subordinate Judge at a later stage

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dealt with it as if he were trying it under his ordinary jurisdiction :—(2) that the plaintiff's suit did not cease to be a suit cognizable by a Small Causes Court by reason of the defendant having by way of set-off made a counter claim for Rs. 120, when the pecuniary limit of the jurisdiction of the Court invested with the jurisdiction of a Court of Small Causes was Rs. 50 : (3) that the suit and counter-claim must be treated as decided under the Small Causes jurisdiction of the Subordinate Judge's Court invested with the jurisdiction of a Court of Small Causes, subject to the bar of a right to appeal from the decree of such a Court. BALCHAND v. BALARAM, **5 Bom. L.R. 398.**

(103)—S. 33—*See* NO. 20, *supra.*

(104)—*S.* 35—*S.* 25, *Civ. Pro. Code*, 1882 (=*s.* 24, *new Code*)—" *Court of Small Causes* " —*S.* 17, *Act* XII *of* 1887 (*B.C.*)—*Exercise of jurisdiction.*—The expression "Court of Small Causes," in s. 25, Civ. Pro. Code, 1882, must be held to be a Court of Small Causes constituted under the Provincial Small Cause Courts Act, 1887, and not to include a Court vested with the powers of a Court of Small Causes under another Act (23 B 352, *F.*; 5 A. 274, 13 A. 324, *Diss.*) Where a Munsiff, vested with small cause powers, is transferred and is succeeded by a Munsiff not vested with such powers and the Court of Small Causes is in consequence abolished, the successor may try all small cause suits, pending on the file at the date of his accession to office, as regular suits, without the necessity for a transfer, under s. 25, Civ. Pro. Code, 1882 (13 A. 324, *Diss.*). The successor can try such suits only in his ordinary civil jurisdiction, and his decision in such case is not final. DULAL CHANDRA DEB v. RAM NARAIN DEB, **31 C. 1057.**

(105)—*S* 35—*Abolition of Small Cause Court after a decree—Application for execution, where to be made—Jurisdiction how determined.*—Where, after a decree in a Small Cause suit the Court of Small Cause is abolished, the decree-holder, wishing to execute the decree against the defendant, must apply for execution, under s. 35 of the Act, to that Court in which the suit, if instituted at the time of the application, should be instituted. Where, in such a case, the jurisdiction is to be determined by considering the place of residence of the defendant, his residence at the time of application for execution is to be considered as his place of residence. KURELLA CHENCHAYYA v. POLISETTI SEETHARAMASWAMI, **30 M. 217.**

(106)—S. 35—*See* NOS. 94, 95, *supra.*

(107)—*S.* 35 (1), *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 25—*Small Cause —Transfer of case—Appeal* —A small cause was instituted in the Court of a Munsif having Small Cause Court powers sufficient to try it. The Munsif died and his successor on a date when he had been conferred similar powers dismissed the suit against one of the defendants and passed

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an *ex-parte* decree against the other. On appeal, the District Judge set aside the judgment and remanded the case for re-trial. On re-trial, the suit was dismissed by the Munsif in default. The District Judge, on appeal, set aside this order and remanded the case again for re-trial. The Munsif passed a decree against one of the defendants. On appeal, the District Judge declined to interfere on the ground that the suit had been throughout a small cause, and no appeal lay to him. *Held*, that all the proceedings after the *ex parte* decree were *ultra vires* and the view of the law taken by the District Judge was correct. BIHARI LAL v. RADHA RAM, **127 P.L.R. 1903.** (21 C. 249, *R.*)

(108)—S. 35, cl. 1—*See* TRANSFER OF CIVIL CASES, 13 A. 324=A.W.N. 1891, 96.

(109)—*Sch.* II, *art.* 3—*Official Act—Order by Commissariat Officer confiscating security tendered by contractor.*—*Held*, that an order given by a Commissariat Officer forfeiting a contractor's earnest-money is not an Official Act such as is contemplated by art. 3 of sch. II of the Provincial Small Cause Courts Act. A claim for recovery of earnest-money against Government being in the nature of a small cause, appeal in a case of value not exceeding five hundred rupees lies to the District Judge and not to the Divisional Judge. BABU GOPAL SAHAI v. THE SECRETARY OF STATE, **91 P.L.R. 1902.**

(110)—*Sch.* II, *art.* 3—*Suit for damages for breach of contract against Secretary of State for India—Government officer, suit in consequence of some act done by one in capacity of—Small Cause Court suit, suit in nature of—Second appeal—Civ. Pro. Code, s.* 586—The station staff officer of Sitapur, as an officer of Government, leased 1,132 bighas, 4 biswas of land to the plaintiff for grazing purposes for five years. In the 9th clause of the lease it was provided that the whole or any portion of it might be resumed for the whole term of the lease or for lessor period on payment of a proportionate compensation. In June 1898, 451 bighas 4 biswas were taken from the plaintiff for the purpose of establishing a Government-grass-farm and compensation was paid to the plaintiff under the term of c. 9 of the lease. In January 1899 the land which had been taken from the plaintiff was let to others for grazing purposes. The plaintiff sued the Secretary of State to recover Rs. 450 as damages for the loss the plaintiff sustained by the land, which was taken from him, being let to others and used for grazing purposes. The first Court dismissed the suit, the District Judge decreed it. In second appeal before the Judicial Commissioner a preliminary objection was taken to the effect that the appeal was barred by the provisions of s. 586, Civ. Pro. Code, inasmuch as the suit was of the nature of a Small Cause Court suit, and its value was under Rs. 500. *Held*, that the suit fell within art. 3, sch. II of the Provincial Small Cause Courts Act, and the appeal was not barred by s. 586 of the Code of Civil Procedure. SECRETARY of STATE FOR INDIA IN COUNCIL v. MUNISHI NIAZ AHMAD, **5 O.C. 403.**

(110-*a*)—*Art.* 3—'*Act purporting to be done*', *meaning of — Failure by defendant —(Government) to carry out a contract—Suit by plaintiff for money due under contract—Whether of Small Cause nature—Second appeal.*—The suit in this case was for recovering the amount of Rs. 500 due to the plaintiff under a contract entered into by him with the Government, whereby he undertook to repair a tank and to build a pipe sluice. The plaintiff's case was that the plaintiff had performed his part of the contract and was entitled to the amount due to him under it. *Held*, in second appeal by the Government, that the amount being Rs. 500, the suit is of a Small Cause nature, and that no second appeal lies. Art. 3 of Act IX of 1887 applies to a suit relating to some distinct act done by an officer of Government. A mere failure to carry out a contract cannot be regarded as such an act. THE SECRETARY OF STATE FOR INDIA v. AYLAVAJJULA RAMABRAHMAM, **12 M.L.T. 299=M.W.N. (1912) 954=23 M.L.J. 732.** (20 B. 697, 35 B. 42, 17 C. 290, 28 M. 213, *R.*)

(111)—Art. 3—*See* NO. 7, *supra.*

(112)—*Sch.* II, *art.* 4—*Jurisdiction—Claim for the price of building materials and for possession of a small plot of building land—Unclassed suit—Appeal.*—This was a suit to recover Rs. 200, the price of materials of a house, and to obtain possession of a small plot of building land valued at Rs. 25, or for such other relief as the Court might think proper. *Held*, that the suit was neither a "land suit" nor a "Small Cause" but an "unclassed suit" and the appeal from the decree of the Munsif lay to the Divisional Judge and not to the District Judge. JAWAHIR MAL v. FATTU MAL, **P.L.R. 1900, p. 345 =60 P.R. 1900.**

(113)—*Sch.* II, *art.* 7—*Rent of house.*—A suit for rent of house including rent at an enhanced rate as agreed up is cognizable by a Small Cause Court. HAJI AHMAD HUSAIN v. SUNDAR LAL, **80 P.R. 1893.** [*D.*, 63 P.R. 1901=101 P.L.R. 1901; *R.*, 37 P.R. 1903.]

(114)—Sch, II, art. 7—*See* ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 6 O.C. 190.

(115)—*Arts.* 7 *and* 13—*Claim for* poruppu *and* kulavettu.—A claim for *poruppu* does not fall within the prohibition in art. 7 of the Act as a claim for apportionment of rent. It is not also clear that the claim for *kulavettu* falls within the prohibition enacted in art. 13. SEETHARAMA IYER v. FISCHER, **17 M.L.J. 487.** (27 M. 478, *R.*)

(116) — *Sch.* II, *art.* 8 — *Ground rent of of a shop—Suit for —Nature of.*— A suit for recovery of ground rent of a shop *i.e.*, rent of the site on which the shop stands does not lie

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in a Small Cause Court. MULLA BAKHSH v. MIRZA ANWAR ALI, **1 P.R. 1894.** (17 C. 541, *D.*)

(117)—*Sch.* II, *art.* 8—*Landlord and tenant—Suit by assignee of rent—Suit for rent.*—A suit brought by an assignee of rent against the tenant, where it appears that the money was due as rent at the time of the assignment, is a suit to recover rent within the meaning of art. 8 of sch. II of the Provincial Small Cause Courts Act. SHEIKH MUNSAR v. LOKE NATH ROY, **4 C.W.N. 10.** (14 W. R. 456, Marsh 199, 15 W. R. 344, *F.*; 19 W. R. 431, *D.*)

(118)—*Sch.* II, *art.* 8—*Rent of a ferry, suit for, if cognizable by a Small Cause Court.*—To determine whether an amount payable under a contract is rent or not, each case must be judged by its own circumstances. In a suit to recover sums due under a contract for the defendant plying boats in a private ferry: *Held* that, in the circumstances of the case, the sum payable was in no sense a rent. PROHLAD PATNI v. SASHADHAR RAI, **14 C.W.N. 994=7 Ind. Cas. 553.**

(119) — *Sch.* II, *art.* 8 — *Rent of a masonry outlet—Not cognizable by Small Cause Court.*—A suit for rent of a masonry outlet or *mogu* belonging to the plaintiff and used by the defendant for the irrigation of his land is one for rent other than house-rent and as such is not cognizable by a Small Cause Court. MAHARAJA OF KASHMIR v. FATTEH DIN, **164 P. R. 1888.**

(120)—*Sch.* II, *art.* 8—*Compensation for rent wrongfully taken by a trespasser—Suit for mesne profits.*—Where a suit is for compensation for rent wrongfully taken by a trespasser, art. 8 of the Provincial Small Cause Courts Act does not apply. GANGA RAM v. ABADAN, **3 P.L.R 1903.** (23 C. 885, F. B., 12 M. 196, 80 P.R. 1896, 94 P. R. 1900 =39 P.L.R. 1901, *R.*)

(121)—*Sch.* II, *art.* 8—*Failure of tenant to raise crop—Suit by landlord for recovery of value of his share, 'if lies in Small Cause Court—"Rent"—"Damages for use and occupation."*—Where a landlord brought a suit against his tenant claiming damages for wilfully omitting to raise crops, whereby the plaintiff was deprived of his share thereof: *Held* that, inasmuch as the share of the produce to be received by the landlord was ascertained before the commencement of the suit, and the term for which the land was let out had not terminated, the claim was in substance one for recovery of rent and the suit would not lie in the Small Cause Court. LALJI PANDAY v. BARHOMDEO PANDAY, **16 C.W.N. 89=13 Ind. Cas. 29.**

(122)—*Art.* 8, *sch.* II—*Jurisdiction—Suit for rent.*—A suit against the defendants who had executed a bond in favour of the plaintiff,

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

undertaking to pay a debt due from their landlord, is not a suit for rent and is therefore cognizable by a Court of Small Causes. HRIDOY NATH PODDAR v. JOYRAM MAHTO, **4 C.L.J. 402.** (27 C. 827, F.B., *D.*)

(123)—*Sch.* II, *cl.* 8—*'Judge of the Court of Small Causes,' meaning of, if it means and includes Munsifs and other Judicial Officers vested with Small Cause Court powers.*—The expression, "the Judge of the Court of Small Causes" in cl. (8), sch. II of the Provincial Small Cause Courts Act, must be taken to apply either to the Judge of the Court of Small Causes constituted under the Act or of a Court invested with the jurisdiction of a Court of Small Causes. Where, therefore, the Local Government purporting to act under cl. (8), sch. II of the Provincial Small Cause Courts Act, by a notification in the Official Gazette, invested in general terms the Munsifs of a certain place, with authority to exercise jurisdiction with respect to suits for recovery of rent of homestead lands up to a certain value, and empowered such Munsifs to try such suits under the Small Cause Court Procedure, such Munsifs, if invested with the jurisdiction of a Court of Small Causes, are competent to entertain and try such suits as Court of Small Causes. AKSHAYA KUMAR SAHA v. HIRA LAL DOSADH, **7 C.L. J. 407=35 C. 677.**

(124)—Sch. II, cl. 8—Suit for burga rent—Maintainability—*See* BURGADAR, 14 C.W.N. 639=6 Ind. Cas. 594.

(125)—Art. 8—Land given in lieu of service—Non-performance—Suit for damages—Jurisdiction—*See* DAMAGES — DAMAGES, SUITS FOR, 12 C.L.J. 480=8 Ind. Cas. 96.

(126)—Art. 8—*See* NOS. 6, 8, *supra.*

(126-*a*)—*Arts.* 8, 11—*Small Cause Court—General Clauses Act* (X *of* 1897), *s.* 3—*Lease to collect rent—Immoveable property—Suit not cognisable by.*—A suit to recover the rent of certain shops in a bazaar under an oral lease is not cognizable by a Court of Small Causes, being a suit either for recovery of rent other than house rent within the meaning of art. 8, sch. II, Provincial Small Cause Courts Act, or for the enforcement of some other rights to or interest in immoveable property within art. 11. A right to collect rents of shops or houses from persons actually occupying them is "immoveable property" by virtue of the definition in art. 25, s. 3 of the General Clauses Act, which definition applies to the Transfer of Property Act by reason of s. 4 of the General Clauses Act, in so far as it is not inconsistent with the special provisions of s. 3 of the Transfer of Property Act. BABU LAL v. BHAWANI DAS, **9 A.L.J. 776=15 Ind. Cas. 32.**

(127)—*Art.* 11, *sch.* II—*Maintainability of suit.*—Art. 11 of sch. II to the Provincial Small Cause Courts Act does not cover a suit by a vendee to recover from the vendor the purchase money which he has paid for the land

Provincial Small Cause Courts Act (IX of 1887) - *continued.*

bought, from which he has been ejected by order of a Civil Court at the instance of a third person. GOOL KHAN v. TETAR GOALA, **4 C.W.N. 63.**

(128)—*Sch.* II, *cl.* (11)—*Suit for damages for the cutting of plaintiff's trees by defendant—Defendant not claiming trees as his own but alleging non-existence of trees—Jurisdiction of Small Cause Court—Plea of jurisdiction—Duty of Court—High Court's power to interfere—Revision—Practice.*—A suit for damages for the cutting of plaintiff's trees by the defendant, who did not claim that the trees were his own property, but alleged that there were no trees and none cut down, does not involve the determination of any right to immoveable property, within the meaning of the cl. 11 of sch. II to the Provincial Small Cause Courts Act, and is, therefore, cognizable by a Small Cause Court. High Court is not bound to interfere in every case in revision from the decree of a Court of Small Causes. CHINGAN GIR v. BABU LAL, **5 Ind. Cas. 322.**

(129)—Art. 11—*See* NOS. 5, 126-*a*, *supra.*

(130)—*Sch.* II, *arts.* 11 *and* 13, *suit for arrears of jodi not exempted under.*—A suit to recover arrears of jodi is cognizable by the Small Cause Court. Jodi is not a cess or due of the kind referred to in art. 13 of the Provincial Small Cause Courts Act. The word "dues" in that article must be taken to comprise only dues similar in kind to those specifically mentioned therein. VENKATAGIRI RAJAH v. VENKAT RAU, **21 M. 243.**

(131)—Arts. 11, 14—*See* CIV. PRO. CODE, 1908, s. 88, 20 M. 155.

(132)—*Sch.* II, *arts.* 11, 21—*Suit cognizable by Court of Small Causes—Execution purchaser—Suit to recover refund of purchase money—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 315.—A suit brought by an execution purchaser of immoveable property, under s. 315 of the Civ. Pro. Code, 1882, for recovery of his purchase money on the ground that the judgment-debtor had no saleable interest therein, is one cognizable by a Court of Small Causes. ABDULBHAI v. NASHIA, **8 Bom. L. R. 369.**

(133)—*Sch.* II, *arts.* 11 *and* 31— *Wrongful carrying away of crops — Small Cause.*—A suit for damages for defendant's wrongfully cutting and carrying away produce of immoveable property belonging to plaintiff. ISHAR SINGH v. WASAWA SINGH. **94 P.R. 1900 = 39 P.L.R. 1901.** [*Disappr.*, 35 P.R. 1902 = 84 P.L.R. 1902, F.B.]

(134)—*Sch.* II, *arts.* 11, 31 *and* 35—*Wrongful ouster from land — Suit for damages—Question of title involved.*—The fact that in a suit for damages for wrongful ouster from land, the question of the plaintiff's title is involved cannot oust the jurisdiction of a Small Cause Court. DAL SINGH v. BHUPA, **80 P.R. 1896.** [*Disappr.*, 35 P.R. 1902 = 84 P.L.R. 1902, F.B.; *R. & Cons.*, 94 P.R. 1900.]

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(135)—*Art.* 13—*Land cess--Zemindar's suit to recover from Inamdar—Whether of Small Cause nature--Second appeal.*—A suit to recover land-cess by the zemindar from the inamdar is one of a small cause nature, and no second appeal lies in such a suit. The cesses and dues contemplated in art. 13 of the Act are payments which a person is entitled to as representing his interest in certain immoveable property, and not because he possesses some interest in immoveable property. SRI MAHARAJA OF VIZIANAGARAM v. KOTTA VEERANNA, **10 M. L.T. 167 = 21 M.L.J. 819 = 2 M.W.N. 1911, 139 = 11 Ind. Cas. 760.**

(136)—*Sch.* II, *art.* 13 — *Suit for recovery of ferry tolls.*—A suit by the lessee of a Government ferry for recovery of tolls falls under this article. GOKAL CHAND v. LAL CHAND = **48 P.R. 1897.** *See also* DESA SINGH v. NARAIN DAS, **80 P.R. 1898.**

(137)—*Art.* 13, *sch.* II — *Suit for dues wrongfully paid.*—This article must be limited to suits by the person entitled to the dues against those by whom they are payable ; and cannot be extended to suits to recover the dues from persons to whom they have been wrongfully paid. HARNAM v. GANDU, **81 P.R. 1889.** [*R.*, 28 P.R. 1894.]

(138)—*Art.* 13, *sch.* II—*Suit to recover share of voluntary payments made to a religious association — Not cognizable on the Small Cause side being 'dues to which a person is entitled by reason of his interest in a religious institution'—'Dues,' meaning of—Law prior to the present Act.*—A suit by member of a religious association to recover his share of 'voluntary payments' made to the association is on the same footing as the right to share in the income from the landed endowments thereof and as such, it is a suit to recover 'dues to which a person is entitled by reason of his interest in a religious institution' within the meaning of sch. II, art. 13 and consequently excepted from the cognizance of a Court of Small Causes. The word 'dues' applies to shares in even what has been paid voluntarily. Even prior to the enactment of the present Provincial Small Cause Courts Act, suits relating to participation in voluntary offerings made at shrines had been held to be not cognizable by Courts of Small Causes. BHAVADASON v. NARAYANA SOMAYAJIPAD, **28 M. 202.** (26 A. 360, *commented on.*)

(139)—S. 13—*See* NOS. 115, 130, *supra.*

(139-*a*)—*Art.* 13—*Amount not falling under it—Of a Small Cause nature—No second appeal.*—Where money is payable annually to the plaintiff, he must make out that the suit came within one of the articles of the second schedule to the Provincial Small Cause Courts Act. Otherwise it will be treated as a suit of a Small Cause nature ; and no second appeal would lie. RAMANATHA KALKURA v. DARAMMA SHEHITHI, **M.W.N. 1912, 537 = 16 Ind. Cas. 107.**

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(139-b)—*Sch.* II, *cl.* 13—*General Clauses Act* (X *of* 1897)—*S.* 3 (25)—*Right to a ferry—Immoveable property—Jurisdiction of Provincial Small Cause Court.*—The right to a ferry is a benefit which arises out of land and comes within the definition of 'immoveable property' under s. 3 (52) of the General Clauses Act, and a suit by a lessee of a ferry to levy a toll falls under cl. 13, sch. II, Provincial Small Cause Courts Act, and is therefore not cognizable by that Court. ABDUL HAMID KHAN v. BABU LAL, **11 A.L.J. 133=35 A. 156=18 Ind. Cas. 282.** (48 P.R. 1897, 80 P.R. 1898, *F.*)

(140)—Arts. 13, 15 and 18—*See* CIV. PRO. CODE, 1908, s. 102, 27 A. 200=A.W.N. 1904, 227.

(141)—*Arts.* 13, 18—*Pujaris claim* neivedhanam *along with other emoluments—Triable as regular suit.*—Where the plaintiff sues for *neivedhanam* or rice allowance, along with the emolument pertaining to his office of pujari of a temple, the whole suit is triable as a regular suit by the District Munsiff. The claim would fall within the wording of art. 13, and, apparently also of art. 18 of the schedule to the Provincial Small Cause Courts Act. RENGASAMI PILLAI v. MUTHU CHIDAMBARA KURUKAL, **2 M.W.N. 1911, 589.**

(142)—*Arts.* 13 *and* 31—*Suit for money had and received—Civ. Pro. Code, s.* 586—*Cesses and dues.*—A compromise decree provided for the maintenance of a temple, situated in the market, which was partitioned between the parties, and indicated the sources of income arising from the market which were to be devoted to the maintenance of the temple. One of these sources was certain weighment charges. The plaintiff sued for recovery of Rs. 150 which the defendant was alleged to have collected from his share of the market, and which according to the plaintiff the defendant ought to have handed over to him for the benefit of the temple. The suit was instituted in the Court of a District Munsiff. *Held* that the suit was one for money had and received, and was not covered by art. 11 of Act IX of 1887, not by art. 31, and that s. 586, Civ. Pro. Code, was applicable to the case and barred a second appeal. [*Diss.*, 28 M. 202.] The cesses and dues referred to in art. 13 are cesses and dues which are claimed *qua* cesses or dues and apparently from the person who is liable to pay them. MAHADEO v. BUDHAI RAM, **26 A. 358.**

(142-*a*)—Art. 14—*See* NO. 131, *supra.*

(143)—*Sch.* II, *art.* 15—*Specific performance—Suit on a bond for supply of articles or value—Specific Relief Act* I *of* 1877, *s.* 21 (*a*), *Illustration* (2)—*Jurisdiction.*—A sued B for the recovery of 380 baskets of paddy or their value, Rs. 302 as due upon a bond. *Held*, that a contract for the supply of specific articles is not one which could be specifically enforced by the Courts, for compensation in money is clearly an adequate relief, see Specific Relief Act, 1877, s. 21 (*a*), Illustration (2), and therefore does not fall under Provincial S.C. Courts Act, 1887, sch. II, art. 15. *Held*, also, that the jurisdiction of Small Cause Courts cannot be ousted merely by asking for an alternative relief to which the plaintiff is not entitled. NGA HLA GYI v. NSA AUNG YA, **U.B.R. 1908, Third Quarter, Provincial S.C. Courts Act, 3** (1 B. L.R. 91, 21 B. 248, *R.*)

(144)—Sch. II, art. 15 — *See* FRAUD — GENERAL, 49 P.R. 1904.

(145)—Art 15 — *See* LEASE—ZURPESHGI LEASE, 6 Ind. Cas. 704.

(146)—Art. 15 — *See* NOS. 5, 8-*a*, 140, *supra.*

(147)—Art. 16—*See* NO. 5, *supra.*

(148)—*Sch.* II, *art.* 18—*Suit by dismissed guardian against minor for money spent by him for minor's use.*—When the plaintiff sued for the recovery of money spent in connection with the guardianship of the person and property of minor defendant, over and above the income realized from the minor's estate, plaintiff having been appointed his guardian and subsequently removed. *Held*, that the suit was one relating to a trust under art 18 of sch. II of the Provincial Small Cause Courts Act. JAGAN NATH v. NIRANJAN DAS, **141 P.L.R. 1903=58 P.R. 1903.** (25 W.R. 25, *R.*)

(149)—*Sch.* II, *art.* 18—*Suit for damages against previous manager of temple.*—A suit brought by the manager of a temple against the defendant, who was the late manager, for recovering a sum of money being the amount of damages which the Devastanam had sustained by the defendant's negligence in the discharge of his duties as manager, *i.e.*, by reason of his failure to prosecute certain suits which he had instituted on behalf of the Devastanam, was held to be a suit relating to a trust exempted from the cognizance of a Court of Small Causes by art. 18 of the Provincial Small Cause Courts Act. KRISHNAYYAR v. SOUNDARARAJA AYYANGAR, **21 M. 245.**

(150)—*Sch.* II, *art.* 18 — *Suit to recover moveable property or its value deposited for safe custody—Suit relating to trust—Jurisdiction of Small Cause Court.*—A suit for the recovery of moveable property alleged to have been deposited for safe custody with the defendants, or its value, is not one "relating to a trust" within the meaning of art. 18 of sch. II of the Provincial Small Cause Courts Act; and such a suit is cognizable by a Small Cause Court. KARTAR DEVI v. SURASTI, **9 P.R. 1908=28 P.W.R. 1908=98 P.L.R. 1908.** [*R.*, 142 P.R. 1908.]

(151)—*Art.* 18—*Suit relating to trust—Appointment of plaintiff by deed of trust—Suit for salary—Small Cause suit.*—A printing press was vested in trustees for the conduct of a newspaper. Plaintiff was appointed editor and manager on a salary by the author of the trust. Plaintiff acted for some time

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

and resigned. He then sued to recover the arrears of pay due to him and filed the suit on the Small Cause side of the Court. *Held* that the suit fell under art. 18 of the Provincial Small Cause Courts act, as it related to a trust. By the deed of trust, the settlor had appointed plaintiff as editor and manager. The suit was against trustees to carry out the direction in the instrument of trust and pay plaintiff his salary therein provided. If the plaintiff had any cause of action, it was to enforce performance of the trust in so far as it related to him. The plaint was accordingly ordered to be returned for presentation to the proper Court. SUBRAMANIAYYAR v. PANDI DORAISAMI TAVER, **26 M. 368.**

(152)—*Art.* 18 — *Suit relating to a trust—Whether a suit for subscription against a trust is a.*—Suit by a limited liability company, for subscriptions due to the company alternatively against the first defendant, the trust, or against defendants 2 to 4, trustees, either in their personal capacity or as trustees, the subscriptions being due by defendants 2 to 4 as members of the company under its articles of association and rules.—*Held per C.J. and Sankaran Nair, J.* (*Benson, J. Diss.*), that the suit is not one relating to a trust within the meaning of art. 18, Act IX of 1887, as the defendants are sued, not because they are trustees, but because they, as members, are liable for the subscriptions, and the suit is cognizable by the Small Cause Courts. SRI VENKATACHELLAPATHY SAHAYA VYAVASAYA CO. v. KANAKASABAPATHY PILLAI, **20 M.L.J. 146=5 Ind. Cas. 912=8 M.L.T. 67=33 M. 494.** (26 M. 200, 21 M. 245, 26 M. 368, *R.*)

(153)—*Sch.* II, *cl.* (18)—*Jurisdiction—Suit to recover money paid to legal practitioner, for legal expenses but not so spent.*—A suit wherein the plaintiff claimed from the defendant, a legal practitioner, the refund of certain moneys alleged by the former to have been paid to the latter for the purpose of instituting certain suits, but not to have been so spent, was *held* to be cognizable by a Small Cause Court, and was not a suit relating to a trust within the meaning of cl. 18 of second schedule to Act IX of 1887. NORTH WESTERN COMMERCIAL BANKING CORPORATION, &C. v. MUHAMMAD ISMAIL KHAN, **24 A. 208=A.W.N. 1902, 15.**

(153-*a*)—*Sch.* II, *art.* 18—*Suit by trustee—Claim based on agreement by defendant to pay a specified sum to plaintiff.*—A suit by a trustee for the recovery of a specified amount agreed to be paid to him by the defendant for being used as a trust is not a suit relating to a trust within the meaning of art. 18 of the Act, and is triable by a Small Cause Court, if the amount of the claim falls within its pecuniary jurisdiction. AYYA PILLAI v. VRITHACHELLAM PILLAI, **15 Ind. Cas. 273.** (26 M. 200, 20 M.L.J. 146, 5 Ind. Cas. 912, 8 M.L.T. 67, *R.*)

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(154)—Art. 18—*See* HINDU LAW—GIFT, 18 M. 252.

(155)—Art. 18—*See* NOS. 140, 141, *supra.*

(156)—*Art.* 19 — *Jurisdiction — Suit for balance due on a partnership account—Addition of prayer for declaration of dissolution of partnership—Civ. Pro. Code, s.* 646 *B.*—Where a plaint asked in effect for the recovery of a balance alleged to have been struck on the winding up of a partnership: *Held*, that the fact that a prayer for a declaration that the partnership had been dissolved was added did not oust the jurisdiction of the Court of Small Causes. *Held*, also, that, when a reference is made to the High Court under s. 646-B of the Code of Civil Procedure, the Court, which makes it, should state its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous. CHHOTU v. JAWAHIR, **A.W.N. 1906, 29=3 A. L.J. 23=28 A. 293.**

(157)—*Sch.* II, *art.* 20—*Attachment of moveable property—Suit by unsuccessful claimant.*—A suit by a defeated claimant to attached moveable property for recovery of the same or its value is not cognizable by a Small Cause Court. DYAL v. SUNDER SINGH, **51 P.R. 1890.**

(158)—Sch. II. art. 20—*See* CIV. PRO. CODE, 1908, s. 47, 63 P.R. 1889.

(159)—Art. 20—*See* NO. 3, *supra.*

(160)—Art. 21—*See* NO. 132, *supra.*

(160-*a*)—*Sch.* II, *art.* 24—*Award—Question regarding validity of award — Incidentally arising—Jurisdiction of Small Cause Court to decide.*—The Small Cause Court has jurisdiction to adjudicate on the validity of an award, when that question arises incidentally in a suit that was within its cognizance. CHIMANDAS v. MANGHOOMAL, **6 S.L.R. 85.** (17 B. 42, 21 B. 248, 10 Bom. L.R. 733, *R.*)

(161)—*Art.* 28, *sch.* II—*Suit for recovery of ornaments or their value—Right of inheritance—Not a suit for a share in the property of an intestate.*—A suit for recovery of ornaments or their value by right of inheritance is not a suit for the whole or a share of the property of an intestate and is not excluded from cognisance of the Court of Small Causes. CHEDI v. GULABO, **2 A.L.J. 388=A.W.N. 1905, 134=27 A. 622.** (11 W.R. 93, 7 C.L.R. 71, *F.*)

(161-*a*)—*Art.* 28—*Suit for the return of marriage presents—Death of bride and bridegroom—Property of intestate.*—Plaintiff made certain presents to her son-in-law on the occasion of the marriage of her daughter and the son-in-law. Both the son-in-law and the daughter died subsequently. The daughter died after her husband. Plaintiff now claimed the return of the jewels presented by her. She based the claim, not on her right to inherit, but on a certain custom of her caste. *Held*,

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that such a claim is not a claim for any property of the intestate, and art. 28 of the Act does not therefore apply. BONDA CHINNAYYA v. POTTULA ACHAMMAH, **23 M.L.J. 282 = M.W.N. 1912, 887 = 12 M.L.T. 308 = 16 Ind. Cas. 542.**

(162) — *Sch.* II, *art.* 29 — *Agricultural transaction — Profits of partnership — Suit for.*—A suit for profits out of a partnership business in connection with an agricultural transaction is governed by this article. BHUP SINGH v. FATTA, **92 P.R. 1889.**

(163) — *Sch.* II, *art.* 29 (*c*) — *Scope and meaning of sub-article.*—The words "unless the balance has been struck by the parties or their agents" indicate a final adjustment of the whole partnership account, no portion thereof remaining for future adjustment and the result being stated in the form of a balance struck. SRI RAM v. BANSI DHAR, **64 P.R. 1895.**

(164) — *Sch* II, *art.* 29 (*g*) — "*Compensation, meaning of.*"—The word "compensation" in this article has the same meaning as it has in s. 73 of the Contract Act. So a suit by a person for return of a sum of money alleged to have been taken from him by the defendant under a promise to give the latter's daughter in marriage to the former falls under this article. NURA v. ALA DITTA, **132 P.R. 1889.** [*R.*, 125 P.R. 1907 = 80 P.W.R. 1907.]

(165)—*Sch.* II, *art.* 31—*Suit for account, what is—Account between silk merchant and dyer and dresser of silk.*—If, in order to grant relief to the plaintiff, it is necessary to take accounts, the suit is one for accounts within the meaning of art. 31 of the Provincial Small Cause Courts Act, although the plaintiff may have chosen to put a definite money value upon his claim. The plaintiff, a silk merchant, advanced money to the defendant from time to time. Out of the money so advanced, the defendant purchased materials for dyeing and dressing, and retained the balance as remuneration for work done. The plaintiff kept an account book. The accounts have not been adjusted. The plaintiff brings this suit for recovery of Rs. 307 on the allegation that upon settlement of accounts that sum would be found due from the defendant: *Held* that the suit was one for account within the meaning of art. 31 and that the Small Cause Court had no jurisdiction. KAILAS CHANDRA MANDAL v. KIRANENDA GHOSH, **10 Ind. Cas. 883.**

(166)—*Art.* 31—*Suit of Small Causes Court nature — Second appeal — High Court.*—The plaintiff sued to recover from the defendants Rs. 120 as the value of his share in the produce of certain lands alleged to belong jointly to him and the defendants. This right was denied in the written statement. The lower Court dismissed the suit. On second appeal, a preliminary objection was taken that no second appeal lay, as the suit was of a Small Causes Court nature: *Held*, upholding the objection, that no second appeal lay. The question of title arose incidentally and did not therefore remove the suit from the cognizance of the Court of Small Causes. KESRISANG v. NARANSANG, **10 Bom. L.R. 733 = 32 B. 560.**

(167)—*Art.* 31—*Jurisdiction—Mesne profits.*—A claim by the plaintiff for mesne profits of certain lands based on the allegation that he had been dispossessed therefrom by the defendant falls within cl. 31 of sch. II of the Provincial Small Causes Courts Act, 1887; and is, therefore, not cognizable by a Court of Small Causes. ANTONE v. MAHADEV, **2 Bom. L. R. 683 = 25 B. 85.**

(168)—*Art.* 31—*Suit cognizable by Court of Small Causes—Practice and procedure—Appeal.*—A suit to recover his share of profits of immoveable property which the plaintiff alleges the defendant to have wrongfully received but as to which the plaintiff claims a definite sum is a suit falling within the cognizance of the Court of Small Causes. GIRJABAI v. RAGHUNATH, **7 Bom. L.R. 741 = 30 B. 147.**

(169)—*Art.* 31—*Suit for an account.*—Plaintiff sued the defendant on small cause side to recover a sum alleged to be due under a settlement of accounts. The Munsiff gave a decree for the sum found due to the plaintiff on examination of the accounts of the parties. On revision, the High Court *held*, that the suit fell under art. 31 of the Act and was not cognizable by a Small Cause Court. *Held*, on Letters Patent appeal, from the said order on revision, that a suit like the present one is not a suit for an account within art. 31 merely because it involves a certain amount of investigation of the accounts of the parties. A suit for an account is a special form of suit. A special process is required to take an account in such a suit. KANDURU RUNGA REDDI v. SUBBIAH SETTY, **28 M. 394.**

(170)—*Art.* 31—*Suit for damages—Cognizability by the Small Cause Court.*—Where the defendants cut and carried away crops standing on the land, and the suit was by the landlord to recover the value of such crops, such a suit was cognizable by the Court of small causes and it did not fall within the purview of art. 31 of the said Act. RAMAIYAR v. P. S. SAMINATHA AIYAR, **2 M.W.N. 1191, 189 = 11 Ind. Cas. 31 = 35 M. 726.** (15 M. 298, *F.*)

(171)—*Art.* 31, *sch.* II—*Specific performance—Agreement to convey immoveable property to plaintiff—Conveyance executed by Court—Suit for money due under terms of conveyance whether lies in Small Cause Court—Mesne profits—Civ. Pro. Code (Act V of 1908), s. 47.*—A suit for recovery of money due to the plaintiff, under the terms of a conveyance of immoveable property executed in his favour by the defendant, is not a suit for recovery of profits of immoveable property wrongfully received by the defendant, within the meaning of the art. 31 of sch. II of the Provincial Small Cause Courts Act, and is cognizable by the

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

Small Cause Court. The plaintiff agreed to purchase certain immoveable properties from the defendant who, in breach of that agreement, sold the properties to other persons. The plaintiff brought a suit for specific performance, and obtained a decree; the conveyance was not executed by the defendant and the Court executed it on behalf of the vendor. The plaintiff then sought to recover from the defendant the profits collected by him, between the date of the execution of the agreement for sale and the date of the execution of the conveyance, under the terms of the conveyance: *Held* that the suit was not barred under s. 47 of the Civ.Pro.Code, for, as soon as the conveyance was executed by the Court, nothing further remained to be done in the execution proceedings, and a separate suit was maintainable to enforce the rights of the plaintiff under the conveyance. KALI NARAIN v. HARI NATH, **7 Ind. Cas. 484 = 12 C.L.J. 599**

(172)—*Applicability of art.* 31, *sch.* II—*Suit for rent by a divided co-parcener against his co-parcener and the tenant, cognisable by Small Cause Court.*—First defendant was a tenant of the joint family composed of second defendant and the plaintiffs. On partition between the plaintiffs and second defendant, a certain proportion of the family lands fell to the share of the former, who instituted the present suit for the rent due on that proportion making the second defendant also a party, because the lease deed stood solely in his name and because he was alleged to be bound to pay plaintiffs their share of the rent in case the first defendant be not found liable. *Held*, that the suit was substantially one for rent and so cognizable by a Small Cause Court and did not fall within art. 31 of the Second Schedule, as "a suit for the profits of immoveable property belonging to plaintiff, which have been wrongfully received by the defendant." SRINIVASA RAGHAVA AYYANGAR v. PICHAIKARAN, **29 M. 184.**

(173)—*Sch.* II, *cl.* 31, *suit exempted und r.*—Where a person claiming as land-owner to be entitled to receive the rents or fees paid by shopkeepers for the temporary occupation, during a fair, of a piece of land belonging to his mahal, sued the defendant on the allegation that he had wrongly received those dues or rents, the suit, though it did not come within the purview of cl. 13 of the second schedule to the Provincial Small Cause Courts Act, as contended by the defendant, because it was a suit by the plaintiff to recover from the defendant money paid to, and received by, the defendant to the plaintiff's use, and wrongly retained by defendant, was yet held to be one excluded from the cognizance of the Court of Small Causes on the ground of its being covered by the latter portion of cl. 31 of the Act as being "a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant." RAMESHAR SINGH v. DURGA DAS, **23 A. 437 = A.W.N. 1901, 128.** (17 B. 42, *R.*) [*F.*, 16 C.P.L.R. 1.]

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(174)—*Sch.* II, *cl.* 31—*Profits of immoveable property, suit for, not cognizable by Small Cause Court—Jurisdiction.*—A suit for a definite sum of profits of immoveable property is not cognizable by a Court of Small Causes, although it involves no rendition of accounts. SRIMATI NAND RANI v. SWASHWA NESWAR, **8 Ind. Cas. 270.** (23 A. 437, 26 A. 321, *F.*; 23 C. 88, 35 P.R. 1902, 84 P.L.R. 1902, 24 M. 118, 25 M. 103, 29 M. 184, 13 M.L.J. 136, 25 B. 87, 10 Bom. L.R. 733, *R.*)

(175)—*Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *cl.* 31—*Suit for profits of land—Civ Pro Code, s.* 586.—A suit brought to recover the value of crops alleged to have been illegally carried away by defendant while plaintiff was in possession, is not exempted from the jurisdiction of the Small Cause Courts Act by cl. 31, Act IX of 1887, and it makes no difference that, in the course of investigation, it appears the defendant is acting under color of some claim of title to the land. No second appeal lies under s. 586, Code of Civil Procedure, when the value of such a suit is less than Rs. 500 ANNAMALAI v. SUBRAMANYAN, **15 M. 298.** [*R.*, 119 P.R. 1894, 23 C. 884, 94 P.R. 1900 = 39 P.L.R. 1901.]

(176)—*Sch.* II, *cl.* 31—*Civ. Pro. Code, s.* 586—*Suit of the nature cognizable by a Court of Small Causes—Suit for damages for eviction from land—Jurisdiction.*—A suit to recover damages on account of the alleged wrongful eviction of the plaintiff from immoveable property is not a suit falling within cl. 31 of the second schedule to Act No. IX of 1887, though the profits of the property may be a measure of the damages claimed. PRASADI LAL v. IMDAD HUSEN, **A.W.N. 1898, 10.** (23 C. 884, *F.*) [*R.*, 2 O.C. 256; *Cited*, 7 O.C. 202.]

(177)—*Sch.* II, *art.* 31—*Damages for forcible cutting and carrying away of grass.*—The Provincial Small Cause Courts Act of 1887 has altered in no way the cognisability, by Small Cause Courts, of suits for trespass on land and the wrongful appropriation of produce. So, a suit for damages for the forcible cutting and carrying away of grass is cognizable by the Court of Small Causes. KRISHNA PROSAD NAG v. MAIZUDDIN BISWAS, **17 C. 707.** (2 N.W.P. 18, 3 N.W.P. 101, 2 M. 118, 3 M. 192, *R.*) [*Overruled*, 23 C. 884, F. B.; *F.*, 18 C. 316, 15 M. 298, 2 O.C. 256; *Cited*, 119 P.R. 1894; *R. & Commented on*, 94 P.R. 1900, 39 P.L.R. 1901; *D.*, 22 C. 877.]

(178)—*Sch.* II, *art.* 31—*Small Cause—Mesne profits.—Claim for—Appeal. Held*, by the Full Bench, that a suit for mesne profits for the plaintiff being kept out of possession of property to which he was entitled is not a suit for accounts, and does not fall within the purview of article 31, schedule II of the Provincial Small Cause Courts Act. The suit being in the nature of a Small Cause, the appeal against the decree passed in it lies to the District Court and not to the Divisional Court

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under s. 39 of the Punjab Courts Act, when the value of the suit does not exceed Rs. 500. MUSSAMMAT KISHEN KAUR v. SARDAR TULSA SINGH, **84 P.L.R. 1902, F.B.=35 P.R. 1902.** (23 C. 884, 22 M. 196, 80 P.R. 1896, 94 P.R. 1900, 39 P.L.R. 1901, *F.*; 119 P.R. 1894, *Disappr.*)

(179)—*Sch.* II, *art.* 31—*Suit for account—Nature of—Distinguishing feature—Cognisability by Small Cause Court.*—A 'suit for an account' is a special form of suit and does not include every case in which accounts have to be looked into in order to ascertain whether the amount claimed by the plaintiff is correct or not. Therefore every case in which it is necessary to go into the plaintiff's account cannot, on that ground alone, be said to fall within art. 31, Provincial Small Causes Court Act, and therefore to have been exempted from the cognisance of a Court of Small Causes. (23 C. 884, 27 A. 200, 28 M. 394, *R.*) The distinguishing feature of a 'suit for an account' seems to be the defendant's possession of or duty to furnish detailed accounts, the plaintiff being more or less precluded, by reason of the nature of the relations between the parties, from putting the precise pecuniary outcome of those relations before the Court. MAROTI v. BALAJI, **8 N.L.R. 36=14 Ind. Cas. 786.**

(180)—*Sch.* II, *art.* 31 — *Suit for mesne profits—Value less than Rs.* 500—*Second appeal.*—No second appeal lies from a suit for mesne profits, where the value of the subject-matter is less than Rs. 500. (*Ghose and Bannerjee, JJ.*, Diss.) KUNJO BEHARY SINGH v. MADHUB CHUNDRA GHOSE, **23 C. 884, F. B.** (18 C. 316, *Overruled.*) [*F.*, 18 A.W.N. 10, 22 M. 196, 2 O.C. 256, 24 M 118, 84 P.L.R. 1902, F.B.; *R. Commented upon*, 94 P. R. 1900; *R.*, 4 O.C. 89, 6 Bom. L.R. 370, 30 B. 147=7 Bom. L.R. 741; *Cited*, 7 O.C. 202; *Not F.*, 25 B. 85, 16 C.P.L.R. 1; *Disappr.*, 39 P.L.R. 1901, 35 P. R. 1902, F.B; *Diss.*, 3 P.L.R. 1903.]

(181)—*Sch.* II. *art.* 31 —*Jurisdiction—Property common to plaintiff and defendant—Suit for recovery of plaintiff's share of produce taken by defendant.*—A suit by the plaintiff for his share of the value of the produce realised by defendant, from property common to both plaintiff and defendant, is cognizable by a Provincial Small Cause Court, and is not excepted by art. 31 of sch. II of Act IX of 1887. SUBBU REDDI v. VEERA REDDI, **7 Ind. Cas. 390=8 M.L.T. 281.** (25 M. 103, 11 M.L.J. 428, 13 M.L.J. 136, 18 M.L.J. 88, *D.*; 21 B. 248, *F.*)

(182)—*Sch.* II, *art.* 31—*Suit for mesne profits—Jurisdiction.*—A suit for mesne profits is not a suit for an account, but a suit for damages, and is not exempted from the jurisdiction of the Small Cause Courts under art. 31 of the second schedule to the Provincial Small Cause Courts Act. SUBBA RAO v. SITARAMAYYA, **24 M. 118.** [*R.*, 16 C.P.L.R. 1.]

(183)—*Sch.* II, *art.* 31—*Landlord and tenant—Suit by landlord for damages for breach of covenant not to cut and carry away trees—Waiver of jurisdiction.*—A landlord instituted a suit to recover Rs. 20, the value of trees cut and carried away by his tenants in violation of the terms of an agreement between them. *Held*, that the suit was one for damages for breach of covenant and cognisable by a Court of Small Causes. An objection as to jurisdiction cannot be given up by consent nor can be waived. RAMASAMY CHETTIAR v. R. G. ORR, **26 M. 176=12 M.L.J. 264.**

(184)—*Sch.* II, *art.* 31—*Claim for the value of crops cut and carried by a person in wrongful possession.*—Plaint stated that plaintiffs are tenants of a third person on certain land from which defendant illegally ousted them, that they got back possession under s. 9, Specific Relief Act, that defendant took the crop during the period of his illegal possession and plaintiffs claim Rs. 42-8 the value of that crop. *Held*, that the suit was cognizable by a Court of Small Causes. ISHAR SINGH v. WASAWA SINGH, **39 P.L.R. 1901=94 P R. 1900.** [*Disappr.*, 35 P.R. 1902=84 P.L.R. 1902, F. B.]

(185)—*Sch* II, *art.* 31—*No suit for accounts—If one party not bound to render accounts to the other.*—Where the plaint does not call upon any of the defendants to render accounts, the suit is not one for an account. CHIDRIE KRISTAPPA v. SIDDAMSETTI ZAMANAPPA, **M.W.N. 1912, 36=11 M.L.T. 13=13 Ind. Cas. 159.** (28 M. 394, *F.*)

(185-*a*)—*Sch.* II, *art.* 31—*No allegation of accountability — Cognizability — Jurisdiction determined by allegations in plaint—Scope of art.* 31—*Principal and agent—Suit against agent—Small Cause Court—Maintainability.*—Where the plaint did not state that the defendants were agents bound to render accounts, but simply averred that the defendants were purchasers of cloths from the plaintiffs and had other dealings with them, and where on such footing a sum of money was claimed from the defendants. *Held*, that, according to the averments in the plaint, the relationship between the parties was not one which made the plaintiff's primary right against the defendant one to have an account rendered by him, and that the suit was cognizable by a Small Cause Court. The Court which has jurisdiction to try the suit must be determined by the allegations contained in the plaint. It is not every suit by principal against an agent that is shut out from the cognizance of a Small Cause Court. A suit to recover a specific sum of money against an agent would often be entertainable by a Small Cause Court. (27 A. 200, 19 M.L.J. 113, *R.*) Scope of art. 31, Provincial Small Cause Courts Act, considered. Art. 31, Act IX of 1887 applies to cases where the relationship of parties is such that one of them is bound to render accounts to the other. VARADARAJULU CHETTIAR v. PATTRA NARAYANASAMI CHETTY, **24 M.L.J. 693=14 M.L.T. 46.** (23 C. 884, 10 Ind. Cas. 883, 13 Ind. Cas. 159, *R.*)

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

(186)—Art. 31—Suit by principal against agent for specific items of money credited to himself by the agent is cognisable by the Small Cause Court—*See* ACCOUNTS — SUIT FOR ACCOUNTS, 19 M.L.J. 113.

(187)—Sch. II, art. 31—*See* JAGIR, 7 P.L.R. 1900. p. 127.

(188)—Sch. II, art. 31—*See* MORTGAGE—REDEMPTION, 6 Ind. Cas. 336=14 C.W.N. 1001.

(189)—Sch. II, art. 31—*See* PROFITS, SUIT FOR, 5 O.C. 130.

(190)—Art. 31—*See* NOS. 9, 133, 134, 142, *supra.*

(190-*a*)—*Sch.* II, *art.* 31, *s.* 23—*Suit for damages.*—Where a suit was brought in a Court of Small Causes for damages, on the allegation that the plaintiff had been kept out of possession even after depositing the mortgage-money in compliance with the decree for redemption of a mortgage, *held*, that it was in effect a suit for the profits of immoveable property belonging to the plaintiff which had been wrongfully received by the defendant and was, therefore, not cognisable by the Court of Small Causes under the Provincial Small Cause Courts Act, sch. II, art. 31, but the Court should not have dismissed the suit, but should have returned the plaint for presentation to the proper Court under O. VII, r. 10, Code of Civil Procedure. *Held* further that s. 23 of the Provincial Small Cause Courts Act, was no bar to its doing so, as it only sets out a special case. SHEO BODH v. SURJAN, **11 A.L.J. 238=19 Ind. Cas. 427.** (14 C.W.N. 1001, *Not Appr.*)

(191)—*Sch.* II, *arts.* 31, 38—*Compromise between widow and husband's brothers—Suit for maintenance provided for—Chastity if a condition.*—Where in compromise of a dispute between a widow and her husband's brothers in respect of her husband's properties, it was agreed that some lands should be left in her possession for her life and that she should have the right to collect the rents therefrom for her maintenance, and the widow sued her brother-in-law who nevertheless remained in possession and collected the rents, for the rent of a particular period collected by him and not paid to her, *held* that the suit was not cognisable by a Small Cause Court by reason of cls. 31, 38 of sch. II to the Provincial Small Cause Courts Act. Where the agreement did not provide a condition that the widow should continue to be chaste, unchastity on her part subsequent to the agreement was no bar to her recovering the rent on the basis of her claim to immoveable property. BHUP SINGH v. LACHMAN KUNWAR, **26 A. 321.** [*R.*, A.W.N. 1908, 149.]

(192)—*Sch.* II, *art.* 35—*Suit by tenant to recover excess money paid under distraint, not exempted under art.* 35.—Where, on the landlord having distrained the tenant's cattle, the latter was forced to pay money in excess of the amount of rent actually due to the former, a suit by such tenant to recover back the excess so paid by him, under pressure, would be a suit cognizable by a Court of Small Causes. Such a suit could not be regarded as a suit to recover compensation exempted under art. 35, cl. (*j*), of the second schedule to Act IX of 1887, which has been held to apply only to suits brought to recover damages as for a tort. KARUPPANAN AMBALAM v. RAMASAMI CHETTI, **21 M. 239=8 M.L.J. 165.** (24 C. 163 at p. 165, *R.*) [*R.*, 30 M. 41=1 M.L.T. 414.]

(193)—Art. 35—*See* NOS. 3, 10, 134, *supra.*

(193-*a*)—*Art.* 35—*Contract to marry plaintiff's girl to defendant's minor son—Breach—Waste of provisions and articles purchased—Loss—Suit for compensation—Not cognizable by Small Cause Court.*—A suit by the father of a Muhammadan girl against the father of a minor boy for breach of a contract agreeing to marry the boy to the plaintiff's daughter falls within art. 35, cl. (*g*), of the Provincial Small Cause Courts Act (15 C. 833, 14 Ind. Cas. 837, *F.*), and therefore a claim for compensation for loss sustained by the plaintiff, in consequence of the articles and provisions got ready for the marriage having become wasted, is not cognizable by a Small Cause Court. P. K. MOHIDEEN KUTTI v. C. PARKER, **13 M.L.T. 497=M.W.N. 1913, 637=19 Ind. Cas. 700.**

(194)—*Sch.* II, *art.* 35, *cl.* (1)—*Injury to the person—Assault*—A suit to recover damages from the defendant who ran after the plaintiff with a shoe in hand threatening to beat him and using abusive language, but did not actually touch his person, is a suit for "injury to the person" within cl. 1 of art. 35, sch. II, Provincial Small Cause Courts Act, 1887, and is exempted from the cognizance of the Court of Small Causes. GOVIND v. PANDURANG, **14 Bom. L.R. 323=36 B. 443=15 Ind. Cas. 505.**

(195)—*Sch.* II, *art.* 35, *cl.* (1)—*Maliciously causing house to be searched by police—Suit for compensation on account of—Cognizability by Small Cause Court—Meaning of "injury to the person," in art.* 35, *cl.* (1).—A suit for compensation for maliciously causing the plaintiff's house to be searched by the police is not excluded from the cognizance of a Small Cause Court. Meaning of the phrase "injury to the person" in art. 35, cl. (1), sch. II, Act IX of 1887 discussed. KODA BUKSH v. LOKEMAN, **U.B.R. 1910, 40=8 Ind. Cas. 1168.**

(196)—*Sch.* II, *art.* 35 (*c*)—*Damages for injured feelings or actual expense.*—A suit for damages for malicious prosecution, whether the claim is for money as a salve to injured feelings or as a payment for actual loss caused to the plaintiff, falls under this clause. WAZIRA v. GANGA RAM, **30 P.R. 1889.**

(197)—*Sch.* II, *art.* 35, *cl.* (*g*)—*Suit for recovery of money advanced, on a breach of contract of marriage.*—A suit to recover money and ornaments which have been given to the

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defendant to expend on his daughter, after a breach of a betrothal contract, falls within sch. II, art. 35, cl. (*g*). ABDULLAH v. LADHA, **2 S.L.R. 31.**

(198)—*Sch.* II, *art.* 35, *cl.* (*g*)—*Suit for compensation for breach of contract of betrothal —Jurisdiction of Small Cause Courts—"Unclassed" suit, under s. 3 of the Punjab Courts Act —Appeal—Defect of jurisdiction—Interference of Chief Court.*—A suit for compensation for breach of betrothal contract falls under art. 35, cl. (*g*) of the Provincial Small Cause Courts Act. (132 P.R. 1889, *F.*; 24 M. 652, *R.*) Such a suit is an "unclassed" suit, as defined in s. 3 of the Punjab Courts Act, and, if the value exceeds Rs. 100, a District Judge has no jurisdiction to hear and decide an appeal. Where the inferior Court hears an appeal entertainable by a superior Court, the Chief Court will not interfere, unless the defect of jurisdiction has actually prejudiced the party who complains of the want of jurisdiction. HAKIM v. RALYA, **125 P.R. 1907=80 P.W.R. 1907.** (36 P.R. 1902, F.B., *R.*)

(199)—*Art.* 35 (*i*), *sch.* II—*Compensation for diversion of water-course, suit for, whether cognizable by a Small Cause Court—Appeal from suit lies to Divisional Court and not to District Judge—S.* 39 (*a*), *Punjab Courts Act,* 1884.—This was a suit instituted for compensation for diversion of a water-course, which, but for the forcible obstruction thereof caused by the defendant, would have flowed over to the plaintiff's land. Upholding the contention raised in revision, it was *held* that the claim was one covered by art. 34 (*i*) of the Act and was, therefore, not cognizable by a Small Cause Court. *Held also, that,* the suit being an unclassed suit of more than Rs. 100 in value, an appeal in the case would lie not to the District Judge but to the Division Court under s. 39 (*a*) of the Punjab Courts Act, 1884. LEHNA SINGH v. HIRA SINGH, **134 P.R. 1906 =18 P.L.R. 1907.** (18 M. 28, *F.*; 71 P.R. 1896, *R.*)

(200)—*Art.* 35 (*j*)—*Second appeal—Suit for recovery of money paid.*—Where a suit is merely for the recovery of money paid, but not for compensation for illegal, improper or excessive distress or attachment, the suit is one of a small cause nature and there is no second appeal therefrom; such a suit does not come under art. 35 (*j*) of the Act. SENTHIVELU MUDALIAR v. VARADACHARIAR, **16 M.L.J. 353.**

(200-*a*)—*Art.* 35 (*j*)—*Suit for damages for illegal attachment.*—An ekka and pony belonging to the plaintiff were seized in execution of a decree against a third person. She brought a suit for damages for illegal attachment. *Held* that the suit was a suit for compensation for illegal, improper or excessive attachment, and was excepted from the cognizance of the Small Cause Court by the provisions of art. 35 (*j*), Act IX of 1887. MUZAFFAR HUSAIN v. BIBAN, **11 A.L.J. 91=18 Ind. Cas. 695.**

(201)—Sch. II, cl. 35 (*c*)—*See* RIGHT OF SUIT—COSTS, 14 B. 100.

(202)—Sch. II, cl. 35 (*j*)—Second appeal—*See* BEN. ACT III OF 1884, ss. 6 (18), 9 (*e*), 44, 65, 66, 85 and 114, 1 Ind. Cas. 388.

(203)—Art. 35 (*j*), sch. II—Wrongful seizure of goods by creditor—Suit for damages—Jurisdiction—*See* TORT, 8 A.L.J. 92=9 Ind. Cas. 317.

(204)—Sch. II, s. 35 (*k*)—*See* CIV. PRO. CODE, 1908, s. 95, 26 M. 504.

(205)—*Sch.* II, *art.* 37—*Suit by lambardar to recover additional rates not cognisable by Small Cause Court.*—A suit by a Lambardar for recovery of additional rates is a suit of the kind mentioned in this article and is not of the nature cognizable by a Court of Small Causes. RANI UMED KOWAR v. JAWAHIR LAL KAYATH, **3 C.P.L.R. 177.**

(206)—*Art.* 38, *sch.* II—*Small Cause Court —Jurisdiction—Suit relating to maintenance.*—Art. 38 refers to a suit which, both in form and in substance, is a suit for maintenance. Hence, when, in settlement of a family dispute as to the possession of Zemindari property, a compromise was entered into by which the defendant agreed to pay to the plaintiff's mother a certain sum annually, but this was not stated to be by way of maintenance, it was *held* that a suit by the son of the annuitant to recover arrears of the annuity, on the ground that the same was payable to him also, was not excluded from the jurisdiction of a Court of Small Causes. MAHADEO RAI v. DEO NARAIN RAI, **A.W.N. 1905, 137=2 A.L.J. 697.**

(207)—*Sch.* II, *cl.* (38)—*Suit for arrears of maintenance—Acts* XVIII *of* 1884 *and* XIII *of* 1888 (*Punjab*)—*Jurisdiction.*—Under sch. II, cl. 38 of the Small Cause Courts Act a suit for arrears of maintenance not being cognizable by a Small Cause Court, a District Judge was, under Act XVIII of 1884, incompetent to hear an appeal from such suit. But as, according to Act XIII of 1888, such a suit is an "*unclassed suit*", an appeal may be preferred to the District Judge, subject to the other provisions of the Act. DHIRTA v. NIHAL DEVI, **123 P.R. 1889.**

(208)—Art. 38—*See* NO. 191, *supra.*

(209)—*Arts.* 38, 41—*Suit for contribution—Payment by one of several judgment-debtors to decree-holder — Jurisdiction of Small Cause Court—Second appeal.*—A Small Cause Court has jurisdiction to hear a suit for contribution in respect of sums paid by the representative of a judgment-debtor to satisfy a decree passed against the latter and his three brothers for maintenance which, however, was not made charge on property. Neither art. 38 nor the first part of art. 41 has any bearing on the case. No second appeal lies in such a case

Provincial Small Cause Courts Act (IX of 1887)—*continued.*

under s. 586, Civ. Pro. Code. The anterior liability which led to such a maintenance decree being passed cannot affect the question of jurisdiction. RAMASAMY PANTULU v. NARAYANAMOORTHY PANTULU, **14 M L J. 480.**

(210)—*Sch.* II, *art.* 39—*Suit for "Arhat" wrongfully received—Cognizability by Small Cause Court*—A suit by the *Chandhris* of a village for "Arhat" against the zemindars alleged to have been wrongfully received by the latter is cognizable by a Small Cause Court. HAYAT SHAH v. JAWAYA, **204 P.R. 1889.**

(211)—*Art.* 41—*Contribution, Suit for—Joint decree—Payment by one.*—Where one of several judgment-debtors discharged a decree for costs passed jointly against him and other judgment debtors, and brought a suit for contribution, *held*, that the suit was a suit cognisable by the Court of Small Causes and was not excluded by reason of art. 41 of the second schedule. ROSHAN LAL v. RAM LAL, **4 A.L.J. 543=A. W.N. 1907, 230.**

(212)—*Art.* 41—*Scope of—Suit for contribution—Debt due only by virtue of payment by the sharer—Whether of small cause nature—S.* 586, *Civ. Pro. Code—Second appeal lies where subject-matter of suit exceeds Rs.* 500—*Test.*—Art. 41 of the Act applies only to a suit for contribution in respect of payment made by a sharer of money due from a co-sharer, and such a suit is exempt from the jurisdiction of Small Cause Courts. But it does not apply to a suit for contribution claimed in respect of a debt which becomes due only by virtue of such payment by the plaintiff, there having been no debt due from the defendant, the co-sharer, at the time the plaintiff made the payment. In the latter case, as the suit is of the nature cognizable in a Court of Small Causes, no second appeal will lie under s. 586 of the Code, when the amount of the subject-matter of the suit does not exceed Rs. 500. In deciding whether second appeal lies from an order in execution in a suit of the nature cognizable by a Court of Small Causes, the test is not the amount claimed in the execution proceedings but the amount of the subject-matter of the suit. MAVULA AMMAL v. MAVULA MARACOIR, **30 M. 212=17 M.L.J. 376.** (11 C. 169, *F*)

(213)—*Art.* 41, *sch.* II—*Small Cause Court—Jurisdiction—Suit for contribution arising out of satisfaction of a joint decree for costs.*—*Held*, that a suit by one of several joint judgment-debtors, who had satisfied a joint decree for costs, for contribution against the other joint judgment-debtors was not a suit exempted from the jurisdiction of a Court of Small Causes. BHAIRON v. RAM BARAM, **A.W.N. 1906, 6=3 A.L.J. 6=28 A. 292.** (15 C. 713, *F*.)

(213-*a*)—*Sch.* II, *art.* 41—*Contribution, Suit for—Decree for rent against registered tenant who is not interested in land in suit—Money paid by him under decree—Suit by him against real*

Provincial Small Cause Courts Act (IX of 1887)—*concluded.*

tenants—Jurisdiction of Small Cause Court—Second appeal.—The plaintiff was sued for rent of certain lands of which he was the registered tenant, but he had not any interest in the land at the time of the suit. An *ex parte* decree was passed against the plaintiff, in consequence of which he paid a certain sum of money. He then sued the persons, who were in fact interested in the land, to recover the sum paid by him. The amount in suit was less than Rs. 500. *Held*, that, as the plaintiff didnot sue as a co-sharer, the suit was one which might be brought in a Small Cause Court, not being excluded by art. 41 the Provincial Small Cause Courts Act, and that, therefore, a second appeal did not lie. GAGAN CHANDRA DAS v. RAM DHAN DHAR, **14 Ind. Cas 735.**

(214)—Sch. II, cl. 41—*See* CONTRIBUTION, SUITS FOR—MISCELLANEOUS, 23 C. 189.

(215)—Art. 41—*See* NO. 209, *supra.*

(216)—*Sch.* II, *art.* 44—*Ejectmentof tenant—Suit for refund of rent—Punjab Tenancy Act, s.* 77.—A suit by a tenant against his landlord for refund of the rent paid by him in advance for land rented by him for a fixed term, on the ground of his ejectment therefrom before such term is cognizable by a Small Cause Court, the same not being barred by any of the clauses of s. 77 of Punjab Tenancy Act. MEHR DIN v. KARM ILAHI, **172 P.R. 1888.**

(217)—*Exceptions* 2 *and* 3, *sch.* II—*Tort by Judicial Officer—Suit for damages—Suit of a Small Cause nature—Second appeal.*—A Judicial Officer (a Magistrate) committed a tort. The person affected thereby sued for damages, the amount claimed being less than Rs. 500. The question for decision was whether a second appeal lies in such a case or whether the suit is of a Small Cause nature so as to preclude a second appeal. *Held*, that the act does not fall within the third exception of sch. II of this Act, because that exception only aims at the acts of some Officer of Government other than a Judicial Officer; here the act is that of a Judicial Officer; the act does not fall within third exception because that exception relates to an act purporting to be done by some person in pursuance of an order of a Judicial Officer; here the act was not done by any person in pursuance of the 'order' of a Judicial Officer but it was done by the Judicial Officer himself. There being no other exception applying to the case, the suit is of a Small Cause nature and no second appeal lies. MOTI LAL GHOSE v. SECRETARY OF STATE, **9 C.W.N. 495=1 C.L. J. 355.**

(218)—Sch. II, Exceps. 2 and 3—*See* TORT, 9 C.W.N. 495=1 C.L.J. 355.

Proxy, Vote by.

Right to vote by proxy—*See* COMPANY—MEETINGS AND VOTINGS, 7 Bom. L.R. 99=29 B. 126.

Puberty.

And discretion, evidence of—*See* MAHOMEDAN LAW—MARRIAGE, 2 O.C. 90.

Public Agent, Contract by.

See PRINCIPAL AND AGENT—GENERAL, 4 Bom. L.R. 706=26 B. 80.

Publication.

See DAMAGES—DAMAGES, SUITS FOR, 33 P.R. 1874.

Communication made to complainant only —I.P.C., s. 499—*See* DEFAMATION, 7 A. 205, F.B=A.W.N. 1884, 340.

Letter given by manager of firm to clerk to copy—*See* LIBEL, Cor. 134=2 Hyde, 274.

Public Charitable Property.

Public charitable property, mortgage of—*See* MORTGAGE — GENERAL, 7 Bom.L.R. 772.

Public Charity.

(1)—*Jurisdiction—Public charity—Scheme, alteration of—Committee, appointment of.*—Where, in a suit for administration of a public charity, a scheme has been framed by the District Judge and confirmed by the High Court, the High Court alone can alter the scheme, but the District Judge can give directions to secure compliance with the scheme. Method of control of the High Priest of a public temple explained. UMESHANANDA DUT JHA v. SIR RAVANESHWAR PROSAD SINGH, **16 C.L.J. 431.**

Public Conveyances (Bombay Town Suburbs and Harbour) Act.

See BOM. ACT VI OF 1863.

Public Demands Recovery Act.

See BEN. ACT VII OF 1880.

See BEN. ACT I OF 1895.

Public Demands Recovery Amendment Act.

See BEN. ACT I OF 1897.

Public Documents.

See EVIDENCE ACT, 1872, S. 74.

(1)—*Board of Trade certificate—"Public document," not a.*—A certificate granted by the Board of Trade is not a "public document" under s. 74 of the Evidence Act; though the duplicate kept by the Registrar General of seamen may be one. *In the matter of a collusion between the* "AVA" AND THE "BRENHILDA," **5 C. 568=5 C.L.R. 331.**

(2) — *Jummabundi — Public document.—Quære.*—Whether a jummabundi is a public document? AKSHYA KUMAR DUTT v. SHAMA CHURN PATITANDA, **16 C. 586.** [*R.*, 3 O. C. 205.]

(3)—*Anumatipatra—Public documents—Evidence Act, ss. 74, 76.*—An anumatipatra is not a public document under s. 74, Evidence Act,

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nor, if it were, would its being on the record constitute a copy certified as required by s. 76 of the Act. KRISHNA KISHORI CHAUDHRANI v. KISHORI LAL ROY, **14 C. 486=14 I. A. 71, P.C=5 Sar. 13.**

Entry in the register of inventions—Documents recorded in that register—*See* ACT V OF 1888, ss. 14 and 29, 4 A.L.J. 11=A.W.N. 1907, 23.

See U.P. ACT I OF 1869, ss. 2, 3, 7, 8, 10, 14, 22, 1 O.C. Sup. Vol. 36.

Collectorate registers whether—*See* CONTRIBUTION, SUIT FOR—GENERAL, 15 C.L.J. 191.

See EVIDENCE—SECONDARY EVIDENCE, 27 C. 639, P.C.=27 I.A. 1=4 C.W.N. 429.

Record of rights of latter date — Effect of omission of entry—*See* EVIDENCE ACT, 1872, s. 35, 25 A. 90=A.W N. 1902, 207.

Teiskhana Register prepared by patwari, not a public document—*See* EVIDENCE ACT, 1872, ss. 35, 74, 18 C. 534.

A census register is not a—*See* EVIDENCE ACT, 1872, s. 74, 6 Bom. L.R. 535.

See EVIDENCE ACT, 1872, s. 74, 7 C. 76.

Public Ferries and Canals.

See MAD. ACT II OF 1890.

Public Highway.

See PUBLIC WAY.

(1)—*Public highway—Suit for declaration—Special damage.*—A suit for declaration of a right of way by a public road is not maintainable unless there is an allegation of any special injury or inconvenience to the plaintiff. RAMTARAK KARATI v. DINANATH MANDAL, **7 B. L.R. 184=24 W.R. 414, Note.** [*R.*, 24 W.R. 413, 1 A. 249, 2 B. 370.]

(2)—*Suit for removal of obstruction to public road—Special damage—Remedy under Ch. XXXIX, Cr. P. C.*—A suit for the demolition of a wall built by the defendant on the ground that it encroached upon and obstructed a public thoroughfare, where no special inconvenience to the plaintiff was alleged, was held not maintainable, though the road might be one which the plaintiff himself had dedicated to the public The most efficacious remedy for any private individual who is incommoded in common with others by an obstruction of a public thoroughfare, is that provided by Ch. XXXIX, Cr. P.C., and he can gain his end by resorting to the Magistrate. LALU MYA BHOWANI AND LATCHMAN v. JAMIYAT RAI, **72 P. R. 1877.** [*R.*, 134 P.R. 1882, 4 P. R. 1895.]

Powers of Municipality—*See* BEN. ACT III OF 1864, 2 C. 425.

User of; for religious purposes—*See* PENAL CODE, ss. 153 and 296, 26 M. 554, F.B.=13 M.L.J. 171.

Public Market.

Public market—Ownership vested in Municipality—Power of Municipality to refuse permission to use public market—Necessity for license—*See* MAD. ACT IV OF 1884, ss. 191, 192, 194 and 195, 2 M.L.J. 206.

Public nuisance — *See* CIV. PRO. CODE, 1908, s. 91.

(1)—*Right to sue—Private individual—Particular damage—Damage must be direct and substantial.*—To entitle a private individual to sue for a public nuisance, it must be shown that he seeks some particular damage beyond that suffered by the public, and the particular damage must be both direct and substantial. SADU v. SUKA, **5 Bom. L.R. 116.**

(2)—*Public thoroughfare—Nuisance—Private action in respect of—Damage in common with others—No special damage—Mandatory injunction—Suit for—Maintainability of.*—A private action cannot be maintained in respect of a public nuisance, save by a person who suffers particular damage beyond what is suffered by him in common with all other persons affected by the nuisance. BHAWAN SINGH v. NAROTTAM SINGH, **6 A.L.J. 499=2 Ind. Cas. 365=31 A. 444.** [*R.*, 8 Ind. Cas. 808.]

(3)—*Public nuisance—Right to sue—Special damage—District Police Act (Bombay Act IV of 1890), s. 44—Orders by District Magistrate—Religious assemblies, orders at—Music, right to play.*—No individual or class of individuals can sue in respect of a public right unless the obstruction caused has resulted in special damage. (2 B. 457, 18 B. 693, *F.*) The Bombay District Police Act (IV of 1890) is not intended to confer any right upon any individual or class of His Majesty's subjects, which had not been given by the common law. The Act was passed in the interests of public peace. All that s. 44 of the Act contemplates is that, where a District Magistrate has passed an order in the interests of peace, it is open to any party to go to a Civil Court and get an adjudication in favour of his right, if any. The Legislature merely assumes that there is a right, which the District Magistrate's order has opposed and which can be vindicated in a Court of law. VIRUPAXAPPA FAKIRAPPA v. SHERIFF SAB MULLA MASUD SAD, **11 Bom. L.R. 372=2 Ind. Cas. 494.**

(4) — *Noise — Legitimate trade—Malice.* — Though a legitimate calling or trade may involve a serious nuisance by noise, it does not render that noise non-actionable, in other words, noise does not necessarily become non-actionable merely because it is an incident of a legitimate trade. In determining whether an actionable wrong has been committed and what measure of relief should be granted, the existence or non-existence of malice is a material consideration. HARI v. VITHAL, **8 Bom. L.R. 89.**

(5)—*Killing of cows by Muhammadans—Custom.*—Acts calculated to offend the sentiments of a class do not necessarily amount to

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a public nuisance. Under certain limitations, the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property, as he may think fit, provided that, in so doing, he does not cause real injury to others, or offend against the law, even though he may thereby hurt the susceptibilities of others. The right of Muhammadans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its exercise can be interfered with. SHAHBAZ KHAN v. UMRAO PURI, **A.W.N. 1908, 64=5 A.L.J. 147=7 Cr. L.J. 381=30 A. 181.** (7 M. 590, 12 B. 430, 10 A. 44, 150, 17 C. 852, 25 W.R. 72, *R.*)

Powers of Advocate General to interfere in cases of—Mandatory injunction when will be granted—*See* BOM. ACT III OF 1888, ss. 349-A, 249-B, 12 Bom. L.R. 274=5 Ind. Cas. 213.

See JURISDICTION OF CIVIL COURTS, A. W.N. 1884, 74.

Public Officer.

See CIV. PRO. CODE, 1908, S. 80.

See PUBLIC SERVANT.

(1)—*Surveyor employed by Collector managing khas mehal—"Public officer."*—A surveyor employed by the Collector in the khas mehal department is a public officer. BAJOO SINGH v. QUEEN-EMPRESS, **26 C. 158=3 C.W.N. 115.**

(2)—*Specific Relief Act (I of 1877), s. 42—Suit for decree declaratory of title without prayer for consequential relief—Relief by way of injunction not sought—Effect—Civ. Pro Code, 1882, s. 424, notice under.*—This suit was in relation to the succession to a talukdari estate brought under the operation of Act XXI of 1881, and plaintiff merely prayed for a declaration of his right to succeed to the estate on the death of his father in preference to defendant No 1. Defendant No. 1 pleaded that the suit was not sustainable, that the plaint had not been properly stamped and the suit was bad under s. 42 of the Specific Relief Act by reason of the omission to ask for consequential relief; and the second defendant, the talukdari settlement officer, stated that the suit could not be maintained in the absence of any notice to him as required by s. 424 of the Civ. Pro. Code. The Assistant Judge found that the suit could be maintained without any notice given, under s. 424 of Code, to the settlement officer; but he rejected the claim on the grounds that, as plaintiff was suing to establish title by inheritance, he could not get relief on a stamp of only Rs. 10, and that, as he could seek for other relief than a mere declaration of title (*e.g.*, a suit for an account), the suit was barred under the provisions of s. 42 of the Specific Relief Act. *Jardine, J.*, upheld the finding of the Assistant Judge with reference to s. 42 of the Specific Relief Act, on the ground that plaintiff had

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omitted to seek the relief of an injunction against the first defendant restraining him from receiving future payment of maintenance (*Candy, J. doubting*). Plaintiff was permitted to amend his plaint by adding prayers asking for reliefs by way of injunction restraining the first defendant from receiving and the second defendant from making payments towards future maintenance of the former. SABDARSINGJI v. GANPATSINGJI, **14 B. 395.** [*R.*, 25 C. 49=2 C.W.N. 76, 23 B. 486.]

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 24 C. 102=1 C.W.N. 138.

Public policy—Trafficking in—*See* CONTRACT ACT, 1872, s. 23, 86 P.R. 1893.

Manager of an estate under Court of Wards—*See* COURT OF WARDS, 28 C. 344.

Illegal arrest when actinig bona fide—Liability of—*See* JUDICIAL OFFICERS, LIABILITY OF, 3 Agra 409.

Suit against Collector—Act done in official capacity—*See* JURISDICTION OF SUBORDINATE JUDGE, 15 B. 441.

Official trustee—"Public Officer"—*See* OFFICIAL TRUSTEE, 7 C. 499.

Practice—Summoning of—As witnesses—*See* WITNESS—SUMMONS TO AND ATTENDANCE OF WITNESSES, 6 M.H.C. App. 6.

Public Place.

(1)—*What is a.*—"The goods yard of a railway station" is a public place. CAWASJI v. G.I.P. RAILWAY, **4 Bom. L.R. 290.**

(2)—*What is not a.*—"A machhwa (boat) chartered by the accused for gambling" is not a public place. EMPEROR v. JUSUBALLY, **7 Bom. L.R. 333=29 B. 386.**

Public Policy.

See CHAMPERTY.

See CONTRACT—ILLEGAL CONTRACTS.

See CONTRACT ACT, 1872, S. 23.

(1)—*Contract to stifle prosecution.*—A contract to stifle a prosecution is void as being against public policy. DALSUKHRAM v. DE BRITTON, **6 Bom. L.R. 73=28 B. 326.**

(2)—*Agreement—Consideration—Stifling of prosecution — Non-compoundable offence—Ultimate finding of compoundable offence or no offence— Void—Public policy—Facts not full pleaded—Void as opposed to public policy—Inference—Court's power.*—Where part of the consideration for an agreement was the stifling of a prosecution, which at the time was proceeding as a prosecution of a non-compoundable offence, *held*, that the agreement was void as opposed to public policy, even though the Criminal Courts might ultimately have found that a compoundable offence, or no offence, at all, had been committed. (28 B. 326, 19 M. 189, *R.*) Even where the facts have not been fully pleaded by the parties, the Courts

Public Policy—*continued.*

will deduce them from the evidence and apply the doctrine of public policy. CHHATRAPAL v. FUNDILAL, **6 N.L.R. 148** (27 A. 266, *R.*).

(3)—*Agreement for reward to procure wife.*—An agreement by a hireling or stranger to assist a Hindu for reward in procuring a wife is void as being contrary to public policy. SARJU PARSHAD v. NARAIN PARSHAD, **2 O. C. 365.** (17 M. 9, *F.*)

(4)—*Contract to avoid marriage on breach of a specified condition.*—It is contrary to the policy of the law as administered by British Courts to allow parties to a contract to avoid a marriage on the breach of a condition embodied in the agreement. CHAIT RAM v. MUSAMMAT NATHI, **P.L.R. 1900, p. 193.**

Contract against—Undue influence — Unconscionable bargain—Voidable contract, power of Court in respect of—Contract Act, 1872, ss. 16, 19-A. 23—Act VI of 1899, s. 2—Ratification of contract caused by undue influence, proof of—*See* U. P. ACT XVII OF 1876, ss. 173, 174, 5 C. O. 256.

Office of Khatib—Appointment of deputy during minority—Consideration—Public policy—*See* AGREEMENT, 8 Ind. Cas. 745=9 M.L.T. 159.

Compromise decree giving mortgage-decree for debt not secured by mortgage, validity of—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 3=17 M.L.J. 200.

Hindu law—Mirasi right in temple—Suit against office-holder—Compromise for sale of office and emoluments—Public policy—Execution of decree passed in terms of compromise—Power of executing Court to refuse to execute decree—*See* COMPROMISE—GENERAL, 26 M. 31.

Marriage—Agreement to pay money in consideration of giving child in marriage—Void as against public policy—*See* CONTRACT—ILLEGAL CONTRACTS, 22 B. 658.

Sub-overseer obtaining lease in the names of his brother and brother-in-law—Public policy—*See* CONTRACT ACT, 1872, s. 23, 11 Ind. Cas. 2.

See CONTRACT ACT, 1872, s. 27, 2 M. 44.

Contract of marriage—Agreement to pay money—Legality of contract—*See* CONTRACT ACT, 1872, s. 65, 1 C.L.J. 261.

See COSTS—TAXATION OF COSTS, 17 M. 162.

See CUSTOMS—PUNJAB—GENERAL, P.L.R. 1900, p. 534.

Public policy—Payment of *dustoori* or commission—*See* DUSTOORI, 91 P.R. 1910=129 P.W.R. 1910=189 P.L.R. 1910=8 Ind. Cas. 317.

Office of dancing girl attached to temple, Courts bound to recognise endowments connected with—Custom—*See* HINDU LAW—CUSTOM, 14 B. 90.

Public Policy—*concluded.*

See HINDU LAW—CUSTOM, 1 M. 168.

See HINDU LAW—MARRIAGE, 28 C. 751=5 C.W.N. 673.

Exclusion of murderer and his descendants from inheriting to the property of the deceased their succession being opposed to—*See* INHERITANCE, 41 P.R. 1906=95 P.L.R. 1906.

See INHERITANCE, 74 P.R. 1900.

Insolvent—Private settlement with creditor, validity of—Absence of notice to Official Assignee and other creditors — *See* INSOLVENCY — GENERAL, 20 B. 636.

See LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 5 P.R. 1878, F.B., 26 P.R. 1874.

A Judge to have regard to, in cases of discovery - *See* LETTERS PATENT, 1865, HIGH COURT—BOMBAY, s. 15, 4 Bom. L.R. 342.

Agreement in adjustment of decree of Court —Agreement opposed to—Estoppel—*See* LIMITATION ACT, 1908, ART. 182—GENERAL, 5 O.C. 217.

Succession—Slayers right to inherit--Muhammadan Law—Public policy — *See* MUHAMMADAN LAW—INHERITANCE, P.L.R. 1900, p. 455.

Gambling in litigation—Failure of consideration—*See* RIGHT OF SUIT—MISCELLANEOUS, 9 C.W.N. 477, P.C.=8 O.C. 155=27 A. 271=32 I.A. 113=15 M.L.J. 197.

Agreement with Inspector of Land Records to purchase land in name of another—Public policy—*See* SPECIFIC PERFORMANCE, 8 Ind. Cas. 441.

Public Purposes, Acquisition of Land for.

See ACT VI OF 1857.

Public Record.

Ancient documents—Presumption as to their genuineness—Production from proper custody —Mortgage—Acknowledgment of liability—*See* EVIDENCE ACT, 1872, ss. 35, 74, 80, 90, 59 P.R. 1901.

Public Right.

(1)—*Public right—Special damage—Right to sue.*—When the plaintiff is, as a raiyat of a certain village, entitled to graze his cattle on the tank-bed, the fact that the other raiyats of the village have similar rights does not make his right a public right in the sense, that no action can be brought upon it unless special damage is proved. VENKATACHALA v. KUPPUSAMI, **11 M. 42.** [*R.*, 5 Bom L.R. 116, 8 C.W.N. 425, P.C.]

See JURISDICTION OF CIVIL COURTS, 3 B.L.R. A.C. 305=12 W.R. 199.

Public Road.

See PUBLIC WAY.

See ROAD.

Public Road—*concluded.*

Right of person to sub-soil of road—Land when not used as —Owner's right to claim possession of—*See* BEN. ACT III OF 1664, s. 10, 20 C. 732.

Encroachment on—Powers of Municipal Commissioner—*See* BOM. ACT III OF 1872, s. 195, 12 B. 474.

Encroachment on a—*See* BOM. ACT V OF 1879, S. 214, 1 Bom. L. R. 161.

What is—Passage of cattle of adjoining owners—Effect—*See* MAD ACT V OF 1884, 8 Ind. Cas. 682.

Suit for possession of a part of public road —*See* APPEAL—MISCELLANEONS, P.L.R. 1900, p. 440.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 6 B.L.R. App. 73.

See EASEMENT, 62 P.R. 1898.

Suit to set aside order of Magistrate—Public road—Civil Court—Jurisdiction—*See* JURISDICTION OF CIVIL COURTS, 3 B.L.R. App. 43=11 W.R. 434=12 W.R. 199=3 B.L.R. 305.

See JURISDICTION OF CIVIL COURTS, 103 P.L.R. 1901.

Public Servants.

See CIV. PRO. CODE, 1908, S. 80.

See PUBLIC OFFICER.

(1)—Poddar *of the Bank of Bengal, not a public servant.*—A *poddar* of the Bank of Bengal is not a public servant, under cl. 9, s. 21 of the Penal Code. *In re* MODUN MOHUN, **4 C. 376.**

(2)—*Act* XXVI *of* 1850—*Municipal Commissioners—Public servants — Reg.* II *of* 1827, *s.* 43—*Suit against Municipal Commissioner—Jurisdiction.*—A Municipal Commissioner appointed under Act XXVI of 1850 is a public servant within the meaning of Reg. II of 1827, s. 43. [*Appl.*, 1 B. 628; *D.*, 14 B. 286.] A Munsif has no jurisdiction to try a suit brought against a Municipal Commissioner for acts done by him in his public capacity. GREAVES v. BHAGVAN TULSI, **4 B.H.C.A.C. 93.** [*Appl.*, 1 B. 628; *D.*, 14 B. 286.]

(3)—*Bombay Act* I *of* 1865, *s.* 11—*Power of surveyor to enter private houses.*—Whether s. 11 of Bombay Act I of 1865 justifies surveyors in entering private houses for the purpose of measuring them. REG v. BHAGTI DAS BHAGWANDAS, **5 B.H.C. Cr. 51.** [*R.*, Rat. Un. Crim. Cases, 850.]

(4 & 5)—*Censure of— Libel by a public servant.*—The power to dismiss a public servant includes the power to reduce him, or to censure and reprimand him. A charge of libel against a public officer must fail if it is contained in a document which is privileged, because that

Public Servants—*continued.*

document cannot be produced and so is incapable of being produced in a Court. JEHANGIR v. SECRETARY OF STATE, **5 Bom. L. R. 30=27 B. 189.**

(6)—*Public servant, dismissal of—Board's Rules*, 1902, *s.* 14—*Dismissal in contravention of Rules— Declaration — Jurisdiction — Civil Court—Specific Relief Act, s.* 42—*Notification, if justifiable.*—The plaintiff, who was a public servant, was prosecuted for certain offences under the Penal Code but was acquitted. The Collector in whose office he was employed, however, dismissed him in consequence of facts or circumstances brought to his notice, but not elicited at the judicial trial, without giving him opportunity to explain them. *Held* (*per Mookerjee, J.*) that the Collector was bound to hear him before he was dismissed. The exception mentioned in Board's Rules, 1902, page 70, s. 14 contemplates cases where the public servant has been convicted at a judicial trial. *Per Curiam.*—Except when it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown; and all in general, are subject to dismissal at any time without cause assigned. What the Crown can do independently of any enquiry and without the assignment of any reason, cannot be questioned in a Court of law on the ground that the enquiry has not been satisfactory or in proper form, or that the reason assigned is unsound and open to criticism. A suit for damages for wrongful dismissal cannot be maintained against the Secretary of State. S. 42 of the Specific Relief Act does not sanction every form of declaration but only a declaration that the plaintiff is entitled to a specific legal character or right as to property. The plaintiff was not entitled to a declaration that the dismissal had been in contravention of the Rules, because it did not fall within the scope of s. 42 of the Specific Relief Act, nor could it lead up to any consequential relief against the Crown which the Court was competent to grant. The Government acted within its rights when it notified the fact of the dismissal of the plaintiff, solely with a view to prevent his re-employment in Government service in any capacity. The publication of the notification did not entitle the plaintiff to any relief against the Secretary of State. RAMDAS HAJRA v. SECRETARY OF STATE, **17 C.L.J. 75=16 Ind. Cas. 922.**

Sanitary Inspector of Union whether a—under the Act—*See* MAD. ACT V OF 1884, s. 43, 21 M. 428.

Photedar appointed by District Treasurer, whether a—*See* CONTRACT ACT, 1872, s. 23, 5 P.W.R. 1912 (N.W.F.P.)

Contract with public servant—Conflict with public duties—Contract void—*See* CONTRACT ACT, 1872, s. 24, 13 C.W.N. 59=1 Ind. Cas. 351.

See DAMAGES—DAMAGES, SUITS FOR, 8 B.H.C.A.C. 202.

Public Servants—*concluded.*

Assistant Collector's report to the Collector—Admissibility in evidence — *See* EVIDENCE ACT, 1872, s. 35, 2 S.L.R. 82.

See JURISDICTION OF MUNSIFF'S COURT, 1 B.H.C. 144.

Act of, in closing irrigation canal—Authorised by statute—Tortious eviction—Suit against—Right to withhold rent—*See* LANDLORD AND TENANT—GENERAL, 1 S.L.R. 244.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 18 M. 395.

Order against, for enforcing the performance of duty by, by an order of High Court—*See* SPECIFIC RELIEF ACT, 1877, s. 45, 7 Bom. L. R. 161.

Public Street.

See PUBLIC WAY.

(1)—*Public street—What constitutes.*—Where the lane in dispute was shown, besides its user as a public lane, to be (1) named by the Municipality; (2) bearing a name in Laughton's plan; and (3) described as a public lane in the documents of title, the lane was held to be a public lane. OOSMAN v. ESMAILJEE, **2 Bom. L R. 952.**

(2)—*What constitutes a.*— The mere facts that Municipal sweepers are employed in sweeping a street and that the Municipality keeps up lamps in that street, are not sufficient by themselves to establish that the street is a public one. ANKLESHWAR MUNICIPALITY v. RIKHAVCHAND, **2 Bom. L.R. 1076=25 B. 315.**

Construction of—*See* BOM. ACT VI OF 1873, s. 17, 20 B. 146.

See BOM. ACT VI OF 1873, ss. 42 (1), 48, 75, 19 B. 212.

See NUISANCE, 4 P.R. 1895.

Right of every member of public to conduct procession—*See* PROCESSIONS, 26 M. 376.

Public Thoroughfare, Obstruction to.

See RIGHT OF SUIT—OBSTRUCTION TO PUBLIC THOROUGHFARE, SUITS CONCERNING.

(1)—*Public street — Obstruction — Special damage.*—The appellant sued the respondent for removal of a certain obstruction from a public thoroughfare, alleging that such obstruction had narrowed the way, and such narrowing had resulted in cattle driven along it straying on his land. *Held* that, there being a sufficiency of road along which cattle could be driven the damage which had resulted to the appellant from such obstruction was not a natural or necessary consequence of the respondent's act, or such special damage as could give the appellant a right to sue. KNADHI v. KAMTA, **A.W.N. 1881, 98.**

(2)—*Public thoroughfare — Obstruction — Removal—Special damage.*—Where no special

Public Thoroughfare, Obstruction to—*concld.*

damage is caused to the plaintiff by an obstruction in a thoroughfare, a suit for its removal instituted by the plaintiff is not maintainable. TAFFUZUL HUSAIN v. FAZAL IMAM, **A.W.N. 1881, 103.**

Removal of obstruction from public thoroughfare—*See* JURISDICTION OF CIVIL COURTS, 11 B.L.R. 9=19 W.R. 345.

Public thoroughfare, obstruction to—Special damage essential for right of suit in Civil Court—*See* JURISDICTION OF CIVIL COURTS, 10 A. 498=A.W.N. 1888, 205.

Public thoroughfare—Suit to remove encroachment—Maintainability—*See* JURISDICTION OF CIVIL COURTS, 1 A. 249.

See JURISDICTION OF CIVIL COURTS, 3 C. 20, F.B., 27 C. 793.

Public Way.

See PUBLIC STREET.

(1)—*Public road—User of road by public—Acquiescence by owner—Intention—Effect.*—In order to prove that a road is a public road, it is sufficient if acts of user by the public are shown to have been acquiesced in by the owner of the land over which the road passes and if those acts are of such a character as to warrant the inference that the owner intended to make over to the public the right to use the land as a public highway. J. ANDERSON v. JUGGODUMBA DABI, **6 C.L.R. 282.**

(2)—*Public road—Extent.*—A public road includes also a fair margin which may be used for various purposes in connection with that road. When the proprietor of certain lands through which a public road passed, sued for the removal of certain trees planted on the margin of the road, *held* that the plaintiff was not entitled to remove those trees so long as the land on which they grew formed a portion of the public road. But, the plaintiff would not lose all rights that he had as owner of the lands used as a public road. The lands would still continue to be subject to the right of easement. When they ceased to be used as a public road, the land would revert to the plaintiff or to any other person who might establish his right as proprietor thereof. HARRENDRO COOMAR CHOWDHRY v. TARAMONEE CHOWDHRAIN, **7 C.L.R. 272.**

(3)—*Public road—Dedication—Presumption of dedication—Length of user by public sufficient to give rise to a presumption of dedication to public use.*—Where a certain piece of land was found to have been used by the public continuously and without interruption as a passage for more than twenty years under such circumstances as to indicate an intention on the part of the proprietor to leave the public in undisturbed enjoyment of the land. *Held*, that this was more than sufficient to show dedication or an intention to dedicate the land to public use by the proprietor. BACHCHU v. THE MUNICIPAL BOARD OF BENARES, **A.W.N. 1900, 128.**

Public Way—*continued.*

(4)—*Right of dedicator of road to public—Such dedicator responsible for keeping road in order—Right to sue for damages and injunction—Proof of special damage not necessary.*—The owner of the soil who dedicates a way to the public for paths with no other rights than a right of passage, may exercise any right not inconsistent with the exercise of the right of way by the public. If such owner is bound to keep the road in repair and in order, for the use of the public, he is entitled to bring a suit for damages and injunction against the person who destroys the improvements effected by him, here, special damage need not be proved. MAHARAJ BAHADUR SINGH v. PARASH NATH SINGH, **31 C. 839.**

(5)—*Public highway—Obstruction—Nuisance—Suit by private individual—Special damage—Inconvenience and loss of time—Detour.*—In the case of a public road, a private action cannot be maintained in respect of an obstruction to it by a person, unless he suffers particular damage beyond what is suffered by him in common with all other persons affected by the nuisance. (31 A. 444, 6 A.L.J. 499, 2 Ind. Cas. 365, 2 B. 469, *R.*) The stopping of a public road and thereby rendering it necessary for a person to make a detour is such special damage as justifies him in instituting a suit for the removal of the obstruction. RAMA CHANDRA v. JOTI PRASAD, **8 Ind. Cas. 808.**

(6)—*Public way—Obstruction—Right to sue—Special damage.*—The defendants obstructed the plaintiff from carrying his *taboot* on a public road during the Mohurrum on the ground that they did not receive from the plaintiff certain *Man-pans* which they were entitled to receive: *Held*, that the fact that the defendants had the right to receive certain *Man-pans* from the plaintiff would not entitle them to cause obstruction to the plaintiff's *taboot* and to his right to use the public road; since if the defendants had any right to any *Man-pans*, they ought to have asserted it in a Court of law and that could give them no right to prevent the plaintiff from using a public road. In a suit in respect of obstruction caused to a person's right to use a public road, he must prove either that there has been an interference with his public right which involves interference with some private right of his or that if no private right of his has been interfered with, he has suffered some damage peculiar to himself from the interference with his public right. KASHIM SAHEB v. AYAPPA, **5 Bom. L.R. 646.**

(7)—*Public way—Right of public—Procession—Marching a procession on a public road—Public nuisance—Special damage.*—The plaintiffs sued, on behalf of themselves and of other members of a religious community, in a village, to have a declaration of their right of marching in procession with a car along a particular public road to certain temples, and for an injunction restraining the defendants (members of another religious community of the village)

Public Way—*continued.*

from interfering with the plaintiffs. The defendants (who occupied land abutting upon a portion of the road) contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that, as the road was public, the plaintiffs could not sue unless special damage were shown and proved. On appeal: *Held*, that the suit lay, since it was not for the removal of a public nuisance, but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public street in a lawful manner, and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege. BASLINGAPPA PARAPPA CHEDACHAL v. DHARMAPPA BASAPPA CHEDACHAL, **12 Bom. L.R. 586=7 Ind. Cas. 663=34 B. 571.** (26 M. 376, *F.*)

(8)—*Adverse user by individual—No bar to assertion by public.*—Adverse user by an individual of a public high-way, or any part thereof, for more than twenty years, is no bar to the assertion by the public of their right over the high-way or the portion thereof, so adversely used. GOVIND GANGADHAR v. PRESIDENT, MUNICIPAL COMMITTEE, BHANDARA, **2 C.P. L.R. 50.**

(9)—*Public highway—Diversion of road—Rights of adjoining landholders—Grant by Municipality of abandoned road—Act* XV *of* 1873 (*N.W.P. and Oudh Municipalities Act*), s. 38.—A highway or waste land adjoining it, must be presumed to belong to the owners of the adjoining land, and when it is abandoned as a road, it reverts to such owners jointly. S. 38 of the N.W.P. and Oudh Municipalities Act, was not intended to deprive persons of any private right of property they might have in land used as a public highway, or to confer such right on the Municipality, nor has the section any such effect. NIHAL CHAND v. AZMAT ALI KHAN, **7 A. 362=A.W.N. 1885, 56.** [*R.*, 10 A. 553, 20 C. 732, 25 M. 635, 30 M. 185, P.C., 6 A.L.J. 539=5 M.L.J. 391=2 Ind. Cas. 468.]

(10)—*Plaint—Alternative reliefs—Rights of one of the residents of a* mohalla *in regard to land belonging to all the residents—Right of suit—Injunction—Public thoroughfare.*—The plaintiffs, residents of a mohalla, sued the defendants for possession of the land in suit, or an injunction restraining them from building thereon and thereby interfering with the easement of the plaintiffs. It was contended by the defendants that (i) the alternative relief sought by the plaintiff was bad in law, (ii) the plaintiffs could not sue the right alleged to have been invaded being a public right of way and all the co-sharers in the *mohalla* or in the land in suit should have been made parties to the suit or should have been formally represented by the plaintiffs, under s. 30 of the Code of Civil Procedure, (iii) an injunction should not be granted, the injury to the plaintiffs, being insignificant and a *pakka chaupal*

Public Way—*concluded.*

proved to exist in the mohalla, rendering the use of the land in suit for public purposes unnecessary. *Held*, that (i) the plaintiffs were at liberty to claim, in the alternative, exclusive possession or an injunction to restrain the defendants from interfering with their rights as co-sharers in the land in suit; (ii) the plaintiffs' suit lay as they claimed to establish rights vested only in them or in them and a limited number of persons residing in the mohalla and they were entitled to sue in their own right for a relief common to themselves and others in respect of the land which was not a public thoroughfare or public in the sense that persons other than the inhabitants of the mohalla had rights in it; (iii) the plaintiffs were entitled to the injunction claimed by them. The fact that land in a mohalla is not Nazul does not prevent its being the property of the residents of the mohalla jointly. One of the residents of a mohalla cannot use exclusively to the detriment of other members of the community land belonging to all of them, nor can he transfer his rights in it. Such land differs from public land or a public thoroughfare in that a limited number of co-sharers can combine and do what they choose with it. GUJAR MAL v. RAM RICHPAL, **113 P.L.R. 1901=91 P.R. 1901.**

Obstruction to—*See* BUILDING, 9 C.W.N. 72=31 C. 979.

Public way--Right of — Implied grant—Remission of revenue on land used as public way—Right of owner to claim compensation —*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 125 P.L.R. 1902.

Public way dedicated by zemindar—Suit by him for removal of obstruction—Special injury need not be proved—*See* JURISDICTION OF CIVIL COURTS, 10 A. 553=A.W.N. 1888, 213.

Public Work Cess.

Road Cess—*See* BEN. ACT X OF 1871, s. 3, 7 C.L.R. 373.

Public Works, 'Provincial,' Act.

See BEN. ACT II OF 1877.

Public Worship.

Mahomedan Law—Custom—Public worship in mosque—Injunction restraining the defendants from interrupting religious ceremonies in a musjid—Interest of Imam or matwali to be protected—*See* MAHOMEDAN LAW—CUSTOM, 18 C. 448, P.C.=18 I.A. 59.

Puchotra.

(1)—*Lumberdars — Payment of Government revenue — Claim for* Puchotra — *Recurring claim.*—Plaintiff and defendant were lumberdars of two bodies of cultivators of different castes. Plaintiff's caste through plaintiff used to pay ⅔ of the Government revenue. Defendant's caste through defendant used to pay the remaining one-third. Plaintiff claimed puchotra in proportion to the revenue for which he

Puchotra—*concluded.*

was responsible. At one time, plaintiff had allowed defendant's father to draw more than his share of the allowance. *Held*, that plaintiff was entitled to *puchotra* in proportion to the Government revenue which he represented as lumberdar, and that the claim was a recurring one which may be taken up at any time, and though plaintiff might have allowed the defendant's father to go on drawing more than his share, he was entitled to come in and demand his share of an allowance given by Government for work and responsibility which he fulfilled. BUDHA v. GULSHER, **14 P. R. 1873.**

(2)—*Suit between lumbardars relating to amount of* puchotra—*Jurisdiction—Civil Courts.*—A claim for *puchotra* between lumbardars is a claim connected with the land revenue and therefore not cognizable by the Civil Courts. It is money collected with the Government revenue and taken by certain persons by order of Government as remuneration for the trouble of collecting the revenue and the performance of other duties, and the Civil Courts cannot therefore have jurisdiction to settle the amount of *puchotra* to be taken by each of the contending lumbardars. When, however, that question has been determined by a properly constituted authority, any infringement of such order could probably be made the subject of a civil suit. NURA, SON OF LAKHERA v. NURA, SON OF SAMANDA, **27 P.R. 1875.**

(3)—Puchotra—*Agreement—Circular order of Punjab Government No.* 536 *of* 16*th April* 1872.—Under Rule 9 of the Rules framed by the Punjab Government under s. 6 and s. 65 of the Punjab Land Revenue Act, 1871, a village headman is alone entitled to take *Puchotra* notwithstanding an agreement to the contrary. (Vide Circular Order of the Punjab Government No. 536 of 16th April 1872). MALIK OULIA KHAN v. MALIK FUTTEH KHAN, **73 P.R. 1873.**

See JURISDICTION OF CIVIL COURTS, 27 P. R. 1876.

Pudukottah.

Suit for land situated within—Civil Court of Trichinopoly—*See* JURISDICTION—SUITS FOR LAND, 2 M.H.C. 437.

Puffing.

(1) *Agreement--Fraud--Rule respecting puffing.*—Plaintiff sued for the recovery of commission on account of certain sales of pictures made by defendant to a third person through the exercise of the personal influence of plaintiff with that person. There was an oral agreement between plaintiff and defendant respecting the terms about the payment of commission, and plaintiff sued on such agreement. *Held* that he was not entitled to recover, as the whole transaction was fraudulent, since it was clear from the evidence that plaintiff was the active agent in getting the third person to buy the goods, that he made an improper use of his influence and friendship to secure a profit for

Puffing—*concluded.*

himself and thereby committed a fraud on the purchaser who was ignorant of the agreement whereby the plaintiff was to make a profit at his expense. *Held* also that the case came under the ordinary rule respecting puffing, that no action would lie against an employer where the customer, in ignorance of a secret agreement between the employer and the person employed to puff, was led to suppose that the recommendation was made not in consequence of the pecuniary reward that the puffer is to get for recommending his employer's wares, but is founded on the known character and reputation of the employer. KHUAJA BUDURUDDIN v. MAHOMED FAZUL, **40 P.R. 1873.**

Puffing Statements.

If fraudulent—*See* COPYRIGHT. 12 C.W.N. 753=35 C. 463.

Puisne Judge.

Power of Lieutenant Governor, N.W.P.—Appointment of acting Puisne Judge of High Court—Time restriction—*See* ST. 24 AND 25 VIC., C. 104, s. 7, 20 A. 267, P.C.=25 I.A. 54 =2 C.W.N. 273.

Puisne Mortgage.

See MORTGAGE.

Non-joinder of—*See* TRANSFER OF PROPERTY ACT, 1882, s. 85, 17 M. 17.

Punchayet.

See CONTRACT—BREACH OF CONTRACT, 6 M.H.C. 40.

See CONTRACT—WAGERING CONTRACT, 135 P.R. 1883.

See HINDU LAW—PARTITION, A.W.N. 1884, 217.

Punctuation.

(1)—*Construction of Acts--Punctuation.*—It is an error to rely on punctuation in construing Acts of the Legislature. THE MAHARANI OF BURDWAN v. KRISHNA KAMINI DASI, **14 C. 365, P.C.=14 I.A. 30=4 Sar. 772.**

Pundits, Opinion of.

(1)—*Reference to—Of legal questions—Frame of the questions.*—Where a reference is made by the Court to the Native Law Officers for an opinion upon a question which arises in a suit before the Court, the answer to which may bind a right, the question submitted should embrace all the important facts proved or admitted in the suit, which may affect the conclusion; and it is the duty of the Court itself so to frame the question, that the Court may elicit an opinion upon the very facts upon which the legal title depends. If the facts be not ascertained, but stated and disputed, then the question should embrace either view of the facts. When the opinion given is apparently irreconcilable with the opinions of approved text writers on the Hindoo Law, those who give

Pundits, Opinion of—*concluded.*

opinion should be asked to explain that which appears, *prima facie*, irreconcilable: so that, they may show on what ground an apparent exemption from the general law is inferred —whether on general custom modifying texts, on local usage, family customs, or other exceptional matter. MYNA BOYEE v. OOTARAM, **2 W.R. 4, P.C = 8 M.I.A. 400 = 2 M.H.C. 196 = 1 Suth. 452 = 1 Sar. 797.**

(2)—*Pundits, Opinion of—Value of.*—The rule laid down in the case of *Myna Boyee* v. *Ootaram*, 8 M.I.A. 400, that an opinion of the Pundits apparently discordant from works of current and established authority upon Hindu Law, given in the absence of authorities or of local usage, is not to be received as conclusive upon the question at issue, approved of. THE COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARRAINAPAH, **2 W.R. 61, P.C., 8 M.I.A. 529.**

Punishment Act (Corporal).

See ACT XI OF 1858.

Punjab.

Applicability of the Indian Easements Act, to Punjab—*See* EASEMENTS ACT, 1882, 85 P.R. 1902.

Punjab Acts.

See ACTS—PUNJAB ACTS.

Punjab Alienation of Land Act.

See PUN. ACT XIII OF 1900.

Punjab Appeals Act.

See PUN. ACT VII OF 1868.
See PUN. ACT IX OF 1873.

Punjab Chief Court Act.

See PUN. ACT IV OF 1866.

Punjab Civil Code.

(1)—*Punjab Civil Code, whether has force of law.*—The Punjab Civil Code has not received the force of law from the Indian Councils Act, owing to its never having been sanctioned by the Governor-General in Council. MUSSUMAT UTTER KOUR v. ATMA SINGH, **47 P R. 1870.** (125 P.R. 1867, *Diss.*) [*R.*, 149 P.R. 1888, 90 P.R. 1909 = 147 P.L.R. 1909.]

(2)—*Punjab Civil Code has legal force in bankruptcy matters.*—The Punjab Civil Code acquired the force of law with regard to proceedings in bankruptcy. The rules of the Judicial Commissioner of February 1863 have legal force so far as they are consistent with the Code. *In re* BICK, **64 P R. 1867** and RAM CHAND v. GUNGA BISHEN, **37 P.R. 1871.**

(3)—*See* PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 32 P.R. 1870.

(4)—*S. 4, para 4, Act* XXVII *of* 1860, *grant of certificate under—Punjab Civil Code, legal force of—Proved custom recognised by Punjab*

Punjab Civil Code—*continued.*

Code.—On this summary application under Act XXVII of 1860, a certificate was granted by the Deputy Commissioner to the sister of the deceased upon the words of s. IV, para 4 of the Punjab Civil Code. On an appeal preferred to the Chief Court against the above order by the nearest surviving collateral male relation of the deceased, asserting himself to be the heir-at-law of the deceased, the Chief Court held that, no question of custom having been raised, the only question was between the rule of the Mitakshara School of Hindu law and the Civil Code and the Deputy Commissioner was right in having acted under its provisions. The general scope and effect of the Code was not to alter the law. But the language of the section above referred to, taken by itself, is clear, and taken alone, clearly alters the law. The question, therefore, whether the Code altered the law or not is not free from doubt. SIRDAR ATMA SINGH v. MUSSUMAT ATAR KOUR, **69 P.R. 1869.** (7 P.R. 1869, *R.*) [*R.*, 36 P.R. 1878.]

(5)—*S. 4, para 9—Mahomedan Law—Inheritance—Punjab Civil Code, s. IV, para. 9, the word 'children' in, referring only to male children.*—The words relied on by the appellant in this case were contained in para. 9, s. IV, Part I of the Punjab Civil Code and they were:—"If the parents are surviving, the grandfather and grand-mother have no claim to a share nor have brothers and sisters any claim when there are children." The question turned on the precise meaning to be attached to the word 'children' in the above passage. If the word could be taken to mean male children, the instance given in the Code would be in consonance with the rules of inheritance according to Mahomedan Law. From the language of several of the paras in s. IV, Part I of the Code, the intention clearly appears to be to give an abstract of the principles of inheritance under the Mahomedan Law. The Chief Court was, therefore, of opinion that it is the duty of the Courts to reconcile, as far as possible, the rules of inheritance laid down in s. IV of the Code with those contained in the recognised authorities on Mahomedan Law, and, on the above principle, decided that the word 'children' in the said section should be construed as having exclusive reference to male children. MUSST. HAFIZAN v. MUSST. MENDHOO, **7 P. R. 1869.** [*R.*, 69 P.R. 1869.]

(6)—*S. 13, para. 11—Pre-emption—Contract of sale—Rule of Mahomedan law inapplicable.*—In a case where the right of pre-emption is founded not on the Mahomedan law but on local custom and agreement as evidenced by the settlement ikrarnamah, strict compliance with Mahomedan formalities is not necessary. The intending vendor should offer an opportunity of pre-emption to certain classes of persons. If they disagree as to price, reference is to be made to the revenue authorities, and if no such opportunity is offered, the sale may be set aside. The offer of purchase need not, as under Mahomedan law, be made after the contract of sale has been concluded. Where

Punjab Civil Code—*concluded.*

an offer has distinctly been made, and as distinctly refused, the right of pre-emption is put an end to, even though the offer may have been made upon the final contract for sale was struck. MEHUR CHUND v. HURDEO, **30 P.R. 1870.** [*R.*, 90 P.R. 1909=147 P.L.R. 1909.]

(7)—*S.* 13, *para* 11—*Power of co-sharer to alienate his share.*—The Hindu law allows a sharer to compel a partition of his share and it prevents him from alienating that share against the will and without the consent of the co-sharers. The Hindu law is overruled by the Punjab Civil Code, according to which a co-sharer in any kind of tenure has the right to sell his share without the consent of co-sharers but he must give them the option of purchasing it. A co-sharer in joint undivided property can, therefore, without the consent of his co-sharers, temporarily alienate his share. GOORDIT SINGH v. OOTUM SINGH, **31 P.R. 1870.** [*Appr.*, 78 P.R. 1879, 21 P.R. 1879.]

(8)—*S.* 19, *cls.* 9-15—*Bankruptcy jurisdiction—Bankruptcy rules, legal force of.*—The bankruptcy jurisdiction given by the Punjab Civil Code, s. 19, cls. 9-15, has not been taken away from the Courts by Act VIII of 1859. A bankruptcy jurisdiction could exist alongside of the Code. The very terms of s. 106 of Act VIII of 1859 show the framers of that Act contemplated such a state of things. If a creditor attach the property of his debtor, subsequently obtain a decree against him, and if in the meantime the debtor becomes a bankrupt, the judgment-creditor can bring his judgment-debtor's interests to sale, notwithstanding the property of the bankrupt has vested in the Official Assignee, for the Official Assignee merely takes the place of the bankrupt. The rule is, "that the Assignee takes the property subject to the rights and equities which affected it at the time of the bankruptcy or insolvency" of the owner, and if there be an attachment before or after decree, and prior to the Assignee taking possession, the judgment-creditor has the right to have the property sold in satisfaction of his decree. RAM CHUND v. GUNGA BISHEN, **37 P.R. 1871.** [*R.*, 93 P. R. 1882.]

(9)—S. 22, para 6—*See* RELIGIOUS INSTITUTIONS, 73 P.R. 1869.

Punjab Civil Courts Act.

See PUN. ACT XIX OF 1865.

Punjab Courts Act.

See PUN. ACT XVII OF 1877.
See PUN. ACT XVIII OF 1884.
See PUN. ACT XIII OF 1888.
See PUN. ACT XXV OF 1899.

Punjab Court of Wards Act.

See PUN. ACT II OF 1903.

Punjab Descent of Jaghirs Act.

See PUN. ACT IV OF 1900.

Punjab General Clauses Act.

See PUN. ACT I OF 1898.

Punjab Government Tenants.

See PUN. ACT III OF 1893.

Punjab Land Alienation Amending Act.

See PUN. ACT I OF 1907.

Punjab Land Revenue Act.

See PUN. ACT XXXIII OF 1871.
See PUN. ACT XVII OF 1887.

Punjab Laws Act.

See PUN. ACT IV OF 1872.

Punjab Laws Amendment Act.

See PUN. ACT XII OF 1878.

Punjab Limitation (Ancestral Land Alienation) Act.

See PUN. ACT I OF 1900.

Punjab Loans Limitation Act.

See PUN. ACT I OF 1904.

Punjab Municipal Act.

See PUN. ACT XIII OF 1884.
See PUN. ACT XX OF 1891.

Punjab Municipality.

See PUN. ACT IV OF 1873.

Punjab Pre-emption Act.

See PUN. ACT II OF 1905.

"Punjab Record."

Urudu Translation— Copyright — Infringement—*See* COPYRIGHT, 15 P. R. 1893.

Punjab Rules.

Mortgage of lands in Oudh—Application to Oudh of Punjab Rules—*See* MORTGAGE—REDEMPTION, 8 M. J. 69.

Punjab Ruling Chiefs.

See NAWAB OF TANK, 30 C. 843, P.C.=67 P.R. 1903=112 P.L.R. 1903.

Punjab Tenancy Act.

See PUN. ACT XXVIII of 1868.
See PUN. ACT XVI OF 1887.

Purakudies.

Free occupation of Manaikats belonging to Mirasdars—*See* LANDLORD AND TENANT—MISCELLANEOUS, 27 M. 517.

Purbia Kurmis.

Adoption of grandson of father's sister among—Validity thereof—*See* HINDU LAW—ADOPTION, A.W.N. 1905, 235=28 A. 170.

Purchase.

Proof of, with notice—*See* NOTICE, 1 L.B.R. 160.

See PARTITION—RIGHT TO PARTITION, 15 P.R. 1878.

See TRANSFER OF PROPERTY ACT, 1882, s. 41, 1 L.B.R. 196.

Purchase-money.

See BENAMI TRANSACTIONS.

See PRE-EMPTION—PURCHASE-MONEY.

See VENDOR AND PURCHASER—PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER.

See AUCTION SALE, 1 Bom. L.R. 446.

Suit for refund of—Where execution-sale was set aside, maintainability of—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 32 C. 332.

See DECREE—DECREE, FORM OF, 1 B.L.R. A.C. 50.

Right of decree-holder to take, when accrues—*See* EXECUTION OF DECREE—MISCELLANEOUS, 5 Ind. Cas. 139.

See GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 7 N.W.P. 201.

Hindu Law—Alienation—Son's share not affected by father's sale—Right of purchaser to refund of purchase money—*See* HINDU LAW—ALIENATION, 22 M. 312.

See HINDU LAW—ALIENATION, 4 B.L.R. A.C. 15=12 W.R. 446.

Suit to recover—On failure of consideration—*See* LIMITATION ACT, 1908, art. 62, 15 C. 51.

Suit by vendor to enforce payment of purchase money by sale of purchased property, nature of—*See* LIMITATION ACT, 1908, arts. 111, 132, A.W.N. 1908, 71=3 M L T. 374=5 A.L.J. 243=30 A. 172.

See LIMITATION ACT, 1908, art. 181, 11 A. 372=A.W.N. 1889, 113.

Mortgage for balance of unpaid purchase money—Dismissal of suit on mortgage—Subsequent suit to enforce lien for balance of unpaid purchase money—Maintainability—*See* RES JUDICATA—CAUSE OF ACTION, 26 M. 615.

Charge—Unpaid purchase-money is a, upon land—*See* SALE—GENERAL, 5 N.L.R. 66=2 Ind. Cas. 243.

Suit to recover purchase-money — Auction purchase—Not of Small Cause nature—Order not final — *See* SMALL CAUSE COURT MOFUSSIL, JURISDICTION OF, GENERAL, 11 M. 266.

Contract to sell immoveable property—Decree for specific performance and payment of purchase money—Passing of ownership—*See* VENDOR AND PURCHASER—COMPLETION OF TRANSFER, 5 B. 554.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER, 3 A. 77.

Purchase-money—*concluded.*

Non-payment of, in a contract of sale—*See* VENDOR AND PURCHASER — VENDOR, RIGHTS AND LIABILITIES OF, 1 Bom. L.R. 5 =23 B. 525.

Purchasers.

See BENAMI TRANSACTIONS.

See LIS PENDENS.

See MORTGAGE—SALE OF MORTGAGED PROPERTY.

See SALE.

See VENDOR AND PURCHASER.

See BURDEN OF PROOF—HINDU LAW, 3 N.W.P. 188.

Purchaser at Court sale—"Party" and "representative of party"—*See* CIV. PRO. CODE, 1908, s. 47, 15 B. 290.

Of attached property after attachment in execution of decree, whether a person 'whose immoveable property has been sold' within the meaning of s. 310-A, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O XXI, r. 89, 8 O.C. 189.

At execution sale—Purchase with knowledge of defective title—Right to refund of purchase-money—*See* CIV. PRO. CODE, 1908, O. XXI, r. 93, 3 A.L.J. 819=A.W.N. 1906, 310.

See EQUITY OF REDEMPTION, 5 B.L.R. 460 Note.

See HINDU LAW—DEBTS, 4 N.W.P. 110.

Of joint family property from the Manager must prove necessity for the sale—*See* HINDU LAW—JOINT FAMILY, 3 Bom. L.R. 243.

Purchase of undivided share of specific family property—Right of purchaser to sue for partition—*See* HINDU LAW—PARTITION, 15 C.P.L.R. 156.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 3 N.W.P. 207.

No saleable interest in judgment-debtor at time of sale—Right of purchaser to sue for purchase money—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 12 C.P.L.R. 49.

Purchase without notice.

(1)—The plea of purchase without notice though it may be good against an equitable claim is no defence against a legal claim. AMIRBIBI v. ABDUL, **3 Bom. L.R. 658.**

Purdanashin Lady.

See PARDANASHIN WOMAN.

Purdanashin Woman.

See PARDANASHIN WOMAN.

Purohit.

See JURISDICTION OF CIVIL COURTS, 7 M. 424.

Suit to establish exclusive right to receive fees paid to—Necessity for proof of contract or usage—*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 2 M.H.C. 330.

Putni.

(1)—Putni *tenure—Purchase at sale for arrears of rent—Notice to* darpatnidar *annulling* darpatni—Darpatnidar *a Hindu lady—Her refusal to give up* darpatni—*Suit by purchaser for possession and mesne profits—Lady's death during litigation—Substitution of her sons as defendants—Mesne profits Son's liability to what extent limited to assets received from lady up to lady's death—Personal liability for subsequent mesne profits—Bengal Tenancy Act* (VIII *of* 1885), *s.* 167.- The plaintiff purchased a *patni* tenure at a sale for arrears of rent and served a notice under s. 167 of the Bengal Tenancy Act on one R, the daughter and heir of the original *darpatnidar*, annulling the *darpatni* tenure and requesting her to give up possession. She refused to give up possession and the plaintiff brought this suit for recovery of possession and mesne profits. R died during the litigation and her sons were made defendants in the suit:—*Held*, that R's failure to deliver possession to the plaintiff was a personal tortious act on her part, which rendered her personally liable to an action for mesne profits or damages, and not an act which can be regarded as one done in the interests of the family estate, and that, therefore, her sons would be liable for mesne profits which had accrued prior to her death, to the extent only of her assets which had come into their hands at her death, and that, for the mesne profits subsequent to her death, they would be liable personally. NAFAR CHANDRA PAL v. KAMINI KUMAR LAHIRI, **16 Ind. Cas. 205.**

Putnidar.

See PUTNIDAR.

Putni Taluk.

See PUTNI TALUK.

Putni Tenure.

See PUTNI TENURE.

"Putra Poutradi Krame,"

See HINDU LAW—WILL, 7 C. 304=8 I. A. 46=10 C.L.R. 349.

Malik—Meaning of—*See* HINDU LAW—WILL, 24 C. 834, P. C.=24 I. A. 76=1 C.W.N. 387, 20 C. 906.

"Putra Poutradi Santan."

Meaning of—*See* DEED—CONSTRUCTION OF DEEDS, 7 C.L.J. 291.

"Putra Poutra Paryantam."

See HINDU LAW—WIDOW, 7 M. 387.

Putteedaree Village.

(1)-*Imperfect putteedaree village, full rights of proprietor in his dwelling house in*—Malik kubza, *residence of, following tenure of land.*—A proprietor in an imperfect puttidaree village, who possesses a residence in it, has a full right of property in that dwelling house although some

Putteedaree Village—*concluded.*

of the village lands and the unoccupied parts of the *abadi* and the portions of the *abadi* in which the cultivators reside remain joint. In this respect, he is in no different position from that of a *malik kubza* whose dwelling house always follows the tenure of his land. KIRPAL SINGH v. KESREE, **67 P R. 1869.** [*R.*, 11 P. R. 1879.]

Pyatpaing.

(1)—*Certificate of report of transfer of interest in a revenue holding—Revenue Register* IX, *foil and counterfoil.*—The foil commonly known as pyatpaing is not admissible in evidence to prove the report. It is merely a statement in writing made by the thugyi that a report of sale had been made to him by the parties. It is not direct evidence that a report had been made. It can only prove that the thugyi stated that a report had been made, and the fact that the thugyi made such a statement out of Court is not admissible. The counterfoil of Revenue Register IX ought to be signed by the parties or at least by the seller. If so signed it is itself the report, and is admissible in evidence. MAUNG CHEIK v. MAUNG THA HMAT, **1 L.B R. 260.** [*R.*, 4 L.B.R. 231, 5 L.B R. 40, L.B.R. 1905—1906, 250.]

Admissibility of, in evidence—*See* EVIDENCE ACT, 1872, ss. 157, 159, and 160, 3 L.B.R. 250.

Meaning of—*See* GIFT, 14 Bur. L.R. 30.

Pykes.

Occupancy right in Assam — Pykes, their rights and privileges—*See* RIGHT OF OCCUPANCY—GENERAL, 15 C. 100.

Quarrel.

Defamation — Use of abusive words in a quarrel—No intention to injure reputation or character—Not actionable—*See* DEFAMATION, 10 M.L.J. 83.

Quarry.

(1)—*Slate quarries, grant of—Quarrying for building materials, whether infringement of grant.*—A peculiar lease of slate quarries granted by the Raja of C to W.M. which was subsequently assigned to T by the lessee was as follows. "...I...Raja of C...do hereby make over to W.M. on lease the good will, *i.e.*, to have and to hold all the slate quarries within my territory at any place within a distance of 15 miles from the station of D that may now exist or may hereafter exist or be *discovered* within the abovementioned distance of the station." *Held*, (*a*) that the lease deed did not purport to grant the soil over that vast extent of territory, not did it even purport to grant all the slate which might be found under the soil. (*b*) That the effect of such grant was merely to grant the right of working such quarries (which then existed or which might be afterwards discovered) as produced *sel* (roofing slate of the best description) and *chokka* (heavier than *cel* but used for roofing

Quarry—*continued.*

purposes), and that the right conferred upon the grantees was of this kind, that if any person should open a quarry for the purpose of working slates of the above description, it was open to them to come to the Courts and restrain him, such person being also liable to damages if he went on after notice. (c) That such lease did not prevent any person from quarrying *bona fide* for the purpose of extracting building materials (like *nila-pather*) *i.e.*, blue clay stone as to which there might be very considerable doubt whether any of the materials extracted were capable of being converted into slabs. TURTON v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **1 P.R. 1874, P.C.** *on appeal from*, **21 P.R. 1872.**

(2)—*Lessee of quarries under independent State—Subsequent cession of territory—Reservation of lessee's rights—Construction of lease—Estoppel—Injunction.*—Suit against the Secretary of State for India in Council for damages, upon a cause of action to the effect that the defendant, without leave and license of the plaintiff, took away and converted to his own use, in and during the years 1865 to 1866, slate from the quarries within a radius of 15 miles from the station of Dalhousie, which quarries had been leased to plaintiff by the proprietor, the Rajah of Chumba, under a lease by which, in consideration of Rs. 1,000 *per annum* the Rajah made over to plaintiff, for a term of years, the right to have and hold all the slate quarries within his territory at any place within a distance of 15 miles from Dalhousie. Defendant contended that he had taken nothing that was "slate" within the meaning of the plaintiff's lease, that what had been taken was blue-clay slate, while the terms as used in the lease comprehended only the right to quarry roofing slate and slab slate. It was also contended that, as the land where the alleged wrongful act had been done, *i.e.*, the Balum Hill, had been ceded to the British Government in 1847 by the separate and independent State of Chumba, the defendant was not responsible for any act done directly in pursuance of the terms of the cession of territory. From the correspondence which preceded the cession of territory, it appeared that, while on the one hand, the lease to the plaintiff was notified to Government, the latter had also left to them the right to quarry slate within the area ceded. *Held*, as to the question of jurisdiction, that the transferring State having only made the broad proposition that the purchasing State was to be allowed to take slate of some kind from Balum without accurately separating what was intended from the material referred to in the lease to the plaintiff which the transferring state required to be recognised, the purchasing Government was liable to be sued in a Civil Court upon alleged breach of the rights, secured or intended so to be. *Held* on the construction of the lease, that the vernacular term for slate referred to therein meant only roofing and slab slate and that the plaintiff had no exclusive right to the blue

Quarry—*concluded.*

clay slate, which was the sort taken by Government. It appeared that whilst the blue clay slate was being excavated under the orders of Government for building, road-making and other purposes, the plaintiff did not raise any objection or make any complaint of which official notice could be taken. *Held*, that this circumstance estopped him from claiming compensation. *Held* also that, inasmuch as the Government were entitled to take blue-clay slate, the incidental extraction of roofing slates and slab slates in the course of quarrying for blue clay slate would not, under the circumstances, render Government liable to compensation. An assignee of the plaintiff's rights had also sued the Government in respect of a similar infringement and obtained an injunction against them. *Held* that the injunction should be maintained, as any further excavation by Government would, as they went further down, interfere with the right of the assignee to quarry roofing and slab slates. MCGUFFIN v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **21 P.R. 1872.** [*Affirmed on appeal*, 1 P.R. 1874, P.C.]

Proper methods of assessment of compensation under Land Acquisition Act—Workmen employed on the land, not persons interested therein—*See* ACT X OF 1870, s. 42, 16 M. 369, P.C.=20 I.A. 80.

Permission to quarry—Agreement—License—Renewal—Payment of rent—Construction of agreement—*See* CONTRACT—CONSTRUCTION OF CONTRACTS, 13 B. 630.

Lease by widow—Quarries worked by State Railway—*See* HINDU LAW—REVERSIONERS, 22 M. 126=9 M.L.J. 19.

Lease for quarrying lime stone—*See* REGISTRATION ACT, 1908, ss. 17 and 49, 7 O.C. 251.

Suit for rent of stone quarry—*See* RENT, SUIT FOR, 3 B.L.R. A.C. 61=11 W.R. 400.

Quarterly Returns.

This circular requests Judges to take care that cases in which judgment has not been delivered are not included in returns by the inferior Courts as decided. **Civ. Cir. No. 13, 20 W.R. Civ. Cir. Rules and Ords. of the H.C.p. 5.**

Records of Subordinate Courts to be sent to Judges quarterly, except in contested cases which are to be forwarded monthly. **Civ. Cir. No. 16, 20 W.R. Rules and Ords. of the H. C., p. 8.**

This circular again enjoins on District Judges the necessity of showing in Quarterly Returns the number of days devoted to civil work during quarter. **Civ. Cir, O. No. 19, 20 W.R. Rules and Ors. of the H C. p. 25.**

This circular directs that the Civil and Criminal Statements for the quarter from April to June 1870 be not submitted till new forms of returns are supplied. **Civ. Cir. No. 15, dated 13th June, 1870 13 W.R. Civ. Cir. 18.**

Quarterly Returns—*concluded.*

This circular lays down new forms of Quarterly Returns of Civil and Criminal business, and prescribes rules for their preparation. **Civ. Cir No. 31 dated 4th November, 1870, 14 W R Civ. Cir. 16.**

This circular circulates letter to the Superintendent of Stationery regarding the supply of slip forms for Quarterly Returns prescribed by Circular No 31, dated 4th November last. **Civ Cir. No. 3816 dated 17th December, 1870, 14 W R. Civ. Cir. 43.**

This circular gives further instruction in respect to the Forms A, B, and C of the quarterly returns of Civil Work **Civ. Cir. No. 28 dated 12th October, 1871, 16 W.R. Civ. Cir. 11.**

This circular gives instructions as to the preparation of Statements A, B, and C, prescribed by Circular No. 31, dated 4th November 1870, laying down new quarterly returns **Civ. Cir. No. 25 dated 12th August 1871, 16 W.R. Civ. Cir. 8.**

Cases struck off on plaintiff's default entered as "otherwise disposed of" in quarterly review. **25 W.R.H.C. Rules General letter No. 4, dated 17th February 1876, p.6.**

This circular deals with Amended Quarterly Return No. X. **Rev. Cir. No 2. 25 W.R. Rev. Cir. 21.**

This circular explains how cols. 16 and 18 of Return No. XVI are to be filled up. **Rev. Cir No. 7, 23 W.R. Rev. Cir. p. 17.**

This circular directs discontinuance of Quarterly Returns prescribed by Circular Order No. 12, dated 8th April, 1872, but extends the instructions of that Circular Order to the Annual Statements **Civ. Cir. Memo. No. 2, 23 W R. Rules and Ords. of the H.C p. 3.**

This circular directs that Sessions Judges and Magistrates are to submit their Quarterly Criminal Returns D and E in duplicate. **Crim. Cir. Memo No. 4, 20 W R. Rules and Ors. of the H C. p. 3.**

Quarterly Statements.

This circular gives instructions as to the preparation of revised forms of Quarterly Statements D and E. **Crim. Cir. Or. No. 11, 20 W R. Rules and Ors. of the H.C. p. 18.**

This circular gives instructions to obviate discrepancies between the Quarterly Statements of Land Revenue Receipts and Return No. 10. **Rev. Cir No. 5, 20 W R. Rev. Cir. p. 5.**

This circular issues instructions for the preparation of the Quarterly Statements A and B, and the Annual Statement No. 6. **Civ. Cir. No. 25 of 30 December 1873, 21 W.R.H. C. Rul. & Or. 2.**

This circular cancels paras. 1 to 6 of Circular No. 31 of 4th November 1870, and prescribes revised forms of Quarterly Statements A. B. and C. **Civ Cir. No. 2 of 26th January 1874, 21 W. R. H. C. Rules and Ors. 5.**

Quarterly Statements—*concluded.*

This circular circulates letter regarding the filling-up of columns "on trial" and "otherwise" under the head "suits disposed of" in Quarterly Statement A. **Civ Cir. Memo. No. 10 dated 5th May 1874, 21 W. R. H. C. Rules & Ors. 24.**

This circular cancels Circular Order No. 15, dated 13th June 1870, and requests that the Civil Statements for the 2nd Quarter of 1870 be submitted in the old forms. **Civ. Cir. No. 22, dated 4th August 1870, 14 W. R. Civ. Cir .9.**

This circular deals with discrepancies as to cases transferred in Quarterly Statements A and B. **Civ. Cir. Or. No. 10, 24 W.R. Rules & Ors. of the H.C. p. 12.**

This Circular directs that Judges and Magistrates are to submit Quarterly Statements D and E separately to High Court. **25 W.R.H.C. Rules. General letter No. 2 dated 25th March 1876, p 7.**

This rule deals with the change in Quarterly Statement D. Part II. **25 W. R. H. C. Rules General letter, No. 1, dated 9th March, 1876, p. 7.**

This circular calls for statement showing the number of days given to Civil and Criminal work and the number of Sessions trials and appeals heard by the Judge and Additional Judge in 1873. **Civ. and Criminal Memo. No. 19 dated 21st August 1874, 22 W. R. Civ. and Criminal 10.**

This circular forwards copy of letter to Superintendent of Stationery regarding alteration in last column of Quarterly Statements A, B and C, **Civ. Cir Memo. No. 17 dated 14th July 1874, 22 W R. Civ. Cir. 7.**

This circular circulates letter showing how columns 2 and 3, Part II of Quarterly Statement D, should be filled up. **Crim. Cir. Memo, No 3 dated 3rd June 1874, 22 W. R. Civ. Cir. p. 1.**

Queen.

Queen's proclamation of 1st November 1858 —*See* BURDEN OF PROOF—GENERAL, A.W. N. 1897, 129.

Queen in Council, Appeals to.

See ACT II OF 1863.

See APPEAL TO PRIVY COUNCIL.

See PRIVY COUNCIL, PRACTICE OF.

Question of Fact.

See APPEAL TO PRIVY COUNCIL.

See PRACTICE AND PROCEDURE.

See PRIVY COUNCIL, PRACTICE OF.

See REVISION.

See SPECIAL OR SECOND APPEAL.

(1)—*Family custom—Question of fact.*—**The** Question whether a plaintiff, as a female, is excluded from inheriting by the custom of the

Question of Fact—*concluded.*

family, is substantially one of fact. BURJORE AND BHAWANI PERSHAD v. BHAGANA, **10 C. 557, P.C.=11 I.A. 7=4 Sar. 498.**

(2)—*Construction of document.*—The construction of the document is a mixed question of law and fact. YUSAF v. LEKH RAM, **P.L.R. 1900, p. 462.**

The question whether a stipulation to pay compound interest can be regarded as a penalty is a—rather than of law—*See* CONTRACT ACT, 1872, s. 74, 1 N.L.R. 9.

Question of fact, implied prohibition to adopt is not a—*See* HINDU LAW—ADOPTION, 1 Bom. L.R. 420=23 B. 789.

Acquiescence is not—*See* LANDLORD AND TENANT—NATURE OF TENANCY, 1 Bom. L.R. 400.

Findings of Lower Courts on—*See* PRACTICE AND PROCEDURE, 9 M. I.A. 456.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 3 B.L.R.A.C. 273=12 W.R. 130.

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 8 W.R 311.

See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, A.W.N. 1887, 183.

Question of Law.

See APPEAL TO PRIVY COUNCIL.

See PRACTICE AND PROCEDURE.

See PRIVY COUNCIL, PRACTICE OF.

See REFERENCE.

See REVISION.

See SPECIAL OR SECOND APPEAL.

(1)—*Construction of document.*—The construction of the document is a mixed question of law and fact. YUSAF v. LEKH RAM, **P.L.R. 1900, p. 462.**

(2)—*Inference to be drawn from documents, question of law.*—The inference to be drawn from the construction of a document is a question of law, and the High Court in second appeal can interfere with the construction put upon it by the lower Courts. CHOCKALINGAM PILLAI v. MAYANDI CHETTIAR, **19 M 485=6 M.L J. 247.** [*Reversed on appeal to the Privy Council*, 27 M. 291, P.C.]

(3)—*Construction—Pottah—Practice of High Court.*—The construction of a pottah is according to the practice of the High Court, a question of Law. In construing a pottah, the Court would however look to the surrounding circumstances, one of the surrounding circumstances being the nature of the possession given by the grantor and accepted by the grantee. JANOKEE NATH DUTT v. MOULVIE MAHOMED ISRAIL, **22 W.R. 285.**

(4)—*Special appeal—Question of law.*—An objection on a question of law might properly

Question of Law—*concluded.*

be taken at any time, and for the first time even in special appeal. BYJNATH PERSHAD v. KOPILMON SINGH, **24 W.R. 95.**

(5)—*Question of law—Decision of High Court—Authority.*—The decision of the High Court on a question of law is clearly conclusive as regards that particular question, so far as any subordinate Court is concerned. GREEDHAREE SINGH v. MUSSAMUT FOOLGHUREE KOOER, **24 W. R. 173.**

(6)—*Second appeal—Sufficiency of evidence to support given conclusion of fact—Question of law.*—It is a question of law for the High Court to determine on second appeal, whether there is evidence before it, on which a Court could properly arrive at any given conclusion of fact. BIDHUMUKHI DABIA CHOWDHRAIN v. KEFYUTULLAH, **12 C. 93.** [*F.*, L B. R. 1893—1900, 543.]

Whether services are towage or salvage is a, —*See* ADMIRALTY, 1 Bom. L. R. 570.

See APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 11 C. 740.

See CIV. PRO. CODE, 1908, s. 113, O. XLVI, r. 1, 93 P.L.R. 1902.

See CUSTOMS—PUNJAB—ALIENATION, 61 P.L.R. 1901.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 36 P.R. 1889.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 3 B.L.R.A.C. 273=12 W.R 130.

See SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—PRACTICE AND PROCEDURE, 4 B.H.C. O.C. 129.

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL 21 B. 91.

Quia timet action.

(1)—Quia timet action—*Necessary ingredients.*—There are two necessary ingredients for a *quia timet action.* There must, if no actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will be very substantial or irreparable. GANGABAI v. PURSHOTUM, **9 Bom. L.R. 912=32 B. 146.**

Rabid Animal.

(1)—*Animal—Dog—Knowledge of master that his dog has become mad—Proof of such knowledge necessary—Negligence.*—If the owner of a dog knows that it is mad and omits to tie up or destroy it, and the dog bites another man's cow and the cow dies of hydrophobia in consequence, the owner of the dog would probably be held liable for the damage done. It is essential in cases of this kind for the plaintiff to show that the damage done was caused or rendered possible by the defendant's negligence. U KYAW MYA v. MI WIN THANDA, **8 Ind. Cas. 984.** (U.B. R. 1902—1903, Tort 1, *F.*)

Rack Rent.

And net produce, relation between—*See* MESNE PROFITS—MODE OF ASSESSMENT, 12 C.W.N. 650=35 C. 1000.

Raffle.

(1)—*Act* XXI *of* 1848, *s.* 3—*A promissory note to pay money to the highest winner.*—S. 3 of Act XXI of 1848, which must be deemed to be in force in the Punjab by virtue of the Rules for the administration of justice in the Punjab, ran as follows:—"An agreement to deliver goods on an event or contingency relative or applicable to the drawing of a number or figure is void." The question was whether a raffle comes within this definition. A raffle is conducted in the following manner. The value of the property raffled is divided into a number of shares and a number of persons purchase one or more of the shares. For every share, certain throws with the dice are allowed and the person throwing highest number is declared the owner of the property. *Held* (1) that, as the effect of the contract was that the property should go to some one whose right to the property was contingent on his throwing the highest number, it comes within s. 3 of the above Act, and is therefore illegal, and a suit to recover money due under a contract tainted with such illegality cannot lie. ORAM v. HAWKES, **16 P.R. 1868.**

Railway.

See RAILWAY COMPANY.

Railway Act (Amendment Act).

See ACT XXV OF 1871.

Railway Company.

See ACT IX OF 1890.

(1)—*No obligation to carry passenger safely—Suit for damages against Railway Company—Onus—Not bound to examine every Parcel - Not common carriers of passengers.*—There is no obligation on a Railway Company to carry a passenger safely. They are only legally bound to carry him with reasonable care and diligence. [*Collet* v. *London and North-Western Railway Company*, 16 Q B. 985 (1851), *Expl.*]. In a claim for damages, for loss of a son who helped his father and whose death was caused by an explosion in a railway carriage, the burden of proving, that the accident was due to a want of reasonable care and diligence on the part of the Railway Company, is on the plaintiff. Railway servants are not bound to examine every parcel carried by a passenger. Railway Companies are not common carriers of passengers, and it is not for them to prove, beyond doubt, that they are not responsible for the accident. THE EAST INDIAN RAILWAY COMPANY v. KALI DAS MUKERJEE, **28 C. 401, P.C. = 28 I A. 144 = 5 C.W.N. 449 = 3 Bom.L R. 293 = 11 M.L J. 156 = 8 Sar. 33.**

(2)—*Negligence—Railway Company liable for negligence if the door of a carriage is open—Breach of statutory duty—Railway Company bound to carry passengers inside the carriage—Putting an arm on the widow sill of a carriage amounts to contributory negligence.*—If the door of a carriage of the railway company is open, it is evidence of negligence on the part of the Company, but not conclusive proof of it.

Railway Company—*continued.*

Where there is a statutory obligation, any breach of that which causes an accident is conclusive against the defendant, apart from special proof of negligence But the breach of the duty must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence. A Railway Company contracts to carry passengers inside and not outside their carriages. A passenger, who puts any part of his person outside the carriage of a Railway Company in which he is travelling and receives an injury to the part so extruded, is guilty not only of negligence by putting himself outside the carriage, but of contributory negligence which disentitles him to recover against the Company, provided that, no matter what negligence the Company has been guilty of, that could not have caused the passenger any injury so long as he remained inside the carriage. DULLABHJI S. SANGHANI v. G. I. P. RY. CO. AND ANNA RAMA v. THE GREAT INDIAN PENINSULAR RAILWAY COMPANY, **12 Bom. L. R. 73 = 5 Ind. Cas. 676.**

(3)—*Death from accident caused by negligence of fellow servant—Company's liability.*—*Per Stuart, C. J.*—Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any other than him who actually caused the damage, it lies on the person injured to shew that the circumstances were such as to make some other person responsible. In general, it is sufficient for this purpose to show that the person whose neglect caused injury was, at the time when it was occasioned, acting not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case, the maxims *respondeat superior* and *qui facit per alium facit per se* apply, and the master is responsible But the same principles do not apply to the case of a workman injured by the want of care of a fellow workman engaged together in the same work. *Per Turner, J.*—It is an established principle of construction that contracts are not to be extended beyond the intention of the parties. A free pass which entitles the holder, "to pass free by any of the Company's trains subject to the same rules and regulations as other passengers" cannot be construed as an undertaking on the part of the Railway Company to carry the holder on the same terms and conditions as other passengers. It is intended to impose an obligation on the passenger and not on the carrier. In the absence of evidence to show that the master has failed to discharge his duty to provide competent workmen and fit tackle and machinery, the doctrine of common employment as established by the English and American Courts may be applied to restrict the employer's liability as a rule of 'justice,' equity and good conscience. Where a platelayer employed by a Railway Company, after finishing his work for the day, was returning to his headquarters on a free

Railway Company—*continued.*

service pass, and was killed by an accident due to the negligence of one of the engine drivers, *held, per Curiam*, that if the deceased was not engaged in duty at the time of the accident, but was being conveyed gratuitously, gross negligence on the part of the company's servants would render it liable for the injury which caused the death of the passenger. *Per Turner, J.*—The engine-driver was a fellow-servant engaged in a common work and the deceased at the time of the accident was a servant of the Company: otherwise, the deceased would be a mere trespasser, and no claim could be brought against the Company by the heir or executor. *Per Stuart, C.J.*—As the deceased, at the time of the accident, was neither engaged in any kind of actual work on the line which brought him into operative contract with the engine-driver nor travelling under any engagement, the maxim *respondeat superior* applied whether the Company was acting *per alium* or *per se*. There must be some limit to the expression "common work of the Company." MARY ANNE TURNER v. SCINDE PUNJAB AND DELHI RAILWAY COMPANY, **1 A.L.J. 653.**

(4)—*Carriers—Breach of contract to convey passengers—Damages — Obligation of railway company regarding safe carriage of passengers —Fire in a train—Presumption—Onus.*—A carrier, though he does not warrant the safety of his passengers, impliedly undertakes to provide for the safe conveyance, so far as human care and foresight can go. Failure to exercise the same is a breach of the implied contract. In such a case, the carrier will be liable for damages for such failure. In providing for the safety of their passengers, it is the duty of a Railway Company to show, at the very least, such a degree of care, as may reasonably be required from them, considering all the circumstances of the case. The Company must show that the accident (if any), was one not preventible by any care or skill. (*Scott* v. *London Dock Co.*, 3 H. and C. 596 (1865), *Kerney* v. *London, Brighton and South Coast Railway*, 6 Q.B. 759 (1871), *Daniel* v. *Metropolitan Railway Co.*, 5 E. and I. Ap. 45 (1871), *R.*; *Welfare* v. *London and Brighton Railway Company*, 4 Q.B. 693 (1869), *D.*) A fire in a train is not an ordinary circumstance. When it is the result of an explosion of a large quantity of fire-works, it raises a presumption of possible negligence on the part of the Company. If from explosion of fire-works in a passenger's compartment, loss of life and damages have resulted, it is incumbent on the Railway Company to show that they exercised every reasonable care and precaution to prevent the conveyance of fire-works in such a way, and not upon the plaintiff to show that they did not. (*Byrne* v. *Boadle*, 2 H. and C. 772 (1863), *Daniel* v. *Metropolitan Company*, 5 E. and I. Ap. 45 (1871), *Cotton* v. *Wood*, 8 C.B N.S. 568 (1860), *Foulkes* v. *Metropolitan Railway Co.*, 5 C.P.D. 157 (1880), *R.*) THE EAST INDIAN RAILWAY CO. v. KALLY DASS MOOKERJEE, **26 C. 465=3 C. W. N. 781.**

Railway Company—*continued.*

[*Affirmed on appeal*, 28 C. 401, P C.=28 I.A. 144=5 C.W N. 449=11 M.L.J 156=3 Bom. L.R. 293; *R.*, U.B R. 1897—1901, Vol. II, 337.]

(5)—*Railway Company—Statutory powers—Fire caused by sparks from engine—Suit for damages—Proof of negligence—Liability of the Company—Damage caused by spark from engine —Negligence what amounts to—Liability for negligence.*—Plaintiff was the owner of a bungalow and dwelling house, with stables and outhouses thereto adjoining at Kharmatta, and the defendant, the East Indian Railway Company, were possessed, and had the care and management of, a line of railway, called the Chord line, running near the said bungalow and premises, with banks belonging thereto and forming part of the said railway. The defendant Company were incorporated under 12 and 13 Vic. Ch. XCIII, for the purpose of making, constructing, working and maintaining the East Indian Company, "including all necessary accessory or convenient extensions, branches, stocks and works as might be agreed upon by the Railway Company and the East India Company, and also of doing and performing all such matters and things necessary or convenient for carrying into effect the object and purpose aforesaid;" and by an agreement of 17th August, 1849 entered into under that Statute between the East Indian Company and the Railway Company, the Railway Company were authorized and directed to make and maintain such stations, offices, machinery and other works or conveniences (connected with the making, maintaining and working the railways) as might be deemed necessary and expedient by the East India Company and "to provide a good and sufficient working stock of engines, carriages and other plant and machinery for working the said railway." The plaintiff sued the Railway Company for damages occasioned by a fire caused by a spark from one of the engines of the Company and in the plaint be alleged that by the negligence and improper conduct of the defendant and want of due care and management of the said line of railway, banks and engines, the dry grass which was allowed and permitted to be and remain upon the railway and bank became and was ignited by sparks of fire emitted from a locomotive engine of the defendant which was driven along the line of railway near to the plaintiff's bungalow and premises without proper precautions being taken to prevent the expulsion of such sparks and fire from the engine. *Held* that, as the defendant Company were empowered by statute to run locomotive engines on the line of the railway in question, they were not responsible for the consequences of the fire, unless they were proved to have been guilty of negligence. When the Legislature has sanctioned the use of a particular means for a given purpose, the sanction carries with it this consequence, that the use of the means itself for that purpose (provided every precaution which the nature of the case suggests has been observed) is not an act for which an action lies, independent of negligence. [*R.*, 2 Bom.

Railway Company—*continued.*

L R. 357.] The Railway Company, in the construction of their engines are not only bound to employ all due care, and all due skill, for the prevention of mischief accruing to the property of others, by the emission of sparks or any other cause, but they are bound to avail themselves of all the discoveries which science had put within their reach for that purpose, provided they are such as under the circumstances, it is reasonable to require the Company to adopt But they are not bound to use every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested. The omission of means to prevent the emission of sparks from the engines is no negligence on the part of the Company where the means suggested are such as would impede the engines and would not be effectual for the object. The Company are also bound to use due care in keeping the line of railway and the land belonging to them on each side of it in a proper state. HALFORD v. THE EAST INDIAN RAILWAY COMPANY, **14 B.L. R. 1.**

(6)—*Negligence—Liability for injury—Act* XVIII *of* 1854, *s.* 11.—A railway company is liable for injury sustained by goods committed to their care, if they have been guilty of gross negligence. ASSAM TEA COMPANY v. EAST INDIAN RAILWAY COMPANY, **Bourke O.C. 39.**

(7)—*Railway Company's control over passenger's luggage.*—A Railway Company cannot plead that they have no control over the luggage carried by their passengers. THE EAST INDIAN RAILWAY CO v. KALLY DASS MOOKERJEE, **26 C. 465=3 C.W.N. 781.** [*Affirmed on appeal,* 28 C. 401=5 C.W.N. 449, P.C.=11 M.L.J. 156 =3 Bom. L.R. 293.]

(8)—*Railway Company—Negligence—Duty of the Company towards the goods consigned—Duty to take all care of the goods—Duty to protect goods when the risks occur — Railways Act, ss.* 72, 76—*Carriers Act* (III *of* 1865), *s* 9—*Contract Act, ss.* 151, 152, 161—*Burden of proof.*—The plaintiff consigned 90 bales of cotton at Malkapur, a station on the defendant company's line of railway, for carriage to Bombay. Those bales were put by the defendant company's men in a waggon which was attached to a goods train. At Varangaum, an intermediate station, the waggon was found to be on fire. It was detached and put on a siding, where the doors were opened, and 39 bales were extracted from it. The remaining 72 bales in the waggon continued burning for some hours till they were completely destroyed. The goods train proceeded on its onward journey to Bhusawal. In the meanwhile, the Varangaum Station Master telegraphed to the Bhusawal Station Master (whose station was eight miles ahead) for a 'fire pipe' but he inquired in reply whether any water was available near the waggon. The Varangaum Station Master wired back saying that there was a well about 250 yards from the waggon and that the water was 30 or 40 feet deep. The Bhusawal Station Master

Railway Company—*continued.*

replied that it was useless to send the fire engine as it would not draw water at that depth. It was proved that there were at Bhusawal at the time duplicate engines with steam up and a hose 250 feet in length. It also appeared that at Varangaum there was a well only 53 feet from the nearest railway siding; so that if the engine and the hose had been sent from Bhusawal, the fire would have been put out. The Bhusawal Station Master never considered the question of sending an engine for the burning waggon and did not consult the engine driver of the goods train about it. In a suit by the plaintiff to recover the value of the cotton-bales: *Held*, that the defendant company was liable to pay damages which ensued owing to its negligence, for it failed to establish that it took the care a reasonable man would have taken in trying to save his own goods, inasmuch as (1) the Varangaum Station Master misled the Bhusawal Station Master as to the distance and so caused that officer to refuse his request for the appliances, and (2) the Bhusawal Station Master was himself negligent and but for his negligence an engine and appliance might have beed gone at Varangaum with the help of which much of the loss would have been avoided. The obligation of a railway company towards the consignor of goods includes not only the duty of taking all reasonable precautions to obviate risks, but the duty of taking all proper measures for the protection of the goods when the risk has actually occurred. S. 76, Railways Act, does not increase the *onus* of proof laid upon the railway company by s. 151, Contract Act. LAKHICHAND v. GREAT INDIAN PENINSULAR RAILWAY, **14 Bom. L.R. 165=14 Ind. Cas. 793=37 B 1.**

(9)—*Railway Company—Carrier—Bailee—Transport of goods—Delivery—Loss—Damage—Acceptance, whether precludes claim for damages.*—When goods have been sent for carriage by railway, the mere fact that the consignee has accepted delivery and granted a clear receipt does not extinguish his right to compensation, if he proves that the goods were lost in part or damaged while in the custody of the Company. EAST INDIAN RAILWAY COMPANY v. SISPAL LAL, **14 C L.J. 472=16 C.W N. 329=12 Ind. Cas. 596=39 C. 311.**

(10) *Railway Act—Loss of silver bars in transmission—Declaration, nature of—Liability of Company—Railway Companies—Their liability.*—If a person transmitting valuable goods by Railway, desires to fix the Company with liability for loss or injury to the goods, he must make the declaration in such a manner that it may be understood that he invited the Company to an engagement to take the special risk and is willing to pay the increased charge. It is not sufficient that the consignor gives an account to the Company of the quantity and description of the goods he delivers for carriage. If other circumstances entitling the sender to recover were proved, the waiver on the part of the Company to demand the extra charge would not disentitle him. [*F.*, 19 B. 165.]

Railway Company—*continued.*

Railway companies in respect of their liability as carriers are placed on a different footing from other common carriers. VENKATACHALA v. SOUTH INDIAN RAILWAY CO., **5 M. 208.**

(11)—*Consignee's claim—Carrier—Liability.*—Where the consignees refused to take delivery of two bundles of cow-hides carried by the Railway Company on the ground of shortness in the number of pieces, and there was no evidence that the bundles had been broken, or the hides counted by pieces, the Railway Company was declared not to be liable. MESSRS. F. SCHLAEPFER PUTZ AND CO. v THE EASTERN BENGAL RAILWAY COMPANY, **21 W.R 380.**

(12)—*Consignment—Consignor's agent changing the condition in which the consignment was originally agreed to be sent—Consignee, ignorant of the changed condition, refusing to take delivery of the consignment as his—Right of suit.*—Plaintiff's agent A handed in a consignment of 250 bags of cocoanuts at Delta Gaunavaram to be forwarded to the plaintiff at Sholapur. When the cocoanuts were loaded in the railway waggon, N, the agent of A, removed the gunny-bags and loaded the cocoanuts loose in one waggon. The railway receipt as well as the label on the waggon described the consignment as 250 bags of cocoanuts. When the consignment reached its destination, plaintiffs declined to take its delivery on the ground that the consignment was not theirs since it was not contained in 250 bags as described in the receipt. The Railway Company then sold the cocoanuts to meet wharfage, freight, etc. Plaintiffs thereupon sued the Railway Company for recovering the damages sustained by them on account of the non-delivery of the consignment. *Held*, (1) that the contract was between N and the Company, and assuming that it was a term of it that the goods should be carried in bags and delivered to the plaintiffs, N himself by his action modified that term, and as between him and the Company, he cannot hold the latter liable for a breach of it: (2) that so far as the plaintiffs were concerned the Company never entered into any contract with them, and the plaintiffs could not sue them, whatever cause of action they might have against their agent. GREAT INDIAN PENINSULAR RAILWAY v. SAHEBRAM, **5 Bom. L.R. 953.**

(13)—*Consignment—Diversion of consignment while* en route—*Delivery to the original consignee—Liability of the Company.*—At Sakrigali Ghat station on the East India Railway, G booked a consignment addressed to R, at Kamti on the Bengal Nagpur Railway. While the consignment was en route to Kamti, G requested the railway servants at Sakrigali Ghat station to direct the consignment to plaintiff at Nargaon station. This diversion was duly communicated to the station-master at Kamti, who in spite of the instructions delivered the consignment to R. The plaintiff sued the East India

Railway Company—*continued.*

Railway for damages consequent upon non-delivery of consignment to him: *Held*, (1) that the Railway Company was liable in damages: the case was a simple case of breach of contract—the defendant Company contracted to carry the goods and deliver them at Nargaon and failed to give such delivery to the plaintiff: (2) that the liability of the Railway Company was not affected by the fact that the station-master at Kamti acted wrongly in disregarding the instructions which he received from Sakrigali Ghat station. CHHAGANLAL v. EAST INDIA RAILWAY COMPANY, **5 Bom. L.R. 531=27 B. 595.**

(14) *Contract with Railway Company—Delivery, at a station on another Railway—Agency.*—A contract by a Railway Company to take a consignment of goods and deliver them at a station on some other Railway does not in itself constitute the former company an agent for the latter. KALU RAM MAIGRAJ v. THE MADRAS RAILWAY COMPANY, **3 M. 240.** [*F.*, 29 A. 228=4 A.L.J. 80=A.W.N. 1907, 21=2 M.L.T. 42; *R*, 3 Bom. L.R. 260.]

(15)—*Contract—Railway receipt—Carrier—Jus tertii.*—Suit against a Railway Company for the value of goods consigned to plaintiff, which defendants had received for delivery to plaintiff, according to a railway receipt, but which they had delivered to T and Co. *Held* that the handing over by the consignors of the railway receipt to plaintiff passed the right of possession and property to plaintiff who had a substantial interest in the consignment, and that the authority given to him by the consignor was coupled with an interest which neither they nor the defendants could revoke; and as defendants had no notice of T and Co.'s equitable title, they were not justified in delivering to them and were liable for the wrongful delivery. EAGLETON v. THE EAST INDIA RAILWAY COMPANY, **8 B.L.R. 581=17 W.R. 532.**

(16)—*Receipt note by company—Conditions—Non-compliance — Ignorance no excuse.*—The receipt note given by a railway company is a contract between the company and the consignor and contains the conditions on which the goods are to be delivered to and accepted by the Railway for carriage. Where a person delivers the goods for carriage under the terms of the note, he could not claim exemption from those terms on the ground that he omitted to inform himself of the same or that he did not sign the note. BEAN v. SANDYS, **99 P.R. 1885.** (94 P. R. 1883, *Cited.*)

(17)—*Railway Company—Risk note—Loss or non-delivery of goods—Liability of Company.*—The Railway Company are responsible for the safe carriage of goods except so far as they have protected themselves from responsibility by the terms of the "risk note." Although the Company are protected from certain risks by the risk note, it does not absolve them from all liability or enable them to impose on the consignor the burthen of proving that the loss or non-delivery of the goods was caused by

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some default (not covered by the Risk Note) for which the Company are liable. SUNTOKH RAI v. EAST INDIAN RAILWAY COMPANY. **2 Agra 200.** [*D.*, 18 A. 42=A.W.N. 1895, 150]

(18)—*Contract to carry goods—Risk note by consignor, meaning of the words "before, during and after transit"—Damage beyond place for which consigned.*—Plaintiff's consignor consigned cotton to be carried from Erode to Kallai by the defendant Railway Company. The goods were carried in a covered waggon, but to a station beyond its destination, where the cotton was damaged by water being poured over it to quench a fire which broke out in the waggon. The plaintiff's consignor, in a risk note which he executed to the Company, agreed to hold them free from all liability to damage to the consignment "from any cause, whatever, before, during and after transit, over the Railway." The plaintiff sued the company for compensation for the damage done to the goods *Held*, that the company were not liable for any damage, because the words "before, during and after transit" covered the whole period, from the time the goods were delivered to the defendants at Erode, up to the time they were delivered to the plaintiffs at Kallai. Every customer dealing with a Railway Company, whether he enquires or not, is bound not only by the ordinary route, but also by the ordinary train arrangements and hours of arrival according to which they profess to carry. ARUNACHALLAM CHETTIAR v. THE MADRAS RAILWAY COMPANY, **6 M.L.T. 292=33 M. 120=3 Ind. Cas. 931.**

(19)—*Terminal charges—Right to levy—Sanction—Statutes* 12 *and* 13, *Vict. Chap.* LXXXIII.—S. 5 of the Act of Incorporation of the G.I.P. Railway Company (Stat. 12, 13. Vict. Chap. 83) enacts "that it shall be lawful for the Company, from time to time to enter into and conclude with the East India Company, on account of the Government of India, such contracts, etc., as the respective parties may think fit and agree upon, for making any railway, and for maintaining and working the same, and for the other objects and purposes aforesaid" (which, as shown by s. 1, include doing and performing all matters and things "necessary or convenient for carrying into effect the making, maintaining and working of the railway," and also "including any provision as to the tolls, receipts and profits thereof." In virtue of this section, the defendant Company and the East India Company entered into an agreement by which the former was empowered to make certain charges called "terminal charges." The plaintiffs objected to these charges as not within the scope of the powers conferred by the Act of Incorporation of the defendant Company. *Held* that the objection was ill-founded. The terminal charges in question were levied on account of carrying goods to and from the waggons, loading and unloading them on and from the waggons and for the use of the Company's premises, where

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the goods frequently remained for some time before they were taken away. Such charges, if not strictly perhaps "tolls" are certainly charges for performing of services, if not "necessary" at any rate "convenient for the working of the railway;" and payment for such services might be properly regarded as a source of "profit" to the Company for which the Act expressly provides. LALJIBHAI SHAMJI v. THE G. I. P. RY COMPANY, **16 B. 434**, *on appeal from*, **15 B. 557.**

(20) — *Railway Company — "Terminal charges," meaning of—Right of G.I.P. Railway Company to levy terminal charges—Statutes* 12 *and* 13, *Vic. ch.* 83—*Act* IX *of* 1890 *ss.* 41, 45, 46. *Jurisdiction of High Court.*—The expression "terminal charges" means charges for the use of goods station and for the various duties which the Railway Company, as common carriers, perform in connection with the goods consigned to them for carriage [*R.*, 17 B. 723.] The question raised in the suit was as to the right of the defendant (the G.I.P. Railway Company) to claim what are called "terminal charges" in respect of goods carried by them upon their Railway. The plaintiffs having paid over a lakh of Rupees as such charges, now sued to recover the same from the defendants, contending that the defendants were not legally entitled to charge them, and even if they were entitled the charges were excessive. *Held*, dismissing the suit, that the defendants were entitled to levy such charges, subject only, as to the rates and amounts thereof, to the sanction of Government; and that the rates charged by them in the present case were not higher than the sanctioned charges. Under s. 5 of Stat. 12 and 13 Vic., Cap. 83, under which the defendant Company was incorporated, the right to take tolls, receipts and profits by the Company were made subject only to such provisions as the Company and the Government of India may agree to from time to time in reference thereto. An agreement, accordingly, was entered into by the defendant Company on the 17th August 1849, with the Government of India, by which it was agreed that, subject to the approval of the Government of India, the Company could impose upon the public using the railway such terms and levy from them such tolls and fares as their own interest or the necessity of the case should dictate. The rates originally sanctioned for the carriage of goods upon the defendant's railway having proved inadequate, the defendants approached the Government of Bombay and obtained their sanction for a certain scale of maximum tolls, terminal charges, etc. The sanction of the Local Government was sufficient, because under s. 43 of Act XVIII of 1854, the Local Government is the proper authority to sanction a tariff of charges to be made by Railway Companies within their area. *Semble*:—Under ss. 41, 45 and 46 of Act IX of 1890, the High Court has no jurisdiction to consider or entertain a claim relating to terminals charged by the defendants subsequently to the time at which that Acts

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came into operation. LALJIBHAI SHAMJI v. THE GREAT INDIAN PENINSULA RAILWAY COMPANY, **15 B. 537.** [*Affirmed*, 16 B. 434.]

(21)—*State Railway, suit for damages against, by servant, if may be brought against the Secretary of State for India in Council - Jurisdiction, High Court, Calcutta—Cl.* 12, *Letters Patent, Calcutta High Court* (1865), *leave to file plaint under, if defendant may question propriety when once granted—Secretary of State for India in Council, if a Body Corporate and if represents Government of India in all suits maintainable against Government—S.* 65 *of* 21 *and* 22, *Vict., c.* 106—*Government carrying on business for State purposes, where may be sued—Railway Company, if a person carrying on business and where suit may be brought against it—Decision of a Bench of two Judges sitting on Original Side, if binding on a single Judge.*—A servant of the Eastern Bengal State Railway was prosecuted at Rungpur on a charge of criminal breach of trust which resulted in his acquittal. He thereupon filed a plaint claiming damages for false and malicious prosecution against the Secretary of State for India in Council in the Calcutta High Court in which he craved leave under cl. 12 of the Letters Patent of the High Court (1865) for the institution of the suit in the said Court and the Court granted such leave: *Held*—That, as the cause of action had arisen wholly outside the jurisdiction of the Calcutta High Court, the leave was not properly granted, and that the fact of the leave having been granted did not preclude the defendant from questioning the jurisdiction of the Court at the trial. Under s. 65 of 21 and 22 Vict., cl. 106, the Secretary of State in Council is a Body Corporate for purposes of a suit, and as such represents the Government of India in such suits as may be maintained against the Government. By 21 and 22 Vict., c. 106, such right of suit as individuals had against the East India Company were continued as against the Secretary of State. A Railway Company is a "person" "carrying on business" within the meaning of s. 12 of the Letters Patent, and it may be sued at the place of its principal office where the directors meet and the general business of the company is transacted or the brain power of the business is A Government may be presumed to dwell in its own capital, and a Government engaged in trades, though it may be for purpose of the State, carry on business there. (14 C. 256, *Diss.*; 14 C. 262, *Appr.*) *Held*—That the decision in 14 C. 256 being the decision of two Judges sitting on the Original Side presumably upon a reference by one of the Judges sitting singly on the Original Side, the decision is binding on a single Judge so sitting. B. E. M. RODRICKS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **16 C.W.N. 747=15 Ind. Cas. 955=40 C. 308.**

(22)—*Railway Company—Goods consigned for carriage—Risk note, Form B—Company*

Railway Company—*continued.*

absolved from liability in all cases except negligence or dishonesty of its servants—Onus.—Where goods were consigned to a Railway Company for carriage, the contract being embodied in a risk note, Form B, under which, in consideration of the Railway Company accepting a lower freight, the consignor absolved the Railway Company from all liability for loss or damage to the goods, subject, however, to the proviso that the Company would be liable for loss due to wilful negligence on the part of their servants or due to thefts by its servants or agents: *Held*—That the *onus* lay on the person, seeking to charge the Railway Company with damages for loss of goods, to show that the case came within the proviso. SHEOBARUT RAM v. THE BENGAL NORTH WESTERN RY. CO., **16 C.W.N. 766=15 Ind. Cas. 56.**

This circular states in effect that ministerial officers drawing less than Rs. 50 per mensem are to travel in "intermediate" class Railway Carriages. **Cir No. I, dated 8th Feb. 1865, 2 W.R. Civ. Cir. Order, p. 1.**

This circular deals with the sale-proceeds of railway lands. **Rev. Cir. No. 6. 25 W.R. Rev, Cir. 22.**

See ACT XVIII OF 1854, s. 10, 2 M. 310.

Erroneous description of goods consigned—Loss of goods by fire—Liability of Railway Company—Burden of proof—*See* ACT III OF 1865, s. 9, 3 B. 120.

See ACT XXV OF 1871, s. 2, 1 B. 52.

Deposit by servant of Railway Company—Rights of attaching creditor—*See* ATTACHMENT—SUEJECTS OF ATTACHMENT, 9 M. 203.

Liability of—Risk Note—Contract to contrary—*See* BURDEN OF PROOF—MISCELLANEOUS, 14 M.L.J. 396.

See CARRIERS, 18 C. 427.

Contract between—and passengers—Obligation for safe carriage—Due care—*See* CARRIERS, 2 C.W.N. 609.

Secretary of State to be sued as defendant in suit against State Railway—Railway administration, meaning of—*See* CIV. PRO. CODE, 1908, ss. 80, 79, O. XXVII, rr. 1, 6, 4 O.C. 133.

Consignment of goods—Suit against Railway Company for damages for non-delivery of goods consigned — *See* CONTRACT — MISCELLANEOUS, 4 Bom. L.R. 890=27 B. 126.

See COSTS—SPECIAL CASES, 26 C. 465=3 C.W.N. 781.

Government — Suit for compensation for lands taken for Railway — *See* COSTS — SPECIAL CASES, Marsh, 91=1 Hay 157.

Lease by widow—Quarries worked by State Railway—*See* HINDU LAW—REVERSIONERS, 22 M. 126=9 M L.J. 19.

Railway Company—*concluded.*

See INJUNCTION—SPECIAL CASES, 10 B. 390.

See LIMITATION ACT, 1908, art. 30, 7 B. 478.

A suit against a—for the loss of goods—*See* LIMITATION ACT, 1908, art. 30, 3 M. 240.

Suit by consignee against Railway Company for loss of goods—*See* LIMITATION ACT, 1908, arts. 30, 115, 5 M. 388.

Non-delivery of goods, by suit for compensation for, applicability of art. 31 of the Limitation Act to—*See* LIMITATION ACT, 1908, art. 31, 108 P. R. 1906=2 P.L.R. 1907=30 P.W.R. 1907.

See MASTER AND SERVANT, 13 M. 34.

Damages to a passenger from a train overshooting the platform—*See* NEGLIGENCE, 6 Bom. L.R. 673.

See NEGLIGENCE, 6 M.H.C. 180.

Agreement for interchange of traffic—Liability for loss of goods—Agency — *See* PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF PRINCIPAL, 5 B. 371.

See STAMP ACT, 1899, arts. 5, 34, 5 B. 478, F.B.

Service on—*See* SUMMONS, 1 Hyde 197.

Purchased goods consigned through—Goods receipt note issued by Railway authorities, not an instrument of title within s. 103 of the Contract Act—Endorsee of Railway receipt, extent of rights of — *See* VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF, 14 B. 57.

Railways Act.

See ACT XVIII OF 1854.

See ACT IV OF 1879.

See ACT IX OF 1890.

Railway Fare.

Fare, excess of, recoverable as fine—*See* ACT IX OF 1890, s. 113, 1 Bom. L.R. 166.

Railway Servant.

Power of S. C. Court to attach salary of—not fallen due—Salary disbursable outside jurisdiction of Court—*See* ATTACHMENT—GENERAL, 30 C. 713=7 C.W.N. 821.

Attachment of the salary of—*See* CIV. PRO. CODE, 1908, O. XXI, r. 46, 5 Bom. L.R. 803 =28 B. 198.

Railway Station.

Goods yard of a, is a public place—*See* ACT XI OF 1890, s. 3 (*b*), 4 Bom. L.R. 290.

Rain Water.

Passing surplus — Defined channel — *See* EASEMENT, 8 C.W.N. 244.

Right to use water-way for—*See* LIMITATION ACT, 1908, s. 26, 68 P.R. 1880.

Raiyat.

See RYOT.

Raiyati Holding.

(1)—*Burden of proof—Transferability of raiyati holding—Doctrine of* caveat emptor.—It is for the person alleging transferability of raiyati holding to show that the custom of transferability exists. The doctrine of *caveat emptor* applies with the greatest force to persons who undertake to purchase *raiyati* holdings from tenants. GOBINDA CHANDRA JANA v. SRIMANTA CHARAN JANA, **6 Ind. Cas. 761.**

Zamindar's right to eject ryot from ryoti land and recover possession thereof — *See* EJECTMENT, SUIT FOR, 7 M.L.T. 366.

Raiyati Interest.

Test of—*See* BENGAL ACT VIII OF 1885, s. 5 (5), 2 Ind. Cas. 72.

Test of—*See* LANDLORD AND TENANT—NATURE OF TENANCY, 14 C.L.J. 38.

Raiyati Land.

See MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 6 C.W.N. 732.

Raiyatwari Estates.

Raiyatwari estates—Partition—*See* PARTITION—RIGHT TO PARTITION, 7 M. 382, F.B.

Raj.

Assignment of a—by the Rajah in possession by a deed to his eldest son—*See* HINDU LAW —CUSTOM, 6 M.I.A. 164.

Rajkot.

Courts in Kathiawar and—whether British Courts—*See* BRITISH COURTS, 5 B. 249.

Rajput.

(1)—*Naru Rajputs—Gift to son by wife of inferior caste—Validity.*—A gift of ⅓ of his property accompanied by possession made by Naru Rajput to a son by an inferior wife *held* to be valid though the donor had an infant son by a Rajput wife. HAIDAR ALI v. SONDHA, **102 P R. 1880.** [*F.*, 113 P.R. 1883; *R.*, 145 P.R. 1894, 92 P.R. 1904=12 P.L.R. 1905, 65 P.R. 1911; *D.*, 110 P.R. 1894.]

Khatris—Soodras—*See* CASTE, 4 W.R. 132, P.C.=7 M.I.A. 18.

Of Agra, family custom of primogeniture—Evidence establishing impartibility — *See* HINDU LAW—CUSTOM, 19 A. 1, P.C.=23 I. A. 147.

Raj, Succession to.

(1)—*Raj—Succession to—Impartibility.*—A suit having been instituted by some of the descendants of a deceased Rajah for possession of

Raja, Succession to—*concluded.*

his property, to which the defendant laid claim, under an alleged *Wusseeyut-namah*, or deed of gift, proclamation was made, by order of the Provincial Court, for all persons pretending to have any claim to the property in question to come in and prosecute the same; in pursuance of which, the present, with another, suit was instituted. The Provincial Court, being of opinion that the *Wusseeyut-namah* was not authentic, passed a decree, declaring the right of succession and inheritance to be among the several claimants, and pursuant to Regulation III, 1793, s. 13, specified the shares to which they were respectively entitled. An appeal was interposed to the *Sudder* Court, by one of the co-sharers, on the ground that the property was a *Raj*, and indivisible, and ought to have been decreed to him, as nearest in descent from the *Rajah*, but no fresh evidence, respecting the nature of the property, or the claim of the entirety, as permitted by the practice of the *Sudder* Court, was produced. The decree of the Provincial Court was affirmed by the *Sudder* Court, and, on appeal to Her Majesty in Council, the Judicial Committee upheld the decision of both Courts below, being of opinion that all parties knew and acted on the knowledge that the suits were not only to decide upon the claim under the *Wusseeyut-namah*, but to determine also what parties were entitled to the property, the subject of the suit; and dismissed the appeal with costs. GHIRDHAREE SING v. KOOLAHUL SING, **6 W.R.P.C. 1=2 M.I.A. 344.**

(2)—*Raja—Rule of descent — Private and public property.*—There is a distinction between the public and private property of a Hindu Sovereign, as upon his death, his private property goes to one set of heirs, and the Raj and the public property to the succeeding Rajah. The general rule of the Hindu Law of inheritance is partibility. The succession of a single heir, as in the case of a Raj, is the exception. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KAMACHEE BOYE SAHABA, **7 M.I.A. 476.**

See HINDU LAW—CUSTOM, 29 C. 343, P.C. =29 I.A. 62=6 C.W.N. 459.

See HINDU LAW—JOINT FAMILY, 3 B.L.R. P.C. 13=12 W.R. P.C. 21=13 M.I.A. 523.

Ramnad Zamindary.

(1)—*Ramnad—Zamindary—Impartibility.*—The history of the Ramnad Zamindary discussed in detail. *Held* on a survey of the whole history, that the Zamindary was impartible. DINAKARASAMI SETUPATI v. BHASKARASAMI SETUPATI, **11 M.L.J. 29.**

Rampur Stamp Law.

(1)—S. 52, proviso (c)—*See* STAMP, 8 A.L.J. 566.

Rangoon Small Cause Court.

(1)—*Recorder's Court in British Burma—Act* XXI *of* 1863—*Small Cause Court at Rangoon—Act* XI *of* 1865—*Jurisdiction.*—In 1863, Act XXI of 1863 was passed to constitute Recorder's Court for three towns including Rangoon, in Burma, and to establish Courts of Small Causes in the said towns. By s. 10 of that Act it was declared that the Recorders to be appointed under the Act should exercise Civil Jurisdiction within their territorial limits, and that, save as in this Act provided, no Court other than the Recorder's Court shall have or exercise any Civil Jurisdiction whatever within the said limits.—By Act XI of 1865, after reciting that it was expedient to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original Civil Jurisdiction of the High Courts, and declaring that, in every part of British India in which the Act operates, the words "Local Government" should denote "the person authorized to administer the executive Government in such part," it was enacted (s. 3) that the Local Government might, with the previous sanction of the Governor-General of India in Council, constitute for the trial of suits under that Act, Courts of Small Causes at any places within the territories under such Government, with power to fix the territorial limits of such Courts. By s. 13, the Judge was to be appointed by the Local Government. This Act did not repeal s. 10 of the Recorder's Act XXI of 1863. By a notification of the Home Government dated 1st September 1869, the Governor-General in Council extended the provisions of Act III of 1864 to the province of British Burma and invested the Chief Commissioner of British Burma with the powers conferred upon a Local Government by the said Act. By another notification, dated 2nd October 1869, the Governor-General in Council, under s. 3 of Act XI of 1865, sanctioned the establishment of a Court of Small Causes in the city of Rangoon for the hearing of suits cognizable by such Courts under the provisions of the said Act. Under s. 7, the jurisdiction of the said Court was extended to an amount not exceeding Rs. 1,000. The territorial jurisdiction of the Court was made co-extensive with that of the existing Small Cause Court jurisdiction of the Recorder's Court at Rangoon. In 1870, a plaint was presented in the Recorder's Court for Rs. 600, though the nature of the suit was such as a Small Cause Court, duly constituted under Act XI of 1865, with jurisdiction up to Rs. 1,000, would have had power to entertain. *Held* that there was nothing in the case as stated or in the Recorder's Act (XXI of 1863), to justify the conclusion that the Small Cause Court at Rangoon was not properly constituted. There is nothing in Act XI of 1865 to show that the words "Local Government," as used in that Act, were intended to include a Chief Commissioner. KO SHOAY DOON v. SHOAY GAN, **6 B.L.R. 196=14 W.R. 331.**

(2)—*Foreigner defendant residing only for a temporary purpose — Jurisdiction—Act* XI *of*

Rangoon Small Cause Court—*concluded.*

1865, s. 8 (*Mofussil Small Cause Courts*).—Where, in suit by a sailor for wages against the Captain of a foreign ship, the plaintiff's cause of action was complete on arrival of the ship in Rangoon, *held* the Small Cause Court at Rangoon had jurisdiction, though the defendant was dwelling there for a temporary purpose only. FRITZ OLNER v. LAVEZZO, **10 C. 878.**

Rateable Distribution.

See CIV. PRO. CODE, 1908, S. 73.

(1)—*Rateable distribution — Several decree-holders—Payment into Court to prevent execution of one decree—Claim to rateable distribution by another decree-holder.*—A obtained a decree against B, C and D, and in execution of the said decree brought to sale the properties belonging to B. On the day of sale, B paid the amount in Court. Subsequently E, another decree-holder against C alone, applied for an attachment of the same properties, and claimed a rateable distribution of the amount paid into Court. The question is whether the claim was legal. It was contended that he could not claim rateable distribution, for the money having been paid into Court by B voluntarily of her own accord on the day of auction, it cannot be said to have been realized in execution of the decree, and having been so paid to satisfy the decree of A, other decree-holders against another debtor cannot claim rateable distribution. *Held* that as the amount was paid into Court by B specially to satisfy the decree of A, other decree-holders, against C, alone cannot claim rateable distribution. VILAYUTEE BEGUM v. BANKEE RAI, **1 P.R. 1866.**

(2)—*S.* 270, *Act* VIII *of* 1859 *and s.* 295, *Act* XIV of 1882, *distinction between.*—Under s. 270, Act VIII of 1859, a creditor obtaining an attachment, was entitled to be first paid out of the proceeds of the sale, notwithstanding a subsequent attachment of the same property by any party in execution of his decree, but s. 295, Civ. Pro. Code, 1882, points to a rateable distribution of the proceeds of sale under a decree in certain events and under certain circumstances. FREDERICK PEACOCK v. MADAN GOPAL, **29 C. 428, F.B.=6 C.W.N. 577.** (25 C. 179, *R.*) [*F.*, 29 B. 405=7 Bom. L.R. 488; *R.*, 32 M. 429=19 M.L.J. 401, 26 M. 673=13 M.L.J. 278, 7 O C. 314, 5 C L.J. 80=11 C.W.N. 163, 5 P.W.R. 1909=6 P.L.R. 1909 ; *D.*, 30 M. 413=17 M.L.J. 334=2 M. L.T. 365.]

(3)—*Rateable distribution of assets—Principle of distribution.*—Where certain creditors brought the whole of the property of their debtor to sale, in execution of their decree upon a mortgage of only a share therein, and themselves purchased it, and were allowed a set-off of a part of the purchase-money against their debt, *held*, in a suit for rateable distribution of the assets by another creditor, that the creditors were not entitled to deduct the sum, which was paid by them subsequently to clear off a

Rateable Distribution—*continued.*

mortgage held by the plaintiff in a share of the property, from the amount of the purchase money, before the Court could determine the amount rateably distributable among the parties concerned. *Quære* :—Whether the creditors (defendants) could even reckon the sum so paid by them for paying off the plaintiff's mortgage as one of the claims for rateable distribution. TAPONIDI HORDANUND BHARATI v. MATHURA LALL BHAGAT, **12 C. 499.**

See ACT XXIV OF 1867, s. 33, 6 M.H.C. 346.

See CIV. PRO. CODE, 1908, ss. 47, 144 (1), 115, 8 M. 494.

See CIV. PRO. CODE, 1908, ss. 60, 73, 4 B. 429.

Execution-sale—Transfer of execution—Proceedings to superior Court—Principle of—Among attaching creditors—*See* CIV. PRO. CODE, 1908, ss. 63, 73, 21 C. 200.

Discharge of debt due to attaching creditor, effect of, on the attachment—Absence of subsisting attachment claim for—Affected—*See* CIV. PRO. CODE, 1908, s. 64, 23 M. 478=10 M.L.J. 98.

See CIV. PRO. CODE, 1908, ss. 64, 73, O. XXXIX, r. 1, 25 A. 431=A.W.N. 1903, 93.

Decree-holder applying for execution before realisation—Right of his representatives to rateable distribution—*See* CIV. PRO. CODE, 1908, s. 115, O. XXI, r. 90, 3 M.L.T. 249.

Application for rateable distribution by transferee to Court to which decree transferred —*Res judicata*—*See* CIV. PRO. CODE, 1908, O. XXI, r. 16, ss. 73, 47, 25 A. 443=A.W.N. 1903, 99.

See CIV. PRO. CODE, 1908, O. XXI, r. 22 and ss. 73 and 115, 9 M. 508.

See CIV. PRO. CODE, 1908, O. XXI, r. 72, s. 73, 5 M. 123, 11 M. 356.

Application for — Application to be paid money distributed—Whether step-in-aid—*See* LIMITATION ACT, 1908, ART. 182—STEP IN AID OF EXECUTION, 8 C.W.N. 382.

Mortgagee, general right of, to keep mortgage unsplit — Purchase of portion of mortgaged property by mortgagee—Splitting up of mortgage and — Of mortgage debt — *See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 21 B. 619.

Execution of decree—Of proceeds of decree—Civ. Pro. Code, s. 295, *bona fides* of decree-holders—*See* SALE—SALE IN EXECUTION OF DECREE — PROCEEDS OF SALE, RIGHT TO, 13 B. 154.

Decree against estate of deceased person—Purchase of decree by legal representative—Realisation of amount under decree—Right of purchaser to—under s. 295, Civ. Pro. Code, 1882—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALE, RIGHT TO, 13 B. 171.

Advocate High Cou
Jammu & Kashmir
Srinagar.

Rateable Distribution—*concluded.*

See SALE — SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 1 C.W.N. 195, 21 M. 51.

Ratification.

See GUARDIAN.

See MINOR.

See PRINCIPAL AND AGENT.

(1)—*Contract—Repudiation not in reasonable time—Ratification.*—Where a party to a contract seeks to get released from its obligations, on the ground that, for some reason or another, he is entitled to repudiate it, he must assert this right to repudiate as soon after becoming aware of it as he reasonably can. Long inaction entirely unaccounted for may be considered to be a ratification of the contract. ISHAN CHUNDER MOJOOMDAR v. SREEKANT NATH, **9 W.R. 110.**

(2)—*Act done by agent of Government—Ratification—Effect.*—An act done by an agent of the Government, though in excess of his authority, being ratified and adopted by the Government, *held* to be equivalent to previous authority. THE SECRETARY OF STATE IN COUNCIL OF INDIA v. KAMACHEE BOYE SAHABA, **7 M.I.A. 476.**

(3)—*To be entire.*—There can be no ratification of a part of the agent's act except in the sense that it is a ratification of the whole. MADRAS CONSOLIDATED SUGAR AND SPIRIT FACTORIES, LTD. v. WILLIAM SISSMORE SHAW, **14 M. L. J. 443.**

(4)—*Void transaction—Ratification.*—A void transaction cannot be ratified. RANGANAIKULU v. SATTAMMA, **9 M.L.J. 104.**

(5)—*Lease by agent not authorised by proprietor--Notice--proprietor how far bound—Ratification.*—Where an agent, in spite of the refusal of the proprietors, gave an applicant an *amuldustuck* to enter on the property of the proprietors as lessee, and did not immediately inform them of it, *held* that the proprietors were under no legal obligation to take early steps to disavow the act. The proprietors had not parted with their right either by any act of their own, or by any act of their duly authorised agent, or by any act of a person not authorised to act for them, but which they had subsequently ratified. MUSSAMUT MUHBOOL BUKHSH v. MUSSAMUT SHUHEEDUN, **14 W. R. 378.**

See ACT OF STATE, 9 B.H.C. 314.

Contract against public policy—Undue influence — Unconscionable bargain — Voidable contract, power of Court in respect of—Contract Act, 1872, ss. 16, 19-A, 23—Act VI of 1899, s. 2 —Of contract caused by undue influence, proof of—*See* U.P. ACT XVII OF 1876, ss. 173, 174, 5 O.C. 256.

Of contract entered into before formation of company, effect of—*See* COMPANY—ARTICLES OF ASSOCIATION AND LIABILITIES OF SHAREHOLDERS, 2 P.R. 1905.

Ratification—*concluded.*

Applicability of term only to acts done on ratifier's behalf—Recognition of this rule in Contract Act, s. 196—*See* HINDU LAW—ALIENATION, 12 C.W.N. 393, P.C.=35 C. 420=35 I.A. 48=14 Bur. L.R. 49=3 M.L.T. 344=18 M.L.J. 100=5 A.L.J. 184=10 Bom. L.R. 230 =7 C.L.J. 335.

Conditions under which doctrine of ratification is applicable—*See* HINDU LAW—REVERSIONERS, 8 C.L.J. 458=13 C.W.N. 201=4 Ind. Cas. 513.

See LEASE—GENERAL, P.L.R. 1900, p. 303.

Where transfer is void *ab initio*, whether subsequent ratification can validate it—*See* MAHOMEDAN LAW—GUARDIANSHIP, 11 O.C. 1.

See MASTER AND SERVANT, 2 B.L.R.O.C. 140.

See MINOR—CONTRACTS BY MINORS, 10 B. L.R. 326, Note=13 W.R. 166, 10 B.L.R. 327, Note=13 W.R. 172.

Ratification by Government of contract by its servants—*See* PRINCIPAL AND AGENT — GENERAL, 4 Bom. L.R. 706=26 B. 801.

Gomashta employed to collect rents—Power to distrain—*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, Marsh 282.

Razinamah.

See COMPROMISE.

(1)—*Private rights of parties not to be affected by Government system of accounts*—Razinamah. —By a *razinamah* executed in the year 1824, a compromise of a suit was entered into, whereby the respective rights of A and B in their father's (C's) real and personal estate were declared. C was entitled to a tax levied on pilgrims resorting to a temple situate on his estate. This tax was abolished by Government in the year 1840, and a perpetual annual money-payment awarded by the Government to C as compensation. On the death of C, a partition of his estate was made between A and B, by assigning to each certain mehals according to their supposed value, in respect of their proportions of the shares provided by the *razinamah* of 1824. This partition did not include the compensation for the pilgrim-tax. Government, in dealing with the annual compensation-money, deducted the amount from the jumma paid by A and B for the mehals, which led to disputes as to the value of the mehals so taxed and apportioned between A and B. *Held* that the mode of remission by Government from the jumma, in respect of the mehals, by the appropriation of the compensation-money, did not affect the rights of the parties. MAHARANEE INDERJEET KOOER v. ISMUDH KOOWAR, **5 W.R.P.C. 14=10 M.I.A.329.**

Re-admission of Appeal.

(1)—*Appeal—Dismissal for default—Application for re-admission, rejection of—Appeal from order of rejection.*—When, after the dismissal of an appeal for default, a lower appellate Court

Re-admission of Appeal—*concluded.*

rejects an application for its re-admission, there is no appeal against such order of rejection. MUSSUMAT MAHAR BUKSH v. GHAUSI KHAN, **87 P.R. 1876.**

(2)—*Appeal struck off for default—Application for re-admission—Order rejecting application—Appeal.*—No appeal lies from an order rejecting an application for the re-admission, under s. 347 of Act VIII of 1859, of an appeal struck off for default. SOOLTAN MAHMOOD v. OOJUL KHAN, **23 P.R. 1871.** [*R.*, 52 P.R. 1873.]

Re-Admission of Appeals, Bengal and Madras.

See ACT XVI OF 1845.

Realisation.

What constitutes—Within the meaning of s. 295—Civ. Pro. Code, 1882—*See* CIV. PRO. CODE, 1908, s. 73, 21 C. 809.

Re-arrest.

(1)—*Exemption from re-arrest--Civ.Pro.Code*—In this case, the judgment-debtor was discharged from arrest on the application of the decree-holder, on the ground that an arrangement had been made for the liquidation of the debt which was satisfactory. *Held* that the Civ. Pro. Code, does not prevent the re-arrest of the debtor so discharged if he failed to perform the agreement he had made with his creditor. MUSSUMAT SUBHANI v. SADHO RAM, **37 P.R. 1873.**

Reasonable and probable cause.

See MALICIOUS PROSECUTION.

See DEFAMATION, 2 Agra 87.

See MALICE, 2 N.W.P. 352, 4 N.W.P. 42.

Reasonable Care.

See TRANSFER OF PROPERTY ACT, 1882, s. 41, 1 L B.R. 196.

Reasonable Time.

For appointment of legal representative—*See* CONTRACT ACT, 1872. ss. 2 (*c*), 37, 38 and 67, 4 M.L.T. 335.

'Reasonable time'—What is—Question of fact—*See* CONTRACT ACT, 1872, ss. 46, 49, 10 M.L.T. 496.

Rebel.

Attachment of rebel's property—*See* LIMITATION—MISCELLANEOUS, 1 Agra 46.

Confiscation and sale of—Property—Right of co-sharers—*See* PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 1 Agra 88.

Rebellion, Confiscation, etc., for.

See ACT X OF 1858.

Recalling Certificate.

(1)—*Act* XL *of* 1858, *ss.* 12, 21—*Certificate recalled—Estate placed under Collector.*—The District Judge granted a certificate under Act XL of 1858 to a Hindu widow, and, on a reference from the Collector to the effect that she did not desire to take out the certificate and that the certificate ought to be given to a first cousin on the paternal side of the deceased, the Judge recalled his order granting the certificate to the widow and directed the Collector to take charge of the estate. *Held* that the order was made under s. 21, which empowered the Civil Court for any sufficient reason to recall a certificate and direct the Collector to take charge, or grant a certificate to the public curator, or any other. and that s. 12 did not apply to the case. *Held* also that the widow was not entitled to appeal, inasmuch as she had expressed her unwillingness to take charge and the first cousin was not competent to prefer the appeal as there were the widow and a half-brother and an uncle of the deceased, who were nearer relations. BUSSUNT COOMAREE DOSSEE v. THE COLLECTOR OF JESSORE, **13 W.R. 243.**

For recalling certificates granted, what does not amount to—*See* ACT XL OF, 1858, ss. 7, 21, A.W.N. 1881, 4.

Receipt.

(1)—*Stamp Act*, I *of* 1879, *s.* 3 (17)—*Receipt.*—To constitute a "receipt" within the meaning of s. 3 (17) of the Stamp Act (I of 1879), there must be an acknowledgment, either express or signified or imported, of the receipt and not a mere statement that money was received. *In re* JAMNADAS HARI NARAN, **23 B. 54.**

Rent—By landlord or agent—*See* BEN. ACT VIII OF 1885, s. 88, 25 C. 531=2 C.W.N. 375, F.B.

Rent—signed by landlord's gumashta, containing certain recital, effect of—*See* BEN. ACT VIII OF 1885, s. 88, 25 C. 533, Note.

Evidentiary value of rent—*See* BEN. ACT VIII OF 1885, ss. 153, 88, 16 C. 155.

Given by Bank for amount of loan deposited—Terms of contract of loan contained in—Production of—Whether could be insisted on before payment by Bank—*See* CONTRACT—CONDITIONS PRECEDENT, 14 B. 498.

Unregistered receipt for earnest money comprising terms of conveyance—Admissibility in proof of contract of sale—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 10 C.P L.R. 107.

Miscellaneous documents—Document receipt—book—Book kept by attorney—Receipt given by defendant for documents of title—Admission—*See* EVIDENCE, MISCELLANEOUS DOCUMENTS, Cor. 148.

Unregistered—For payment of mortgage debt produced by mortgagee, inadmissibility of, in evidence—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 7 B. 123.

Receipt—*continued.*

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 12 W.R. 34, 29 C. 187, P.C.=29 I.A. 24=6 C.W.N. 386.

Pre-emption—Unregistered receipt for purchase money — Evidence, admissibility of—*See* EVIDENCE—MISCELLANEOUS, A.W.N. 1881, 2.

For rent—No writing necessary—*See* EVIDENCE ACT, 1872, s. 91, 1 C.P.L.R. 16.

See EVIDENCE ACT, 1872, s. 92, Proviso 4, 26 M. 195.

Containing declaration of title as to immoveable property when admissible without registration—*See* REGISTRATION, 4 B. 590.

Unregistered receipt, proof of payment recited in—Admissibility of receipt—Extinction of mortgage right—*See* REGISTRATION, 23 M. 92 =9 M.L.J. 124.

For payment of mortgage money—Oral evidence—*See* REGISTRATION ACT, 1908, s. 17, A.W.N. 1887, 188.

For payment of mortgage-money—*See* REGISTRATION ACT, 1908, s. 17, 91 P.L.R. 1904=39 P.R. 1904.

Extinguishing interest of one only of several mortgagees, admissible without registration—*See* REGISTRATION ACT, 1908, s. 17, 18 A. 338 =A.W.N. 1896, 92.

Passed by mortgagees, whether compulsorily registrable — *See* REGISTRATION ACT, 1908, s. 17, 4 B. 235.

Mortgage—For payment of mortgage money —*See* REGISTRATION ACT, 1908, s. 17, 6 A. 335=A.W.N. 1884, 107.

By vendee to vendor for money paid for repurchase—Covenant to execute stamped document for re-sale—Document creating right to immoveable property — *See* REGISTRATION ACT, 1908, s. 17, 21 B. 533.

For money paid, registration of—*See* REGISTRATION ACT, 1908, s. 17 (*c*), 3 M. 53.

Unstamped and unregistered, is evidence of payment—*See* REGISTRATION ACT, 1908, s. 17 (*n*), 2 Bom. L.R. 422=24 B. 609.

Receipt relating to mortgage, if admissible without registration — *See* REGISTRATION ACT, 1908, s. 49, 2 B. 489.

For rent—*See* SPECIAL OR SECOND APPEAL — GROUNDS OF APPEAL, Marsh 381 = 2 Hay 419.

For rent—Comparison of signatures—Credibility of evidence—*See* SPECIAL OR SECOND APPEAL — GROUNDS OF APPEAL, Marsh 322=2 Hay 421.

Receipt, whether an instrument within the meaning of s. 39, Specific Relief Act — *See* SPECIFIC RELIEF ACT, 1877, s. 39, 7 M.L.T. 270=5 Ind. Cas. 240.

See STAMP ACT, 1879, s. 3 (17), 6 A. 253= A.W.N. 1884, 72.

Receipt—*concluded.*

Barrister's fees—Stamp duty on receipt—*See* STAMP ACT, 1879, s. 3 (17), sch. II, 15 (*b*), 9 M. 140, F.B.

By barrister—Stamp duty—*See* STAMP ACT, 1879, s. 54, 85 P.R. 1885.

Proof of demand of stamped receipt—*See* STAMP ACT, 1879, ss. 58, 61, 64, 27 C. 324.

Acknowledgment by letter—*See* STAMP ACT, 1879, ss. 61 and 64, 8 M. 11, F.B.

Passed by counsel for fees not chargeable with stamp duty—*See* STAMP ACT, 1879, art. 15, 16 A. 132, F.B.=A.W.N. 1894, 12.

For money paid for agreed future sale of shares in Company—Undertaking to execute a formal document of sale—Receipt liable to stamp duty—*See* STAMP ACT, 1879, sch. I, art. 5, 14 B. 316.

Granted by Municipality for tax paid exceeding rupees twenty—Stamp duty—*See* STAMP ACT, 1879, sch. I, art. 52, 12 B. 103.

Receipt—Endorsement of payment on mortgage bond—*See* STAMP ACT, 1879, sch. II, art. 15 (*a*), 10 M. 64, F.B.

Given by Secretary of Club to member for Club bill — *See* STAMP ACT, 1879, sch. II, art. 15 (*b*), 10 M. 85, F.B.

Meaning of the term—Certificate to the effect that premium on an insurance policy has been paid, issued for the purpose of supporting a claim to exemption from income-tax not a receipt —*See* STAMP ACT, 1899, s. 2 (23), 2 L.B.R. 307.

Not stamped—If master liable—*See* STAMP ACT, 1899, s. 62, cl. (*b*), 8 C.W.N. 378.

Transfer from Provincial to Local Funds by adjustments in Collector's accounts—Receipts by Presidents, Dt. Boards—Stamp duty—*See* STAMP ACT, 1899, sch. I, art. 53, Exemption (4), 9 Ind. Cas. 342, F.B.=9 M.L.T. 355.

Receipt Stamps.

Stamps, cancellation of—*See* STAMP ACT, 1899, s. 12 (3), 6 Bom. L.R. 436=28 B. 432.

Receiver.

See APPEAL—RECEIVERS.

See CIV. PRO. CODE, 1882, ss. 503, 505.

See CIV. PRO. CODE, 1908, O. XL.

See MANAGER.

(1)—*Principles relating to the appointment of —Proof of mismanagement necessary—S. 503. Civ. Pro. Code—Suit against a tenant for life.* —The appointment of a Receiver under s. 503, Civ. Pro. Code, is not a matter of course. Though s. 503, gives a wide power to the Court, that power must be exercised with a sound discretion on a view of the whole of the circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. Unless

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there is proof of violent and wholesale charges of waste and malversation against a defendant in possession of property as the tenant for life, a Receiver will not be appointed. JIWANI v. LABHU RAM, **107 P.R. 1908=12 P.L.R. 1909 =4 Ind. Cas. 694.** (5 A. 561, 15 C. 818, 73 P.R. 1902, *Relied on*).

(2)—*Duration of receivership—Discretion of Court.*- It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so. MATHUSRI UMAMBA BOYI SAIBA v. MATHUSRI DIPAMBA BOYI SAIBA, **19 M. 120, P.C.=23 I.A. 28=6 Sar. 684.**

(3)—*Civ. Pro. Code*, 1882, *s.* 503—*Appointment of receiver by High Court pending appeal —Power of subordinate Court to give directions as supplementary to those given by the High Court.*—Where a person was appointed receiver by the High Court, pending an appeal, no other Court has power to make an order or give any directions as supplementary to those given by the High Court, or without authority given by that Court. JANAKI AMMAL v. NARAYANASAWMI IYER, **4 M.L.T. 268.** (27 M. 602, *R.*)

(4)—*Jurisdiction — Appointment — Property outside jurisdiction —Quære.* —Whether the High Court at Calcutta can appoint a Receiver for property which is within the jurisdiction of the Bombay High Court? HADJEE ISMEIL HADJEE HUBBEEB v. HADJEE MAHOMED HADJEE JOOSUB AND RAHIMA BYE v. HADJEE MAHOMED HADJEE JOOSUB, **13 B.L.R. 91=21 W.R. 303.**

(5)—*Jurisdiction—Suits for land—Land in possession of Receiver.*—The High Court cannot exercise jurisdiction in respect to land which is situate out of its local limits, even though it be in possession of the Receiver. DENONAUTH SREEMONY v. HOGG, **1 Hyde 141.**

(6)—*Application for appointment of Receiver to be made in Court or Chambers —Practice and Procedure.*—An application, for the appointment of a Receiver, in place of the retiring Receiver, is not an application which should be made before the Judge sitting in Chambers, but should be made in Court. STALKARTT v. STALKARTT, **28 C. 250.**

(7) —*Receiver and administrator* pendente lite. —The Receiver appointed in an ordinary civil suit does not represent the estate nor the parties. He only holds the estate for the benefit of the successful litigant. Although the position of an administrator *pendente lite* is similar to that of a Receiver, there is a distinction, inasmuch as an administrator *pendente lite* represents the estate for all purposes except distribution. MEERZA KEERATUL AIN BAHADUR v. BROUGHTON, **1 C.W.N. 336.**

(8) —"*Equitable execution*"—*Appointment of Receiver.*—The appointment of a Receiver at

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the instance of a judgment-debtor is "equitable execution," FINK v. MAHARAJA BAHADOOR SINGH, **26 C. 772=4 C.W.N. 27.** [*R.*, 10 O.C. 268.

(9)—*Civ. Pro. Code, s.* 505—*Appointment of receiver—Power of District Court.*—When a Subordinate Judge submits to the District Court the name of a person fit to be appointed as a receiver, stating the ground for such nomination, it is open to the District Judge, under s. 505 of the Civ. Pro. Code, to authorise the Subordinate Judge to appoint such person or "pass such other order as the District Court thinks fit." These latter words, however, cannot be construed as empowering the District Judge to himself nominate some person and appoint him as receiver. These general words should be read as qualified by the more specific words standing in collation with them, and the expression used in s. 505 is not that the District Court may *appoint*, but that it may only *authorise* the Subordinate Judge to appoint. AMAR NATH v. RAJNATH, **18 A. 453=A.W.N. 1896, 141.** [*R.*, 31 C. 495.]

(10)—*Civ. Pro. Code*, 1882, *ss.* 503, 505, 622—*Nomination of receiver by Subordinate Court—* Ex-parte *order by District Judge, appointing such receiver—Power of District Judge to review.*—The power given to Civil Courts to appoint a receiver under s. 503 of the Civ. Pro. Code, is a power which Subordinate Courts are forbidden by s. 505 to exercise without sanction. Such Courts can only make a nomination with the grounds for the nomination, and thereupon, the District Judge can authorize the Subordinate Judge to appoint the person so nominated, or pass such order as he thinks fit. In other words, nomination in s. 505 is equivalent to the conditional appointment of a receiver which the District Court can accept, reject or modify. In this case, the order of the District Judge appointing the receiver having been passed by him *ex parte* he clearly had the power to review it, whether or not an appeal would lie from such order to the High Court. CHUNI LAL v. SONIBAI, **21 B. 328.** [*R.*, 24 B. 38.]

(11)—*Power of removal of a Receiver inherent in Court—Refusal to hand over property to a Receiver—Practice—Enquiry as to the possession of such property—Temporary injunction ordering the handing over of the property under s.* 492, *Civ. Pro. Code after notice under s.* 494, *and enforcement thereof under s.* 493, *para.* 3—Ex parte *order appointing a Receiver, whether an application to cancel it can be admitted under s.* 108, *Civ. Pro. Code.*—The power of removal of a Receiver is inherent in the Court, which may at any time hold an inquiry as to whether an order appointing a Receiver should remain in force or not, and may, if it thinks fit, cancel the order that has been made. When a Receiver is appointed, if any person refuses to hand over certain properties to him, an inquiry should ordinarily be held as to the possession of such property and as to whether it is the property which should be handed over to the Receiver, after giving notice of the application

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for such enquiry under s. 494, Civ. Pro. Code; and then, an injunction can be issued under s. 492, Civ. Pro. Code, ordering the property to be handed over to the Receiver, disobedience to which can be enforced under the third para of s. 493, Civ. Pro. Code. Such an inquiry before issuing the injunction, should not, however, be held where the object of granting it, would be defeated by the delay. Where a Receiver was appointed *ex parte*, and an application to cancel such appointment was admitted under s. 108 Civ. Pro. Code, and an order for the removal of the Receiver was made by the Court *held*, the Judge has power to do so, and the matter is quite outside the consideration as to whether the order of appointment comes within the meaning of the word "decree" as used in s. 108, Civ. Pro. Code. RANGANAYAGAMMAL v. MAHALI PILLAI, **4 L. B. R. 356.**

(12)—*Civ. Pro. Code, s.* 503—*Appointment of receiver—Discretion of Court.*—S. 503 gives a wide discretion to the Court. The power of appointing a receiver under s. 503, however, is not greater than that exercised by the Courts in England, and must be exercised with a sound discretion on a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. Where a right is asserted to property in the possession of the defendant claiming to hold under a legal title, the Courts will not interfere by appointing a receiver, unless a very strong cases is made out. SIDHESWARI DABI v. ABHOYESWARI DABI, **15 C. 818.** [*Appr.*, 22 C. 459; *R.*, 5 C.W.N. 362=27 C. 279, 59 P.L.R. 1902=73 P.R. 1902, 2 L.B.R. 222, 1 S.L.R. 121.]

(13)—*S.* 503, *Civ. Pro. Code*, 1882—*Receiver, appointment of—Waste—Discretion of Court.*—In an application for the appointment of a Receiver in a suit in which the title to certain properties in the possession of the defendant is in question, it is not necessary that a strong case should be made out; enough, if a fair *prima facie* case is made out. (15 C. 818, 22 C. 459, *R.*) The mere circumstance that a large amount of property was removed, (under circumstances which might fairly give rise to suspicion), during the pendency of a suit in which the question of title to that property would be determined, is in itself a sufficient ground for the appointment of a Receiver. SIA RAM DAS v. MOHABIR DAS, **27 C. 279=5 C.W.N. 362.** (15 C. 818, 22 C. 459, *R.*) [*R.*, 32 C. 741.]

(14)—*Appointment of a receiver—Not to be made without special reasons*—Bona fide *possessor with legal title.*—The appointment of a receiver is entirely in the discretion of the Court. But the power of appointment is not to be exercised as a matter of course, but should be used with the greatest care and caution. A good *prima facie* title has to be made out before an order for the appointment of a receiver can be

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granted. (5 A. 556, 22 C. 459, *F.*) The step of appointing a receiver should not be taken without special reasons, particularly in the case of a *bona fide* possessor with legal title. Parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to Court for this form of relief. NGA KYI MAUNG v. MI SIN, **U.B.R. 1908, 2nd Quarter, Civil Procedure p. 17.** (6 C.L.R. 467, *F.*)

(15)—*Receiver, appointment of—Title to property—Removal of property.*—In an application for the appointment of a Receiver, it is sufficient if a *prima facie* title to the property, over which the Receiver is sought to be appointed, is made out. The fact that a large amount of property is removed by the defendant under circumstances which may fairly give rise to suspicion, during the pendency of a suit in which the question of title to that property is to be determined, is in itself a sufficient ground for the appointment of a Receiver. SHAM CHAND GIRI v. BHAYA RAM PANDAY, **5 C.W.N. 365.** [*R.*, 5 C.W.N. 362=27 C. 279.]

(16)—*Civ. Pro. Code*, 1882, *s.* 503—*Receivers—Waste or misappropriation of property.*—An application for the appointment of a Receiver cannot be refused because the acts complained of amounted to misappropriation and not waste, and a criminal complaint can be filed in respect of it. HANUMAYYA v. VENKATASUBBAYA, **18 M. 23.**

(17)—*Discretionary refusal to remove a Receiver and Manager of the estate of Hindu widows.*—Rights and proceedings rendering a Court's order, refusing to remove an appointed Receiver and Manager of the estate, of which the widowed Ranis of the late Maharaja of Tanjore had become possessed by grant from the Government, are entirely a matter of discretion of the Court, which had exercised its discretion soundly. JIJAI AMBA *Ex parte*, **13 M. 39, P.C.=5 Sar. 584.**

(18)—*Step-in-aid of execution—Application for appointment of receiver after decree, whether a—Receiver, whether can be appointed after sale and pending confirmation.*—An application for the appointment of a receiver after sale, and pending confirmation thereof, is a step-in-aid of execution. A receiver can be appointed for the preservation of the property, after sale and while the sale was pending confirmation. SAMBASIVA MUDALI v. KRISHNAN, **7 M.L.T. 86=5 Ind. Cas. 758.**

(19)—*Civ. Pro. Code*, 1882, *s.* 503—*Receiver—Appointment of receiver to realize amounts of decrees under attachment.*—Where a decree-holder had in execution of his decree attached two decrees held by the judgment-debtor against third parties, it was *held* that s. 503 of the Code of Civil Procedure gave power to the Court to appoint a receiver to realize the amounts of the attached decrees where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected. PARTAP SINGH v. THE DELHI AND LONDON BANK, LD., **A.W.N. 1908, 164=5 A.L.J. 583=30 A. 393.**

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(20)—*Suit for recovery of property—Appointment of—During pendency of suit—Discussion on the merits at that stage of suit, desirability of.*—The plaintiff sued as Mohunt by right of election of a certain *asthan* to recover moveable and immoveable properties belonging to the *asthan* from the defendant, who alleged that he was Mohunt by right of appointment. Pending this suit, the Court appointed a Receiver for the properties in dispute on the ground that a sufficiently strong *prima facie* case was made out to justify such appointment. *Held*, that, where the appointment of a Receiver is under consideration, a discussion of the documents filed in the suit and on the merits of the case is always regarded as undesirable and as tending to prejudice the case and prejudice the parties. The lower Courts being in a far better position to judge as to whether it was desirable in this case to appoint a Receiver or not, the High Court declined to interfere with the order appointing a Receiver. RAM SUNDAR DASS v. KAMAL JHA *alias* KAMAL DAS, **32 C. 741.**

(21)—*Bengal Act*, VIII *of* 1869, *suit for arrears of rent and ejectment under—Receiver, appointment of, under s.* 503 *of the Civ. Pro. Code — Possession of receiver, nature of.* — Though, if the suit, under Bengal Act VIII of 1869, were merely for arrears of rent, s. 503 of the Civ. Pro. Code might not apply, the Bengal Act does not exclude the operation of the section, when the suit is for recovery of the tenure itself; so that a receiver of the rents and profits of the tenure was held properly appointed, under s. 503 of the Civ. Pro. Code, in a suit brought for arrears of rent and for ejectment. The possession of the receiver is not adverse to the lease-holder, and could not be pleaded against him in any question of limitation. The possession of the receiver is for the benefit of the parties in the suit. KARTIC NATH PANDY v. PADMANUND SINGH, **11 C. 496.** [*Appl.*, 2 C.L.J. 602.]

(22)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 503 *and* 588—*Receiver, Appointment of — Appeal.*—The plaintiff and the defendant were widows of a Hindu Brahmin of Lahore city. The property in dispute was of a considerable value. By custom and Hindu law, both were entitled to a life interest in the property as Hindu widows. In the revenue records, names of both were entered as owners of the lands of their deceased husband. Certificate of collection of debts due to the deceased was also obtained by them jointly. On a dispute between them, the defendant denied the plaintiff's title altogether, and set up her sole right under an oral will of the deceased. The plaintiff applied for and obtained the appointment of a Receiver of the whole property of the deceased in the suit filed by her against the defendant. It was found as proved that the plaintiff's rights were being set at naught, and her share of the income was being made away with without reference to her wishes. The defendant did not offer to keep intact, until the decision of the case, the share of the income to which the

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plaintiff would be entitled, if the alleged oral will was not proved. On appeal against the order appointing a Receiver, *held*, that the plaintiff's title being *prima facie* clear and the danger to her interest being immediate and certain, it would be wrong to refuse the appointment of a Receiver. The plaintiff was not disentitled to the prayer merely because she had contracted debts on onerous conditions as this was the direct result of the defendant's acts. *Held*, also, that the Court in the exercise of its discretion was competent to place the whole property left by the deceased in the hands of the Receiver. In a suit only for a declaration of title, where the plaint alleges the property in dispute to be in the possession of the plaintiff, a Receiver may be appointed on proof of the fact that the plaintiff was in possession at the date of the suit. MUST. BUDHWANTI v. MUST. BISHEN KOUR, **59 P.L.R. 1902=73 P.R. 1902.** [*R.*, 36 P.R. 1910 =53 P.W.R. 1910; *Obs.*, 107 P.R. 1908.]

(23)—*Appointment of permanent Receiver—Suit by next reversioner—Gross mismanagement and malversation by widow—Surplus income paid to widow for her life.*—Where a suit was brought by the next reversioner to remove the widow from the management of the estate, and to appoint a Receiver on account of gross mismanagement and malversation by her, and it was proved to the satisfaction of the Court that the estate which was worth over a lakh of rupees has shrunk to a little over Rs. 20,000, that the widow never concerned herself with the management of the estate, and never enquired whether the expenditure was out of the capital or out of the income of the estate, that the management of the estate was left entirely in the hands of strangers who were misappropriating the monies, and that the widow was contracting debts not valid, and binding on the reversioners, *held*, that under the circumstances of the case, it is unsafe to leave the estate in the hands of the widow, that it is necessary in the interests of the reversioner that a Receiver should be appointed for the proper management of the estate, and that, the widow not having been proved they have acted with any intention to defraud, was entitled to be paid the surplus income for her life. GARUVA CHETTY v. RAGAMMAL, **8 M.L.T. 189=7 Ind. Cas. 534.**

(24)—*O.* XL, *r.* 1, *Civ. Pro. Code*, 1908—*Receiver, appointment of—"Convenient and just," meaning of — Appeal—Indiscretion—Onus.*—A large impartible estate was bequeathed by the widow of the last male owner for some religious and charitable purposes. The trustees were put in possession of the property and they remained so for over ten years, when a suit to set aside the bequest was brought by one of the claimants of the estate. The profits of the estate were large and the expenses necessary for the purposes of the trust were small. The trustees, moreover, in making the expenses, paid no due regard to any method of account: *Held*, that, under the circumstances, it was

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convenient to appoint a receiver of the property pending the decision of the suit. Where the lower Court, in the exercise of its discretion, after considering all the facts and evidence, has come to a conclusion, it is for the appellants to show that the Court exercised its discretion improperly. RAJA RAM v. THAKURAIN SHEORANI KUER, **7 Ind. Cas. 344.**

(25)—*Mortgage—Suit by mortgagee—Appointment of receiver on application by mortgagee—High Court, powers of, with regard to appointing receivers.*—In a suit for foreclosure or sale of mortgaged property, a receiver can be appointed upon an interlocutory application for the purpose made by the mortgagee. The High Court possesses the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act. S. 25 of the Judicature Act of 1873 enables the Court of equity to depart from its former practice and to grant a receiver, not only where there is no power to take possession at law, but where there is power to interfere, if it is just or convenient that an order for a receiver should be made. In the present case, there were exceptional circumstances rendering the appointment of a receiver "just and convenient." The Court of appeal which had granted a receiver until the appeal filed by the plaintiff against so much of the decree as refused to appoint a receiver came on for hearing, varied the decree itself after hearing the appeal by appointing a receiver of the rents and profits of the mortgaged property as from the date of the filing of the suit. JAIKISSONDAS GANGADAS v. ZENABAI AND KASI MAHOMED MIYA DADA MIYA, **14 B. 431.**

(26)—*Civ. Pro. Code*, 1882, *s.* 503—*Receiver, appointment of—Suit to enforce a mortgage.*—A Receiver can be appointed under s. 503, Civ. Pro. Code, in a suit to enforce a mortgage. CHANASHYAM MISSER v. GOBINDA MONI DASI, **7 C.W.N. 452.** (3 C. 335, *Expl.*) [*R.*, 6 M.L.T. 238.]

(27)—*Receiver, Appointment of—Mortgage suit—Sale, appointment after—Receiver, if may be appointed of property in hand of common manager—Civ. Pro. Code (Act V of* 1908), *O.* XL, *r.* 1, *sub-r.* (2)—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 95.—A mortgage suit does not necessarily terminate with the sale and a Receiver may be appointed after the sale, pending application to set it aside. A receiver may very well be appointed under O. XL, r. 1 sub-r. (2), Civ. Pro. Code, in respect of property in the hands of a common manager appointed under s. 95 of the Bengal Tenancy Act. MADANESWAR SINGH v. MAHAMAYA PROSAD SINGH, **15 C.W.N. 672=13 C.L.J. 487.**

(28)—*Mortgage—Mortgagee restrained by injunction from selling the property in execution of his decree—Civ. Pro. Code* (XIV *of* 1882), s. 503—*Receiver, if can be appointed.*—Where the appellant, a mortgagee decree-holder, who had been restrained by an injunction from selling the mortgaged property in execution of his decree, applied for the appointment of a Receiver: *Held* it is just to appoint a Receiver to collect the income and place it in charge of the Court. The fact that the decree is one in a mortgaged suit is no bar to such an appointment. ARUNACHELLAM CHETTIAR v. MANICKA VASAGA DESIKAR, **6 M.L.T. 238=3 Ind. Cas. 437.** (7 C.W.N. 152, *F.*)

(29)—*Receiver — Partition suit — Mortgage suit—Receivers how to act—Decree for sale—Decree for foreclosure.*—In a partition suit between co-owners, a consent decree was made. To give effect to that decree, a Receiver was appointed. Certain properties, which included not merely the properties under the charge of the Receiver, but also two other properties, were mortgaged. After an *ex parte* decree was obtained by the mortgagee, an application was made for the appointment of a Receiver in the mortgage suit. *Held*, that a Receiver might be appointed in the mortgage suit, although a Receiver was appointed in the partition suit. The same person who was appointed Receiver in the partition suit might be appointed Receiver in the mortgage suit or different persons might be appointed. If different persons were appointed as Receivers, the collection might be made by one of the Receivers only (for instance, by the Receiver in the partition suit), but the sums collected by him and payable to the mortgagor should be placed in the hands of the Receiver in the mortgage suit to be applied for the benefit of the mortgagee under the direction of the Judge. (13 C.L.J. 487, 15 C.W.N. 672, *R.*) Where the mortgage decree was for sale, and it was established that the security was not sufficient to satisfy the judgment-debt, a Receiver would be appointed almost as a matter of course, specially if there had been default in the payment of interest. But where the mortgagee had obtained a decree for foreclosure, and no personal decree had been made, a Receiver need not be appointed before the expiry of the period of grace, as the mortgagee was not entitled at that stage to the profits of the property, and did not allege that the property was in danger of being lost or wasted. KHUBSURAT KOER v. SARODA CHARAN GUHA, **14 C.L.J. 526=12 Ind. Cas. 165=16 C.W.N. 126.**

(30)—*Trust deed for liquidation of mortgage debt—Mortgagee assenting party—Receiver, if can be appointed—Civ. Pro. Code* (*Act* V *of* 1908), *O.* XL, *r.* 1, *cl.* (2).—The appointment of a Receiver is a matter entirely within the discretion of the Court, in the exercise of which it will be guided by a consideration of the circumstances of the particular case. The appointment of a Receiver will be made almost as a matter of course in the case of an English mortgage, on the application of a mortgagee if the interest payable under the security is in arrear. Moreover, if the property mortgaged would be in danger if left in the possession of the mortgagors, a Receiver should be appointed.

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Where, under a trust deed, the mortgaged properties were vested in trustees, but the estate they took was subject to mortgages, the trustees to continue in possession and manage the properties with a view to the liquidation of the mortgage-debt by periodical payments, and one of the trustees died and the surviving trustee was absent for a long period from the country, and the stipulations in the trust-deed were not carried out: *Held*, that the mortgagees were entitled to ask for the appointment of a Receiver. Although the trust-deed was assented to by the mortgagees, it did not in any way abridge their statutory right to ask for the interference of the Court. The provisions of O. XL, r. 1, cl. (2) did not stand in the way of the mortgagees, who were not bound to allow the arrangement to continue when its purpose had wholly failed. WEATHERALL v. EASTERN MORTGAGEE AGENCY CO., **13 C. L. J. 495.**

(31)—*O. XL, r. 1, Civ. Pro Code, 1908—Receiver, appointment of—Court's discretion—Partition suit—Exclusion of co-owner if ground for appointment, when no waste established—Change of law.*—Under O. XL, r. 1 of the Code, the Court has been given precisely the same discretion in questions of appointment of a receiver that the Courts in England have. The condition in the old Code that, to justify such appointment in any case, it should be found necessary to preserve property from waste and alienation having been removed, there has been a substantial widening of the Court's discretion. Where, therefore, in a suit for partition of joint family property, it was proved that a co-owner admittedly entitled to a half share in a considerable portion of the properties in suit was being kept out of possession by the co-owner, with the result that all supplies were cut off from his branch of the family. *Held*—that, although no case of waste might have been established against the co-owner in possession, the case was eminently one for the appointment of a receiver. RAMJI RAM v. SALIGRAM, **14 C.W.N. 248 = 5 Ind. Cas. 96.** (22 C. 459, 17 C. 614, *Not F.*)

(32)—*Suit for partition of joint estate—S. 503, Civ. Pro. Code, meaning of certain expressions in—Receiver of whole estate.*—The words "property the subject of a suit," in s. 503, Civ. Pro. Code, when the suit is one for the partition of a joint estate, mean the whole joint estate. It follows then, that the words "the owner," in s. 503 (*d*), must mean the whole body of owners to whom the joint estate belongs. In a suit for partition the Court may place the whole of the joint estate, of which partition is claimed, under a Receiver. Such a Receiver may raise money on the security of the whole of such estate. PARESHNATH MOOKERJEE v. OMERTH NAUTH MITTER, **17 C. 614.** [*R.*, 6 C.L.J. 404 = 11 C.W.N. 489.]

(33)—*Testamentary suit—Appointment of Receiver by High Court.*—There is nothing in the law relating to procedure to prevent the High Court from appointing a Receiver in a testamentary suit. YESHWANT BHAGWANT PHATARPAKAR v. SHANKAR RAMACHANDRA PHATARPAKAR, **17 B. 388.** [*R.*, 18 B. 237.]

(34)—*Court of Chancery, rule of—Will of Mahomedan testator—Appointment of receiver against executor in possession—Parties—Civ. Pro. Code, 1882—S. 433.*—The rule of the Court of Chancery that a receiver will not be appointed as against an executor unless gross misconduct on his part was shown, is not applicable to the case of an executor of the Will of a Mahomedan. Where a Mahomedan testator by his Will appointed three executors, only one of whom had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was held sufficiently well constituted for the purpose of a motion for a ereciver, although only the executor who had intermeddled with the estate was made a defendant hereto, the other two executors not being parties to the suit. *Quære*:—Whether it would not be necessary, or at any rate advisable, to add the other two executors as defendants before the suit came on for hearing? HAFIZABAI v. KAZI ABDUL KARIM, **19 B. 83.**

(35)—*Civ. Pro. Code, s. 503—Receiver, appointment of, after decree.*—There is nothing in the Civ. Pro. Code, to limit the power of the Court to appoint a receiver after decree, where this course is necessary or proper. SHANMUGAM v. MOIDIN, **8 M. 229.**

(36)—*Civ. Pro. Code, s. 503—Appointment of Receiver.*—The powers conferred on Courts by s. 503 of the Civ. Pro. Code, cannot be exercised as a matter of course, and simply because it could do no harm to appoint a Receiver. The discretion given by that section is one that should be used with the greatest care and caution. Because a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of property as executrix under a will, or as tenant for life, and upon this basis applies for a Receiver to be appointed, it is not a necessary consequence that such appointment should be made. SRIMATI PRASONOMOYI DEVI v. BENI MADHAB RAI, **5 A. 556 = A.W.N. 1883. 136.** [*F.*, U.B.R. 1908, 2nd Qr., Civ. Pro. Code. 503, 107 P.R. 1908; *R.*, 2 L.B.R. 222; *D.*, 73 P.R. 1902.]

(37)—*O. XL. r. 1, Civ. Pro. Code, 1908—Receiver, appointment of—Judicial discretion of Court—"Just and convenient," what is—Defendant in possession not to be disturbed except on strong grounds—Waste—Delay in instituting a suit, effect of, on receivership application by plaintiff.*—The words "just and convenient" in O. XL, r. 1, are derived from the English Judicature Act, which greatly enlarged the powers which the Court of Chancery formerly exercised, and the Courts in India have the fullest jurisdiction to appoint as well, as to remove a Receiver in the exercise of a sound judicial discretion. A Receiver should not be

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appointed in supersession of a *bona fide* possessor of the property in controversy unless there is some substantial ground for interference. (15 C. 818, *F.*; 5 C.W.N. 365, 5 C.W.N. 62, *R.*) *Held*, on the facts, that the charge of waste against the defendant in possession had not been established, and that plaintiff's delay in instituting the suit was such as to disentitle him to relief by appointment of a Receiver. SRIMATI MUTHURIA DEBYA v. SHIBDAYAL SINGH HAJARI, **14 C.W.N. 252=5 Ind. Cas. 27.**

(38)—*Appeal—Receiver appointed by the District Judge on the direction of the Deputy Commissioner — Civ. Pro. Code, r. 1 (s) of O. XLIII.—Held* that very strong grounds have to be adduced before a Court can interfere with private rights by the appointment of a receiver. Where, in a suit for obtaining a declaration to the effect that certain widows were entitled to maintenance only and not to possession for life of their husband's estate, the Deputy Commissioner *suo moto* moved the District Judge to appoint a receiver of the estate *pendente lite*, and the latter officer did so, the order of the appointment was set aside as illegal and improper, and the District Judge was directed to restore the property to the parties at once BAKHT BHARI v ISA SHAH, **62 P.W.R 1911.** (136 P.R. 1890, 73 P.R. 1902, 36 P.R. 1910=53 P.W.R 1910, *F.*)

(39)—*O. XL, Civ. Pro. Code, 1908—Receiver, appointment of—Declaratory suit—Jurisdiction—Parties to suit, without succession certificate—Receiver over estate of deceased in suit between them—Effect.*— Where an adopted son brought a suit against the widow of his adoptive father, for a declaration that he was entitled to the property left by the deceased, subject to the widow's right of residence and maintenance, and, pending the suit, obtained an order appointing a receiver of the property, and where neither of the parties had obtained either probate, letters of administration or succession certificate under s. 4, Succession Certificate Act VII of 1889. *Held*, that, in spite of the general terms of O. XL, Civ. Pro. Code, 1908, a Court has no jurisdiction to appoint a receiver over property not the subject of litigation, and that, in this suit, the outstandings due to the deceased are not the subject of litigation, but the subject of litigation is merely the right to recover them. The only person legally entitled to recover outstandings due to the deceased is one to whom probate of letters of administration, or a certificate has been granted (see Act VII of 1889, s. 4), and a receiver appointed in this suit would have no more power to grant a valid receipt than the parties themselves. MUSAMAT POUNCHABAI v. LEKHRAJ DAYARAM, **3 S.L.R. 118=4 Ind. Cas 605.**

(40)—*Receiver, appointment of—Civ. Pro. Code (Act V of 1908), O. XL, r. 1, O. XLV, r. 13 (d)—Privy Council appeal—Application for the appointment of Receiver after leave to appeal to Privy Council is granted.*—O. XLV, r. 13, applies where an application for appointment of a Receiver is made after leave is granted to appeal to the Privy Council. The principles, however, on which a Receiver would be appointed, must and shall be the same as mentioned in O. XL. A Receiver ought not to be appointed, where no risk of loss is shown by the applicant. MI SHWE MA v. MI MI, **12 Ind. Cas. 198.**

(41)—*District Judge's powers—Appointment of Receiver—Civ. Pro. Code, 1882, s. 503—Receiver, who can appoint—Ground for appointment of Receiver not very strong.*—A District Judge has no power to appoint a Receiver in respect of property, the subject of a suit or attachment in other Courts, even though such Courts may be subordinate to his Court. S. 503 clearly gives the power to appoint a Receiver only to the Court wherein a suit is brought or by which the property has been attached. There is no doubt that a Court cannot appoint a Receiver, except it has seisin of the property, either by a suit being pending or by proceedings in execution of decree made in a suit being pending and attachment having been made. Also, it is only the Court in which a proceeding is pending, and which has thereby the property under its control that can appoint a Receiver. A Receiver cannot be appointed in respect of the mortgaged property on the mere ground that the property would not fetch so much by forced sale as it would by sale under a private contract. LATAFUT HOSSEIN v. ANUNT CHOWDHRY, **23 C. 517.**

(42)—*Common property belonging to community—Decree appointing receiver till a proper trustee is appointed by a community, whether proper—Decree awarding possession to plaintiffs on behalf of whole community.*—In a suit brought by certain members of a community, for a declaration that the defendants were not trustees of a rest-house, and for the appointment of a receiver for the management of the rest-house until a proper trustee is appointed by the community, it was *held*, that a decree, directing the appointment of a receiver for the proper management of the rest-house belonging in common to the members of the community until a proper trustee is appointed by the community, is bad: but a decree awarding possession to plaintiffs, on behalf of the whole community including the defendants on the suit, will be proper. NARAYANAN CHETTY v. RAMASAMI CHETTIAR, **19 M.L.J. 669=4 Ind. Cas. 1069.**

(43)—*Appointment of, in testamentary suit—Validity of will for dharmarth.*—A receiver should not be appointed in a testamentary suit to take charge of property in the hands of a defendant unless—(*a*) there is a fair probability of the suit succeeding; and (*b*) there is an allegation that the defendant is wasting, or about to waste, the property or is incapable of managing it; and (*c*) there is some proof of this allegation by affidavit or otherwise. Where the bulk of the property is to be used for *dharmarth*, it is doubtful whether such

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provisions in a will are capable of being carried out, inasmuch as *dharmarth* covers an infinity of purposes. KESAR DEVI v. PARTAB SINGH, **39 P.R. 1908=91 P.W.R. 1908=185 P.L.R. 1908.**

(44)—*Appeal—Order appointing Receiver—Final order—Interlocutory order—Civ. Pro. Code (Act V of 1908), O. XLIII, r. 1, cl. (s).*—A final and not an interlocutory order appointing a Receiver is appealable under O. XLIII, r. 1, cl. (s) of the Code. UPENDRA NATH NAG CHOWDHRY v. BHUPENDRA NATH CHOWDHRY, **13 C.L.J. 157=9 Ind. Cas. 582.**

(45)—*Civ. Pro. Code*, 1882, *s.* 503—*Appointment of Receiver—Appeal.—Held*, that when a Subordinate Court proceeds to make an appointment of a Receiver under s. 503, Civ. Pro. Code, an appeal lies from that order. SARDAR HUSAIN KHAN v. NOWROJI & CO., **1 O.C. 168.**

(46)—*Appeal—Order refusing to remove Receiver.*—An order refusing to remove a Receiver appointed by a decree in an administration suit is appealable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree. MITHIBAI v. LIMJI NOWROJI BANAJI; HARRIVULLBHDAS CALLIANDAS v. ARDASAR FRAMJI MOOS, **5 B. 45.**

(47)—*Refusal to appoint—Appealable order—Civ. Pro. Code, ss.* 503, 588.—An order refusing to appoint a receiver is an order under s. 503 of the Code of Civil Procedure and is appealable under s. 588, cl. (24). VENKATASAMI v. STRIDAVAMMA, **10 M. 179, F.B.** (6 M. 355, *Overruled.*) [*F.*, 17 C. 680; *R.*, 24 B. 38, 31 C. 495.]

(48)—*Order refusing to appoint a Receiver—Appeal—Order on appeal—Ss* 503 *and* 588, *Civ. Pro. Code*, 1882.—An order rejecting an application for the appointment of a Receiver under s. 503, Civ. Pro. Code, is appealable. The order in appeal being final, no further appeal lies from it under s. 588, Civ. Pro. Code, 1882. RAMCHANDRA GHOSE v. BALLY MUNICIPALITY, **17 C. 680.** (6 C.L.R. 467, *F.*) [*R.*, 31 C. 495.]

(49)—*Civ. Pro. Code (Act X of* 1877), *ss.* 503, 505—*Receiver—Appeal.*—An order dismissing an application for the appointment of a receiver is an order under s. 503 and not under s. 505, and is therefore appealable under s. 588 of the Code. A Subordinate Judge may, if he has sufficient grounds, decline to appoint a receiver even though he might have received the necessary authority from the District Judge under s 505 to do so. GOSSAIN DULMIR PURI v. TEKAIT HETNARAIN, **6 C.L.R. 467.** [*F.*, 10 M. 179, 17 C. 680, 24 B. 38, 31 C. 495, 53 P.W.R. 1910=36 P.R. 1910; *R.*, U.B.R. 1908, 2nd Qr., C.P.C., 17.]

(50)—*O.* XL, *r.* 1, *and O.* XLIII (1), *Civ. Pro. Code*, 1908—*Appointment of Receiver when allowed—Appeal from order refusing to appoint Receiver—Hindu Law—Position of eldest brother.—Held* that—(1) An order refusing to appoint a Receiver is appealable. (24 B. 38, 31 C. 495, 6 C.L.R. 467, 10 M. 179, F.B., *F.*) (2) The exercise of the jurisdiction to appoint a Receiver under O. XL, r. 1, is not a matter *ex debito justitiæ*, and the Code leaves it to the Court to decide whether to make the appointment would, in its opinion, be "just and convenient." But in all such cases the opinion of the first Court is entitled to great weight and is liable to be set aside only if it is either arbitrary, vague and fanciful. (10 C. 713, *F.*) (3) The appointment of a Receiver should only be granted where some specific act of misappropriation, malversation or mismanagement is shown, but not on a mere apprehension of future waste; and this principle is particularly to be applied in case of partition of Hindus' joint property in the hands of the eldest brother, who, according to Hindu Law, is in the position of manager of that property. SANT RAM v. RAM CHAND, **53 P.W.R. 1910=36 P.R. 1910=6 Ind. Cas. 659=72 P.L.R. 1910.** (73 P.R. 1902, 17 C. 614, 18 M. 23, *D.*)

(51)—*S.* 503 (*b*), *Civ. Pro. Code* (1882)—*Receiver, appointment of—Stranger, removal of Court's discretion—Receiver's appointment, when takes effect—Possessory lien of agent of mortgagor, if paramount to right of Receiver appointed in the suit of the mortgagee.*—An order, authorising a Receiver appointed by the Court to remove any person in possession of the property, is appealable under s. 588, cl. 24, Civ. Pro. Code (1882), at the instance of the person sought to be dispossessed. The mere assertion, by a stranger in possession, of a paramount title against the Receiver, does not compel the Court to withhold its hands. The title must be proved. The Court has a discretion, which it will exercise judicially in determining whether or not it will direct the removal of a stranger upon a proceeding under s. 103. The test which the Court will apply in such a case is whether the parties to the suit or some or one of them have or has a present right to remove the stranger. The possessory lien of an agent is subject to all the rights and equities available against the principal at the time such lien attaches. The appointment of a Receiver does not take effect or date back by relation to a period prior to his appointment. The appointment of a Receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved. ROWLAND HUDSON v. JOHN PIERPONT MORGAN, **13 C.W.N. 654=9 C.L.J. 563=36 C. 713=1 Ind. Cas. 356.**

(52)—*Appointment of receiver—Order nominating person—Order of confirmation by District Court—Appeal—Nomination for office of receiver—Duty of Judge confirming nomination.*—Neither a preliminary order under s. 505 of the Civ. Pro. Code, nominating a person for appointment as a Receiver for approval by a District Judge, nor the order confirming such nomination, is appealable. [*R.*, 10 M. 179 F.B., 1 O.C. Sup. 21, 1 O.C. 168, 24 B. 38,

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31 C. 495, 34 C. 305=5 C.L.J. 270; *Appr.*, 21 B. 328, 33 B. 104=10 Bom. L. R. 1037.] When a nomination is made for the office of receiver, the District Judge must, in addition to deciding upon the fitness of the person nominated for the office, also decide on the necessity for the appointment of a receiver itself. BIRAJAN KOOER v. RAM CHURN LALL MAHTA, **7 C. 719=9 C.L.R. 203.**

(53)—*Appeal—Receiver - Order that Receiver should be appointed—Not appealable.*—An order that a receiver should be appointed, which is not an order appointing a Receiver, is not appealable. SRIMATI MATHURIA DEBI v. SHIB DYAL SINGH HAZARI, **3 Ind. Cas. 430.** (7 C. 719, 9 C.L.R. 203, *F.*)

(54)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 92 —*Refusal to appoint receiver—Order not appealable.*—An order refusing to appoint a receiver under Act VIII of 1859, s. 92, was not appealable. *Ex parte* IMBICHI PATAMA, **1 M.H.C. 129.**

(55)—*Civ. Pro. Code, ss.* 503, 508 (24)—*Refusal to appoint a receiver—Appeal.*—An order refusing to appoint a receiver under s. 503, Civ. Pro. Code, is not appealable. SUBRAMANYA v. APPASAMI, **6 M. 355.** [*Overruled*, 10 M. 179; *R.*, 24 B. 38.]

(56)—*Order refusing to sanction appointment of Receiver, passed by District Judge—Execution of decree—Appeal—Civ. Pro. Code, ss.* 503, 505 *and* 588.—*Held*, that the order of the District Judge, refusing to sanction the appointment of a Receiver on the nomination of the Subordinate Judge in proceedings in execution of a decree, was passed under s. 505 and not under s. 503, Civ. Pro. Code, and as such was not appealable under s. 588, Civ. Pro. Code. SANKATA DIN v. SHANKAR BAKHSH, **1 O.C. Supp. 21.**

(57)—*Civ. Pro. Code*, 1882. *ss.* 503 *and* 588, *cl.* (24)—*Receiver's accounts, orders in passing—Appeal.*—The directions which a Court gives in passing a Receiver's accounts are not appeallable under cl. (24) of s. 588 of the Civ. Pro. Code. RANI KESHABATI KUMARI v. W. O. MACGREGOR, **12 C.W.N. 648=35 C. 568.** [*R.*, 18 M.L.J. 589=4 M L.T. 268.]

(58)—*Receiver, position and function of.*—The receiver appointed in a particular suit is nothing more than the hand of the Court, so to speak, for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court in order to preserve the subject-matter of the suit *pendente lite*; and the possession of the receiver is simply the possession of the Court. Any attempt to disturb that possession, without the leave of the Court, is a contempt of Court. The receiver has no personal rights in the property, and he cannot take any steps even for the purpose of defending his possession, without the sanction of the Court. As a rule, so little personal interest of any kind has he in the matter, that he is not justified in making any application whatever to the Court. If it is necessary that he should take action of any sort, it is for the parties to the suit, or one of them, to come to the Court to put him in motion; and whatever the receiver rightly does, with regard to the property, he does it simply in the character of agent for the owners of the property, or the persons interested in it. WILKINSON v. GANGADHAR SIRKAR, **6 B L.R. 486.** [*R.*, 31 C. 572.]

(59)—*Powers and duties of Receiver—Act* II *of* 1874 (*Administrator-General's Act*)—*Private agreement with one of the parties.*—A Receiver is a servant of the Court and not of the parties to the suit, and has only such power and authority as the Court may choose to give him. Any interference with his management by a secret agreement, whether come to before or after the appointment, is nothing short of an interference with the Court in the management of the estate. He ought not, without the special leave of the Court and without giving notice to it, enter into any private agreement with any of the parties. The party so interfering renders himself liable to the penalties of contempt. MANICK LALL SEAL v. SURRET COOMAREE DASSEE, **22 C. 648.** [*R.*, 61 P.L. R. 1902, 30 C. 696.]

(60)—*Receiver appointed, pending appeal, rights of—Contempt proceedings by Receiver himself—Court, jurisdiction of.*—A Receiver of property appointed by an Appellate Court pending an appeal to that Court, even when the appeal is no longer pending, must, until he is finally discharged, be regarded as the Receiver of the property, of which he has been put in possession. He has the right to take proceedings against a party for contempt, of his own motion and till the time of his discharge. The Appellate Court has ample jurisdiction, until the Receiver has had his accounts passed by it, to deal with matters relating to him, including contempt proceedings. GREY v. WOOGRAMOHUN THAKUR, **28 C. 790.**

(61)—*Defendant realising sums after Receiver's appointment—Powers of Court.*—In a partition suit, the District Judge appointed a Receiver for the property in dispute, and the defendants, while their case was under appeal, realized certain sums, which the Receiver might have realized, and the District Judge directed them to pay in at once the sums realized by them to the Receiver or into the Court. *Held* that the property vested in the Receiver directly the order appointing him had been passed, and no one had the right to assume his functions without reference to the Court, and the order passed by the District Judge was proper and within his powers. PALA MAL v. TEK CHAND, **61 P.L.R. 1902.**

(62)—*Receiver—Loss—Who should bear it—Civ. Pro. Code, s.* 503.—The appointment of a Receiver is an act of Court and once made, he is an officer or representative of the Court, and subject to its orders. His possession is the possession of the Court by its Receiver and enures for the benefit of all the parties to the proceeding according to their title. If a loss

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arises from the default of the Receiver, the estate must bear the loss as between the parties to the suit or proceeding. ORR v. MUTHIA CHETTY, **17 M. 501.** [*Affirmed by the Full Bench*, 20 M. 224; *Appl.*, 2 C.L.J. 602.]

(63)—*Duties and liability of Receiver—Civ. Pro. Code*, 1882, *s.* 503 (=*O.* XL *rr.* 1 *to* 3, *new Code*).—A Receiver appointed under s. 503, Civ. Pro. Code, to collect the rents of an estate, is bound to make good a loss caused to it by a breach of his duties. A Receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court as its selected and trusted officer. In all important matters, the Receiver should apply for and obtain the direction of the Judge who appoints him. A Receiver is entitled to his costs, charges and the expenses properly incurred in the discharge of his duties. BALAJI NARAYAN PATVARDHAN v. RAMACHANDRA GOVIND KANADE, **19 B. 660.** [*R.*, 5 C.W.N. 223, 61 P.L.R. 1902.]

(64)—*Liability of Receiver, executor and trustee, contrasted—Debt on behalf of estate—Right of Receiver to indemnity—Parties—Creditor's right to proceed against representative of estate for debts contracted by Receiver as manager.*—A Receiver occupies a position towards the estate in his hands different from that of an executor or trustee. A Receiver acts through the Court. His acts are virtually the acts of the Court. Executors or trustees, not acting through or under directions of the Court, do not and cannot, under ordinary circumstances, create obligations binding on the estate in favour of creditors. In the event of a Receiver being sued for acts done by him as such, he would doubtless be entitled to rely on his right to indemnity, as against the estate; and in order to try this question of indemnity, it would be necessary to secure the presence of the beneficiaries or others as parties to the suit, who are interested in questioning the authority of the Receiver. A creditor has the right to proceed against the representative of an estate for the debt incurred by the Receiver during his management of the estate. The right to maintain such a suit is founded on the fact and equitable principle that as the acts of a Receiver, so long as they fall within his authority, are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. (*Burt Boulton and Haywar* v. *Bull*, (1895), 1 Q.B. 276, *Expl.*) MOHARI BIBI v. SHYANA BIBI, **30 C. 937=7 C.W.N. 799.**

(65)—*Dismissal of suit in which Receiver was appointed—Effect on Receiver's powers.*—Although, where a Receiver has been appointed in a suit, the Court usually directs, at the instance of the parties or of some of them, that the Receiver should pass his final accounts and then be discharged, the Court has no power, after the suit has been dismissed, to give the Receiver any fresh power, such as liberty to sell. RABEHOLME v. SMITH, **34 C. 336.**

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(66)—*Receiver—Execution sale of property in hands of—Illegality—Civ. Pro. Code (Act XIV of 1882), ss. 244, 248—Non-service of notice on judgment debtor, if ground for setting aside the sale—Confirmation of sale, effect.*—Where the receiver appointed by the Court was directed to take possession of moveable properties and of the rents and profits of the immoveable properties, and was further authorised to get in and collect all debts and claims due to the estate. *Held*, that he must be taken to have been appointed Receiver in respect of the whole estate, and had authority to apply for an order absolute on a decree *nisi* for foreclosure. A sale of the foreclosure decree, while the estate was in the possession of the receiver in execution of a decree for money, without leave of the Court previously obtained, was illegal and liable to be avoided; and punishment by the procedure for contempt was not the only remedy against such unauthorised sales. The provisions of s. 248 are not mandatory. A sale held without issue of notice under s. 248, Civ. Pro. Code (1882) is therefore not a nullity, but such an omission is a serious irregularity, sufficient to vacate the sale upon an application made by the judgment-debtor under s. 244 of the Code. (5 C.W.N. 10, 25 B. 337, 27 I.A. 216, 32 B. 572, 21 B. 424, 9 C.L.J. 271, 36 C. 543, *R.*) Such an irregularity is a ground for setting aside the sale even after it has been confirmed. (11 C.W.N. 1011, 35 C. 61, *R.*) A purchaser of property at an execution sale is not protected, when grounds for setting aside the sale under s. 244 or s. 311 are established, merely because he is a stranger. MRS. LEVINA ASHTON v. MADHABMONI DASI, **14 C.W.N. 560=5 Ind. Cas. 390=11 C. L. J. 489.** (13 C.W.N. 710, *R.*)

(67)—*Order appointing Receiver, powers of Receiver under—Suit to eject tenant, right of—Monthly tenant—Notice to quit—Holding over.*—A Receiver appointed with power "to let and set the immoveable property in dispute or any part thereof as he shall think fit and to take and use all such lawful and equitable means and remedies for recovering, realising and obtaining payment of the rents and profits thereof, and of the outstandings, debts and claims, by action, suit or otherwise, as shall be expedient," had sufficient power to bring a suit to eject a monthly tenant, whose tenancy was determinable by a notice to quit, without obtaining special leave of the Court. HURIDAS KUNDU v. MACGREGOR, **18 C. 477.** [*R.*, 31 C. 304=5 C.L.J. 270.]

(68)—*Civ. Pro. Code, s.* 503—*Powers of receiver.*—The provisions of s. 503 of the Civ. Pro. Code, were intended to declare that the receiver had, in respect of all property which was or could be attached, the powers of the owner, as they existed at the time the property was brought under the orders of the Court, provided they have not ceased by operation of law. Therefore, where the lease of a portion of a Zemindari for a term was, after attachment of the Zemindari in execution of a decree, renewed for a lesser rent and in perpetuity a

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receiver subsequently appointed with full powers could claim the higher rate of rent from the lessees, ignoring the lease executed subsequent to the attachment. GOPALSAMI v. SANKARA, **8 M. 418.** [*R.*, 34 C. 305=5 C.L.J. 270.]

(69)—*Civ. Pro. Code, s.* 503—*Powers.*—Where a receiver is appointed with full powers under s. 503, Civ. Pro. Code, to a Zemindari, the whole of which was placed under attachment in execution, the receiver is entitled to maintain a suit against the inamdars of the village, who with the Zemindar are jointly interested in the up-keep of a tank, for the sums which the Zemindar had spent before attachment towards its repairs, and which the inamdars should have contributed for that object. SUNDARAM v. SANKARA, **9 M. 334.** [*Appr.*, 34 C. 305=5 C.L.J. 270.]

(70)—*Power of—Suit to eject tenant claiming permanent tenure without leave of Court—Maintainability—Civ. Pro. Code*, 1882, *s.* 503.—Where the order appointing a receiver to a certain estate authorized him to take possession of the property (moveable and immoveable) of the estate, and, amongst other things, authorized him to let and set the said immoveable property or any part thereof as he should think fit, and the Court did not give him full powers under the provisions of s. 503, Civ. Pro. Code, under which he was appointed, and where the receiver served a notice to quit on certain tenants of the estate claiming to hold a permanent lease, and afterwards instituted a suit to eject them, both without special leave of the Court, *held*, that the receiver's acts were unauthorized without leave of Court, and that the suit should be dismissed. DROBOMOYI GUPTA v. C. T. DAVIS, **14 C 323.** [*D.*, 18 C. 477; *R.*, 5 C.L.J. 270=34 C. 305.]

(71)—*Sale by, by order of Court—Right of a party to suit to challenge validity of sale in a separate suit* Shebait *of* Thakur, *a party—Right of succeeding shebait to recover property sold—Representation of* Thakur *by* Shebait—*Continuing representation—Application in suit to set aside sale.—Maintainability.*—A sale of properties, the subject-matter of a suit, by the Receiver, under the order of the Court, cannot, in the absence of fraud, be attacked collaterally by persons, who were parties thereto, or their representatives (6 B.L.R. 486, *R.*) Where one member of a joint Hindu family, sued for partition of certain properties, on the allegation that they were secular properties of the family, and another resisted it on the ground that the properties were the absolute *debutter* properties of the family, idol of which he was the *shebait*, and a receiver was appointed in that suit, and he, under the direction of the Court, sold certain portions of the properties to meet the costs of the suit, *held*, in a suit brought to recover the properties sold, by persons claiming to be successors in office of the *shebait*, that the substantial question raised in the former suit was as to the real character of the properties sold and the

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Thakur was represented in it in the only manner possible, *viz.*, by the *shebait*. The succeeding shebaits, forming a continuing representation of the *Thakur's* property, were bound by the order for sale, which it was not open to them to challenge in an independent action. (2 I.A. 145, 8 C.W.N. 809=31 I.A. 203, 13 M.I.A. 270, 9 C.W.N. 961=32 I.A. 193, 2 C.L.J. 189, *Rel. on.*) *Quære*—Whether, having regard to the purpose for which the properties were sold, an application in the former suit to set aside the order would have succeeded. GORA CHAND LURKI v. MAKHAN LAL CHAKRAVARTTY, **11 C.W.N. 489=6 C.L.J. 404.** [*F.*, 6 M.L.T. 363=12 C.W.N. 739=9 C.L.J. 597; *R.*, 6 C.L.J. 621.]

(72)—*Receiver appointed in execution of decree—Payment to receiver by tenants of judgment-debtor—Effect on liability of judgment-debtor*—In execution of a decree, a receiver was appointed to superintend the harvest and collect the rents payable to the judgment debtor. No security was demanded from the receiver. Instead of paying the moneys collected by him into Court, the receiver misappropriated them and absconded. The question was whether the judgment-debtor could claim credit for the moneys so collected but not paid into Court. *Held per Shephard, J.*, that the moneys paid by the tenants to the receiver did not *pro tanto* relieve the judgment-debtor from liability under the decree. *Held per Davies, J.*, that the payments made to the receiver were good and valid discharges *pro tanto* of the decree debt. MUTHIA CHETTI v. ORR, **20 M 224, F.B.**

(73)—*Receiver—Mortgage suit—Mortgagor taking money from Receiver as accommodation loan—Refusal to pay—Power of Court to compel payment.*—A Receiver was appointed in a mortgage suit from whose officer the judgment-debtor took a sum of money as accommodation loan out of the funds of the Receiver in his hands. The officer was dead and the judgment-debtor refused to re-pay the amount: *Held*, that the Court had power to direct the judgment-debtor to deposit the money in Court within a fixed time; and that in default of such deposit the Receiver was entitled to execute the order of the Court as a decree. CHANDRA SEKHAR PROSAD SINGH v. HARI HARENDRA SAHAI, **10 Ind. Cas. 893=15 C.L.J. 254.**

(74)—*Appointment of Receiver in a suit for partition of joint family property—Execution of decree, against certain members of the family—Inability of the Receiver to raise the decretal amount—Direction to the decree-holder to proceed against the property—Effect of.*—In a suit for partition of joint family property, a Receiver was appointed. While the suit was pending, the respondent, a decree-holder against certain members of the family, made an application for execution of his decree, and the executing Court made an order that the decree should be made over to the Receiver with the direction that he should raise the decretal amount from the usufruct of the property. Upon the

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Receiver reporting his inability to raise the amount without selling the family property, the Court ordered the respondent to proceed against the property, and, accordingly, he applied for sale of the property. The appellants, the judgment-debtors, contended that the order appointing the Receiver was a bar to the application for the execution of the decree. *Held*, that the order of the Court directing the respondent to proceed against the property of the appellants had the effect of discharging the Receiver. Consequently, there was no bar to the present application for execution. RAGHUNATH NAIK v. GOPINATH NAIK, **A.W.N. 1905, 110.**

(75)—*Attorney on the record—Right of plaintiff to consent in person—Application for payment of money by Receiver—Receiver, application for payment — Of money by—Attachment and claim on funds' in Receiver's hands—Receiver to appear and inform Court.*—Where the plaintiff has an attorney on the record, he has no right to appear in person to consent to an application for payment of money by the Receiver. In all applications for payment of money by a Receiver, the Receiver ought to appear and give information to the Court about funds in his hands and whether there are any attachments or claims on the same. CHAITAN CHARUN MULLICK v. GOCOOL CHANDRA MULLICK, **1 C.W.N. 303.**

(76)—*Money in his hands—Pressing debts — Power of Court to order him topay.* — Plaintiff obtained a decree for his half share of an estate and a Receiver was appointed to ascertain and divide the said estate. In the meanwhile, two creditors whose debts were running at considerable interest threatened to attach the property of the estate. The plaintiff applied to the Court for an order to the Receiver to pay those two debts out of the plaintiff's half share of the moneys in his hands, leaving the question whether they ought to be paid out of the whole estate to be determined in the office of the Commissioner, when the proper time for ascertaining that fact arises. *Held* that the Court had undoubted jurisdiction to make an order for payment of these sums out of the plaintiff's share. From early times, it was the practice of the Court of Chancery in England to make such orders; but the Court seems to have exercised the power very sparingly and only in very special cases and under special conditions. MOTIVAHU v. PREMVAHU, **16 B. 511.** [*R.*, 13 M.L.J. 501=27 M. 168.]

(77)—*Civ. Pro. Code, s. 503—Management by receiver—Claim for wages of servants.*—Where the properties of a firm have been placed by the Court under the management of receiver, a servant of such firm has no preferential right over the creditors of the firm, to his wages accrued due befor the appointment of the receiver. SHORT v. PICKERING, **6 M. 138.**

(78)—*Receiver with power to borrow for certain purposes—Death of Receiver—Repayment of money borrowed by Receiver, out of funds in Court.*—A Receiver who was appointed to the charge of certain property in dispute was instructed by the Court to receive from the decree-holder such sums as might from time to time be necessary, by reason of the current receipts of a certain temple being insufficient to carry on the current expenditure of it. Under these instructions advances were made by the decree-holder, but the Receiver instead of repaying those amounts, and entering them in his accounts, remitted the whole amount of collections to the Court. *Held* that, though strictly and technically speaking the decree-holder's remedy would be against the receiver personally who, under the order of the Court was authorised to repay and ought to have repaid the advances to the decree-holder, still, as the Receiver was dead and as there was a fund in Court out of which those advances might properly have been repaid, the Court could deal with the matter so as to enquire how far the sums alleged were advanced, in conformity with the order of the Court, *bona fide* for the purpose of carrying on the worship of the idol, and whether the decree-holder was not fairly entitled to be repaid. CHUNDER MOHUN DUTT v. ISSUREE NUND DUTT, **11 W.R. 224.**

(79)—*Receiver in insolvency, purchase by—Sanction to purchase.*—The purchase by a Receiver in insolvency of property belonging to the insolvent's estate is irregular, and the Court ought not to sanction such a purchase. RAM KOMAL SAHA v. BANK OF BENGAL OF AKAYAB, **5 C.W.N. 91.**

(80)—*Civ. Pro. Code, s. 356—Receiver — Commission.*—A Receiver appointed in insolvency proceedings under the Civ. Pro. Code is entitled to the remuneration at the scale fixed by the Court, but for the amount of that fee, he is only entitled to a lien to the extent of five per cent., upon the sum remaining as net assets after the charges specified in cls. (*b*), (*c*) and (*d*) of s. 356, Code of Civil Procedure, have been paid. MAHADEVA v. KUPPUSAMI, **15 M. 233.**

(81)—*S. 503 Civ. Pro. Code, 1882 (=O. XL, rr. 1 to 3, new Code), position of Receiver under —Promise to pay salary of Receiver without permission of Court, effect of.*—A Receiver is an officer of the Court. Under s. 503, Civ. Pro. Code, 1882, the Court is to determine what fee or commission a Receiver is entitled by way of remuneration The parties cannot to by any act of their's add to or derogate from the function of the Court, without authority from the Court itself. An agreement to pay the remuneration of a Receiver without any leave from the Court, even if it is not conditional, is not binding on the persons promising, as it is made in contravention of the law. A suit cannot be brought on such an agreement. PROKASH CHANDRA SARKAR v. ADLAM, **30 C. 696.** (22 C. 648, *R.*)

(82)—*Receiver's lien on estate—Receiver discharged by dismissal of suit.*—A Receiver though

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discharged by the dismissal of the suit in which he was appointed, is entitled to a lien on the estate for all his just claims and allowances. PREMLALL MULLICK v. SUMBHOONATH ROY, **22 C. 960.**

(83)—*Appointment of Receiver in administration suit—Preservation of property from possible danger.*—The mere fact that the appointment of a receiver would, in an administration suit filed by a next friend on behalf of his minor wife which was found to be under the circumstances unnecessary and uncalled for, preserve the fund from a possible danger in the future, cannot bring it within the ordinary rule as to the solicitor's lien, even if it could, which is very much a matter of doubt, by the existence of the word "preserved," which is introduced into the English Statute 23 and 24 Vic., cap. 127. DEVKABAI v. BHAISHANKAR AND DINSHA, **10 B. 248.** [*R.*, 30 B. 27=6 Bom. L. R. 879, 7 Bom. L.R. 547.]

(84)—*Receiver's liability to account.*—A Court, having appointed a Receiver in a suit, has authority incidental to its jurisdiction, to order him to account, although the suit may be no longer pending. The estate is in its hands, and the Receiver is its officer, and the dismissal of the suit by an appellate Court does not alter that state of things. The original Court in such a case may permit parties to intervene on questions as to the accounts, and may deal with costs and other matters. ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK, **22 C. 1011, P.C.=5 M.L.J. 157=22 I.A. 203=6 Sar. 660.**

(85)—*Civ. Pro. Code (Act V of 1908), O. XL, r. 3—Receiver, duty of—Accounts, examination of—Parties interested, right to object—Notice—Receiver, if can incur expenses without leave of Court—Transaction, beneficial—Receiver, when can charge for legal assistance—Receiver if can retain counsel of either party—Pleader's authority to represent his client, when terminates—Receiver, if can be charged with interest for money improperly kept — Order authorizing expenditure, when conclusive—Receiver's account, when can be re-opened—Appeal—Discretion in passing accounts.*—It is not compliance with the letter or the spirit of r. 3, O. XL of the Code, merely to examine the accounts submitted by the Receiver, and ascertain whether the alleged payments made are supported by vouchers. The Receiver is but an officer of the Court appointing him, and is, therefore, bound to account to that Court for all property which he has received. It is his duty to keep his accounts and vouchers in such condition that they will be ready for examination at any time. Whenever property or funds come into the hands of a Receiver pending litigation, the Court may require him to report his acts and doings and to render an account in order to ascertain the condition of the property, and to enable the Court to settle the rights of, and do justice to, all the litigant parties; when the accounts of the Receiver come up for adjustment, he is a party in interest, entitled

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to be heard, and it is the duty of the Court to see that his rights are protected; but so, also, all other interested parties are entitled to notice and an opportunity to attend and be heard. All persons, having an interest in the estate which the Receiver represents, have the right to be present, and be examined on any subject pertinent to the enquiry which springs out of the proceedings itself, and to take exception to the Receiver's accounts. Courts are disposed to hold Receivers to great strictness in rendering their accounts: and a thorough investigation of the accounts and vouchers is proper where the rights of infants are involved. A Receiver is bound to exercise the same degree of diligence in keeping down expenses and in caring for the estate in his possession, that a prudent man would observe in connection with his own property under similar circumstances. A Receiver, therefore, will not ordinarily be permitted, without the sanction and authority of the Court, to incur any expenditure which will seriously diminish the funds entrusted to his charge, and it is his duty, if he wishes to protect himself, to apply to the Court for instructions as to expenditure, and to keep regular accounts of all items of receipts and expenditures. Where a Receiver has laid out money without a previous order of Court, and the transaction is proved by him to have been beneficial to the parties in interest, he is entitled to be allowed credit in his accounts for the amount thus expended. A Receiver is entitled to legal assistance in proper cases, and will be allowed reasonable and proper fees in his behalf out of the funds, not only when the employment has been previously sanctioned by the Court, but also when it was not previously authorised, if the expense has been incurred in the exercise of a sound discretion. Such allowance will be made only for services requiring legal skill, but not for services which were not rendered to the Receiver or for services which were not in behalf of the interests represented by the Receiver, or what were rendered in matters with which the estate in the Receiver's hand had no concern, or in which the interest only of the Receiver personally may be involved, or for services, the necessity for which had been caused by the Receiver. Such allowances are to be carefully scrutinised, and if they are unnecessary or extravagant, they should be reduced or disallowed altogether. Such allowances are in substance to be governed by the reasonable necessities in that regard, if the Receiver has properly discharged the duties which belong to him to perform, by the time necessarily spent in the administration, the grade of service required, the efficiency of that rendered, the benefit to the trust property, the fidelity displayed and by all other circumstances throwing light on the question. A Receiver should not employ the Counsel of either of the parties to the litigation in which he was appointed; since their duty is to protect the interests of their respective clients and to watch the Receiver's proceedings, to the

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end that a favourable performance of the duties may be insured, they are not regarded as competent to act as Counsel for the Receiver, and their undertaking to act in such a capacity might frequently cast upon them inconsistent and conflicting duties which could not be properly discharged by one and the same person. The rule prohibiting a Receiver from employing the Counsel of either party in the cause, is limited in its application to cases where the Receiver is acting adversely to one of the parties to the litigation. The authority of a Solicitor to represent his client does not necessarily terminate with the judgment in the suit. In general, a Receiver will not be allowed to make interest for his own benefit upon funds in his hands, and will be answerable for interest upon the balance. A Receiver may, therefore, be charged with interest on moneys improperly kept in his hands, although he has passed his accounts, and all parties have expressed themselves satisfied; and for this purpose, an enquiry may be directed as to what money he has received from time to time, and how long he has kept it in his hands. If an order has been made authorising expenditure, after notice to all parties interested, and has remained unimpeached, it is conclusive, and the expenditure cannot be questioned on the Receiver's final accounting. But if an order authorising expenditure is made upon the *ex parte* application of the Receiver, without notice to the interested parties, they are at liberty to contest its correctness upon the Receiver's final accounting, and the Court may investigate and determine the correctness of all the Receiver's accounts, notwithstanding that a partial report has been previously approved. A Receiver's accounts, which have been filed and vouched before an examiner, can be reopened on the discovery of errors in them, notwithstanding that the Judge's certificate is attached, and a Receiver may be surcharged on his accounts, notwithstanding that he has been discharged. No appeal lies from directionsgiven by the Court in passing a Receiver's account. MOHINI MOHAN PATRA v. RAM NARAIN PATRA AND BARADA KANTA SIRCAR, **14 C.L.J. 445=12 Ind. Cas. 780.** (35 C. 568, *F.*)

(86)—*Receiver—Order for discharge of receiver and rendition of accounts—Appeal—Civ. Pro. Code, s.* 588.—A suit during the pendency of which a Receiver had been appointed, was compromised, and the compromise was embodied in a decree of the High Court. Subsequently, one of the parties applied to the Subordinate Judge, asking for the discharge of the Receiver and for rendition of accounts, and it was ordered that "the Receiver be dismissed, and account be rendered to the decree-holder according to the compromise accepted by the Hon'ble High Court, and possession also be given." *Held* that no appeal would lie against such order. SANT SARAN DAS v. GULAB DAS, **A.W.N. 1903, 67.**

(87)—*S.* 503, *Civ. Pro. Code*, 1882 (*O.* XL, *rr.* 1 *to* 3, *present Code*)—*Receiver, liability of—*

Receiver—*continued.*

Extent—Accounts—Receiver's accounts—Application by receiver to pass his accounts—Practice and procedure.—A Receiver is responsible for all properties which come into his custody or management, and he is responsible, not only for actual sums received by him, but for those which might have been received by him but for his wilful neglect and default. (19 B. 660, *R.*) A Receiver's liability is not restricted to matters shown upon his accounts. The only question which properly arises on an application by a Receiver to pass his accounts is as to the items of that particular account, and involves the enquiry whether all his collections made on behalf of the property of which he is the Receiver, are duly entered in the accounts, and next, whether all his disbursements are payments properly made in respect of that estate. If there is any liability attaching to the Receiver, other than that which appears on the face of the accounts, the proper course is to sue the Receiver for the purpose of establishing that liability. Even where a *prima facie* case of the responsibility of the receiver for malpractices of his servants is made out, an inquiry into such mal-practices is foreign to an application to pass the Receiver's accounts. The objection that a Receiver has not included in his accounts collections made in the mofussil cannot be dealt with upon an application to pass his accounts. If a *prima facie* ground is made out of the accountability of the Receiver for the mofussil collections, the proper course is to either postpone the passing of the accounts, until the question of the Receiver's liability is established by suit, or to pass the accounts, reserving the rights of the parties to establish any claim they may make against the Receiver in a suit properly framed for the purpose. Questions with regard to the soundness or prudence of the system of management adopted by a Receiver, or charges of wilful default or neglect, are not matters that can be disposed of in the shape of exception to accounts. COOMAR SATTYA SANKAR GHOSAL v. RANEE GOLAPMONEE DEBEE, **5 C.W.N. 223.**

(88)—*Lease—Application to set aside—Summary jurisdiction*—Pro interessie suo—*Receiver's account—Action — Practice.*—No summary order can be passed to set aside a lease already executed and granted by a Receiver. The proper remedy of the aggrieved parties is to institute a regular suit to set aside the lease against the Receiver and also the lessee, if it is alleged that the lease was obtained by collusion. (15 C. 253, *D.*) No order can be made against a lessee from a Receiver for arrears of rent or interest in an application in a suit. A regular suit ought to be instituted to recover them. The claims against a Receiver for giving up arrears of rent or interest due under a lease granted by him, are matters which cannot be dealt with in an interlocutory application in the suit. *Quære.*—Whether the Court can go into such matters on the passing of the Receiver's accounts, or the parties must file a suit

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in respect of them against the Receiver. KRISTA CHANDRA GHOSE v. KRISTA SAKHA GHOSE, **12 C.W.N. 1023=36 C. 52=1 Ind. Cas. 470.**

(89)—*Receiver's application for leave to sue—Meaning and consequences—Suit by receiver for specific performance—Leave to sue.*—An application that the receiver in a suit should have leave to sue simply means this, that he should use the names of the owners of the property, and come into Court on their behalf, whether they consent to his doing so or not; and the consequence of such an order would be that the Court would compel the parties to the suit to abide by the result of the suit which the receiver was about to institute in their names, and would authorize the receiver to reimburse himself for the expenses of the proceedings in that suit out of the property of the owners. [*R.*, 11 C.W.N. 489 =6 C.L.J. 404; *D.*, 5 C.L.J. 270=34 C. 305.] Where a contract of sale of certain land in the possession of a receiver in a suit was made by the receiver in his own name and there was an order of the Court in the suit for the sale of the property, and the defendant who became the purchaser of a portion of it refused to take the land, alleging that it did not correspond in quality with the specification of it, and the Court gave the receiver leave to sue, a plaint, in a suit for specific performance of the contract of purchase, presented with the name of the receiver as co-plaintiff was admitted. WILKINSON v. GANGADHAR SIRKAR, **6 B.L. R. 486.** [*D.*, 5 C.L.J. 270=34 C. 305.]

(90)—*Receiver appointed by Court—Receiver's possession—Suits by and against Receiver.*—When a Receiver is appointed by the Court, his possession is the possession of the Court, and he cannot be interfered with, except with the leave of the Court (*Ex parte Cochrane*, L.R. 20 Eq. 282; *Russell* v. *East Anglian Railway Co.*, 3 Mac. & G 104; *Ames* v. *Trustees of Birkenhead Docks*, 20 Beav. 332, *R.*). *Semble.*—The Receiver can neither sue nor be sued without the leave of the Court. A. M. DUNNE v. KUMAR CHUNDRA KISOR, **7 C.W.N. 390=30 C. 593.** (10 C. 1014, *R.*)

(91)—*Leave to sue—Party to suit.*—When a Receiver has been appointed to a property, the leave of the Court should be taken to bring a suit in respect of it. But in a suit for declaration of title when the beneficial owner has been made a party, it is not necessary to join the Receiver. RODGER v. ASHUTOSH MUKERJI, **6 C.W.N. 829.** (5 C.W.N. xv, *Expl.* & *D.*)

(92)—*Suit by or against Receiver—Sanction of Court.*—The receiver of the High Court does not represent the owner of an estate. He is an officer of the Court, and as such cannot sue or be sued except with the permission of the Court. A.B. MILLER v. RAM RANJAN CHAKRAVARTI, **10 C. 1014.** [*F.*, 26 M. 492; *R.*, 14 C. 323, 30 C. 593; *D.*, 18 C. 477.]

(93)—*Calcutta Municipal Act (III of 1899, B.C.), ss. 320, 574—Receiver appointed by Court, whether owner of "premises" he is holding—Receiver—Leave of Court necessary before making him party to proceedings or suit.*—A Receiver appointed by the High Court is not the owner of the premises he holds as Receiver, with in the definition of the term "owner" in the Municipal Act. If he receives rent for such premises, he does not do so on his own account, or as agent or trustee for any person or society, or for any religious or charitable purpose, but as an officer of the Court and as manager of the property on its behalf. A Receiver appointed by Court cannot be made a party to any suit or proceedings without the leave of the Court appointing him. W. R. FINK v. THE CALCUTTA MUNICIPAL CORPORATION, **7 C. W. N. 706=30 C. 721.**

(94)—*Suit against—Leave to sue when to be granted.*—The consent of the Court to an action against a Receiver appointed by it is a condition precedent to the right of the party to sue. The mistake, in wrongly bringing a suit without such sanction, cannot be rectified by an application for permission to continue the suit. Where a suit has been instituted without such permission, leave to bring a fresh action against the Receiver in respect of the same cause of action cannot be granted, until the pending suit has either been dismissed or withdrawn. PROMOTHA NATH GANGULI v. KHETTRA NATH BANERJEE, **9 C.W.N. 247=32 C. 270.**

(95)—*Leave to sue the Receiver—When necessary.*—It is neither necessary nor desirable in every case to allow the Receiver to be sued as Receiver. But where any right is established by a decree in the suit to the property in the hands of the Receiver, then the person, in whose favour the right is declared, may apply to the Court, when it will make such order as is proper and direct the Receiver to satisfy the decree. ADMINISTRATOR GENERAL v. DASAI GOUNDAN, **9 M.L.T. 300.**

(96)—*S. 503, Civ. Pro. Code, 1882—Right of receiver, to sue in his own name—Practice.*—The Court has power to allow a receiver to sue in his own name, and if the order appointing the Receiver gives him such power in express terms, he may institute suits in his own name. The authority to give that power is conferred on the Court by s. 503, Civ. Pro. Code. WILLIAM ROBERT FINK v. MOHARAJ BAHADUR SINGH, **25 C 642=2 C.W.N. 469.** [*Rel. on*, 34 C. 305=5 C.L.J. 270.]

(97)—*Receiver's failure to collect amount—Negligence—Right of party aggrieved to sue—Receiver—Leave of Court.*—Plaintiff sued to recover a sum of money from a Receiver for failure to collect the amount by instituting suits within the period of limitation. *Held* that as a Receiver is but an officer of the Court, acting within the limits of the authority assigned to him and on behalf of the Court, the party feeling aggrieved by his conduct as Receiver should seek redress against him in the very proceeding in which he was appointed as

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Receiver, and any separate proceedings taken against him either in that Court or elsewhere should be with the leave of the Court under whose authority the Receiver was acting. No such leave having been obtained, the suit failed. KAMATCHI AMMAL v. SUNDARAM AYYAR, **26 M. 492.**

(98)—*Receiver—Funds in Receiver's hands—Attachment by one of several creditors—Priority—Leave of Court—Duty of Court.*—Where certain partnership funds are in the hands of a Court through its officer, the Receiver, a Court of equity will not allow one out of a whole body of creditors to gain priority over the remainder by the simple expedient of attaching the moneys in the Court's hands. Before any one can interfere with the possession of the Receiver by such attachment, the leave of the Court must first be obtained. That leave would never be given but on equitable terms, *i.e.*, such terms as would ensure equality between the creditors. No Court of equity would render any assistance to a creditor seeking by a side-wind, such as this, to gain an advantage over his fellow-creditors. J. KHAN v. ALLI MAHOMED HAJI UMER, **16 B. 577.** [*F.*, 21 C. 85; *R.*, 61 P.L.R. 1902, 27 B. 556=5 Bom. L.R. 529.]

(99)—*Party to suit, not compellable to give up possession to Receiver of High Court, in absence of order to such effect—Practice—Original side of High Court—Order of Court to party in possession to pay fixed occupation rent.*—In a suit instituted in the Supreme Court by K against B and others, the defendants were ordered by the Court to give up the portion of the real estate of one R to the Receiver appointed by the Court to the estate of R. The Receiver having subsequently brought a suit in his own name to recover certain property which he alleged to be part of the estate of the deceased R, the High Court *held* that, as the Receiver whose nomination had been continued by it, he was not entitled to seek immediate possession of the property and to sue in another Court by himself to receive possession of the property. It is a rule in the original side of the Court, which is taken from the practice of the English Court of Chancery, not to compel a party to a suit to give up to the Receiver possession of property unless an order of Court to that effect had previously been made upon him. In such cases the course is by proper proceedings taken in Court to fix an occupation-rent, and to order the party in possession to pay the occupation rent from the date of the order to that effect. RAM LOCHUN SIRCAR v. HOGG, RECEIVER OF THE ESTATE OF RAM CHUNDER HOLDAR, **10 W.R. 430.** [*D.*, 34 C. 305=5 C.L.J. 270.]

(100)—*Attachment—Collector retaining property as Receiver—Motion to get rid of attachment.*—The acts of a Collector done by him in his capacity of Receiver, in seizing and retaining certain property under his care, cannot be disputed by way of motion to discharge or get rid of the attachment. BISSESSUREE DEBIA v. SOOKRAM DOSS MOHUNT, **15 W.R. 347.**

(101)—*Party—When Receiver is a necessary party—Suit against Receiver—Permission of Court, whether condition precedent.*—Where property in the hands of a Receiver is intended to be affected by the result of the litigation, the Receiver is a proper and necessary party to the suit. (6 Ind. Cas. 214, 14 C.W.N. 653, *F.*; 10 C. 1014, 5 C.W.N. 15, 27, *D.*) The consent of the Court to an action against a Receiver appointed by the Court is not a condition precedent to the right of the party to sue, and the omission can be rectified by a subsequent application for leave to continue an action brought without such permission. (32 C. 270, 9 C.W.N. 247, *Diss.*) Where, therefore, a suit has been brought against a Receiver without the permission of the Court appointing him, it is open to the Court in which the suit has been brought to allow the plaintiff an opportunity to obtain the necessary leave and then to continue the suit. BANKU BEHARY DEY v. HARENDRA NATH MUKERJEE, **8 Ind. Cas. 1.**

(102)—*Receiver, if a necessary party to rent suit—Appointment of Receiver, if bars suit by creditor—Receiver how sued—Civ. Pro. Code (Act XIV of 1882), s. 32—Receiver appointed by another Court, if may be added as party by Court of its own motion.*—Where, during the pendency of a suit for rent under the Bengal Tenancy Act, a Receiver was appointed in respect of the entire property of the defendants by another Court, and the property for which the rent was claimed vested in him. *Held*, that the Receiver was a necessary party to the suit, and if he was not added with the permission of the Court which appointed him, the suit was liable to be dismissed. The appointment of a Receiver does not of itself debar a creditor of the person, over whose estate the Receiver has been appointed, from suing for his claim, provided that such suit does not in any way interfere with the possession or jurisdiction of the Court appointing the Receiver. But where property in the hand of the Receiver is intended to be affected by the result of the litigation, the Receiver is a proper and necessary party to such suit, by way of addition to and not in substitution for the parties primarily responsible. (10 C. 1014, 11 C.L.J. 489, 1 C. 403, 26 C. 157=3 C.W.N. 90, 10 C.L.J. 23, 31 C. 305=5 C.L.J. 270, *R.*) Where the plaintiffs refused to add the Receiver as a party with leave of the Court appointing him, although they had notice of such appointment. *Held*, that the Court was not bound, nor was it competent to it, to add the Receiver as a party, of its own motion, under s. 32, Civ. Pro. Code, as the leave of the Court appointing the Receiver was essential. But, as the point raised was of some novelty, and as a fresh suit by the plaintiffs might be barred by limitation, the High Court allowed the plaintiffs an opportunity of continuing the suit by taking steps to make the Receive a party,

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upon their paying all costs. JOTINDRA NATH CHOWDHURY v. SARFARAJ MIA, **14 C.W.N. 653=6 Ind. Cas. 24.**

(103)—*Suit in ejectment by Receiver under authority from Court—Decree binding upon the real party ascertained.*—When a Court appoints a Receiver in a suit and empowers him to sue in ejectment a person who is not a party to the suit, the necessary implication is that the Receiver as an official representative or trustee is to bring the suit for the benefit of the party who may ultimately appear to be entitled to the property and when the party entitled to the property has been ascertained the Receiver will be considered his Receiver. Where the official representative of an estate sues to recover possession of an estate while the true owner of it is being ascertained by proceedings duly instituted in a Court, any decree passed in favour of the official representative would be for the true owner when ascertained, though he was not a party to it and bind the other party to the decree. The same principle applies, if before the suit ends in a decree, the Receiver's office has come to an end; and the party ascertained has a right to step into the Receiver's place and to continue the proceedings. Where a suit in ejectment is instituted by the Receiver appointed by the Court, and the person beneficially interested in the suit is also a co-plaintiff, and the Receiver is at a subsequent stage of the proceedings discharged, the beneficially interested co-plaintiff can continue the proceedings: the joinder of the plaintiffs though not, strictly speaking, legal, does not constitute mis-joinder. MACLEOD v. KISSON, **6 Bom. L. R. 995=30 B. 250.**

(104)—*Sale by receiver—Party to conveyance—Sale by Court—Application to complete purchase.*—When a receiver in a suit sells certain property under an order of Court, inasmuch as he is in possession of the property, it is practically necessary that he should join in the conveyance. When, however, the sale is by the Court, the parties alone convey, and the officer of the Court does not join. [*Expl.*, 6 B.L.R. 448.] When the sale is by the Court, if the purchaser fails to complete, and the interference of the Court becomes necessary, one of the parties to the suit is the proper person to apply to the Court and put the Court in motion. The Registrar or officer conducting the sale on behalf of the Court never applies and is not entitled to apply. CHANDRANATH BISWAS v. BISWANATH BISWAS, **6 B.L.R. 492, Note.** [*R.*, 21 C. 479.]

(105)—*Receiver, leave to sue — Suit for possession.*—The receiver is not a necessary party to a suit for possession of immoveable property in his possession. KUMAR SUTTYA SUTTYA GHOSAL v. RANI GOLAP MONI DEBI, **5 C.W.N. 27.**

(106)—*Receiver, Application to sue—Suit for possession.*—If there is any question between the parties entitled to the property in the hands of a receiver, a decree in a suit between the parties can always be carried out against such property or any share therein, without making the receiver a party to the suit. SM. SARLA DASSI v. BHUBAN MOHAN NEOGI, **5 C.W.N. 27, Note.**

(107)—*Receiver—Appointment by Court—His rights and duties—Properties in the possession of third parties whose rights date prior to his appointment—No right to recover—Institution of suit—Permission of Court—Necessity—Civ. Pro. Code*, 1882, *s.* 503—*T. P. Act, s.* 53.—A receiver appointed by Court has no power to maintain a suit against the defendant for the value of goods which have been sold away prior to his appointment, by the judgment-debtor, on the ground that, under s. 53, T. P. Act, the sale is not binding on the creditors of the judgment-debtor. Under s. 503, Civ. Pro. Code (1882), when a person is appointed receiver of any moveable or immoveable property, he is entitled to take possession of it from the parties to the suit, to manage it, to realise its incomes and to continue in custody until discharged by the Court. His rights arise only on the date of his appointment and not before. He is not entitled to recover possession from a third party, stranger to the suit, whose rights date prior to his appointment. Nor does his appointment affect any rights previously acquired by third persons. (10 W.R. 430, 34 L.J. Ch. 607, 6 Ch. D. 291, *R.*) The ordinary rule is that the permission of the Court is necessary to entitle the receiver to institute suits. MAHAMAD KASIM SAHIB v. PANCHAPAKESA CHETTI, **35 M. 578=17 Ind. Cas. 233.**

(108)—*Receiver—Power to discharge and remove—No rules—Prayer to be put in possession of properties after discharging receiver—Rule of practice.*—There is no specific provision made in the Civ. Pro. Code for the discharge or removal of a receiver, and no provision to allow appeals in respect of orders of discharge and removal of receivers. The power to discharge and remove or to give directions to a receiver has been taken to be inherent in the Court which appointed the receiver, and the appellate Court has got all the powers of the original Court. A prayer for execution cannot be made to the appellate Court direct. The prayer in the petition to discharge the receiver and put the parties in possession has been treated as a prayer for appointment of the petitioners as receivers of the properties they claim possession of and was granted. SUBRAMANIA IYER v. MUTHULAKSHMIAMMAL, **M. W.N. 1912, 1208=17 Ind. Cas. 583.**

(109)—*Sanction of Court—Prosecution of receiver for ordinary criminal offence.*—The sanction of the Court appointing a receiver is not necessary in order to proceed against him for a breach of the ordinary Criminal law of the country, *e.g.*, defamation. NAGENDRA NATH v. JOGENDRA NATH, **15 Ind. Cas. 491.**

(110)—*Receiver—Leave to sue*—Ex parte *decree without such leave—Application to set aside.*—A Receiver is an officer of the Court appointing him and can only be sued with the

Receiver—*continued.*

leave of that Court. Any party proceeding against him without leave is in contempt of Court. A decree obtained against a Receiver sued without permission must be set aside. (10 C. 1014, *F.*) The fact that a Receiver, against whom an *ex parte* decree without obtaining the leave of the Court to sue him was passed, previously applied to have the *ex parte* decree set aside and for permission to defend the suit, does not debar him from attacking the decree as passed without leave of Court. BALTHAZAR AND SONS v. THE BURMA ENGINEERING AND TRADING CO., **17 Ind. Cas. 916.**

See ACT XX OF 1863, ss. 5, 14, 8 C.W.N. 404.

See BEN. ACT VII OF 1876, ss. 42, 78, 2 C. W.N. 493.

Rent suit by—Maintainability—*See* BEN. ACT VIII OF 1885, ss. 15, 16, 17, 7 Ind. Cas. 761.

Suit against receiver—Leave to sue whether necessary—*See* MAD. ACT VIII OF 1865, s. 85, 17 M.L.J. 483=30 M. 505=3 M.L.T. 7.

Mortgage by residuary legatee—Administration, subsequent, of testator's estate—Receiver of testator's estate pending administration—Sale by receiver before completion of administration—*See* ADMINISTRATION SUIT, 5 C.W. N. 408.

Administration suit—Discharge of receiver before completion of administration decree—*See* ADMINISTRATION SUIT, 5 C.W.N. 417.

Accretions to property if vest in — *See* ALLUVION — MISCELLANEOUS, 14 C.W.N. 681=6 Ind. Cas. 177=11 Cr. L.J. 288.

Appointment of—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 13 C.L.J. 507.

Application to appoint — Powers of High Court — *See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C.L.J. 326 =7 Ind. Cas. 452.

See APPELLATE COURT—OBJECTION FIRST TAKEN IN APPEAL, 12 W.R. 117.

Attachment — Of High Court, property in hands of—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 1 C. 403.

Appointment of, for execution of decree—Appointment when effective—Appeal—*See* CIV. PRO. CODE, 1908, ss. 47, 51, O. XL, r. 1, 14 C. L.J. 489.

Application for execution against—Leave of Court subsequent to application—Validation—*See* CIV. PRO. CODE, 1908, ss. 73, 115, 14 C.L. J. 50.

Suit for a scheme of management of a temple and for appointment in the meanwhile of a receiver—Power of Court to appoint receiver—*See* CIV. PRO. CODE, 1908, ss. 92, 93, O. I, r. 8 (1), O. XL, rr. 1, 2, 3, 4 M.L.T. 88.

Receiver—*continued.*

Possession of—Effect of — *See* CIV. PRO. CODE, 1908, O. II, rr 3,6,7, 2 C.L.J. 602.

Suit by receiver for debt due to a person—Right to set up defence of set-off—*See* CIV. PRO. CODE, 1908, O. VIII, r. 6, 17 M.L.J. 481.

See CIV. PRO. CODE, 1908, O. XXI, r. 46, 2 B. 553.

Injunction, temporary—Procedure in respect of application for injunction—Appointment of—*See* CIV. PRO. CODE, 1908, O. XXXIX, r. 1, 5 O.C. 65.

See CLAIM TO PROPERTY ATTACHED, 9 A. 232=A.W.N. 1887, 20.

See DECREE—DECREE, FORM OF, 26 C. 441=3 C.W.N. 139, 20 M. 313.

See EXECUTION OF DECREE—MODE OF EXECUTION, 7 C. 61.

Mortgage decree—Execution—Properties in the hands of the—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 26 C. 127= 3 C.W.N. 90.

See EXECUTION OF DECREE—PRIVY COUNCIL, EXECUTION OF ORDERS AND DECREES OF, 15 M. 203=2 M.L.J. 1.

See INJUNCTION — INJUNCTION UNDER CIV. PRO. CODE, 6 W.R. Mis. 1.

Distinction between grant of temporary injunction and of appointment of receiver—*See* INJUNCTION—INJUNCTION UNDER CIV. PRO. CODE, 22 C. 459.

Appointment of, when to be made—Injunction when to be granted—*See* INJUNCTION, SPECIAL CASES, 13 C.L.J. 394.

Duty of, to pay off mortgage—Secured and unsecured creditors — *See* INSOLVENCY — INSOLVENCY UNDER CIV. PRO. CODE, 7 B. 455.

See LETTERS OF ADMINISTRATION, 3 C. W.N. 186=23 B. 549, P.C.

See LETERS PATENT, HIGH COURT, 1865 —CALCUTTA, s. 15, 5 C.W.N. 781.

See LETTERS PATENT, HIGH COURT, 1865 —MADRAS, s. 15, 24 M. 511.

Appointment of receiver—Injunction against defendant—Partner collecting partnership debts —*See* LIMITATION ACT, 1908, s. 15, 8 M. 229.

Acknowledgment by—Effect of, on limitation —*See* LIMITATION ACT, 1908, ss. 19, 14, 10 C.W.N. 959.

Payment out of Court of money collected by Receiver—Step-in-aid of execution—*See* LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 22 M. 448.

Agreement interfering with work of—Enforceability—Public policy—*See* MAHOMEDAN LAW—WAKF, 16 C.W.N. 114.

See MANAGER—OF ATTACHED PROPERTY, 19 W.R. 37.

Receiver—*concluded.*

Appointed in mortgage suit — Decree for mesne profits against mortgagor—Execution of decree —Receiver, when a necessary party—*See* MESNE PROFITS—MODE OF ASSESSMENT, 9 C.L.J. 23=2 Ind. Cas. 958.

Examination of account of—Interlocutory order—Appeal—Duties of mortgagee as— *See* MORTGAGE—GENERAL, 6 Ind. Cas. 323.

Mortgage of joint-property executed by, attaching creditors of the property, if entitled to priority over—*See* MORTGAGE—GENERAL, 33 C. 1175.

Application for order absolute—Appointment of, in mortgage suits—Examination of accounts of—Interlocutory order—Appeal—*See* MORTGAGE-GENERAL, 13 C.L.J. 459.

Insolvency of mortgagor — Appointment of receiver — Foreclosure proceedings without notice to receiver, validity of—*See* MORTGAGE —FORECLOSURE, 2 C.P.L.R. 90.

Property of insolvent subject to mortgage—Purchase of property at sale by—Mortgagee's rights when and how far affected—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 12 B. 272.

See PRACTICE AND PROCEDURE, 21 C. 479.

Persons not parties to suit, wherein a—is appointed. application of—Practice of Court—*See* PRACTICE AND PROCEDURE, 17 C. 285.

Sale by—Right of pre-emption — *See* PRE-EMPTION—SUBJECT OF PRE-EMPTION, 46 P. R. 1909=72 P.L.R. 1909=41 P.W.R. 1909=1 Ind. Cas. 474.

Appointment of — Powers of—Subsequent rent decree obtained by owner—Application by, for review—Powers of Court—*See* REVIEW—GENERAL, 11 Ind. Cas. 102.

See RIGHT OF SUIT—CONTRACTS, SUITS ON, 30 C. 696.

Duly appointed by Court—Right to maintain suits for rent due—Interest—*See* RIGHT OF SUIT—LANDLORD AND TENANT, SUITS CONCERNING, 6 M.H.C. 363.

See SPECIFIC PERFORMANCE, 9 B.L.R. 128.

Appointed to take possession—Whether bound to take out certificate—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 6 Ind. Cas. 416=12 C.L.J. 52=37 C. 754.

Court's power to appoint—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 6 and 67, 2 M. L.T. 167=17 M.L.J. 201=30 M. 255.

Receiving Appeal.

(1)—*Act* VII *of* 1868, *ss.* 5, 7—"*Receiving,*" *meaning of.*—An appeal was received by the clerk of the Court and sent to the Commissioner, who rejected the appeal without calling the appellant, and without fixing a time for hearing the appeal. *Held* that the Commissioner was bound

Receiving Appeal—*concluded.*

to proceed under s. 7 of Act VII of 1868 and fix a day for hearing the appellant as the appeal must be held to have been received by the Commissioner under s. 5, inasmuch as it had been received by the clerk of the Court, registered and sent to the Commissioner. BULUB DASS v. SOOLTAN MOHOMED, **3 P.R. 1871.**

Receiving Officer.

Receiving officer, declining to accept the nomination paper of a candidate for counsellorship of a Municipality—Suit against the Municipality for declaration that he was entitled to come forward as a candidate and for injunction to prevent the Municipality from carrying on the election without accepting plaintiff as a candidate—*See* SPECIFIC RELIEF ACT, 1877, ss. 42, 45, 8 Bom. L.R. 209=30 B. 409.

Recitals.

(1)—*In mortgage-deeds—Effect of.*—Recitals in mortgage-deeds and in petitions sent to officials that certain property has been transferred, could not effect a transfer of such property. IMMADIPATTAM THIRUGNANA v. PERIYA DORASAMI, **5 C.W.N. 217=28 I.A. 46=24 M. 377, P.C.=7 Sar. 811.** [*R.*, 26 M. 339, 2 Ind. Cas. 18.]

In document—*See* ADMISSION — MISCELLANEOUS, 6 C.L.R. 12, P.C.=6 I.A. 110.

Bond—Recital as to receipt of consideration —Onus—*See* BURDEN OF PROOF — DOCUMENTS RELATING TO LOANS, SUITS RELATING TO, 4 B.L.R. F.B. 54=12 W.R. 25.

See BURDEN OF PROOF — DOCUMENTS RELATING TO LOANS AND SUITS, RELATING TO, 1 B.L.R. A.C. 92=10 W.R. 132, 10 W.R. 407.

See CONSIDERATION, 99 P.R, 1867, 31 P.R. 1868, 41 P.R. 1868.

Value of—*See* CONTRACT ACT, 1872, s. 25, cl. (3), 7 M.L.T. 81=5 Ind. Cas. 754=33 B. 159.

Of sale—Conveyance—Stamp duty—*See* CONVEYANCE, 23 C. 283.

See DEED—CONSTRUCTION OF DEEDS, 2 M. 239, P.C.

See ENHANCEMENT OF RENT—ENHANCEMENT. EXEMPTION FROM, 1 B.L.R.S.N. 18-*a* =10 W.R. 246.

See EVIDENCE—MISCELLANEOUS, 6 C. 268=7 C.L.R. 6.

In a deed no evidence of contents—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 9 Ind. Cas. 56.

Perpetuities—Recital in will indicating intention to create perpetuity—Valid trusts—*See* HINDU LAW—WILL, 7 C.L.R. 241.

See INSOLVENCY—GENERAL, 20 B. 636.

See LIMITATION ACT, 1908, s. 19, 9 P. R. 1897.

Recitals—*concluded.*

See MESNE PROFITS—RIGHT TO MESNE PROFITS, 6 W.R. 297.

In deed—Pardah lady—Strangers not affected by recital—*See* PARDANASHIN WOMAN, A.W.N. 1887, 69.

Evidence—Recital in decree between other parties—*See* POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 2 B L.R. App. 8=10 W.R 477.

In deed of payment of consideration, effect of—*See* SPECIFIC RELIEF ACT, 1877, s. 21, 8 O.C. 5.

Reciting Texts.

Exclusive right of—*See* INJUNCTION—GENERAL, 7 Ind. Cas. 558=8 M.L.T. 379.

Reclamation.

(1)—*Reclamation of Khar lands.*—Reclamation means, in the case of submerged or overflowed land, the rescuing of it from being submerged. The rendering it fit for cultivation is not the original meaning in regard to the submerged land. That would be its meaning in regard to the reclamation of unarable land. SHAMRAO v. SECRETARY OF STATE, **2 Bom. L.R. 499=25 B. 32.**

Reclamation lease.

Partial eviction—Applicability of doctrine of suspension of entire rent to case of—*See* LANDLORD AND TENANT—MISCELLANEOUS, 11 C.L.J. 591=6 Ind. Cas. 478.

Recognized Agent.

See CIV. PRO. CODE, 1908, O. III.

(1)—*Person duly empowered as agent to be regarded by Courts as recognised agents.*—A person, who has been duly empowered to represent another in all Courts, must be regarded by the Courts as the recognised agent of that other, unless it is shown that he is an unfit person. SRAWAN KURMI v. MT. RUKMA, **4 C.P.L.R. 38.**

(2)—*Want of education no bar to recognition as agent.*—Want of education is not a ground for refusing to admit a person as a recognised agent. The agent is not required to argue the case as a lawyer. His function is to appear for his principal and do such acts as his principal is authorised to do. MT. BARI BAYA v. MT. GOURA KALARIN, **4 C.P.L.R. 45.**

(3)—*Recognised agent—Act* VIII *of* 1859, *s.* 17, *cl.* 2.—All that a recognised agent can do under the section is to file applications or to enter appearance on behalf of the principal, but there is nothing in either of these two privileges which would entitle him to institute or defend a suit, as plaintiff in the one case or as defendant in the other. The professed gomashta of a firm, which is no longer in existence, cannot be regarded as the recognised agent of the firm. That the members of the firm have still to collect their dues or to pay their

Recognized Agent—*concluded.*

liabilities, does not alter the fact of the non-existence of the firm. MOKHA HURRUCKHRAJ JOSHEE v. BISSESSUR DOSS, **13 W. R. 344.**

(4)—*Recognized agent—Suit by or against, in his own name.*—A recognised agent cannot prosecute or defend a suit in his own name. An objection on this ground is not a mere technical one. ABDUL KARIM v. PANA MUSTAN, **1 L.B.R. 191.** (5 B.L.R. App. 11, *F.*) [*D.*, L. B.R. 1907—1908, 95; *R.*, L.B.R. 1907—1908, 284.]

(5)—*Notice, Service of—Recognized agent—Duty of Court—Mooktear.*—It is the duty of the Court to see that notice is served on the right person, and it ought not to be satisfied with the mere return of service. So, it was held that a mere *mooktear* was not the recognised agent of a judgment-debtor on whom notice can be rightly served under the Civil Procedure Code. KRISTO CHUNDER GOOPTO v. FUZUL ALI KHAN, **17 W.R. 389.**

See CIV. PRO. CODE, 1908, O. III, r. 1, s. 85, O. III, rr. 2, 3, O. XXVII, r. 2, 5 B. L.R. App. 11=13 W.R. 345.

Recognised agent conducting suit and appeal without objection—Right as agent, to execute decree—Objection to agent's authority raised for first time in execution proceedings—*See* CIV. PRO. CODE, 1908, O. III, r. 2, 12 B. 68.

Suit by or against a prince—Recognised agent—*See* CIV. PRO. CODE, 1908, O. VI, rr. 14 and 15 (1), s. 85, 54 P.L.R. 1902=41 P.R. 1902.

See LIMITATION ACT, 1908, ss. 4, 5, 4 O.C. 303.

Record.

(1)—*Papers without mark of authenticity—Courts to decline to accept.*—Courts are not to accept papers as authenticated papers of the record where they bear no sort of marks of authenticity about them, no signature, no seal and so on. Otherwise a wide door will be opened to fraud and the interests of no one would be safe, because an order alleged to have been an order of a Judge of the Court may at any time be produced unsigned and not authenticated, relying on the custom of the Court as showing that the orders of the Judge were habitually left unsigned. ROSSOOL MAHOMED v. BASSOO BEWAH, **8 W.R. 163.**

(2)—*Entire records not come up before High Court—Procedure—Direction to lower Court to take further evidence—Final disposal by High Court.*—In this case, the entire records required for the appeal were not forthcoming, and the High Court, desiring not to delay the case any longer, ordered that whatever papers had been sent up to the High Court from the Collectorate should be returned along with the papers that the parties had filed in the High Court, with a direction to the Collector to summon both

Record—*concluded.*

parties, and to take such further evidence as either of the parties may adduce in support of the case and to return such evidence with his opinion in order to enable the High Court to finally deal with and dispose of the case. BUNWARRY LALL v. MR. JAMES FURLONG, **8 W.R. 38.**

(3)—*Act* VIII *of* 1859, *s.* 138—*Act* X *of* 1877 *s.* 137—*Records sent for—Discretion of Court* — A Court has no discretion to refuse to send records which have been sent for by another Civil Court under s. 138 of Act VIII of 1859. *In re* GOLAP COOMARY DOSSEE v. RAJAH SOONDUR NARAIN DEO, **4 C L.R. 36.**

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 7 B L.R. App. 61.

Lost—Burnt—Re-construction of lost record —Execution of decree—*See* EXECUTION OF DECREE—MISCELLANEOUS, 11 C.L.J. 243 = 5 Ind. Cas. 660.

See POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 4 B.L.R. App. 21.

Appeal to Privy Council—Preparation of—Practice—*See* PRIVY COUNCIL, PRACTICE OF —MISCELLANEOUS, 20 M. 395, P.C. = 24 I.A. 194.

See REMAND, A.W.N. 1888, 117.

Translation of—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, A.W.N. 1886, 167.

Records, Destruction of.

(1) *Appeal—Records destroyed—New trial.*—The mere fact that the the record was accidentally destroyed in the interval between the original hearing of a case and the appeal cannot give the appellant a right of re-trial. It is open to a Court of Appeal to try the case upon any materials proved to have been used at the hearing in the first Court, but it is for the appellant to put those materials before the Court. HAR KUMAR PAL CHOWDRY v. SHEIKH ASIATULLAH, **3 C.W.N. 150.**

Recorders' Courts' Burma Act.

See BUR. ACT XXI OF 1863.

Recorder's Court in British Burma.

See RANGOON SMALL CAUSE COURT, 6 B.L.R. 196 = 14 W.R. 331.

Recorder of Moulmein.

(1)—*Decree of Assistant Commissioner—Execution—Recorder's Court at Moulmein.*—The Court of the Recorder of Moulmein has no jurisdiction to issue execution upon a decree made by the late Court of the Town Assistant Commissioner. *In the matter of* KYANPETTEE OF MOULMEIN v. NGA SHA LAW, **14 W. R. 386.**

(2)—*Charter Act,* 24 *and* 25 *Vict.,* c. 104, s. 15 — *Superintendence of High Court over Recorder of Moulmein—Act* XXI *of* 1863—

Recorder of Moulmein—*concluded.*

Power of Recorder to license advocates —The Charter Act, 24 and 25 Vict., c. 104, s. 15, has distinctly made the Court of the Recorder of Moulmein established under Act XXI of 1863, subject to the superintendence of the High Court, and so has rendered it incumbent on the High Court and given it power to take care that all the acts of the Recorder of Moulmein done in his capacity of Recorder be done regularly and according to law. The fact that the High Court does not possess appellate jurisdiction over all classes of cases tried in the Recorder's Court, and that the Privy Council shares with the High Court appellate jurisdiction over the Recorder's Court does not remove the Recorder's Court from the operation of s. 15 of the Charter Act. [*F.*, 27 B. 575 = 5 Bom. L.R. 562 ; *R.*, 20 B. 480, F. B.] The granting or withdrawing of a license to practice as a pleader in the Small Cause Court of Moulmein in such an exercise of the power and authority possessed by the Recorder as will come under the superintendence of the High Court. The authority thus given to the Recorder is part of his authority as Judge of the Recorder's Court and it is bestowed upon him simply with the view to enable him the more effectively to administer justice in the Court over which he presides. *In the matter of* JOHN THOMPSON, **6 B L R. 180 = 14 W.R. 257.**

See BUR. ACT XXI OF 1863, 6 B.L.R. App. 15.

Reference to High Court by Recorder of Moulmein—Questions in execution of decree—*See* BUR. ACT XXI OF 1863, ss. 22, 23, 25, 4 B. L R. A. C. 50.

See PARTIES TO SUIT—ADDING PARTIES TO SUITS, 10 W.R. 86.

Recorder of Rangoon.

(1)—*Jurisdiction—Cause of action—Dwelling place of defendant.*—The Court of the Recorder of Rangoon has no jurisdiction in cases in which the cause of action has arisen within the local limits of the jurisdiction of the Court, but the defendant does not, at the time of the commencement of the suit, dwell within those limits. ANONYMOUS, **18 W.R 397.**

(2)—*Order of Recorder of Rangoon — Final decree—Original civil jurisdiction.*—An order of the Recorder of Rangoon rejecting an application for probate is a final decree passed by him in the exercise of original civil jurisdiction. ESOOF HASSHIM BOOPLY v. FATIMA BIBI, **24 C 30 = 1 C W.N. 8.**

Appeal from—*See* BUR. ACT XVII OF 1875, s. 49, 14 C. 351.

Decision of various High Courts conflicting — Position of the Recorder—*See* BUR. ACT XI OF 1889, s. 42, 25 C. 488 = 1 C.W.N. 172.

Final decree passed by Recorder of Rangoon in exercise of original civil jurisdiction, appeal from—Subject matter exceeding appealable amount—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 24 C. 30 = 1 C.W.N. 8.

Recorder of Rangoon—*concluded.*

See CIV. PRO. CODE, 1908, s. 16, 20 C. 689.

See LIMITATION ACT, 1908, art. 156, 13 C. 221.

Record-of-Rights.

(1)—*Entry in record-of-rights — Whether amounts to trust—Purchaser without notice.*—An entry in a village record-of-rights, caused by the recorded proprietors of a share to be made therein, to the effect that a certain person claimed a portion of such share, and that they were willing to admit his right, whenever he paid them a certain amount of money, does not amount to a declaration of trust in favour of such person, and cannot be regarded as evidence of any such trust. Even if it could be held to be a trust, the property cannot be followed in the hands of a purchaser for value without notice. KAMAL SINGH v. BATUL FATIMA, **2 A. 460**. [*R.*, 9 A. 97=A.W.N. 1886, 303.]

(2)—*Entry in, effect of—Possession, suit for —Limitation.*—The only effect which can be attributed to an entry in the Record of Rights is that it is to be presumed correct till the contrary is proved. The Bengal Tenancy Act does not lay down that the entry is to be taken as conclusive upon the question of title, till a contrary decision has been given by the Civil Court. Hence the plaintiff is not bound to bring a suit for possession within one year from the date on which the entry of the defendant's name was made in the Record of Rights. RAM SAHAWAN MISSER v. BACHU MISSER, **6 C L.J. 670**. (11 C W.N. 48, 30 C. 20, *R.*; 25 B. 337=27 I.A. 215, *Expl.*)

(3)—*Maurasi right, meaning of — Suit for ejectment of tenant-at-will—Correcting entry in Record-of-Rights—Limitation—Limitation Act (XV of 1877), sch. II, art. 120—Presumption—Correctness of Record of-Rights—Whether presumption becomes final—Homestead land—Right of occupancy.*—A maurasi right is not necessarily anything more than an ordinary occupancy right. A suit for ejectment, on the ground that the defendant was a tenant-at will, cannot be regarded as a suit for correcting the Record-of-Rights, and may be brought after six years of the final publication of the record. Under the Bengal Tenancy Act, an entry in the Record of-Rights must be presumed to be correct until the contrary is shown. But it is not the law that this rebuttable presumption becomes final and conclusive after six years. *Obiter dicta* :—A raiyat cannot acquire rights of occupancy in homestead land if it was originally taken for the purpose of constituting his homestead. But if originally he had taken a large holding for agricultural purposes and had merely devoted a particular portion to the building of his homestead, he would be entitled to acquire rights of occupancy in that portion as well as in the rest of his holding. MINAI NAIK v. BANCHANIDHI SAHU, **9 Ind. Cas. 804**. (8 W.R. 250, 24 W. R. 402, *R.*)

Record-of-Rights—*continued.*

Entry in—Effect of—*See* BEN. ACT XVI OF 1869, 4 C.W.N. 257.

Suit to correct entry—Presumption—*Onus* —Enhancement of rent—*See* BEN. ACT VIII OF 1885, ss. 29 (*b*), 103-B, 13 C.W.N. 181=4 Ind. Cas. 577.

Suit for correction or alteration of—Maintainability—*See* BEN. ACT VIII OF 1885, ss. 50, 111, 111-A, 5 Ind. Cas. 266.

See BEN. ACT VIII OF 1885, ss. 55 105, 106, 108, 21 C. 521.

Application to settle rent of land—Application by party concerned and not by Government—Settlement officer, jurisdiction of—*See* BEN. ACT VIII OF 1885, ss. 101 to 107, 9 C.W. N. 504=1 C.L.J. 239=32 C. 518.

Preparation of—Under Ben. Act VIII of 1885 —Revenue officer, power of—*See* BEN. ACT VIII OF 1885, s. 102, 21 C. 38, F.B.

Final publication of—Under s. 103-A (2) of the Bengal Tenancy Act, effect of — *See* BEN. ACT VIII OF 1885, ss. 103-A., 104-E, 104-H, 111-A, 3 C.L.J. 133.

Entry in — Presumption—Entry based on *chitti bandobasti*, if to be proved—*See* BEN. ACT VIII OF 1885, s. 103-B, 9 C.L.J. 284=4 Ind. Cas. 54.

Suit to correct or alter entries in—Not maintainable—Recourse to be had to special remedy provided in Ch. X, Bengal Tenancy Act—*See* BEN. ACT VIII OF 1885 (BENGAL TENANCY), ss. 103 (*b*), 105, 106, 108, 12 C.W.N. 1032=8 C.L.J. 322=35 C. 1013.

See BEN. ACT VIII OF 1885, ss. 103, 111, 28 C. 28.

Power of Revenue officer to make survey and prepare—Without order of Government—*See* BEN. ACT VIII OF 1885, ss. 104 to 108, 117 118, 119, 145, 158, 189, 30 C. 339=7 C.W.N. 33.

See BEN. ACT VIII OF 1885, ss. 105, 106, 28 C. 471=5 C.W.N. 798.

Application to correct entry made before amending Act of 1898 of Bengal Tenancy Act, 1885—Reference to Civil Court under amending Act valid, though proceedings commenced prior to passing of amending Act — *See* BEN. ACT VIII OF 1885, s. 106, 12 C.W.N. 987.

See BEN. ACT VIII OF 1885, ss. 106, 108-B, 24 C. 462, F.B=1 C.W.N. 294.

See BEN. ACT VIII OF 1885, ss. 106 and 108 (3), ch. X, 22 C. 477.

Effect of entry in—as to rate of rent on question of *res judicata*, where rate of rent had been determined in a rent-suit—*See* BEN. ACT VIII OF 1885, ss. 107, 109, 32 C. 336=9 C.W. N. 610=1 C.L.J. 134.

See BEN. ACT VIII OF 1885, ch. X, 6 C.W. N. 914.

Record-of-Rights—*concluded.*

Entry in—Presumption as to correctness of entry—*See* C. P. ACT XVI OF 1889, s. 72, 10 C.P.L.R. 33.

See C.P. ACT XVI OF 1889, s. 83, 10 C.P. L.R. 33.

Entries in—Annual records—*See* PUN. ACT XVII OF 1887, 11 P.R. 1901, Rev.

See PUN. ACT XVII OF 1887, ss. 36, 3 (2) and 32, 7 P.R. 1895, Rev.

An entry in the—with regard to payment of rent cannot be altered during mutation proceedings — *See* PUN. ACT XVII OF 1887, s. 37, 4 P.R. 1905 (Rev.) = 58 P.L.R. 1906.

Presumption as to correctness of entries in record of rights—Rebuttable presumption—*See* PUN. ACT XVII OF 1887, s. 44, 13 P.L.R. 1903.

Entry in—of a certain person as tenant—Such person not precluded from proving he is a proprietor—*See* ATTESTATION, 2 N.L.R. 65.

See CUSTOMS—PUNJAB—GENERAL, 8 P. R. 1892.

See ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT OF, 9 P.R. 1888, Rev.

Of later date—Public document—Effect of omission of entry—*See* EVIDENCE ACT, 1872, s. 35, 25 A. 90 = A.W.N. 1902, 207.

See JAGHIR, 4 P.R. 1888, Rev.

Stipulations in Record-of-rights — *See* MAHOMEDAN LAW — PRE-EMPTION, NATURE AND EXTENT OF RIGHT, 1 A. 207.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, 2 A. 631.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 20 A. 92 = A.W.N. 1897, 202.

Record of Suit.

What—ought to contain, when one party to a suit agrees to abide by the oath of his opponent—*See* OATH, 8 O.C. 11.

Record Room Contingencies.

This circular declares that annual bills of record-room contingencies were superseded by detailed monthly bills. **Rev. Cir. No. 1, 25 W. R. Rev. Cir. 6.**

Recovery of Debt.

(1)—*Suit to recover debt, nature of right.*—The right to sue to recover a debt is in the nature of a common law right, and, unless it is taken away either expressly or by necessary implication, it must be treated as subsisting. KOTHANDAPANI v. SOMASUNDRAM, **15 M. 97.**

Recovery of Money.

(1)—*Paid in consideration of marriage which had not been performed, suit for.*—*Held*, that an action would lie for recovery of money paid in consideration of a marriage which had not been performed. RAMAI v. CHEDI, **3 O.C. 241.**

Recovery, Public Demands Act.

See BEN ACT VII OF 1880.

Rectification of Instrument.

Mistake when ground for—*See* CONTRACT—GENERAL, 16 C.W.N. 225.

Mortgage-bond — Mistake unilateral, suit for—Not maintainable—*See* SPECIFIC RELIEF ACT, 1877, s. 31, 8 O.C. 1.

By insertion of a clause deliberately agreed to be omitted—*See* SPECIFIC RELIEF ACT, 1877, s. 31, 2 N L R. 49.

Recusant Witnesses Act.

See ACT XIX OF 1853.

Reddi.

Hindu Law—Succession—Custom of—Caste—Legality of practice of constituting son-in-law heir to property of father-in-law—Right to disinherit heir in favour of son-in-law—*See* HINDU LAW—CUSTOM, 1 M.H.C. 51.

Custom of—Caste—*See* HINDU LAW—CUSTOM, 4 M. 272.

Redemption.

See LIMITATION ACT, 1908, ART. 148.

See MORTGAGE—REDEMPTION.

(1)—*Conditional sale--Absolute sale--Evidence.*—The evidence to show that a sale of land was not intended to operate as a sale or to show that there was a separate agreement that redemption should be allowed must be clear. Burmans in most parts of Lower Burma are well aware, of the difference between a sale outright and a mortgage or conditional sale. MAUNG SHWE KYAW v. MAUNG PYU, **L. B. R. 1893—1900, 499.**

(2)—*Of land, suit for—Rent—Sale—Mortgage*—Res judicata.—Where one of the issues framed in a rent suit was whether there was a mortgage, and the Judge without deciding the point found merely that the defendant did not agree to pay rent such finding is no bar to a subsequent suit for redemption. MAUNG SHWE VA v. MA TAIR, **L.B.R. 1893—1900, 544.**

(3)—*Buddhist law—House and land acquired during marriage with first wife and redeemed by second wife with her separate money—Separate property—Property acquired during second marriage—Shares, respective, between children of the first and second marriage—Attachable interest of children.*—Where a house with its site was acquired during the marriage with a first wife *held*,—that redemption of the same by the second wife with her separate money did not justify the conclusion that it become the separate property of the second wife so as to constitute it as property acquired during

Redemption—*concluded.*

the second marriage, it never lost its original character, but continued to be property acquired during the first marriage. On the death of the second wife it was divisible into four shares, of which the children by the first wife will take three and the children by the second wife will take one. The interest of the children in the house and ground was attachable. MAUNG MYAT KAUNG v. MA CYAING, **L.B.R 1893—1900, 534.** [*Cited*, L.B.R. 1893—1900, 548; *R.*, 4 L.B.R. 110.]

Right of—*See* BUDDHIST LAW—GENERAL, L.B.R. 1872—1892. 78.

See BURDEN OF PROOF — MORTGAGE, 1 L.B.R. 215.

Decree for redemption of mortgage conditional on payment of certain sum—Appeal by mortgagor—Court-fee on memo of appeal—*See* COURT FEES ACT, s. 7 (IX), 13 A. 94 = A.W.N. 1890, 231.

Claim for rent in suit for—Distinct causes of action—Court-fee on appeal—*See* COURT FEES ACT, 1870, s. 17, 16 M. 415.

Suit in ejectment—Court's power to pass decree for—*See* DECREE—DECREE, FORM OF, 20 B. 196.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 23 M. 521 = 10 M.L.J. 145.

See MORTGAGE—FORM OF MORTGAGES, L. B. R. 1872—1892, 549.

Mortgagor's right to redeem—Right of—Of auction-purchaser at revenue sale—Mortgagee—Purchaser's right on failure to redeem—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY. 15 C. 546.

References by Mufassil Small Cause Courts Act.

See ACT X OF 1867.

Reference to Arbitration.

See ARBITRATION.

See AWARD.

See CIV. PRO. CODE, sch. II.

(1)—*Reference to arbitration—Agreement in writing—Civ. Pro. Code*, 1877, *s.* 523—Where an agreement executed by the plaintiff and one of three defendants empowering an arbitrator to settle certain accounts relating to the dealings between the plaintiff and the other two defendants who were no parties to the agreement was sought to be filed in Court by the plaintiff under s. 523, Civ. Pro. Code, 1877, *held* that, since the agreement was only between the plaintiff and one of the defendants, neither of whom professed to make or execute the agreement on behalf of any person other than himself, it cannot be said that the person who made the application under s. 523, Civ. Pro.

Reference to Arbitration—*continued.*

Code, 1877, and the person against whom it was sought to enforce the agreement, had "agreed in writing" within the meaning of that section. JAI SINGH v. KISHEN SINGH, **17 P.R. 1880.**

(2 & 3) *-Reference to arbitrators--Award--Power of Court to vary arbitrator's order.*—Where, in a suit brought *in forma pauperis* the points in issue were referred to arbitrators who, in their award, directed that each party should bear its own costs, and the Court varied the arbitrators' order by making an additional order that the defendant and the plaintiff should, as regards the Government, each pay half the amount of the Court-fees, *held* that the order of the Court making the defendants liable was in conflict with the award of arbitrators and was made in excess of the Court's jurisdiction. MIR MAHOMED v. MUSSAMMAT KHAIR-UL-NISSA, **19 P.R. 1880.** [*R.*, 91 P.R 1888.]

(4)—*Civ. Pro. Code (Act X of 1877), s. 506—Arbitration, reference to—Co plaintiff not being party to reference—Application by or in presence of co plaintiff—Effect.*—An application purporting to be made on behalf of both the plaintiffs and of the defendant, for an order of reference to arbitration in a case, is an application in writing within the meaning of s. 506 of the Civ. Pro. Code, although it is not subscribed by a co-plaintiff; and if such application is presented by the other parties in his presence or by himself, he cannot afterwards question the decree based on the award of arbitrators appointed under the above order of reference. NEK MAHOMED v. AHMAD ALI, **53 P.R. 1880.** [*F.*, 33 P R. 1881; *R.*, 109 P.R. 1883.]

(5)—*Award of arbitrators — Judgment in terms of award of majority—Appeal—Civ. Pro. Code (Act X of 1877), s. 522.*—An order in appeal based on the award of the majority of the arbitrators, and reversing the finding of the first Court upon the misconduct imputed to the umpire, is appealable. The provisions in the last sentence of s. 522 of Act X of 1877 apply only to a decree which follows upon a judgment passed according to an award upon a reference made by the Court which passed the judgment. MUSSAMMAT BANO v. NASAR, **5 P.R. 1880.** (5 B L.R. App. 77, *R.*)

(6)—*Civ. Pro. Code*, 1882, *ss.* 506, 508—*Reference of the whole matter in difference in a particular case — Award of two out of three arbitrators—Non-consultation with third before making award.*—A reference of the whole matter in difference in a particular case may be a reference of a particular matter within the meaning of ss. 506, 508 of the Civ. Pro. Code An award of two out of three persons is not a nullity merely because the two have not consulted with the third before making it. Their conduct is probably misconduct, but it ought to be alleged accordingly, and if found to be misconduct, it is a ground for avoiding the award. KHILU RAM v. JIWAN SINGH, **55 P.R. 1889.**

Reference to Arbitration—*concluded.*

(7)—*Arbitration award—Act* VIII *of* 1859, *s.* 325.—Applying the principle that every judicial act which is done by several Judges ought to be completed in the presence of the whole of them, it may be said that an award of arbitrators to be legal must be completed and signed by each in the presence of the whole of them. An arbitration award is not legal, if not signed by the arbitrators sitting together at one place and at the same time. *In the petition of* MAHARAJA SRI JAI MANGAL SINGH BAHADUR, **3 B L.R.A.C. 82=11 W.R. 433.** (9 W.R. 29, *Appl.*)

Reference to Full Bench.

(1)—*Value of subject-matter in dispute not exceeding Rs.* 50—*Reference to Full Bench by single Judge sitting alone, Validity of.*— A reference to the Full Bench cannot be made by a single Judge of the High Court sitting alone to hear cases in which the value of the subject-matter in dispute does not exceed Rs. 50. NABU MONDAL v. CHOLIM MULLIK, **25 C. 896, F.B.**

(2)—*Judge sitting alone—Division Court—Competency to make reference to Full Bench—Rules of High Court, Appellate Side, r.* 1, *Ch.* 5.- It is not competent to a Judge sitting alone to make a reference to a Full Bench, as he does not constitute a "Division Court" within the meaning of r. 1, Ch. 5 of the Rules of the High Court, Appellate Side. NATU MANDAL v. BADAL MULLICK, **2 C.W.N. 405, F.B.**

(3)—*Principle of.*—Questions arising from a difference of opinion between individual Judges should not, generally, be the subject of reference to a Full Bench. RAJKOOMAR SINGH v. SAHEBZADA ROY, **3 C. 20, F.B.**

(4)—*Civ. Pro. Code, s.* 575—*Delivery of dissentient judgments—No reservation—Reference to Full Bench—Legality of reference.*—Where the Judges of the High Court differed and delivered dissentient judgments as judgments and without any reservation, they could not make an order of reference to the Full Bench under s. 575, Civ. Pro. Code, and the order of reference so made was *ultra vires.* LAL SINGH v. GHANSHAM SINGH, **9 A. 625, F.B.=A.W N. 1887, 154.** (6 A. 468, *R.*) [*D.*, 6 Bom. L R. 131.]

(5)—*Reference to Full Bench—Junior Judge whether can make reference.*—A judgment of the senior Judge of a Division Bench of the High Court is final within the meaning of s. 36 of the new Letters Patent, even when the junior Judge entertains doubts, and expresses no final opinion. The junior Judge cannot refer a question for the decision of the Full Bench without the concurrence of the senior Judge. *In the matter of the petition of* CHUNDER KANT BHUTTACHARJEE, **B.L.R. Sup. App. 43=7 W.R. 277.**

Reference to High Court.

See CIV. PRO. CODE, 1908, S. 113.

See CIV. PRO. CODE, 1908, O. XLVI.

(1)—*Reference—Review—Act* XXIII *of* 1861, *s.* 28—*Applicability.*—S. 28 of Act XXIII of 1861 authorises the reference to the High Court of such questions as may arise in the trial of the suit, and not of questions arising on an application for a review of judgment, which cannot, in any sense, be considered as the trial of a suit. BONOMALLY DEO v. RAM SADOY CHUCKERBUTTY, **17 W.R. 95.**

(2)—*Application for review of judgment—Reference.*—No reference can be made upon an application for a review of judgment. TALIM MUNDAL v. MESSRS. R. WATSON & CO., **17 W.R. 94.**

(3)—*Civ. Pro. Code,* 1877, *s.* 617—*Reference to High Court.*—It is only when a matter cannot come before the High Court as a Court of appeal that a reference can be made under s. 617, Civ. Pro. Code. KRISHNA NATH SARCAR v. RAM KUMAR DE, **7 C.L.R. 144.**

(4)—*Reference to High Court—"Final" decree or order—Civ. Pro. Code,* s. 617.—A reference to the High Court under s. 617 of the Civ. Pro. Code can only be made when there is a suit or an appeal before the Court making the reference, in which the decree is final. RAMPHUL v. DURGA, **7 A. 815=A.W.N. 1885, 245.** [*F.*, 16 C.P.L.R. 17.]

(5)—*Decree—Execution—Reference to High Court—Civ. Pro. Code,* 1882, *s.* 617—*Practice.*—S. 617 of the Civ. Pro. Code, 1882, allows of a reference for the decision of the High Court in respect of a question arising in execution of a decree, only when the decree is final. ORIENTAL LOAN ASSOCIATION, LTD. v. GEORGE PELHAM HATCH, **17 B. 735.**

(6)—*Civ. Pro. Code, Act* X *of* 1877, *s.* 617—*Reference in suit instituted before Code came into force.*—Reference under s. 617 of Act X of 1877, made to the Chief Court by an Extra Assistant Commissioner in a suit instituted before the Code came into force. *Held* that the reference was not authorised by s. 617 of the Code, as the suit was instituted before the said Code came into force and any decree made in it by the Extra-Assistant Commissioner would not be final but open to appeal in the ordinary course. ALADIN v. JOWAYA, **40 P.R. 1878.**

(7)—*Act* X *of* 1877, *s.* 617—*Reference under, when to be made.*—S. 617 of the Civ. Pro. Code, 1877, clearly contemplates that the question in dispute should be raised before or on the hearing of the suit and that the Court should then draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement for the decision of the Chief Court. In the present case, however, although the question was raised during the course of the trial, the parties did not ask for a reference to the Chief Court, nor did the Court consider it necessary to make the reference of its own motion. The decree

Reference to High Court—*continued.*

passed was not made contingent in any way upon the result of a reference to the Chief Court. That being so, it was not competent to the defendant to now ask for a reference to the Chief Court on the question which arose at the hearing of the suit and did not arise in execution of the decree. F. H. DRUMMOND v. J. W. LOWRIE, **31 P.R. 1879.**

(8)—*S.* 617, *Civ. Pro. Code.* 1882—*Reference—High Court.*—Ss. 617 and 647, Civ. Pro. Code, apply when doubts arise in the hearing of a suit or appeal or execution or other proceeding. S. 617 was not intended to provide for suppositious cases which do not actually arise in a proper proceeding before the Court. MAHAMAD v. AHMEDBHAI, **3 Bom. L.R. 368=25 B. 327.**

(9)—*Reference—High Court.*—A reference under Ch. 46 of the Civ. Pro. Code, 1882, can only be made when the Judge of the lower Court entertain a reasonable doubt. And he cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency, unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council. BHANAJI v. DE BRITTO, **7 Bom. L.R. 995=30 B. 226.**

(10)—*Reference under s.* 617, *Civ. Pro. Code, Act* X *of* 1877—*Decree, finality of—Application to sell house in execution of decree—Reference on question whether sanction necessary.*—According to s. 617 of the Civ. Pro. Code (Act X of 1877), the power of referring questions to the High Court (or the Chief Court) is confined to questions of law or usage having the force of law, or relating to the construction of a document affecting the merits arising "before or on the hearing of a suit or appeal in which the *decree is final*, or, in the execution of any such decree." A reference on the question whether, in the case of an application to sell houses or other buildings in execution of decrees, the sanction of the Commissioner or of the Chief Court is necessary, under s. 327 of the Civ. Pro. Code, and the notification published thereunder by the Punjab Government, No. 3859, dated 3rd October 1877, before the sale can take place, does not lie under s. 617, if the decree concerned in such reference is not a final one. Although an order directing the sale of attached property under s. 284 of the Civ. Pro. Code, is not expressly made appealable, and the question whether a Court executing a decree is itself competent to sell houses or other buildings can scarcely be said to be a question arising "between the parties to the suit," so as to fall under s. 244 and became appealable under the amended definition of "decree" (Act XII of 1879, s. 2), still, the finality which permits a reference to be made under s. 617 relates distinctly to the decree itself which is sought to be executed, and not to the order passed in execution. LAKHU MAL v. TULLA, **100 P.R. 1880.**

(11)—*Action by a third person not a party to the suit.*—A reference to the High Court under s. 617 of the Civ. Pro. Code, 1882, is not bad merely because it arises out of the action taken by a third person not a party to the suit. PURSHOTTAM NARAYAN v. BALVANT BABAJI, **10 Bom. L.R. 13=32 B. 157.**

(12)—*Probate order—Reference to High Court—Concurrency of jurisdiction of High Court—Succession Act,* 1865, *s.* 264.—A District Judge's order on a probate application is not final and cannot be referred to the High Court under s. 617 of the Civ. Pro. Code. But the High Court may, as a Court of concurrent jurisdiction, entertain, such an application under s. 264 of the Indian Succession Act. *In the matter of* MONOHUR MOOKERJEE, **5 C. 756=7 C L.R. 223.**

(13)—*Reference to Sudder Dewanni Court—No adjudication made—Order of reference varied.*—Under an order of reference, the Judicial Committee of the Privy Council, upon an appeal coming before them, remitted the case, by reason of the rejection of certain evidence, to the Court below, with directions to take the evidence rejected. The Court in *India*, upon the remit, examined such of the witnesses before tendered as were produced, but made no adjudication in the cause, and transmitted the further evidence to *England*. No fresh order of reference was made to the Judicial Committee. Upon the appeal, with the further evidence coming before them, their Lordships, under the circumstances, were of opinion that they had no jurisdiction to entertain the case, the original order of reference having been exhausted by the remit. But, upon a special petition for such purpose (all parties consenting), the Order in Council directing the remit to *India* was varied and amended, by being made a mere reference to the *Sudder Dewanny Adawlut*, to take evidence, without throwing any duty upon that Court to re-consider or adjudicate upon the cause, but to remit the same for the consideration of the Lords of the Committee. JESWUNT SINGJEE UBBY SINGJEE v. JET SINGJEE UBBY SINGJEE, **6 W.R. 46, P.C., 3 M.I.A. 245.**

(14)—*Act* XXI *of* 1863, *ss.* 22 *to* 26—*Question of law arising in execution—Reference to High Court—Act* X *of* 1867—*Recorder's Court.*—Under Act XXI of 1863, a case cannot be stated for the opinion of the High Court with reference to a point of law arising out of proceedings in execution of a decree. Act X of 1867 does not apply to the Record's Court at Rangoon. *In the matter of* R. SUTHERLAND, **9 W.R. 478.**

(15)—*Act* XI *of* 1865, *s.* 22—*Reference to High Court—Question arising out of execution of decree.*—Only questions which arise in the trial of a suit and not such as arise on applications for execution of decree, can be referred, under s. 22, Act XI of 1865, for the opinion of the High Court. ANAND CHANDRA MAJUMDAR v. GOBARDHAN KHAN, **B.L.R. Sup. Vol. 457=5 W.R.S. C.C.Ref. 19.** [*Cons.*, 15 W.R. 542=14 B.L.R. 288, Note.]

(16)—*Civ. Pro. Code,* 1882, *s.* 617—*Fine levied on pleader for refusing to act for client—Appeal*

Reference to High Court—*continued.*

by pleader—Reference by appellate Court to High Court—Dispute between litigant parties in suit essential to justify reference.—Where a pleader prefers an appeal from an order imposing a fine upon him for having declined to appear and act for his client, it is not competent to the Court hearing such appeal to make a reference to the High Court, as, under s. 617 of the Civ. Pro. Code. An enquiry of the kind is not of a litigious nature but rather one of a disciplinary character. A reference under the above section could properly be made only in respect of a matter in litigation. No such reference will lie under the Code except in some matter within dispute between the parties in a suit or appeal, or in a matter in which the Court is required to adjudicate on the rival claims of the contending parties in the litigation. YASHVANT NARAYAN ADARKAR v. XAVIER, JJ. **12 B. 78.**

(17)—*Reference by Division Bench to third Judge—Civ. Pro. Code, s. 575—Scope of appeal.*—Where an appeal is referred to a third Judge by a Bench of two Judges under s. 575 of the Civ. Pro. Code, the whole appeal is open for argument before him, and not simply the point or points on which the Judges differed. SESHADRI AYYANGAR v. NATARAJA AYYAR, **21 M. 179.** [*R.*, 6 Bom. L.R. 230, 14 Bur. L. R. 59.]

(18)—*Reference by one of two Judges differing—Act* X *of* 1877, *s.* 575.—When, during the hearing of an appeal there is a difference of opinion between the two Judges composing a Bench on a point of law, a reference lies to a third Judge under s. 575 of the Civ. Pro. Code, and it is competent to one of the two differing Judges to make the reference. TELU MAL v. SUBHA SINGH, **90 P.R. 1880.**

(19)—*Civ. Pro. Code,* 1882, *s.* 643-*B* (=*O.* XLVI, *r.* 7, *new Code*), *when reference can be under—"Shall."*—Before a District Court can make a reference under the section, it must be of opinion that the subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that, therefore, the matter is one in which the interference of the High Court should be sought. The references under the section do not apply to a case where a Judge has not exercised his mind to consider whether or not the Court below had or had not jurisdiction. The word "shall" in cl. (1) of the section has only a directory sense, and is not mandatory. MADAN GOPAL v. BHAGWAN DAS, **11 A. 304 = A.W.N. 1889, 75.**

(20)—*Civ. Pro. Code,* s. 646 *B—Reference by the District Court to the High Court.*—The District Court is bound to make a reference to the High Court under s. 646-B, Code of Civil Procedure, when one of the parties requires it to do so, and the fact that an appeal lay to it from the order made by the Munsiff's Court does not preclude it from making the reference. SIMSON v. MCMASTER, **13 M. 344.** [*R.*, 3 O.C. 20.]

Reference to High Court—*continued.*

(21)—*S.* 16, *Act* IX *of* 1887 (*Provincial Small Cause Courts Act*)—*Ss.* 586, 646-*B*, *Act* XIV *of* 1882, *Civ. Pro. Code—Suit under s.* 646-*B*, *Civ. Pro. Code—High Court's power to consider matter of jurisdiction—S.* 46 (*b*) *of Act* XIV *of* 1882—*Jurisdiction.*—Where a case has been submitted to the High Court under s. 646-B, Civ. Pro. Code, *held*, that the High Court has full power to consider the matter of jurisdiction or to deal with the case on the merits, so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial (notwithstanding the provisions of s. 16, Act IX of 1887). [*F.*, 27 M. 478; *R.*, 3 O.C. 20, 127 P L.R. 1903 11 Bom. L.R. 1330.] S. 646-B of the Civ. Pro. Code must be read with s. 16 of the Provincial Small Cause Courts Act, so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken on appeal to the District Court; the parties having in both the lower Courts submitted to the jurisdiction of the ordinary Courts, all the time, it is not competent to either of them on second appeal to plead the want of jurisdiction in those Courts so as to render all proceedings taken in the suit void. SURESH CHUNDER MAITRA v. KRISTO RANGINI DASI. **21 C. 249.** [*F.*, 27 M. 478; *R.*, 3 O.C. 20, 127 P.L R. 1903, 11 Bom. L.R. 1330.]

(22)—*Reference from Presidency Small Cause Court to High Court — Practice—Ss.* 69, 70, *Presidency Small Cause Courts Act—Effect of failure to deposit costs of reference.*—In the case of a reference from the Presidency Small Cause Court to the High Court, the provisions of the Statute which governs the matter should be strictly complied with. Where a judgment is given contingent on the opinion of the High Court on a point to be referred to the latter, and the party, at whose instance the contingent judgment is given and the reference made, fails to deposit the security "at once," the reference will be liable to dismissal. JUGAL KISHORE v. SEWMICK ROY, **28 C. 260.** (14 B.L.R. 180, *D.*)

(23)—*Act* XI *of* 1865, *s.* 22—*Reference by Small Cause Court to High Court—Procedure.*—When the Judge of a Small Cause Court refers a case for the opinion of the High Court, he shall, as s. 22 of Act XI of 1865 directs, draw up a statement of the case and refer it with his own opinion. In the present case, however, there was neither any statement of the case, nor any detail as to how the question arose on the trial of the suit, nor any expression of the referring Court's own opinion. The High Court found it impossible to answer the question set forth in the abstract and accordingly sent the case back for amendment. DINONATH ADDY v. PAY SERGEANT W. WELLER, **7 W.R. 165.**

(24)—*Jurisdiction of Small Cause Courts—Appellate Court having small cause jurisdiction—Suit tried by first Court as original suit—Reference to High Court.*—Where the only point in dispute in a suit was whether the defendant had paid to the plaintiff the sum of money which

Reference to High Court—*continued.*

the former had admittedly received on her behalf and as her agent, *held* that, if the defendant acted as agent of the plaintiff, there was a true contract implied between them that the defendant would recover the sums due to the plaintiff and pay them over or account for them to her, and that the suit therefore was within the jurisdiction of the Court of Small Causes. Where a Small Cause suit was tried as an original suit and came before the Subordinate Judge in appeal, who was also the Judge of the Small Cause Court competent to try the case as a Small Cause case, *held* that it was competent to the Judge to deal with the case on the merits, and that there was no necessity for a reference to the High Court. SHUMBOONATH MOZOOMDAR v. KASHESSUREE DEBEE, **13 W. R. 100.**

(25)—*Ajmere Courts Regulation* (I *of* 1877), s. 18, *powers of High Court, on reference made under.*—When, under the provisions of s. 18 of Reg. No. I of 1877, the Commissioner and District Judge of Ajmere makes a reference to the High Court asking for a ruling upon a question of law, or, amongst other things, upon the construction of any document, arising out of an appeal which has been heard by him, and upon which he has expressed his own opinion, the power of the High Court is limited to expressing its opinion on the specific point referred to it and it is not competent to the High Court to go into the question whether such point has really arisen in the case or to enter upon the merits of the case in any other respect. KALIAN MAL v. RAM KISHEN, **21 A. 163 = A.W.N. 1899, 4.**

(26) —*Reference by Settlement officer.*—Whether a valid reference can be made in a settlement case in the Sonthal Pergunnahs by a Settlement Officer. TARINI PROSAD MISSER v. MAHAMMED CHOWDHRY, **6 C.L.R. 555.** [*R.*, 8 C.L.R. 548, 18 C. 133.]

(27) —*Application for trial on suit* de novo—*New point—Reference to High Court.*—A point arising upon the application for a new trial may be referred to the High Court. NOBO COOMAR CHUCKERBUTTY v. KOYLASH CHUNDER BAROOREE, **17 W.R. 518.**

Proceedings in case decided by Mamlatdar under Bom. Act III of 1876—Collector not competent to make—, party aggrieved by Mamlatdar's decree, remedies open to—*See* BOM. ACT III OF 1876, 14 B. 371.

Reference to High Court by Recorder of Moulmein—Questions in execution of decree—*See* BUR. ACT XXI OF 1863, ss. 22, 23, 25, 4 B.L.R.A.C. 50.

To High Court—*See* MAD. ACT III OF 1873, s. 27, 8 M.H.C. App. 10.

Proceeding in Revenue Court having jurisdiction—Commissioner on appeal holding the case not proved, but suggesting registration of Revenue Court's decree as that of Civil Court—Commissioner's power of reference—Chief Court's powers—*See* PUN. ACT XVI OF 1887, s. 100, 45 P.R. 1907.

Reference to High Court—*concluded.*

See U P. ACT II OF 1901. s. 195, 1 A.L.J. 37.

Stay of execution of decree — Amount of security required—Question relating to execution—Reference to High Court under s. 617, whether can be made in such proceedings—*See* APPEAL — DECREES AND EXECUTION OF DECREES, 12 B. 30.

Of appeal to other Judges—Composition of Bench hearing referred appeal—*See* CIV. PRO. CODE, 1908, s. 98, 6 A. 468.

See CIV PRO. CODE, 1908, s. 141 (1), 13 W. R. 27.

See CONTRACT ACT, 1872, s. 178, 23 P.L R. 1902 = 34 P.R 1902.

By Small Cause Court at request of party—Non-appearance of party before High Court—Costs—*See* COSTS—SPECIAL CASES, 11 B. L.R. 415 = 20 W.R. 349.

See DISTRICT JUDGE, JURISDICTION OF, 3 O.C. 20.

See LIMITATION ACT, 1908, s. 19, 25 P.R. 1886.

Case stated for opinion of High Court—Reference to be only on precise point of law or usage Practice — *See* PRESIDENCY SMALL CAUSE COURTS ACT, s. 69, 15 B. 376.

By Presidency Court of Small Causes, to the High Court at Bombay — *See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 69, 2 Bom. L.R. 460.

To Judge of one High Court—Establishment of another High Court Practice—*See* BEN. REG. VI OF 1831, 6 B.L.R. 283, P. C. = 13 M. I.A. 585 = 15 W R. P.C. 16.

See REVIEW - REVIEW WHEN LIES, 10 B. 68.

Decision by Mamlatdar — Reference by Collector to High Court—Revision—*See* REVISION - GENERAL, 21 B. 806.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF - GENERAL, 35 P.R. 1886.

See SMALL CAUSE COURT, PRESIDENCY TOWNS. JURISDICTION OF - PRACTICE AND PROCEDURE, 1 C.W.N. 143.

Ajmere case Question of fact—Reference to High Court—*See* SPECIAL OR SECOND APPEAL—GENERAL, 11 Ind Cas 671.

Certificate by Head Quarters Deputy Collector that documents are exempt from duty—Reference by Revenue Board to High Court—*See* STAMP ACT, 1899, s. 57, 25 M. 752.

Reformatory.

There being no Reformatory then in Bengal this circular suggested that sentences of confinement in a Reformatory under s. 318, Act X of 1872, should not be passed. **Criminal Cir. Memo No 2, dated 20th May 1874, 22 W.R. Civ. Cir. 1.**

Refund.

Of shares in company consequent on repudiation of agreement—No purchase within meaning of s. 249, Companies Act, 1882—*See* ACT VI OF 1882, s. 242, 10 P.R. 1905=100 P.L.R. 1905.

Suit for—*See* BOM. ACT VII OF 1863, s. 352, 17 B. 407.

Of purchase-money when sale is set aside, suit for, maintainability of—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 32 C. 332.

Essentials for obtaining—Of purchase-money paid to judgment-creditor in execution sales—*See* CIV. PRO. CODE, 1908, O. XXI, r. 93, 3 A.L.J. 819=A.W.N. 1906, 310.

First lessee delivering possession of land to subsequent lessee on payment of compensation—Such lessee afterwards becoming entitled to restitution of land by decree of Court—Refund of compensation money by such lessee whether a condition precedent to his obtaining relief by way of restitution—*See* CIV. PRO. CODE, 1908, O. XLI, r. 4, 18 M.L.J. 39.

Stamp duty—Of excess—Power of High Court—*See* COURT FEES ACT, 1870, 11 B.L.R. 370=20 W.R. 106.

Stamp duty—*See* COURT FEES ACT, 1870, s. 15, 11 B.L.R. 372, Note.

Of Court-fees on Letters of Administration—*See* COURT FEES ACT, 1870, s. 19-*d*, 4 Bom. L.R. 974=27 B. 140, *the effect of this decision is negatived at* 6 Bom. L. R. 652.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 3 B. 42.

Of money realised in execution of a decree afterwards reversed on appeal—Remedy whether by suit or application—*See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1908, 206=5 A.L.J. 527.

Application for—of amount of an *ex parte* decree, subsequently set aside—*See* LIMITATION ACT, 1908, art. 181, 28 C. 113.

Suit by auction-purchaser for, of purchase money on failure of consideration—Maintainability—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 12 Bom. L. R. 723=7 Ind. Cas. 955.

Of cancelled stamps used for mortgage deed in favour of another—*See* STAMP ACT, 1879, ss. 51 (*d*), 6, 16 M. 459, F.B.=2 M.L.J. 181.

Refund of Fees.

This circular declares that no refund is to be made of the minimum fee prescribed by Circular Order of 6th August 1873, when no sale takes place. **Civ. Cir. Memo No. 11 of 6th May 1874, 21 W.R.H.C Rules & Ors. 24.**

Refund of Purchase-money.

(1)—*Refund of purchase money—No separate suit for.*—The purchaser is entitled to recover the purchase-money that he paid at the sale, and he should not be driven to a separate suit for the same. RAM SARAN PODDAR v. MAHOMED LATIF, **3 C.W.N. 62.**

Refund of Stamp-duty.

See STAMP DUTY, 4 B.L.R. App. 96, 4 B.L.R. App. 96, Note.

Refusal of registered packet.

See EVIDENCE ACT, 1872, s. 114, 3 Bom. L. R. 420.

Register.

Correction of entry in—*See* BEN. ACT VII OF 1876, s. 7, 17 C. 304.

Of baptism, statement of date of birth in a, how far evidence of age—Attestation of sale-deed, when operates as estoppel—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 2 N.L.R. 34.

Entry in Mahomedan marriage—Of amount of dower, admissible in evidence to prove amount fixed—*See* EVIDENCE ACT, s. 32, 19 C. 689.

Entries in Collectors—Kept under Bengal Act VII of 1876, whether admissible in evidence—*See* EVIDENCE ACT, s. 35, 2 O.C. 940.

Municipal—Of deaths—*See* EVIDENCE ACT, 1872, ss. 35, 74, 59 P.R. 1901.

Teiskhana Register prepared by patwari, not a public document—*See* EVIDENCE ACT, ss. 35, 74, 18 C. 534.

Entries in a chowkidar's register — *See* LEGITIMACY, P.L.R. 1900, p. 412.

Registered Deed.

Extinguishment of—*See* DEED—MISCELLANEOUS, 1 Bom. L.R. 91.

Gift by Mahomedan under registered instrument—Applicability of Mahomedan Law—Delivery of possession, whether necessary—*See* MAHOMEDAN LAW—GIFT, 17 M.L.J. 562=30 M. 519.

Agreement for sale of ship whether creates any equitable title—Completion of sale of ship's necessity of—Sale deed for—*See* ST. 17 AND 18 Vic. Ch. 104, 21 M. 395.

Registered Letter.

Refusal of—*See* EVIDENCE ACT, 1872, s. 114, 3 Bom. L. R. 420.

Service of notice through post by— Whether sufficient— *See* TRANSFER OF PROPERTY ACT, s. 106, 28 C. 118=4 C.W.N. 790.

Register of Suits.

(1) —*Act* VIII *of* 1869 *(B.C.)—Separate register of suits—Object — Jurisdiction.*—The Bengal Legislature, when it passed Act VIII of 1869, restoring to the Civil Courts the jurisdiction of which they had been for a time deprived, and empowering them to try suits for rents and others of a kindred nature, thought fit to direct that the suits instituted under the provisions of the act should be entered in a separate register. This provision, however, was introduced obviously for statistical purposes, and not for the purpose of separating into

Register of Suits—*concluded.*

parts the jurisdiction exercised by one Court. JALLALOODEEN v. J. BURNE, **15 B.L.R. 261, Note = 18 W R. 99.** [*R.*, 18 W.R. 343, 22 W. R. 478, 24 W.R. 154 = 15 B.L.R. 238.

Registrar.

(1)—*Registrar, Duty of.*—When an attorney enters appearance for a defendant before the expiry of the time mentioned in the summons it is the duty of the Registrar to put it down immediately in the cause list or at all events he ought to ask the Judge whether he should do so or not. **Cumming v. Green, 4 B L.R. App. 75.**

Appeal to Privy Council, leave to—Order refusing to vary or discharge report of Registrar—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 5 C.W.N. 41.

District Registrar not a Court—*See* CIV. PRO. CODE, 1908, s. 115, 17 M.L.J. 313 = 2 M.L.T. 267 = 30 M. 326.

Mortgage-deed, when said to be properly attested—Signatures of Sub-Registrar and identifier on the back of the bond not sufficient to render mortgage valid—*See* DEED—ATTESTATION OF DEEDS, 26 C. 246 = 3 C.W.N. 84.

Acknowledgment before—*See* DEED—ATTESTATION OF DEEDS, 26 C. 78.

Execution of deed—Admission of signature before Registrar—Denial of execution—Jurisdiction of, to register—Certificate of registration—*See* DEED—EXECUTION OF DEEDS, 6 C.W.N. 329.

Reference pending before—Filing statement of facts after appointed time right of party—*See* PRACTICE AND PROCEDURE, 26 C. 585.

Registrar, Duty of—*See* REGISTRATION ACT, 1908, ss. 34, 35, 1 B.L.R.O.C. 47.

O. XI, r. 21, Civ. Pro. Code, 1908—Power of Registrar (Original Side) to dismiss suit under, for want of prosecution—*See* RULES OF HIGH COURTS AND SUPREME COURTS—CALCUTTA, 6 C.L.J. 374.

Dwelling house—Mis-statement in abstract of title—Payment into Court—Subsequent discovery of mis-statement—Recession of sale—*See* SALE—GENERAL, 5 C.W.N. 593.

Registrar—Registration of document when execution admitted—Necessity for sanction for prosecution for forgery—*See* SANCTION TO PROSECUTE, 2 M.L.J. 286.

Jurisdiction of—Presidency Small Cause Court to set aside *ex parte* decree—*See* SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 30 C. 588 = 7 C.W.N. 547.

Registrar-General.

Refusal of—to register—Endorsement of refusal—*See* REGISTRATION ACT, 1866, ss. 31, 82, 84, 6 B.L.R. 576.

Registrars, Marriage by Act.

See ACT V OF 1852.

Registrar of High Court.

(1)—*Registrar of High Court—Power of, to execute conveyance and enter into covenants on behalf of infants and parties refusing to execute.*—When the High Court so directs, the Registrar has statutory authority to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but cannot bind him by entering into any covenants on his behalf. The Registrar in such a case cannot be in a higher position than the guardian of an infant ward. RAM CHUNDER DUTT v. DWARKANATH BYSACK, **16 C. 330.** [*R.*, 2 N.L.R. 25.]

Power of guardian to submit matters to arbitration on behalf of Minor—Reference to Registrar — Practice — *See* GUARDIAN, DUTIES AND POWERS OF—GUARDIAN, 19 C. 334.

Of High Court whether empowered to grant leave to institute suit under cl. 12 of the Letters Patent, 1865—*See* LETTERS PATENT, CALCUTTA, 1865, 7 C.L.J. 441 = 35 C. 394 = 12 C. W.N. 705.

Of Sudder Dewani Adawlt or High Court, right of—to impose trust on Secretary of State—Whether—trustee of owner of Govt. Pro-notes deposited with him for benefit of such owner—*See* LIMITATION ACT, 1908, s. 10, art. 48, 9 C.W.N. 443 = 32 C. 799.

See PRACTICE AND PROCEDURE, 24 C. 437 = 2 C.W.N. 57, 21 C. 566.

Registrar's Sale.

(1)—*Registrar's sale—Deficiency in area—Compensation or annulment of sale—Purchaser's right to re-payment of purchase-money, interests and costs.*—Where there is a substantial deficiency in the area of property sold at a Registrar's sale, so that the purchaser would not have offered the price that he did if he had been aware of such deficiency, the Court will not compel him to take the property with compensation, but will discharge him from the sale. (1 C.W.N. 106, *D.*) The purchaser at a Registrar's sale, who is discharged from the sale on account of the deficiency in area, is entitled to repayment of the purchase-money with interest from the date of payment into Court and the costs, charges and expenses, incurred by reason of his bidding for and being declared the purchaser of the property, and of an incidental to the application to be discharged from his purchase. *Quære:*—Whether he is entitled to the costs of survey made by him to ascertain the area of the property? BANK OF BENGAL v. AKHOY KUMAR MUKERJEE, **6 C.W.N. 365.**

(2)—*Registrar's sale—Deficiency in quantity of land—Compensation.*—Where, at a Registrar's sale, the property sold was stated in the particulars to contain 8 cottahs, and one of the conditions of sale was, that the purchaser would not be entitled to any compensation,

Registrar's Sale—*concluded.*

and the property was found to contain 5 cottahs, 13 chittaks and 38 sq. ft. only, it was *held*, (the purchase-money being still in the hands of the Court at the time of the application by the purchaser for compensation in respect of the deficiency), that the proviso in the condition of sale applied only to small or unimportant errors and misstatements, and not to a deficiency in measurement of a substantial character, and that, in respect of the latter, the purchaser was entitled to compensation out of the purchase money in the hands of the Court, although he had obtained an order for confirmation. (*Whitemore* v. *Whitemore*, L. R. 8 Eq. 603, *F.*) KISSORY MOHAN ROY v. KALI CHARAN GHOSE, **1 C.W.N. 106.** [*D.*, 29 C. 370, 6 C.W.N. 365.]

Registrar's sale—What is purchased—Sale notification—Rectification of boundaries—Annulment of sale—*See* SALE—GENERAL, 4 C. W.N. 504.

Sheriff's sale and Registrar's sale—Difference —*See* SALE—GENERAL, 27 C. 264=4 C.W.N. 13.

Registration.

See REGISTRATION ACTS.

(1)—*Act* XVI *of* 1864, *s.* 15—*Refusal to register sale-deed—Suit to establish right to register.* —S. 15 of Act XVI of 1864 allows a person to institute a regular suit to establish his right to have an instrument registered, if its registration was refused by the Registrar. SHEIKH INAYUT ALI v. SYUD FURZUND ALI, **2 Agra 21.**

(2)—*Suit to contest fact of execution.*—The mere registration of a document does not prevent a party from bringing a suit to contest the fact of its execution. PRASANNA KUMAR SANDYAL v. MATHURNATH BANERJEE, **8 B.L R. App. 26=15 W.R. 487.**

(3)—*Suit for decree directing document to be registered.*—In Upper Burma a suit lies for a decree directing that a document shall be registered. MAUNG TUNG AUNG v. MAUNG MAUNG LAT, **U.B R. 1902—1903, Vol. II, Civil, Registration, 1.**

(4)—*Unregistered conveyance — Covenant to pay—Maintainability of suit.*—Where a transaction was entered into, which was not a mortgage in the strict sense of that word, but a sale for a term of years for a sum of money, evidenced by an unregistered bond, wherein a condition was incorporated that, if the grantor failed to observe the stipulations of the deed, he would pay the principal after deducting the profit received and interest from the date of the bond, a suit to enforce the covenant to pay on default being made, cannot be maintained, as the covenant was a contract depending upon the principal contract, which again failed for want of registration of the bond. VENKATRAYUDU v. PAPI, **8 M. 182.** [*R.*, 13 M. 308, U. B.R. 1904, IV Quarter, Registration, 1.]

Registration—*continued.*

(5)—*Transfer of Property Act* (IV *of* 1882), *s.* 54—*Optional registration.*—S. 54 virtually abolishes optional registration. *Per Garth, C. J.* NARAIN CHUNDER CHUCKERBUTTY v. DATARAM ROY, **8 C. 597, F.B.=10 C.L.R. 241.** [*F.*, 17 M. 146; *Diss.*, 16 C. 622; *R.*, A.W.N. 1885, 201, 19 C. 623, F.B., 16 M. 148, F.B., 2 O.C. 74.]

(6)—*Certificate of — Power of Court to go behind certificate and reject document as registered in wrong office.*—Where a certificate of due registration is granted by a Sub-Registrar, a Civil Court cannot go behind the certificate, and reject the deed, when offered in evidence, on the ground that it has been registered in a wrong Sub-Registrar's office. RAM COOMAR SEN v. KHODA NAWAY, **7 C.L.R. 223.** [*R.*, 14 C. 449, 29 C. 654, 16 C.P.L R. 141, 9 Bom. L.R. 401.]

(7)—*Mortgage—Certificate of sale.*—An endorsement made and signed by a Judge on a deed of mortgage of immoveable property, certifying that the deed was purchased at a public sale, *held* in his Court, in execution of a decree, operates as a sale certificate, and, if it relates to immoveable property of the value of Rs. 100 and upwards, must be registered; and, if unregistered, is inadmissible in evidence. KANAHIA LAL v. KALI DIN, **2 A. 392.**

(8)—*Certificate of Registrar—Proof of execution of document.*—The Court can assume from the certificate of the Registrar that certain persons appeared before him, and that, after satisfying him that they were the persons whom they represented themselves to be, they admitted execution of the deed. But, where the execution of the document is in issue, the circumstances of its having been registered does not of itself suffice to prove its genuineness and dispense with the necessity of any independent proof. FUZAL ALI v. BIA BIBI CHOWDHRIAN, **7 C.L.R. 276.** (6 C.W.N. 105, *R.*)

(9)—*Non-existence of property—Burden of proof.*—When objection is taken to the legality and validity of registration of a deed on the ground of the non-existence of the property within the jurisdiction of the Registration District, the party setting up the plea ought to prove clearly that no property within the Registry District was comprised in the deed. JOGINI MOHAN CHATTERJI v. BHOOT NATH GHOSAL, **31 C. 146.**

(10)—*Property within Registration sub-district.*—Where it is not proved that none of the properties described in a document lay within the jurisdiction of the Registration Office where it has been registered, the registration is valid. PURNA CHANDRA BAKSHI v. NOBIN CHANDRA GANGOPADHYA, **8 C.W.N. 362.**

(11 & 12)—*Invalidity of document for want of registration, objection regarding, when could be raised.*—In a suit on a compulsorily registrable, but unregistered deed, the point as to the invalidity of the deed for want of registration was taken for the first time at the hearing

Registration—*continued.*

of the second appeal. *Held*, the plea ought to be considered, though taken so late, the point being one which a Court ought to take judicial notice of. SAHEB LAL v. SUKH LAL, **2 N.L. R. 121.** (2 B. 489, 2 A. 554, 3 A. 157, 19 W. R. 22, *F.*; 3 B.L.R. 125; 11 W.R. 381, *Diss.*: 13 A. 300, 14 C.P.L.R. 42, *R.*)

(13)—*Non-delivery of document by executant to execute after registration, effect of—Validity of such document—Transaction whether completed.*—Suit on a mortgage deed executed by defendant to plaintiff. The deed was presented for registration by the defendant and registered at his instance, but it was not delivered to plaintiff. The contention of the defendant was that the deed was invalid for want of delivery: *held*, there is no provision of law in this country requiring that a registered deed shall not operate until it is delivered to the person claiming under it. Further, the presentation of such document by the party executing it to the registration Officer and its subsequent registration must be regarded as equivalent to the formality of delivery prescribed for writing under seal by the law of England. KANSHI RAM v. TOTA RAM, **40 P.R. 1906=78 P.L.R. 1907.**

(14)—*Registration, duty of parties as to.*—Where the registration of an instrument embodying a contract is necessary, it is essential that each of the parties thereto should do for the other all that is necessary towards securing the registration of the instrument. KIAM-UD-DIN v. RAJJO, **11 A. 13=A.W.N. 1888, 280.**

(15)—*Registration—Land referred to in document outside district of registering officer—Effect of registering document—Description of property misleading and insufficient for identification—Liability of person registering—Mistake of registering officer.*—The registration by a Sub-Registrar of a document referring to land not in his sub-district has not the effect of registration where the description of the property given in the document was misleading and insufficient for the purposes of identification, though otherwise, a party presenting the document for registration should not be made liable for the mistake of the Sub-Registrar. MA PE SHU v. MAUNG THA DUN, **L.B.R. 1893—1900, 577.**

(16)—*Execution by duly authorised agent—No special power necessary for purposes of registration—Transfer of property by execution and registration by agent.*—Where a document is executed by a duly authorised agent on behalf of his principal, there is no necessity for a power of attorney authorising him to present it for registration. The execution and registration of the document by the agent effects such transfer of the property comprised in it as is intended thereby. HAZARI LAL v. DEBI PERSAD, **1 C.P.L.R. 87.**

(17)—*Bond—Instalment—Registration — Act XX of* 1866, *ss.* 52, 53—A bond for a sum of money payable by instalments contained a proviso that, in case of default being made in the payment of two successive instalments, the whole amount secured by the bond and remaining unpaid should become due. The bond was specially registered under s. 52 of Act XX of 1866. *Held*, that the whole amount remaining due on the bond could not be recovered in a summary way as provided by s. 53 of Act XX of 1866 on the allegation of default of payment of two consecutive instalments—Ss. 52 and 53 not applying to such a case. *Held*, also, that these sections apply only to the two cases—where the full amount of the bond becomes payable and where an instalment becomes payable; and that the sections do not apply to cases not falling strictly within the words of the Act. *In the matter of the Indian Registration Act*, 1866, *and in the matter of* LACHMIPAT SINGH v. DOGAR ROY BAHADUR, **2 B.L.R. O.C. 151=11 W.R. O.C. 24.** (8 W.R. 466, *R.*) [*F.*, 6 B.H.C.O.C. 64; *R.*, 85 P.R. 1869.]

(18)—Razinamah, *whether requires registration and when.*—A *razinamah*, in so far as it is submitted to, and acted upon judicially by, a Court is, in itself, a step of judicial procedure not requiring registration. (22 M. 508, P.C., *F.*) But, so far as regards such of its stipulations and provisions, as have not been incorporated with, and given effect to by, the order of a Court, it would not be exempt from, but be governed by, the provisions of the Registration Act. PATHA MUTHAMMAL v. ESUP ROWTHER, **29 M. 365.** [*R.*, 5 C.L.J. 611=36 C. 193, 7 C.L.J. 492=12 C.W.N. 849=35 C. 837, 7 A.L.J. 206.]

(19)—*Compromise of suit—Pleadings not to be construed with strictness.*—Each document of which the registration is alleged or denied to be compulsory must be judged of strictly on its own merits and care must be taken not to decide one case on the analogy of the decision in another case unless the document in each case is practically of the same purport and character. (97 P.R. 1895, *R.*) An application to Court containing the terms of a compromise in whatever language it might be couched cannot properly be treated as the original contract between the parties to the case in which it was made; it must be held to be a mere recital of the contract independently entered into between them. (98 P.R. 1902=18 P.L.R. 1903, *R.*) A compromise in so far as it is submitted to and is acted upon judicially by Court being in itself a step of judicial procedure does not require registration. (22 M. 503, *R.*) *Held*, that the petition addressed to the Court embodying the terms of a compromise arrived at between the parties and given effect to by the Court at the request of the parties did not require registration and was admissible in evidence, though it was unregistered. (76 P.R. 1887, 25 M. 553, 95 P.R. 1894, 30 C. 783, *R.*) In this country a plaint and the pleadings of parties should not be construed with absolutely literal strictness. Where a suit filed on behalf of a *purdahnashin* lady was described in the plaint as based on a *razinama* and the admissibility

Registration—*continued.*

of the document in evidence having been disputed for want of registration, the plaintiff sought to rely on the oral agreement which resulted in the *razinama*—*Held*, that the plaintiff might be allowed to do so. KHARIUL NISSA v. BHDADUR ALI, **11 P.L.R. 1906=27 P.R. 1906.**

(20)— *Compromise petition, constituting a lease and filed in a criminal proceeding—Registration, if necessary.*—Plaintiff sued a tenant for increased rent on the basis of a petition of compromise filed in a criminal proceeding, which resulted in the withdrawal of the proceeding, though no order was passed incorporating the terms of the petition. *Held*, that the petition was not admissible in evidence without registration. If the petition had been filed in a civil proceeding and had been followed by an order or decree, which embodied directly or indirectly its terms, then it would not have been necessary to have had it registered. BIRAJ MOHINI DASSI v. KEDAR NATH KARMOKAR, **12 C.W.N. 854 =8 C. L. J. 90=35 C. 1010.** (8 C.W.N. 485, 26 I. A. 101, 22 M. 508, 30 C. 783, 1 C.L.J. 388, *R.*) [*D.*, 2 Ind. Cas. 662.]

(21)—*Agreement registration of which is compulsory, embodied in a petition of compromise —Agreement conferring right of pre-emption—Compromise filed before a Revenue Court.*—*Held*, that an agreement conferring a right of pre-emption, the registration of which is compulsory, is not exempted from the operation of the Registration law, on account of its being embodied in a petition of compromise filed in a mutation proceeding before a Revenue Court. KAMTA PRASAD v. SEWAK RAM, **13 O.C. 241.** (4 O.C. 78, 32 A. 206, 10 O.C. 49, *R.*)

(22)—*Adoption deed not registered—Factum of adoption.*—The mere circumstance of an adoption deed not being registered is no ground why the adoption should not be believed. KALI CHANDRA CHOWDHRY v. SHIBCHANDRA BHADURI, **6 B.L.R. 501, P.C.= 15 W.R.P.C. 12.**

(23)—*Interest in land of the value of Rs.* 100 *—Test.*—A deed is not compulsorily registrable which does not create an interest in land of the value of Rs. 100. The value of the present interest should always determine the amount for registration purposes. SADAGOPA v. DORASAMI, **5 M. 214.** (1 A. 274, *Diss.*; 2 B. 353, 1 M. 380, *Appr.*)

(24)—*Registration—Bond for principal less than Rs.* 100 *with ascertained interest more than Rs.* 100 *charging immoveable property.*—Where a bond charging immoveable property dated 18th July, 1871, provided that the principal amount, Rs. 96-11-0, should be paid on the 15th June, 1876, together with interest at the rate of one per cent. per mensem, *held* that the bond should have been registered, as the principal sum was secured with the certain and ascertainable increment of the interest at twelve per

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cent. for five years. MAHIP SINGH v. SUMAT KUAR, **A.W.N. 1881, 27.** (2 A. 40, *R.*)

(25)—*Registration—Immoveable property over Rs.* 100 *in value given in lieu of dower to his wife by a Mahomedan.*—*Held*, that a transfer by a Mahomedan of immoveable property of the value of over Rs. 100, even though in favour of his wife, in lieu of dower, cannot be recognised, unless made by a registered instrument. ASALAT FATIMA v. L. SHAMBHU DAYAL, **14 O.C. 214=11 Ind. Cas. 928.** (13 C.W.N. 160, *F.*; 88 P.R. 1901, 86 P.R. 1902, *R.*)

(26)—*"Birt" Meaning of—Birt deed for less than Rs.* 100*—Registration—Sale of under-proprietary rights—Transfer of Property Act* (IV *of* 1882), *s.* 108*—Reservation of annual rent or lagan sarkari—Lease.*—The question was whether a *birt* deed of which the consideration was less that Rs. 100 and which reserved a fixed annual rent was valid without registration. *Held*, that such a deed really implied a grant for money paid for under-proprietary rights by a superior proprietor in favour of the *birt* holder, and should, therefore, be treated as a sale-deed, and not as a lease, and did not therefore, require registration. (1 O.C. 124, 4 O. C. 31, 8 O.C. 121, 10 O.C. 318, 6 C.L.J. 693, 11 C.W.N. 913, 9 Bom. L. R. 851, 17 M.L. J. 400, 4 A.L.J. 737, 2 M.L.T. 402, 29 A. 708, *R.*) *Birt* generally implies an under-proprietary right. It is cession under which a superior proprietor parts with a certain portion of his proprietary rights either for money paid or for religious purposes. RAM AUTAR v. DRIGPAL, **8 Ind. Cas. 725.**

(27)—*Registration—Lease and agreement of lease.*—An agreement to execute at some future time a lease which should contain specified terms and particulars is neither a lease nor even an agreement to lease, and does not therefore, require registration under s. 7 of the Registration Act. Whether a Court of equity would, under such circumstances, consider a party who had signed such a document as this to be in the same position as if he had actually executed the contemplated lease or its counterpart is another question altogether. HAJI ABDULVIDONA JONAS v. HAJI HARONE ESMILE, **7 B.L.R. App. 21.**

(28)—*Lease—Compulsory registration—Tenancy determinable at the option of the lessor.*—Where a lease contains provisions for payment of rent annually and for payment of the rent in advance in each year, it may import a tenancy exceeding a year. But, where it also provides that the tenancy is to be determinable at any moment at the option of the lessor, it is not compulsorily registrable. RATNASABAPATHI v. VENKATACHELLA, **14 M. 271.** (8 B. 493, L.R. 3 Q.B. 658, and *Hand* v. *Hall*, L.R. 2 Ex. D. 355, *R. & Appr.*) [*R.*, 9 C.P.L.R. 88.]

(29)—*Resignment of absolute occupancy rights —Necessity for registration.*—An instrument

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which purported to resign the absolute occupancy rights in lieu of debts exceeding Rs. 100 required registration, and an acknowledgment of execution by the executant did not give it validity. PURANSINGH v. PARMESHWAR DASS, **1 C P.L.R. 91.**

(30)—*Instrument relating to sale of house, construed—Agreement to sell—Registration.*—Where an instrument recited that a house had been sold for a certain sum, that the vendor had received part of the price as earnest money, and would receive the remainder after due execution and registration of the sale deed, and the instrument also provided penalties in case either party withdrew from the sale *held*, in a suit brought by the vendee to recover the earnest money and the penalty under the instrument, owing to the vendor's default, that the instrument was not a conveyance but only an agreement to sell, and did not require registration to enable the plaintiff to recover under it. HURGOBIND v. MUSSUMMAT JUMNA DAI, **8 P.R. 1877.** [*R.*, 183 P R. 1889, F.B.]

(31)—*Registration Act*, III *of* 1877—*Unregistered agreement forming step in a judicial proceeding.*—Where, during the pendency of a previous suit to recover immoveable property, two unregistered agreements were entered into between the parties, one relating to the items included in the suit and referring only by way of remark to the other agreement, and the other relating to properties not included therein but forming the subject of the later suit in question, and by both agreements the parties had agreed to divide among themselves the properties in halves, and the former agreement was produced in Court as a compromise and formed the basis of the decree therein, *held*, in the later suit to recover items covered by the latter agreement, that the document being unregistered, could not be admitted in evidence and that no title conferred thereby could be recognised. *Held*, also that the former agreement, though unregistered, had been submitted to the Court and acted upon judicially and did not therefore require registration. PRANAL ANNI v. LAKSHMI ANNI, **22 M. 508, P C =26 I.A. 101=3 C.W.N. 485=1 Bom. L.R 394=9 M.L.J. 147=7 Sar. 516.** [*F.*, 29 M. 365; *Expl.*, 28 A. 78=2 A.L.J. 564=A.W.N. 1905, 195; *R.*, 4 O.C. 78, 25 M. 7=11 M L.J. 370, 30 C. 783, 1 C.L.J. 388, 27 P.R. 1906=11 P.L. R. 1906=13 C.W.N. 226=9 C.L.J. 96, 3 N.L. R. 72, 5 C L J. 611=36 C. 193 9 C.L J. 16=13 C.W.N. 217=5 M.L.T. 274=5 M.L.J. 359, 35 C. 837=12 C W N 849=7 C.L.J. 492, 35 C. 1010=12 C.W.N. 854=8 C.L.J. 90, 5 A.L J. 717=31 A. 13=A.W.N. 1908, 264, 31 M. 330=18 M L J. 16 (N)=3 M.L.T. 377; *D.*, 5 C L J. 15]

(32)—'Dowl Fehrist'—*If requires registration.*—A '*dowl fehrist*' is to more a contract than are chittas, measurement papers or 'sumthalic' papers, and does not require to be stamped or registered. GUNGAPERSAD v. GOGUN SING, **3 C. 322.** [*F.*, 5 C. 864=6 C.L.R. 286; *D.*, 10 C.L.R. 121.]

Registration—*continued.*

(33)—*Gift—Registration*—Hibabilawaz.—A *hibabilawaz* was held to be merely a deed of gift, notwithstanding the fact that it was supported by a nominal consideration of a "*than* of cloth and natural love and affection" inasmuch as such consideration should, for all practical purposes, be treated as merely nominal. GOLAM MOSTOFA v. GOBURDHONE MULLA, **8 C L.R. 441.**

(34)—*Gift incomplete, not being registered—Right of donee to compel registration—Registration of document not containing description of property—Registration Act*, III *of* 1877, *s.* 21—*Document relating to appointment of guardian and gift of immoveable property—Registration of document.*—A deed of gift may be registered though it contains no description of the properties referred to in it. Where a deed of gift, though an onerous one, has not been registered, the donee cannot compel the donor or his legal representatives to register the same, since that would be compelling the donor or his legal representatives to complete an incomplete gift. A document appointing a guardian is not a document relating to immoveable property within the meaning of s. 21 of the Registration Act any more than a power of attorney authorizing an agent to collect rents of immoveable property is such a document. Where a document relates to the appointment of a guardian and to a gift of immoveable property, the registration of the document can be compelled so far as it relates to the appointment of the guardian, though the registration thereof cannot be compelled so far as it relates to the gift of immoveable property. The document will have to be registered with the proviso that the registration is to take effect only so far as it is one appointing a guardian. AMIRDAN v. MUTHUKUMARA CHETTY, **13 M.L.J. 303.** [*R.*, 15 M.L.J. 30.]

(35)—*Transfer of property in compromise of lawful claim—Transfer not gift, sale or exchange—No registration necessary—Effect of transfer.*—Where the plaintiff and his brothers allowed their sister to retain and enjoy certain land by way of compromise of her claim in respect of a land belonging to her which they had sold, the transaction was neither a gift, sale or exchange under the Transfer of Property Act. Such a transaction need not be in writing registered, and it conferred a valid title to the land in favour of the sister. THIRUVENGIDACHARIAR v. RANGANATHA AIYANGAR, **13 M.L.J. 500.** [*R.*, 11 Bom. L R. 1336.]

(36)—*Possession—Registration of deed of gift not equivalent to possession.*—The registration of the deed of gift is not equivalent to possession. ISMAL v. RAMJI, **1 Bom. L.R. 177=23 B. 682.**

(37)—*Mortgage bond.*—Where an instrument is executed in the form of a mortgage bond (the registration of which is compulsory) the mortgagee is entitled, on the mortgagor's refusal to register, to call in at once whatever amount is due on the bond without waiting

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for the expiration of the period set out in the bond. NGA NWE v. MI BYAW, **L.B.R. 1872—1892, 313.**

(38)—*Mortgage—Test for registration—Unregistered mortgage—Money bond.*—The test in determining the value, for purposes of registration, of the interest created by the mortgage, is the amount of the least sum recoverable under it. It is the value of the interest created, not the consideration for the creation of the interest, which must be regarded. [*Appr.*, 6 M. 422, 10 C. 82, 13 C.L.R. 256.] An unregistered mortgage is not receivable in evidence for the purpose of affecting immoveable property, or in proof of any transaction affecting it, but it may be received as evidence of the personal obligation JAGAPPA v. LATCHAPPA, **5 M. 119.** (7 M.H.C. 296, *F.*) [*Appr.*, 13 C.L.R. 256, 15 M. 336, 19 B. 36; *R.*, 23 M. 105, 25 M. 396; *D.*, 4 N.L.R. 90.]

(39)—*Mortgage transaction being reduced to writing on different papers—Ascertainment of intention from all documents—Registration.*—Though there is nothing in the law to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers whether attached or detached from each other, and the Court, in cases in which the terms as appearing in the different papers are contradictory or inconsistent, has to ascertain the intention of the parties by reading all the papers together as forming one document though each paper on the face of it purports to be a separate document, yet, the requirements of the Transfer of Property Act, making registration compulsory for the validity of such a transaction cannot be held to have been complied with if some of the papers are registered while the others are left unregistered. MUTHIA VENKATACHELAPATI v. PYANDA VENKATACHELAPATI, **27 M. 348.**

(40)—*Reg.* XVII *of* 1802, *s.* 3, *cl.* 3—*Hypothecation bond capable of registration.*—A deed of hypothecation fell under the head of mortgage capable of registration under cl. 3, s. 3, Reg. XVII of 1802. KADARSA RAUTAN v. RAVIAH BIBI, **2 M.H.C. 108.**

(41)—*Sulehnama hypothecating immoveable property—Registration—Suit for money charged on immoveable property.*—A charge, exceeding Rs. 100 in value, created upon immoveable property by means of a Sulehnama (with a half-rupee Court-fee stamp affixed) presented in Court in execution proceedings, cannot be enforced against such property, the document not being properly stamped and not being registered. Observations, by *Spankie, J.*, on previous decisions of the High Court in which sulehnamas were relied on as evidence of a separate oral agreement or were held not to require registration. SURJU PRASAD v. BHAWANI SAHAI, **2 A. 481.**

(42)—*Mortgage-deed not registered—Covenant to register—Evidence—Admissibility.*—The defendant borrowed from the plaintiff on a mortgage of immoveable property and granted a

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lease in the name of a minor son of the plaintiff which contained an agreement to have the document registered in the following month. As the defendant failed to perform his part of the contract and as for want of registration the plaintiff could derive no title to or interest in the property mortgaged, plaintiff sued to recover back with interest the money advanced. The defendant contended that no action would lie on the mortgage lease which had not been registered and that it was not admissible in evidence. *Held* that the defendant would not be allowed to avail himself of the non-registration of the document for the purpose of protecting himself in a suit against him for a breach of his covenant to register, and that the document was admissible for a collateral purpose without being registered. SHAM NARAYAN LALL v. KHIMAJIT MATOE, **4 B.L.R. F.B. 1.** [*Appl.*, 15 C.P.L.R. 33; *R.*, 7 B.H.C.O.C. 45.]

(43)—*Registration—Unregistered mortgage—Suit for money—Admissibility.*—In a suit to recover a sum of money with interest, which had been lent by the plaintiff on an agreement by the defendant to mortgage certain immoveable property and the mortgage-deed was not registered, *held*, that the document was admissible in evidence as it was used merely as the best evidence that the money sued for was owing and was not used to show any interest in the land. BUTTO KRISTO DOSS v. KHETTRA CHANDRA BUTTACHARJEE, **6 B.L.R. App. 69.**

(44)—*Unregistered mortgage-deed, not admissible as evidence of personal liability.*—When a document records a single and indivisible transaction of mortgage for a sum of money over Rs. 100 and is not registered, it is inadmissible as evidence when it becomes necessary to prove that transaction even for a money decree only. THAKUR DAS v. FATTE KHAN, **60 P R. 1880.** [*D.*, 80 P.R. 1881.]

(45)—*Receipt containing declaration of title as to immoveable property, when admissible without registration.*—The document produced by the plaintiff in this case was executed with the main object of showing that the mutual claims of the parties had been satisfied, but the defendant, therein spoke of the plaintiff as the proprietor of certain lands above Rupees one hundred in value and mentioned the fact of his having come into possession. The document was held to be admissible in evidence, so far as it was sought to be used as a receipt or acquittance and nothing further; but when used as evidence of title, as an admission or acknowledgment of his title to the lands specified therein, and as proof that, at the date of the document, the defendant's possession was not adverse to him, it would come within the letter and spirit of those provisions of the Registration Acts which require declarations of title to be registered so as to be inadmissible without registration. FAKI v. KHOTU, **4 B. 590.** [*F.*, 19 B. 36; *R.*, 9 A. 108=6 A.W.N. 1886, 310, 20 B. 553, 24 B. 615.]

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(46)—*Unregistered receipt, proof of payment recited in—Admissibility of receipt—Extinction of mortgage-right.*—Even where an unregistered receipt passed on payment of money purports, in the result, to extinguish a mortgage right, the Court should not refuse to receive it in evidence of the payment therein recited, oral evidence as to the fact of such payment being also admissible. APPAMMA NAYUBALU v. RAMANNA, **23 M. 92=9 M.L.J. 124.**

(47)—*Acknowledgment of debt contained in unregistered document—Admissibility of document as evidence of acknowledgment.*—When an unregistered document which is compulsorily registrable contains an acknowledgment of a debt, it is admissible as evidence to prove such acknowledgment. KHUSHALO v. BEHARI LAL, **3 A. 523.**

(48)—*Evidence, admissibility in, of compulsorily registrable but unregistered lease.*—Plaintiff claimed the land in dispute under one T and defendants contended that the land belonged absolutely to them as the successors in title of one H. Plaintiff sought to use in evidence an unregistered, though compulsorily registrable lease, which T had given to H, urging that the lease-deed, though invalid for want of registration, was still admissible for the purpose of showing that the possession with H, the predecessor in title of the defendants, was permissive and not adverse as against T, under whom the plaintiff claimed. *Held*, an unregistered instrument, of which registration is compulsory, is admissible only to prove a collateral fact, that is to say, such an instrument may be admitted in evidence for proving something independent of, or divisible from, the purpose for which the law requires registration. (10 C. P.L.R. 107, *D.*) The admission in evidence of the unregistered lease-deed in the present case as indicating the quality of possession of the land with the alleged lessee thereunder was illegal, being in contravention of the express terms of s. 49 of the Act, because the transaction was one affecting immoveable property. NARAYAN BISNOI v. JASWANT SINGH, **1 N. L.R. 147.**

(49)—*Bond—Registration—Evidence.*—The mere circumstances of a bond not being registered is not sufficient by itself to counterbalance the evidence if it is generally satisfactory in proof of the validity of the bond. GANGA PRASAD v. MAWJI LAL, **9 B. L.R. 426, P. C.=16 W. R. 30, P. C.**

(50)—*Evidence for—Collateral purposes—Unregistered document.*—A document which requires to be registered in order to affect immoveable property or to confer a power to adopt may, if not registered, be used for a collateral purpose, which does not require registration. BACHOO v. KHUSHALDAS, **4 Bom. L.R. 1883.**

(51)—*Document.*—An unregistered document affecting immoveable property is admissible to prove a personal obligation where it contains a distinct, *i.e.*, separate admission of liability or

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personal undertaking to pay and not otherwise. MAUNG KYAN BET v. MAUNG LU DOK, **U.B.R. 1904, 4th Qr. Registration, p. 1** (18 B. 745, 19 B. 663, 20 B. 553, 9 C. 520, 26 C. 334, 5 M. 519, 8 M. 182, L.B.R. 1893—1900, 125, L.B.R. 1893—1900, 212, L.B.R. 1872—1892, 195, *R.*)

(52)—*Compulsorily registrable document—Admissibility in evidence—Divisible and indivisible transaction.*—Where the transaction, evidenced by a compulsorily registrable document, is indivisible, the document, if not duly registered, would be inadmissible in evidence. But otherwise where the transaction is divisible; thus a document, in the nature of a bond, securing the repayment of money and further providing for the hypothecation of certain property as collateral security for the loan, would, if unregistered, be admissible to prove the executant's liability for the loan though not to prove the hypothecation. KRISHTO LALL GHOSE v. BONOMALEE ROY, **5 C. 611=5 C.L. R. 43.** (2 C.L.R. 428, *D.*; 4 B.L.R. F.B. 18, *F.*) [*F.*, 11 C.L.R. 166; *R.*, L.B.R. 1872—1892, 195, 13 M. 281, 15 M. 336, 4 C.L.J. 510.]

(53)—*Reception in evidence of unstamped and unregistered document—Objection in first appeal—Civ. Pro. Code*, 1859, *s.* 350—*Civ. Pro. Code*, 1877, *s.* 578.—An appellate Court may admit and consider an objection to the reception, in evidence, of an unstamped and unregistered document. SAFDAR ALI KHAN v. LACHMAN DAS, **2 A. 554.** (3 B.L.R. 126, *Disc.*) [*R.*, 2 N.L.R. 121.]

(54)—*Will—Proof—Identifiers—Admissibility of evidence—General reputation, evidence of—Registration—Presumption—Effect of registration.*—The registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend to parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. When the Judge in the Court below had stated and that the "general reputation of character which the two identifiers enjoyed" tended to throw a cloud of doubt upon the *bona fides* of the transaction, *held* that such evidence of the general reputation of the character of those persons who had both been dead ought not to have been admitted at all. GANGAMOYI DEBI v. TROILUCKHYA NATH CHOWDHRI, **3 C.L.J. 349, P.C.=10 C.W.N. 522=33 C. 537=8 Bom. L.R. 375=1 M.L.T. 131=16 M.L.J. 161=33 I.A. 60.**

(55)—*Unregistered trust deed—Admissibility in evidence—Possession.*—Where a party claimed the right of possession of certain land on an unregistered trust deed which required registration and it was argued that the trust deed though unregistered was admissible in evidence as to the nature of the possession. *Held*, that

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the utmost use that could be made of the document was to show that the land had not been forcibly acquired. MAUNG SHWE NI v. MA NGWE ZA, **L.B.R. (1893—1900), 32.** (25 W.R. 211, 6 B. 215, *R.*)

(56)—*Registration in wrong District—Admissibility in evidence.*—A lease of immoveable property situate in one district, registered by the Registrar of another District, could not be rejected when tendered in evidence, if it bore upon it the Registrar's certificate. BISHUNATH NAIK v. KALLIANI BAI. **A.W.N. 1882, 175.** [*R.*, 11 A. 319.]

(57)—*Document registered by officer having no jurisdiction— Admissibility in evidence.*—Where a Court finds that a document has been registered by an officer who had no jurisdiction to register it, it will refuse to receive it in evidence on the ground that it has not been duly registered. The observations of the Privy Council in 15 B.L.R. 228, upon which the decision in 7 C.L.R. 223 proceeds, are not applicable to this case, as in the former case the document in question was registered by an officer that had the jurisdiction to register it. BENI MADHAB MITTER v. KHATIR MONDUL, **14 C. 449.**

(58)—*Petition transferring rights—Collusion—Fraud—Non-registration — Admissibility in evidence—Registration Act* XX *of* 1866.—A petition, under which the petitioner transfers his rights to another cannot be regarded as collusive, where there is no proof of any fraud having been attempted against any third party. Such a petition, if unregistered, could neither operate as a transfer of the rights of the transferor, nor be used in evidence before any Court. KALEE DASS GOSAIN v. MOOKTAKESHEE THAKOORANEE, **17 W.R. 218.**

(59)—*Fraudulent concealment—Registration — Notice.* — The principle that registration amounts to notice to all subsequent purchasers of the same property is not applicable to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale in execution of a decree obtained by the latter against the former. AGARCHAND GUMANCHAND v. RAKHMA HANMANT, **12 B. 678.** [*R.*, 20 B. 290.]

(60)—*Registration, equivalent to notice—Law in Bombay—First mortgage and transfer of title-deeds to mortgagee—Registration of the mortgage — Mortgagee subsequently giving title-deeds to mortgagor—Gross neglect — Second mortgage with transfer of title-deeds—Priority —Notice—Respective rights of encumbrancers.*—In the Presidency of Bombay, registration is equivalent to notice to subsequent encumbrancers. [*F.*, 6 Bom. L.R. 1043.] The land in dispute was mortgaged by S to T under a registered deed date 11-11-1884. Subsequently, the title-deeds having got back into the possession of S, the latter mortgaged the same property to X and also delivered the title-deeds to him. Thereupon, T sued X for a declaration that his mortgage was entitled to priority over that of the defendant. The latter pleaded that the plaintiff had been guilty of fraud in delivering the title-deeds to the mortgagor with the result that he had advanced money on the security of the same property, under the impression that it had been unencumbered, that he had no notice, and that, therefore, he was entitled to priority over the plaintiff. *Held* accepting the finding of the lower Court that the plaintiff had not been guilty of fraud or negligence in parting with the title-deeds, that the plaintiff's mortgage must prevail over that of the defendant, because registration thereof was equivalent to notice to the defendant, and because there was, in this case, no misrepresentation made by the plaintiff (as prior mortgagee) which would have relieved the defendant (as subsequent mortgagee, of the duty of enquiry. If there had been such misrepresentation, the effect of constructive notice by reason of registration of the first mortgage would be destroyed. BALMUKUNDAS ATMARAM v. MOTI NARAYAN, **18 B. 444.** [*R.*, 17 M.L.J. 499=31 M. 7=3 M.L.T. 87.]

(61)—*Notice, mere registration is.*—A mere registration of a sale or mortgage in itself gives notice to subsequent purchasers or mortgagees. This doctrine is as applicable since the introduction of the Transfer of Property Act, as it was before. DINA v. NATHU, **4 Bom. L.R. 253=26 B. 538.**

(62)—*Registered and unregistered documents, priority between.—Quære.*—Whether the case of a second registered purchaser with notice of a prior unregistered sale is an exception to the rule in 8 C. 597 (F.B.) BAMASUNDARI DASSI v. KRISHNA CHANDRA DHUR, **10 C. 424.** [*Expl.*, 13 C. 70.]

(63)—*Registered conveyance — Unregistered conveyance with possession—Priority—Notice.*—One, who holds under an unregistered deed of sale, the registration of which is not compulsory, and is in possession of the property conveyed, has a superior title to one, who sets up a registered conveyance of a later date unaccompanied by possession; the later purchaser presumably having notice of the title of the first purchaser from the fact of possession having been given. (The authorities on the question of priority are discussed here.) DINONATH GHOSE v. AULUCK MONEE DABEE, **7 C 753=10 C L.R. 129.** [*R.*, 6 B. 515, 10 C. 424, 10 C. 1073, 8 A. 540, 13 C. 70, 16 M. 148, F.B., 1 L.B.R. 293; *Cons.*, 8 C. 597, F.B.]

(64)—*Is registration notice.*—The doctrine that registration is notice has no application so far as registered voluntary transfers as against creditors or subsequent transferees for consideration are concerned. If the doctrine be applicable, it can only apply for the purpose of either rebutting the presumption of fraud or preventing the presumption of fraud from arising. JOSHUA v. ALLIANCE BANK OF SIMLA, **22 C. 185.**

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(65)—*Registration of puisne mortgages, whether notice to prior mortgagee—Suit on mortgage, subsequent mortgagees not being made parties—Rights of purchaser under decree as against puisne mortgagees.*—The mere fact of the registration of a subsequent mortgage is no notice of its existence to a prior mortgagee; it is not the duty of a prior mortgagee, before suing, to make a search in the Registrar's office to find out who has, subsequent to the mortgage to him, acquired a right to redeem and therefore should be made party to the suit, and he is not guilty of either gross negligence or wilful abstention in not causing such a search. (16 A. 478, *Diss.*; 9 B. 427, 14 B. 506, 17 B. 741, 9 A. 591, *Disappr.*; 15 M. 268, 12 M. 429, 13 M. 383, 23 C. 790, 27 C. 358, 5 C.W. N. lxxxiii, Notes, *Appr.*) Whether registration itself is notice or not, depends upon the facts and circumstances of each case, upon the degree of care and caution which an ordinary prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act. A decree obtained by a prior mortgagee who had no knowledge of the subsequent mortgages is not bad under s. 85, Transfer of Property Act, because the subsequent mortgagees were not parties to the suit; where a prior mortgagee who purchases the mortgaged properties under such a decree brings a suit for confirmation of possession against the puisne mortgagees and purchases the property in execution of those decrees, the prior mortgagee ought to succeed against the puisne mortgagees, but subject to their right to redeem the prior mortgage. (23 W.R. 338, *D.*) A purchaser under a prior mortgage may always shield his possession and protect his interest by setting up such prior mortgage, and it is not proper to allow him to be dispossessed simply on the ground that a third party has the right to redeem. BUNWARI JHA v. RAMJEE THAKUR, **7 C W. N. 11.** [*F.*, 31 C. 737, 32 C. 891=9 C.W.N. 728=1 C L.J. 371; *R.*, 12 C W.N. 107=6 C. L.J. 612.]

(66)—*No notice of document.*—Mere registration of a document does not amount to a notice thereof. SUKHNANDAN v. SADARAM SETH, **13 C.P.L.R. 43.** [*R.*, 5 N L.R. 21.]

(67)—*Preference of subsequent registered document to prior unregistered one.*—As between a prior unregistered mortgagee and a subsequent registered mortgagee the preference given to the latter by registration must prevail in the absence of proof of notice of the prior transaction amounting to fraud on his part. SETH BONDRUSA v. SHEORAM, **16 C.P.L R. 95.**

(68)—*Priority.*—An unregistered mortgage deed securing a sum over Rs 100 cannot be received, under s. 49, Registration Act 1877, in evidence to prove the mortgage; s. 50 of the Registration Act gives priority to the title under the registered document. A registered document has priority over an unregistered even when the latter is accompanied with possession. NGA SHWE LON v. NGA SHWE BON, **L.B.R. (1872—1892). 151.** (4 B. 126, 1 B.L.R., F.B., 82, *Not appl.*; 5 C. 336, *F.*)

(69)—*Registered and unregistered documents—Act XIX of 1843—Act VIII of 1871—Act III of 1877—Priority.*—An unregistered document executed when Act XIX of 1843 was in force, cannot be postponed to a document executed in 1873 and registered under Act VIII of 1871. CHATTAR SING v. RAM LAL, **3 A. 488.** [*R.*, 6 B. 168, F.B.]

(70)—*Contract of sale—Registered conveyance—Unregistered contract for sale—Preference—Priority.*—Between a purchaser who has a registered conveyance, and one who has only an unregistered contract of sale, the former must prevail. SHAMA CHARAN NEOGI v. NABIN CHANDRA DHOBA, **6 B.L.R. App. 1 =15. W.R. 239.**

(71)—*Prior unregistered and latter registered documents—Sales or mortgages of immoveable property worth below Rs. 100—Priority.*—*Held*, that, between two purchasers for value of immoveable property worth below Rs. 100, the holder of a registered deed, though subsequent, must prevail against him who relies on an unregistered one, unless the former is shown to have had notice of the prior unregistered sale (5 C. 336, *F.*; 9 B. 427, 16 M. 148, *R.*) *Held*, also, that the question is not affected by the fact that the executants of the two deeds were different persons (*e.g.*, the heir of the executant of the prior unregistered deed executing, as in this case, a subsequent registered one). (12 B. H.C. 241, 27 B. 408, *R.*) *Held*, also, that, as regards this question, there is no distinction between mortgages and sales. LALBEG v. VISHNUSA, **5 N.L.R. 82=3 Ind. Cas. 58.** (9 B. 427, *R.*)

(72)—*Registered deed of sale, priority of—Tangible immoveable proverty, definition of—Possession, delivery.*—Subsequent to the enactment of the Transfer of Property Act, J executed an unregistered deed of sale of a house in favour of the defendant who was already in possession of the house as tenant. The sale-deed was for Rs. 30. On J's death his representatives sold this house by registered deed to the plaintiff. The plaintiff sued the defendant for possession of the house. *Held*, that delivery of tangible immoveable property having taken place the plaintiff could not claim priority for his registered deed of sale. *Held* further, that tangible property means lands, buildings, &c., which immediately or through the medium of tenants may be the subject of possession deliverable by the seller to the buyer. KHAIRATI v. SANDA, **2 O C. 74.** [*R.*, 9 O. C. 109.]

(73)—*Effect of—Registered mortgage—Subsequent sale with possession—Priority.*—A registered mortgage without possession has priority over a subsequent registered sale with possession. [*F.*, 8 B. 168.] The effect of registration of a mortgage is to render it available against all subsequent purchasers or

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incumbrancers. (2 B. 299, *F.*) Where the rights of the mortgagee under a registered mortgage included that of bringing to sale the whole property, as it subsisted at the time of the mortgage, and the property was sold in execution of a decree on the mortgage, *held* the purchaser in execution acquired a right free from any created subsequently to the mortgage. B. SHRINGARPURE v. S. B. PETHE, **2 B. 662.** [*Diss.*, 5 M. 84; *R.*, 4 B. 83, 5 B. 8, 8 B. 481, 28 B. 153.]

(74)—*Registered mortgage—Prior oral mortgage—Priority—Notice—Mortgage before s. 59, Transfer of Property Act.*—A registered mortgage does not take priority over an earlier valid oral mortgage of the same property, made when s. 59, Transfer of Property Act, was not in force at the place where the property is situated, if the second mortgagee had *actual* notice of the oral mortgage at the time when the registered mortgage was made. ARUNACHELLUM CHETTY v PERIA CURPEN CHETTY, **6 L B R. 184=8 Ind. Cas. 597.** (199 P.R. 1900, 16 M. 148, Printed Judgments, Bom. H.C. 1896, p. 778, 13 C. 70, 19 A. 145, *F.*; 115 P.R. 1890, *Diss.*; 10 C. 250, 4 L.B.R. 26, 10 M.I.A. 220, *R.*)

(75)— *Registered and unregistered deed — Priority—Collusion—No distinct finding—Remand.* —A party who purchases an estate and registers his purchase deed, knowing that previous to his purchase the land had already been sold to another party who had not taken the precaution of registering, would not be entitled to priority over the holder of the non-registered deed of anterior date, on the ground of collusion between the vendor and himself. But if a purchaser buys *bona fide* without any notice or knowledge of any previous sale of the property, and takes the precaution which the law advises him to take by Act XVI of 1864 and registers his purchase deed, then, his registered deed would have priority over a deed of a date anterior to it, but not registered. [*R.*, 7 B.H.C. O.C. 45, 9 B H.C. 121, 4 C. L.R. 257=5 C. 336, 4 B. 126, F.B.; *D.*, 7 C. 753.] Where the lower Court failed to record a distinct finding of fraud or collusion on the part of the holder of the registered deed, while giving priority to an unregistered deed over a registered one, the party has a right to ask the appellate Court to remand the case for a proper trial. GOWRI KANT ROY v. GIRIDHAR ROY, **4 B.L.R.A.C. 8=12 W.R. 456.**

(76)—*Suit to compel registration of two documents — Value — Jurisdiction — Distinction between registered document and act of registration.*—When two documents are executed by one and the same person and they create the the same interest in the same property standing to each other in the relation of an operative and a superseded document, the value of the suit for the purposes of jurisdiction is the value of the interest intended to be created by the operative instrument. [*F.*, 31 M. 89=17 M. L.J. 573=3 M.L.T. 73, F.B.] The distinction between a registered document and

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the act of registration, is that the former is only evidence, and, if it is lost, the transaction may be proved otherwise, but without the latter there can be no legal transaction at all. Where the object of the suit is to secure legal efficacy to a transaction evidenced by a document and not simply a mode of proving it? the value of the transaction must be taken to be the value of the suit. RAMA KRISHNAMMA v. BHAGAMMA, **13 M. 56.**

(77)—*Unregistered bond— Limitation*— Bona fide *claim* —Para. 10 of Circular 29 of 1859 was to the effect that "judicial officers shall have a discretionary power, to be very sparingly used, of admitting an unregistered bond for Rs. 50 and upwards in special cases." The Circular leaves it to the discretion of judicial officers to admit such documents in evidence or not. In exercising that discretion, they will have to consider whether a claim was *bona fide* or not and, if it is *bona fide*, to admit the document in evidence. The requirements of the above Circular were not designed to assist a defendant in pleading limitation, where limitation is not of necessary operation in the individual case. If it is only a question of limitation and not of the truth or falsity of the claim, the plaintiff must have the benefit of the discretion conferred by the Circular. ANONYMOUS, **11 P.R. 1866, Cir. Ref.**

(78)—*Registration of document in absence of one party executing it, validity of—Limitation.*—Absence at the time of registration of one of the parties executing a document does not make the registration invalid, though such mode of registration is contrary to the express provision of the Act regulating the manner in which registration is to be carried out; the period of limitation prescribed for a registered document is applicable to a document so registered. SHEO MALL v. UMRDIN AND NURBUKSH, **60 P R. 1877.** [*D.*, 93 P.R. 1883.]

(79)—*Actual fact of registration — Limitation.*—There is in law no limitation for the actual fact of registration, provided the requirements of the Act have been complied within the matters for which a limitation of time is provided. SHAMA CHARAN DAS v. JOYENOOLAH, **11 C. 750.** (15 B.L.R. 228, *F.*)

(80)—*Registration—Petition of compromise filed in mutation proceedings affecting immoveable property of value less than 100 rupees—Whether admissible in evidence without registration—Whether it confers title.*—A petition of compromise relating to immoveable property of value less than Rs. 100—was filed in a Revenue Court in a mutation proceeding, and the order of the Revenue Court was passed in accordance with the terms of the compromise. It was not registered:—*Held*, (1) that a petition of this sort should not be excluded altogether from evidence for want of registration. (20 A. 271=25 I.A. 9=2 C.W.N. 129, *F.*); (2) that, in view of the fact that the compromise related to property of value less than Rs. 100, it was capable of operating as a document of title,

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although it was not registered. NIDHAI v. BIDESI, **15 Ind. Cas. 741.** (8 A.L.J. 918=12 Ind. Cas. 109=33 A. 728, *D.*)

(81)—*Notice — Registration—Presumption—Search of register — Presumption that party searching was acquainted with contents—Presumption it may be rebutted by mere statement that search was unsuccessful—Second appeal—Consideration of evidence by lower appellate Court from wrong stand point—Lower appellate Court misdirecting itself in regard to most important part of evidence—Ground of second appeal—Civ. Pro. Code* (1908), *s.* 100.—Notice of a book is notice of its contents. The mere fact that an instrument was registered is not sufficient to affect a third person with notice of it. Where the search of a register is generally proved or admitted, there is a presumption that the party searching was acquainted with all the contents of the register. The presumption may be excluded by particular facts in a case, but it cannot be rebutted by the mere statement that, though a search was made, it was unsuccessful, that is, the person making the search could not find the document, though it was entered in the register which he searched. Where the lower appellate Court misdirected itself in regard to the most important part of the evidence bearing upon a question, or approached the consideration of that evidence from a wrong stand-point. *Held*, that it committed an error of law, and the High Court could interfere in second appeal. AKHOY KUMARI DEBI v. KANAI LAL KUNDU, **16 Ind. Cas. 618.**

See ACT XIX OF 1843, 6 M.H.C. 391.

Incidental accrual of gain—of Company—*See* ACT VI OF 1882, s. 4, 17 C. 786.

See ACT VI OF 1882, s. 4, 20 M. 68=7 M.L.J. 26.

Mortgage of permanent tenure—Necessity of—*See* BEN. ACT VIII OF 1885, s. 12, 3 C.W.N. 499.

Transfer of tenure and registration—*See* BEN. ACT VIII OF 1885, s. 12, 19 C. 17.

Balance of account signed by agriculturist, necessity of—or, under s. 56 of the Dekhan Agriculturists' Relief Act (XVII of 1879)—*See* BOM. ACT XVII OF 1879, s. 56, 6 B. 729.

Sub-Registrar or Registrar being deceived by false recitals—Effect of registration—*See* C.P. ACT XI OF 1898, s. 46, 1 N.L.R. 112.

See ATTORNMENT, 19 B. 36.

See BILL OF SALE, 3 B.L.R. App. 125.

See BOND, 9 B.L.R. 426=16 W.R.P.C. 30.

See BUDDHIST LAW—GIFT, L. B. R. 1893—1900, 504.

Of certificate of sale—*See* CERTIFICATE OF SALE, 3 M. 37, F.B.

Registration—*continued.*

Incidental accrual of gain—of Company—*See* COMPANY—FORMATION AND REGISTRATION, 17 C. 786.

Decree not passed in accordance with compromise—Admissibility in evidence—Registration—*See* COMPROMISE—GENERAL, 8 A.L.J. 309.

See COMPROMISE—EFFECT OF, 4 O.C. 78.

Fraud—Suit for declaration—of decree—Effect—*See* COMPROMISE DECREE, 4 C.L.R. 52.

Registration, only a condition precedent to the right to sue—*See* COPYRIGHT, 17 C. 951.

Suit to enforce registration of deed of gift—Relief consequential—*Ad valorem* fee payable—*See* COURT FEES ACT, 1870, s. 7, cl. IV (*c*), 12 M.L.J. 87.

Suit to enforce registration—Amount of Court fee payable—*See* COURT FEES ACT, 1870, sch. IV, art. 17, cl. 12, 12 M.L.J. 88.

See COVENANT, 1 B.L.R. A.C. 7.

Admissibility in evidence of compulsorily registrable unregistered document for collateral purpose—*See* CUSTOMS—PUNJAB—INHERITANCE, 143 P.L.R. 1906.

Order of Bankruptcy — Composition deed relating to property in British India governed by the *lex loci rei Sitae*—Composition deed exempt from—*See* DEBTOR AND CREDITOR, 16 M. 85=3 M.L.J. 30.

Proceedings before District Registrar ordering registration of document—Civil suit to cancel the document—Maintainability—Specific Relief Act I of 1877, s 39—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 7 C. 736=9 C.L.R. 471.

See DEEDS—CONSTRUCTION OF DEEDS, A. W.N. 1897, 69.

Execution of deed — Admission of signature before Registrar—Denial of execution—Registrar, jurisdiction of, to register Certificate of—*See* DEEDS—EXECUTION OF DEEDS, 6 C.W.N. 329.

Sale deed executed and registered non-payment of consideration under, not sufficient to prove that the parties did not intend it to be operative—*See* DEEDS—PROOF OF DEEDS, 21 M. 56.

Mere registration of document, effect of—*See* DEED—PROOF OF DEEDS, 17 C. 903.

See DEEDS—PROOF OF DEEDS, 15 W. R. 15.

Unregistered endorsement on registered sale-deed—Effect—*See* ENDORSEMENT, 2 B. 547.

Unregistered receipt for earnest money comprising terms of conveyance—Admissibility in proof of contract of sale without registration—*See* EVIDENCE — MISCELLANEOUS DOCUMENTS, 10 C.P.L.R. 107.

Entry in book recording extent of holding and rate of rent—Admissibility in evidence—Unstamped and unregistered document—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 5 C. 864=6 C.L.R. 286.

Registration—*continued.*

See EVIDENCE—MISCELLANEOUS DOCUMENTS, L. B. R. (1893-1900), 212.

Unregistered receipt for payment of mortgage debt produced by mortgages, inadmissibility of in evidence—*See* EVIDENCE — MISCELLANEOUS DOCUMENTS, 7 B. 123.

See EVIDENCE — SECONDARY EVIDENCE, 8 W.R. 438.

Accounts settled— Hypothecation bond for balance due—Ooliger preventing registration thereof—Suit on account stated — *See* EVIDENCE—SECONDARY EVIDENCE, 11 A. 13= A.W.N. 1888, 280.

Registry in Collector's Books —*See* EVIDENCE —MISCELLANEOUS, 11 M.I.A. 369.

Registered kabuliat, proof of—Contemporaneous oral agreement for reduction of rent—Conduct of the parties—*See* EVIDENCE ACT, 1872, s. 92, 6 C.W.N. 60.

Nature of agreement inadmissible without registration, when original agreement is registered—*See* EVIDENCE ACT, 1872, s. 92, 27 M. 368.

Evidence of oral agreement, admissibility of —Registered contract—*See* EVIDENCE ACT, 1872, s. 92, A.W.N. 1886, 40.

Agreement by a plaintiff in a suit not to prosecute claim against a particular defendant and not to execute decree against that defendant—Agreement affecting immoveable property of more than one hundred rupees—Necessity for—of agreement—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 15 M.L.J. 370.

Registered deed of gift—Possession delivery of, under registered deed of gift—Transfer of Property Act, s. 123 – *See* GIFT, 5 O.C. 89.

Registration of deed of gift after donor's death—Validity—*See* GIFT, 20 A. 392 = A.W.N. 1898, 88.

Of deed of gift—*See* HINDU LAW—GIFT, 21 P.L.R. 1901.

Of gift—Deed not equivalent to possession—*See* HINDU LAW—GIFT, 7 B. 131.

Registered deed of gift executed before Transfer of Property Act—Possession or acceptance by donee necessary according to Hindu Law—*See* HINDU LAW—GIFT, 20 C. 464.

Of specific shares under Land Registration Act—Effect—*See* HINDU LAW—PARTITION, 3 Ind. Cas. 234.

Suit to compel—Of document—*See* JURISDICTION—CAUSE OF JURISDICTION, 7 M.H. C. 176.

See LAMBARDAR, 11 M.I.A. 369.

See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 26 C. 46.

Lease—Indemnity clause in lease—Lease not registered—Suit for indemnity by lessee—Lease, if admissible in evidence—*See* LEASE—GENERAL, 18 B. 745.

Registration—*continued.*

Lessor refusing to register lease—Deed—Suit by lessee to enforce registration and for possession—Maintainability—Admissibility of deed in evidence—*See* LEASE—GENERAL, A.W.N. 1885, 329.

Unregistered lease for term exceeding one year —Admissibility in evidence—*See* LEASE, —GENERAL, 10 Ind. Cas. 892.

Lease—Unregistered deed compulsorily registrable—Admissibility to prove damages for use and occupation—*See* LEASE—GENERAL, 11 Ind. Cas. 23.

Registration—Lease or agreement for lease—Proposal and acceptance—Contract in writing —*See* LEASE—MISCELLANEOUS, 7 C. 703= 10 C.L.R. 121.

Incomplete proposal to grant lease—Admissibility in evidence without registration—*See* LEASE — MISCELLANEOUS, 7 C. 708=10 C.L.R. 127.

See LIMITATION ACT, 1859, ss. 1 (10), 16, 2 M.H.C. 329.

See LIMITATION ACT, 1908, s. 5, 184 P.R. 1889.

See LIMITATION ACT, 1908, s. 18 and art. 95, 2 M.H.C. 401.

Unregistered document — Effect of non-registration on its admissibility in evidence for collateral purposes—Registration Act, 1871, s. 49--*See* LIMITATION ACT, 1908, s. 19, 5 C. 215=4 C.L.R. 361.

Suit for pre-emption—Terminus a quo—Date of—or date of getting possession—*See* LIMITATION ACT, 1908, art. 10, A.W.N. 1887, 235.

Suit for money advanced to minor—Registration of bond executed by guardian—Extension of period of limitation—*See* LIMITATION ACT, 1908, arts. 57 and 61, 10 O.C. 38.

Agreement in writing before — Law—*See* LIMITATION ACT, 1908, arts. 116, 118 and 120, 6 B.L.R. 668=15 W.R. O.C. 1.

Transfer of property in lieu of dower debt, being sale, could only be effected by delivery or registered instrument—*See* MAHOMEDAN LAW—DOWER, 13 C.W.N. 160=4 Ind. Cas. 466.

See MUHAMMADAN LAW—WAKF, 24 A. 231=A.W.N. 1902, 32.

Registered or unregistered mortgage—Evidence of personal covenant—*See* MORTGAGE—GENERAL, 1 Ind. Cas. 1, F.B.=32 M. 410= 19 M.L.J. 584.

Unregistered mortgage bond — Divisibility of bond — *See* MORTGAGE — GENERAL, 11 C.L.R. 166.

Registration—Value of interest passed by mortgage deed for less than Rs. 100—*See* MORTGAGE—GENERAL, 4 C. 61=2 C.L.R. 547.

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Hindu widow—Interest provided by unregistered "rukas"—Appeal, plea taken for the first time in—*See* MORTGAGE—GENERAL, 2 O.C. 209.

Unregistered mortgage deed—Personal Covenant to pay—Money decree—*See* MORTGAGE—GENERAL, 2 C.W.N. 591.

Assignment of mortgage, amount of consideration of, for the purposes of registration—*See* MORTGAGE—GENERAL, 8 B. 610.

Mortgage — Priority — *See* MORTGAGE — GENERAL, 2 M. 108.

See MORTGAGE — POSSESSION UNDER MORTGAGE, 2 N.W.P. 296.

Arrangement to hand over property other than mortgaged property for payment of mortgage-money—Effect when unregistered—*See* MORTGAGE—REDEMPEION, 10 Ind. Cas. 196.

Mortgage—Payment of first mortgage by third mortgagee in ignorance of second—Registration—Notice—Presumption of intention to keep alive first mortgage—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 8 M. 246.

See MORTGAGE—MISCELLANEOUS, 7 A. 820=A.W.N. 1885, 279.

Payment by mortgagor to mortgagee—Registration of sub-mortgage—Notice—*See* MORTGAGE—MISCELLANEOUS, 29 B. 199.

Transfer of mortgage—Registration necessary — *See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 9, 43, 46 (3), 10 M.L.T. 79.

Of document—Equity—*See* NOTICE, 134 P.L.R. 1904.

See PARTIES TO SUITS—GENERAL, 5 C. 445=5 C.L.R. 172.

Of surety bond—Admissibility in evidence—*See* PRINCIPAL AND SURETY—GENERAL, 8 Ind. Cas. 985.

Simple bond payable by instalments—Necessity for *See* MAD. REG. XVII OF 1802, s. 3, 1 M.H.C. 209.

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 20 M. 250.

Sale of land by unregistered deed—Vendee placed in possession—Right of some vendors to sue to recover possession after lapse of several years—*See* SALE—GENERAL, 12 C. P. L. R. 154.

Registered sale deed—Effect of, although the purchase money not paid—*See* SALE—GENERAL, 1 M L.T. 432.

Registrar—Registration of document when execution admitted—Necessity for sanction for prosecution for forgery—*See* SANCTION TO PROSECUTE, 2 M.L.J. 286.

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Oral contract to execute lease—Subsequent registered lease with notice—Suit for—Registration of oral agreement—*See* SPECIFIC PERFORMANCE, 6 C. 534=7 C.L.R. 487.

See SPECIFIC RELIEF ACT, 1877, s. 27, C. 358=4 C.W.N. 490.

Suit for cancellation of document—Suit based on non—of document—Discretion of Court—*See* SPECIFIC RELIEF ACT, 1877, s. 39, A.W.N. 1889, 147.

Relinquishment of claim to immoveable property—Value over Rs. 100—Whether release—Registration—*See* STAMP ACT, 1889, sch. 1, art. 15, 7 N.L.R. 36.

Registry in Collector's Book no evidence of title—*See* TITLE, 9 M.I.A. 303.

Registration of trade mark in England—*See* TRADE MARK, 98 P.L.R. 1902=55 P.R. 1902.

Effect of, of sale deed—*See* TRANSFER OF PROPERTY ACT, 1882, 3 Ind. Cas. 177.

Notice—When amounts to—*See* TRANSFER OF PROPERTY ACT, 1882, s. 3, 2 C.W.N. 750.

See TRANSFER OF PROPERTY ACT, 1882, ch. IV, ss. 3, 85, 13 A. 432, F.B.

Registration of subsequent mortgage, how far notice to prior mortgagee—Registration Act, 1877, s. 50—*See* TRANSFER OF PROPERTY ACT, ss. 4, 85, 16 A. 478, F.B.=A.W.N. 1894, 151.

Unregistered document—Value of property not specified in the deed, but exceeds Rs. 100—Whether valid—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6, 10 O.C. 277.

Sale of undivided share in immoveable property below Rs. 100 — Registration — *See* TRANSFER OF PROPERTY ACT, s. 54, 14 O.C. 161.

Sale of land of upwards of Rs. 100 in value, necessity of—in the case of—Possession on oral sale cannot give title—*See* TRANSFER OF PROPERTY ACT, 1882, s. 54, 16 M. 464.

Registration, if dispenses with proof of passing of consideration — *See* TRANSFER OF PROPERTY ACT, 1882, s. 54, 13 C.W.N. 692=4 Ind. Cas. 541.

Document creating easement—Registration—*See* TRANSFER OF PROPERTY ACT, 1882, s. 54, 6 A.L.J. 871=3 Ind. Cas. 615=31 A. 612.

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Possession of title-deeds—Prior incumbrancer — Gross negligence — *See* TRANSFER OF PROPERTY ACT, s. 78, 7 Ind. Cas. 810=20 M.L.J. 979.

Effect of, on failure of prior mortgagee to get possession of title—deeds—Delay in—*See* TRANSFER OF PROPERTY ACT, 1882, s. 78, 17 M.L.J. 499=3 M.L.T. 87=31 M. 7.

Registration—*concluded.*

See TRANSFER OF PROPERTY ACT, s. 78, 15 M. 268=2 M.L.J. 95.

See TRANSFER OF PROPERTY ACT, s. 81, 23 C. 790.

As notice — Extension of doctrine — *See* TRANSFER OF PROPERTY ACT, 1882, s. 88, 12 Bom. L R. 940=8 Ind. Cas. 633.

Patta tendered to and refused by tenant—Whether a lease—*See* TRANSFER OF PROPERTY ACT, 1882, s. 105, 8 M.L.T. 371.

Reclamation lease granted for removal of jungle—Registration—*See* TRANSFER OF PROPERTY ACT, ss. 107, 117, 7 Ind. Cas. 864.

Registration—Arrangement by lessee to share profits with stranger—Whether necessary to be embodied in registered document—*See* TRANSFER OF PROPERTY ACT, 1882, s. 111 (*g*), 7 M.L.T. 419=6 Ind. Cas. 766.

Unregistered sale-deed confirming an oral sale of land—Subsequent registered conveyances intended to defeat the prior unregistered deed—Fraudulent execution of, effect of—*See* TRUSTS ACT, s. 84, 15 M.L.J. 478=29 M. 72.

Of lease—Transfer of Property Act, ss. 107 and 117—Oral evidence inadmissible to prove lease for a term exceeding one year—*See* USE AND OCCUPATION, 5 O.C. 222.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER, 192 P.R. 1882.

Delivery of possession without writing but for consideration less than Rs. 100—Deed of sale unregistered—Registration—*See* VENDOR AND PURCHASER—COMPLETION OF TRANSFER, 22 C. 179.

Priority of registered over unregistered deeds—Scope of rule—*See* VENDOR AND PURCHASER—POSSESSION, 6 B. 193, F.B.

Of sale deed subsequent to execution of second sale-deed, effect of, on subsequent purchaser with possession—*See* VENDOR AND PURCHASER—POSSESSION, 6 B. 165.

Possession, how far amounts to notice to subsequent transferee—when equivalent to possession—Whether notice — *See* VENDOR AND PURCHASER—POSSESSION, 6 B. 168.

See VENDOR AND PURCHASER—POSSESSION, 2 B. 299=P.J. 1880, 57.

See VENDOR AND PURCHASER—PURCHASE MONEY AND OTHER PAYMENTS BY PURCHASER, 3 B.L.R. App. 49.

Non-effect of—Proof of actual contract of sale and possession on payment of purchase money—*See* VENDOR AND PURCHASER—PURCHASERS RIGHT OF, 1 Agra 283.

See VENDOR AND PURCHASER—MISCELLANEOUS, A.W.N. 1882, 7.

Deposit of will under Act VIII of 1871, (Old Registration Act) is no registration—*See* WILL—MISCELLANEOUS, 10 C. 976, P.C.=11 I.A. 121.

Registration Act (XIX of 1843).

[REP., ACT XVI OF 1864.]

(1)—*Act* XIX *of* 1843—*Purchaser for value without notice—Priority—Lien—Mortgage.*—A registered deed of sale does not invalidate a prior unregistered mortgage under the provisions of Act XIX of 1843. A *bona fide* purchaser for value without notice is not entitled to priority over a prior unregistered mortgagee. MAHARAJA MAHESWAR BAX SINGH BAHADUR v. BHIKHA CHOWDHRY, **B.L R. Sup. Vol. 403 =5 W.R. 61=1 Ind. Jur. N.S. 12.** [*F.*, 20 W.R. 110; *Appr.*, 11 W.R. 559, 4 M.H.C. 434, 9 B.H.C. 121; *R.*, 12 W.R. 217, 7 C. 753; *D.*, 10 W.R. 291=1 B.L.R. A.C. 197.]

(2)—*Registration—Registered and unregistered mortgage-deeds—Sale in satisfaction of both—Registered mortgage subsequent to decree and before auction-sale—Lien—Invalidity.*—K had executed two bonds hypothecating his shares in an estate as security for re-payment of debts due to T and O; the bond in favour of the former was unregistered and that in favour of the latter was registered. Both T and O sued on their bonds and obtained decrees. T applied for sale of the hypotheca in satisfaction of his decree and the property was advertised for sale at his instance. O also applied for satisfaction of his decree out of the sale-proceeds. The hypotheca was sold and both the decrees of T and O were satisfied out of the sale-proceeds. K had, subsequently to the passing of the said two decrees and before the auction-sale, executed a conditional sale-deed in favour of the plaintiffs. *Held* that the sale of the property had substantially taken place in satisfaction of both the decrees and that that the property was not liable to a lien created subsequently to that of O, and that, although the plaintiffs might have, by reason of registration, a right preferable to that possessed by the decree-holder under an unregistered bond, they had yet no claim preferable to that of the decree-holder under the prior registered bond. MOTEE RAM v. KAISREE, **2 Agra 52.**

(3)—*Unregistered and registered mortgage-deeds— Same property—Priority.* — Property sold in satisfaction of a superior lien cannot be held to have been sold subject to inferior liens. The provisions of the Registry law give a preferential value to a registered mortgage-deed over an unregistered one even of a prior date. SEETUL PERSHAD v. BABOO HUR CHUND SAHOO, **1 Agra 263.**

(4)—*Prior unregistered sale and subsequent registered sale of same property—Act* XIX *of* 1843, *s.* 2.—It was not intended by s. 2, Act XIX of 1843, that a registered sale should invalidate an unregistered sale of earlier date, when the original vendor is dead and the second vendors are the persons who, but for the first sale, would have inherited the property. UMBIKA CHURN KOONDOO v. DHURMO DOSS KOONDOO, **11 W.R. 128.**

(5)—*Registration Act XIX of* 1843, *s.* 2, *construction of—'Authenticity,' meaning of, in proviso to s.* 2.—Two questions arose in this

Registration Act (XIX of 1843)—*concluded.*

case with reference to the Indian Act, XIX of 1843; *first*, whether the words at the close of the enactment, "any knowledge or notice of any such unregistered deed or certificate alleged to be bad by any party to such registered deed or certificate notwithstanding," are to be construed as referring only to the mortgages and certificates mentioned in the earlier part of the enactment; and *secondly*, what meaning is to be attributed to the words "provided its authenticity be established to the satisfaction of the Court," which are contained in the enactment. As to the first question, their Lordships were of opinion that, upon the true construction of the Act, the words first above mentioned apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift; it would be difficult to find any reason why, in the case of a mortgage, priority should be given to a registered deed over an unregistered deed, notwithstanding knowledge or notice of the unregistered deed by the registered mortgagee, but in the case of a sale, however, priority of an unregistered deed over a registered deed should be retained, in cases of knowledge or notice by the registered vendee or donee. With regard to the second question, their Lordships observed that although the word 'authenticity' in the above section according to its natural meaning, would point merely at the exclusion of a forged deed from the benefit of the Act, it could not have been intended that, by the Act, a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bona fide* deed. SREENATH BHUTTACHARJEE v. RAM COMUL GANGOOLY, **3 W.R.P.C. 43 = 10 M I.A. 220 = 1 Suther 600 = 2 Sar. 121.**

(6)—*Act* XIX *of* 1843 *s.* 2—*Construction of term "satisfied".*—The term "satisfied" in s. 2, Act XIX of 1843, does not merely signify that the mortgage money may be realized by sale, but that all the stipulations of the mortgage-deed are to be performed, and its terms and conditions fulfilled No distinction of class is made in respect of mortgages save this; that those which are registered are to have priority over those which are not. PERSHAD NARAIN RAI v. SHEIKH MAHOMED SHOOKOOL HUQ, **1 N.W.P. 35.**

(7)—*S.* 2—*Registration—Priority.*—By s. 2 of Act XIX of 1843, a registered mortgage takes priority over an unregistered mortgage of earlier date, and a purchaser, under a decree on the mortgage which has priority, has a preferable right over the purchaser under the execution of a decree on the other. PRAHLAD MISSER v. UDIT NARAYAN SINGH, **1 B.L.R. A.C. 197 = 10 W.R. 291.** [*F.*, 16 W.R. 270; *Appr.*, 12 W.R. 217 = 3 B.L.R. A.C. 312; *R.*, 9 B.H.C. 121, 7 C. 753.]

Registration Act (XVI of 1864).

[REP., ACT XX OF 1866.]

(1)—*S.* 13—Shebaitnama *conveying no interest—Registration.*—A *shebaitnama* conveying no right or interest, but merely providing for the expenditure of a portion of the *thakoor's* income, is a deed not requiring registration under Act XVI of 1864. GIREEDHUR DOOS MOHUNT v. NITTO GOPAL DOSS, **19 W.R. 291.** [*Appl.*, 19 B. 36; *Expl.*, 24 B. 615.]

(1-*a*)—*Ss.* 13, 14—*Usufructuary mortgage below Rs.* 100—*Registration.*—Where a document purported to grant the plaintiff possession of certain lands for a term of six years in consideration of Rs. 99 advanced by the plaintiff to the defendant, *held* that the document was not a lease, but an usufructuary mortgage, and being a mortgage below Rs. 100, its registration was not compulsory, but optional. ISHAN CHANDRA v. SUJAN BIBI, **7 B L.R. 14 = 15 W.R. 331.** [*F.*, 4 C. 61, 12 C.L.R. 444, 10 C. 82 = 13 C.L.J. 256.]

(2)—*Ss.* 13 *and* 16—*Registration.*—Where a document in the first portion of it merely provided for a scheme of compromise between the parties to the document, part of which scheme was the execution of a deed of conveyance, but in the latter portion contained declarations of rights of the parties to immoveable property, *held* that the deed required registration and would be inadmissible in evidence if it were not registered. COWAR RAJKUMAR ROY v. COWAR KALIKRISHNA ROY, **7 B L.R. 197.**

(3)—*Ss.* 13, 17—*Deeds executed prior to Act, receivable in evidence—Scope and object of s* 17.—S. 13 of the Registration Act XVI of 1864 refers to instruments executed *on or after* the date on which the Act came into operation, which was the first of January 1865; and s. 17, referring to s. 13, merely prescribes that instruments executed before the date on which the Act came into operation, shall not be accepted for registration unless presented for that purpose within 12 months from such date. This section was intended merely to encourage parties to register old deeds at once. It does not say that deeds executed prior to the passing of the Act shall not be received as evidence in Courts. KAROO LAL THAKOOR v. DOONAL MUNDUL, **8 W.R. 86.**

(3-*a*)—S. 14—*See* No. 1-*a*, *supra*.

(4) This circular deals with Registration Act, XVI of 1864, ss. 13, 43, and 45. Cir. No. 5, dated the 31st March 1865, **2 W.R. Civ. Cir. Order, p. 2.**

(5)—*S.* 15—*Refusal to register—Suit to enforce Registration.*—Suits to enforce registration are not, under Act XVI, solely maintainable in cases of refusal by Registrars to register an instrument. Such suits lay where one of the parties to the deed refused to register it. RAJAH KRISHAN KISHORE CHAND v. MAHOMED ZUKAH-OLL-LAH, **Agra F.B. 148 = Ed., 1874, 111.**

(6)—S. 15—*See* LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 9 W.R. 101.

(6-*a*)—S. 16—*See* No. 2, *supra*.

Registration Act (XVI of 1864)—*concluded.*

(6-*b*)—S. 17—*See* NO. 3, *supra.*

(7)—*Ss.* 17 *and* 68—*Admissibility in evidence—Priority of registered over unregistered deed.*—A deed creating an interest in immoveable property exceeding in value Rs. 100 executed prior to 1st January 1865 was not affected by Act XVI of 1864, s. 13, although it might have been registered under s. 17. All former Acts and Regulations having been repealed except in respect of registered instruments, an unregistered deed creating an interest in immoveable property exceeding in value Rs. 100 executed prior to 1st January 1865 was not, by any provision of Act XVI of 1864, postponed to a registered instrument executed subsequently to that date. CHUTTERDHAREE MISSER v. NURSINGH DUTT SOOKOOL, **3 Agra 371.** (Agra, F.B., Ed. 1874, 163, *R.*)

(8)—S. 18—*See* VENDOR AND PURCHASER—INVALID SALES, 2 Agra 401.

(8-*a*)—S. 43—*See* NO. 4, *supra.*

(8-*b*)—S. 45—*See* NO. 4, *supra.*

(9)—S. 51—*See* EVIDENCE — MISCELLANEOUS DOCUMENTS, 5 W.R. S. C. C. Ref. 14.

(10)—*Ss.* 51, 52, *bond registered under—Fixed amount of interest payable at end of every month—Execution.*—Where a bond was registered under ss. 51, 52, of the Registration Act (XVI of 1864), and according to its terms a fixed amount of interest was to be paid at the end of every month, *held* that, by virtue of the special registration, the obligee was entitled to move for execution in respect of each instalment of interest due MANTHARESWARA AIYAR v. KAMALA NAIKER, **3 M.H.C. 88.**

(11)—S. 52—Register of applications for enforcing a registered bond or other obligation as enjoined in s. 52, Act XVI of 1864. **Cir. No 33, dated the 22nd December 1865, 4 W. R. Civ. Cir. Order, p. 7.**

(12)—S. 52—*See* INTEREST — WHERE INTEREST IS SPECIFICALLY PROVIDED FOR, 10 W.R. 175.

(13)—S. 52—*See* NO. 10, *supra.*

(14)—S. 68—*See* NO. 7, *supra.*

Registration Act (XX of 1866).

[REP., ACT VIII OF 1871.]

(1)—*Registered and unregistered mortgages—Priority--Decree.*—Neither the Registration Act, XX of 1866, nor any subsequent Registration Law gives priority to a later compulsorily registrable mortgage-deed over an earlier deed the registration of which was only optional. Nor will the fact that a suit had been instituted and a decree obtained on the later deed, give priority to it over the earlier deed. KISHORI LAL v. SHAM KARAN, **A.W.N. 1884, 184.** (A.W.N. 1884, 134, *R.*)

(2)—*Deed of sale—Non-registration—Effect of—Payment of purchase-money—Transfer of possession—Evidence.*—On a sale of property the

Registration Act (XX of 1866)—*continued.*

purchaser was given possession of the same after payment of the purchase-money by him, but the deed of sale which was made before the Registration Act came into operation, was not registered within the appointed time. *Held* that it did not follow from the above circumstances that the purchaser had acquired nothing by his purchase or that the vender could resume possession of the property. If there was a contract for sale, and the purchaser paid the money in pursuance of such contract and obtained possession of the property, it was for the vendor to show some title in himself to throw the purchaser out of possession; and that there was no provision in the Registration Act excluding such a sale-deed from being adduced in evidence. RAM SURUN DASS v. RAM CHUND, **1 Agra 283.**

(3)—*Registration Act* (XX *of* 1866) — *Registered document—Verbal transfer accompanied by possession—Preference.*— When possession had been *bona fide* taken under a verbal transfer, a subsequent conveyance of the property by registered deed would not take effect. BUHADUR v. MUST. GRATTAN, **47 P.R. 1871.**

(4)—*Unregistered bond prior to Act* XX *of* 1866 -*Suit on bond subsequent to Act—Admissibility of bond in evidence—Debt or contract under inadmissible instrument—Parol evidence.*—A money bond which, at the time it was made, ought to have been registered under the rules in force in 1859, and, which, if it had been executed after the coming into effect of Act XX of 1866 would have been receivable in evidence under that Act, is admissible in a suit instituted upon the bond subsequently to the coming into operation of the Act. A party coming into Court and resting his claim on a written document, cannot, when that document turns out to be inadmissible, prove his claim by secondary evidence. MYA DOSS v. KOULNAIN, **46 P.R. 1869.** [*F.*, 10 P.R. 1880.]

(5)—*Registration Act*, 1866—*Trees—Moveable property.*—Trees were held moveable property for the special purpose of the Registration Act of 1866, but not so in other Acts. CHOODHRY ROOSTUM ALI v. DHANDOO, **3 Agra 157.**

(6)—This circular is one regarding the paper to be used for engrossing Memoranda under the Registration Act. **Cir. No. 37, dated the 20th September 1866, 6 W.R. Civ. Cir. Order, p. 9.**

(7)—*Act* XIX *of* 1843—*Registration—Deed of sale or mortgage—Priority.*—Act XX of 1866 makes no provision for priority of deeds of sale or mortgages for sums exceeding Rs. 100, registered under that Act, over deeds of sale or mortgages also for sums exceeding Rs. 100 which might have been, but were not, registered under Act XIX of 1843. (2 B.H.C. 204, 222, *D.*) *Quære.*—Would it be otherwise if the sale or mortegage was for less than Rs. 100? KHANDU DULABDAS v. TARA CHAND AMARCHAND, **1 B. 574.** [*F.*, 20 B. 390; *R.*, 2 M. 108, 4 B. 459.]

Registration Act (XX of 1866)—*continued.*

(8)—*Registered deed of sale—Prior unregistered sale—Notice—Act* XIX *of* 1843.—A registered deed of sale invalidates a prior unregistered sale-deed, though notice of the prior deed be alleged. KRISHNASAMI PILLAI v. VENKATACHELLA AIYAN, **3 M.H.C. 89.** [*R.*, 7 B. H. C. 45, 9 B.H.C. 121, 26 P.L.R, 1900, F.B.]

(9)—*Registration—Acts* XX *of* 1866 *and* VIII *of* 1871—*Admissibility in evidence of document—Question of procedure—Law at time of suit, applicable.*—A suit was brought in 1874 to recover money secured by a mortgage in writing of immoveable property made in 1870. At the time of the execution of the document, Act XX of 1866 was in force and by it the document was not admissible in evidence even to enforce the demand for money, as it was not registered. At the time when the suit was brought, Act VIII of 1871 had come into force and according to it the document was rendered admissible. *Held* that the old law did not render such securities void but merely prevented them from being offered in evidence, and that, as the question was one of the course of procedure, it was governed by the law in force at the period of suit and that, under the new law, the document was admissible in evidence. GUDURI JAGANNADHAM v. RAPAKA RAMANNA, **7 M.H.C. 348.** [*Appr.*, 15 M. 336 ; *R.*, 1 B. 197. 13 M. 308.]

(10)—*Limitation Act,* IX *of* 1871, *sch.* II, *art.* 168—*Registration Act—Registration of certified copy of decree.*—The words of art. 168, sch. II, Act IX of 1871, refer only to registration Act of 1871 ; because there is no provision for the registration of a certified copy of a decree in any of the earlier Registration Acts. Therefore, the said article of the Limitation Act cannot apply to a decree, of which only a memorandum has been registered under Act XX of 1866. RAJAH RUGHOO NUNDUN SINGH v. S. COCHRANE, **24 W.R. 372.**

(11)—*Agreement between landlord and tenant for more than one year—Pattah—Act* VIII *of* 1865—*Exemption from Registration Act* XX *of* 1866.—An agreement between a landlord and tenant in the Presidency of Madras for more than one year is a pattah within the meaning of Act VIII of 1865, and consequently exempted from registration under Act XX of 1866. VAKATY RAMA REDDY v. DUVVURU AYAPPA REDDY, **7 M.H.C. 234.**

(12)—*Act* XX *of* 1866—*Bond—Interest.*—Under a specially registered bond under Act XX of 1866, the creditor may summarily have a decree for the amount including interest up to date of decree. If he intends to secure interest at the rate stipulated after suit and decree, it is not enough to insert the phrase "date of realization," as this phrase must be held controlled by other parts of the agreement. ADUAR MONEE DEBIA v. KOOLO CHUNDER CHATTERJEE, **21 W.R. 140.**

(13)—*See* APPEAL—ACTS AND REGULATIONS, 24 W.R. 225.

Registration Act (XX of 1866)—*continued.*

(14)—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 9 W.R. 477.

(15)—*See* VENDOR AND PURCHASER—PURCHASE MONEY AND OTHER PAYMENTS BY PURCHASER, 5 B.L.R. App. 46=14 W.R. 20.

(16)—Ss. 2, 53—*See* CIV. PRO. CODE, 1908, O. XXII, r. 3 (1) (2), 14 B.L.R. 408, F.B.=23 W.R. 187.

(17)—*Ss.* 3, 53, 55, *Act* XVI *of* 1864—*Registration—Appeal.*—The decision of the Subordinate Judge's Court made after the passing of Act XX of 1866 upon a petition presented under Act XVI of 1864 must, under s. 3 of the Indian Registration Act, have the same effect as if it had been passed upon a petition presented under Act XX of 1866; and, consequently, under s. 55, no appeal lies to the Judge. GIRISH CHANDRA DUTT v. BAZUL-UL-HUQ, **3 B.L.R. A C. 68.**

(18)—*S.* 17, *cl.* 4—*Construction of words* Shan-ba-Shan *in a pottah—Registration.*—Where the form of a pottah is expressed by the words *Shan-ba-Shan* a year by year tenancy is meant, and such a pottah falls within the fourth clause of s. 17, Act XX of 1866, and is a lease for a term exceeding one year, and, unless registered, it cannot be received as evidence. RAMKUMAR MANDAL v. BRAJAHARI MRIDHA, **2 B.L.R. A.C. 75=10 W.R. 410.** [*D.*, 14 W.R. 68.]

(19)—*Ss.* 17, 18.—An agreement to deposit certain deeds and to execute a proper agreement is not a document coming within the meaning of cl. 2, s. 17, Act XX of 1866, but one the registration of which is optional, and which falls under the description in cl. 7, s. 18, of the Registration Act. MARK RIDDED CURRIE v. S. V. MUTU RAMAN CHETTY, **3 B.L.R. A.C. 126=11 W.R. 520.** [*R.*, 15 W.R. 354, 12 B.H.C. 175, 7 N.W.P. 124.]

(19-*a*)—S. 18—*See* NO. 19, *supra.*

(20)—*Ss.* 18, 50, 100—*Scope—Registration.*—S. 50, Act XX of 1866, does not vitiate titles acquired prior to the passing of that Act, merely because the instruments on which they rest are not registered. [*Appr.*, 22 W.R 3; *R.*, 11 W. R. 128, 47 P.R. 1871, 2 B. 299, 6 B. 168, F.B.; *D.*, 19 W.R. 279, 7 C. 753.] Where, before the new Registration Law was passed, a bill of sale was executed, full consideration was paid, and the purchaser has obtained, and remained in possession *bona fide*, for eleven years, *held* that a subsequent sale, duly registered under Act XX of 1866 which was in force at the time of its execution, did not prevail against, or affect, the title which the purchaser under the prior unregistered deed had acquired. GIRIJA SINGH v. GIRIDHARI SINGH, **1 B.L.R.A.C. 14=10 W. R. 65.** [*Appr.*, 22 W.R. 3; *R.*, 11 W.R. 128, 47 P.R. 1871, 2 B. 299, 6 B. 168, F.B.; *D.*, 19 W.R. 279, 7 C. 753.]

Registration Act (XX of 1866)—*continued.*

(21)— *Ss.* 18, 50, 100—*Priority.*—Where a plaintiff came into Court upon an unregistered mortgage-bond nearly 12 months after its execution, and was met by an allegation of possession under a deed of sale by his mortgagor, *held* that the registered deed must prevail over the unregistered bond with reference to Act XX of 1866, s. 50, notwithstanding the fact that the mortgage-bond was executed before the Act came into operation, the principle of the section having been contained in the previous Acts XIX of 1843, s. 2 and XVI of 1864, s. 68. SOODHARAM BHUTTACHARJEE v. UDHOZ CHUNDER BUNDHOPADHYA, **10 B.L.R. 380=19 W.R. 279.** [*F.*, 5 C. 336=4 C.L.R. 257 ; *R.*, 9 C.W.N. 14 ; *D.*, 7 C. 753.]

(22)—*Ss.* 20, 53—*Obligation specially registered and pledging land as security—Enforcement of obligation — Decree—Jurisdiction.*—Where an obligation executed for repayment of a loan contained also a pledge of land as security for the debt, and was specially registered under s. 20 of Act XX of 1866, *held* that, under s. 53 of that Act, the Court had jurisdiction to give the creditor a decree only for the sum mentioned in the obligation with interest and costs, but had no jurisdiction to give also a decree declaratory of the creditor's right to sell the property pledged in the obligation. *In the matter of* RAJ MOHUN MOOKERJEE v. NIL MONEE MITTER, **11 W.R. 222.** [*R.*, 14 W.R. 233.]

(23)—*Ss.* 31, 82, 84—*Refusal of Registrar-General to register—Endorsement of refusal.—Property outside jurisdiction of High Court—Registrar-General within jurisdiction—Petition to High Court.*—S. 82 of the Registration Act (XX of 1866) is merely directory. A Registrar-General to whom a deed is duly presented for registration would be justified in not accepting it for registration, and not making any endorsement of refusal in the deed if he thinks fit to take this course. But, where he has in fact endorsed his refusal on the document, the last words of s. 82 are applicable and the case falls within s. 84, and the person aggrieved by the order of refusal has a right to present a petition to the District Court. Where the Registrar-General, who refused to register a document presented to him for registration, was within the jurisdiction of the High Court and had his office within that jurisdiction, and the order refusing to register was made within that jurisdiction, but the property to which the document related was without the jurisdiction of the High Court, the High Court must be the District Court within the meaning of s. 84 and it was within the power of the High Court to order the Registrar-General to register the deed. *In the matter of* PERCY WYNDHAM, **6 B.L.R. 576.**

(24)—*Ss.* 41, 42.—This Circular directs that only one copy of memoranda for registration under ss. 41 and 42, Act XX of 1866, be retained by Civil Judges. **Civ. Cir. No. 7 dated 12th March 1870, 13 W.R. Civ. Cir. 13.**

Registration Act (XX of 1866)—*continued.*

(24-*a*)—S. 42—*See* NO. 24, *supra.*

(24-*b*)—S. 50—*See* NOS. 20, 21, *supra.*

(25)—*Ss.* 50, 100—*Unregistered mortgage of* 1865, *and sale after Registration Act* VIII *of* 1871—*Priority.*—With regard to the law of registration and its express and explicit enactment contained in ss. 50 and 100 of Act XX of 1866, and s. 50 of Act VIII of 1871, a registered sale deed of land subsequent to the passing of the latter Act takes priority over an unregistered mortgage on the same land effected in 1866. ADU RAM v. SADIK MUHAMMAD KHAN, **34 P.R. 1876.** [*D.*, 95 P.R. 1893.]

(26)—*S.* 51—*Registration Act* (XVI *of* 1864) —*Bond registered under—Suit on—Limitation —Act* XX *of* 1866, *s.* 51—*Jurisdiction.*—A suit for money lent under a bond registered under Act XVI of 1864, must, under S. 51 of Act XX of 1866, be brought within 6 years from the time when the cause of action arises. In a suit for money lent under a bond, which was executed at a place where plaintiff had been resident at the time and some years previously, and which provided for payment to the plaintiff in person, *held* that the intention of the parties being to make the money payable there, the District Judge had jurisdiction. NIRBAN SINGH v. KUMLA SAHOY, **17 W.R. 345.**

(27)—*S.* 52—*Obligation—Pledge of land as collateral security for payment of loan.*—A contract to pay money on a certain day with interest is an obligation within the meaning of s. 52 of Act XX of 1866, though, by the same instrument, land is pledged as collateral security for the payment of the debt. This obligation can be enforced by a Subordinate Judge in the summary manner allowed by the Act. WOOMA CHURN MOOKERJEE v. HURRY CHURN BOSE, **11 W.R. 60.** [*D.*, 11 W.R 222.]

(28)—*S.* 52—*Act* VIII *of* 1859, *s.* 273—*Act* VIII *of* 1871, *ss.* 53, 54 *and* 55—*Appeal—Execution —Procedure—Repeal.* — Orders in execution under ss. 53, 54 and 55 of Act XX of 1866 are not appealable. Though this Act has been repealed by Act VIII of 1871, the procedure under it has been saved by ss. 53, 54 and 55 of the latter Act. RAMANAND v. THE BANK OF BENGAL, **1 A. 377.** (7 W.R. 130, 17 W.R. 512, *Cited.*) [*Overruled*, 1 A. 583.]

(29)—S. 52—*See* AGREEMENT, 9 W.R. 498.

(30)—S. 52—*See* MERGER, 1 B.L.R. O.C. 35.

(31)—*Ss.* 52, 53—*Suit on registered deed of simple mortgage.*—There is nothing in Act XX of 1866 which excludes obligations accompanied by hypothecation of immoveable property from the provisions of ss. 52 and 53 of the Act. GOBIND SHUNKERJEE v. GIRDHAREE SINGH, **1 N.W.P. 142.**

(32)—*Ss.* 52, 53—*Signature by single partner in name of firm—Summary procedure.*—The managing partner of a firm, who had executed a pro-note, on behalf of his firm, registered the note under s. 52, Registration Act, and signed

Registration Act (XX of 1866)—*continued.*

the agreement mentioned in ss. 52 and 53. *Held* that, as there was nothing in the section to show that the summary remedy thereby given was so given against any person other than the obligor signing the agreement, the other partners of the firm could not be made liable. If the obligee wished to proceed against other persons alleged to be liable under the obligation, he should do so by ordinary Civil suit. *Quære*:—Whether he could do so after resorting to summary proceedings against the obligor who had signed the agreement? *In re* BAKATRAM BADRINATH, **6 B.H.C.O.C. 131.**

(33)—*Ss.* 52, 53—*Summary suit—Bond containing stipulation that in default of due payment of interest principal sum is recoverable—Summary procedure if applicable.*—A mortgage bond payable 2 years after the date of its execution provided that interest should be paid in instalments and that, on failure to pay the instalments in due time, the whole amount of principal was due, and the bond was specially registered under s. 62. *Held* that, as, in such a case, it would be necessary for the plaintiff to produce evidence, beyond the mortgage deed itself, to show default in one of the monthly instalments of interest payable by the mortgagor, the summary procedure provided by s. 53 of the Act did not therefore apply. *In re* GANPAT MONIKJI PATIL, **6 B.H.C.O.C. 64.** [*Disappr.*, 6 M.H.C. 4.]

(34)—*Ss.* 52, 53—*Bond—Instalment—Registration.*—A bond for a sum of money payable by instalments contained a proviso that, in case of default being made in the payment of two successive instalments, the whole amount secured by the bond and remaining unpaid should become due. The bond was specially registered under s. 52 of Act XX of 1866. *Held* that the whole amount remaining due on the bond could not be recovered in a summary way as provided by s. 53 of Act XX of 1866 on the allegation of default of payment of two consecutive instalments—ss. 52 and 53 not applying to such a case. *Held*, also, that these sections apply only to the two cases—where the full amount of the bond becomes payable and where an instalment becomes payable; and that the sections do not apply to cases not falling strictly within the words of the Act. *In the matter of the* INDIAN REGISTRATION ACT, 1866, *and in the matter of* LACHMIPAT SINGH DOGAR ROY BAHADUR, **2 B.L.R. O.C. 151=11 W.R.A.C. 24.** (8 W. R. 466, *R.*) [*F.*, 6 B.H.C. 60, 64; *R.*, 85 P.R. 1869.]

(35)—Ss. 52, 53—*See* LIMITATION ACT, 1871, arts. 166, 167, 1 A. 586, F.B.

(36 & 37)—Ss. 52, 53—*See* SMALL CAUSE COURT, PRESIDENCY TOWN, JURISDICTION OF—GENERAL, 6 B.L.R. 177=14 W.R. 478.

(38)—*Ss.* 52 *to* 54—*Registration—Money bond.*—Ss. 52 to 54 of Act XX of 1866 contemplate bonds for the payment of money and none others. A bond which provides for the delivery of paddy without any specification as to the money-value of such paddy of the amount to be paid if the paddy is not delivered, is not a bond which can be enforced summarily under the provisions of s. 53 of Act XX of 1866. JADUB MUNDUL v. BISHOO SIRDAR, **15 W.R. 369.**

(39)—*Ss.* 52, 53, 55—*Act* VIII *of* 1859, *ss.* 2 *and* 32—*Mortgagee's lien—Suit to enforce specially registered bond—Jurisdiction.*—S. 55, Act XX of 1866 is no bar to the jurisdiction of the Civil Courts in entertaining a suit for the enforcement of a lien on landed property mortgaged under a bond specially registered under that Act. OOTSHUB NARAIN CHOWDHRY v. CHITTRA RECKA GOOPTA, **14 B.L.R. 411, Note=17 W.R. 154.** [*R.*, 14 B.L.R. 408=23 W.R. 187.]

(40)—*Ss* 52 *to* 55, *effect of.*—The effect of ss. 52 to 55 is to make a decree under them of precisely the same validity as any other decree, to make it enforceable by the same process, but to render it impeachable on the special grounds referred to in s. 55. The special circumstances must be such as to show a vice in the mode in which the contract to submit to decree and the special registration were obtained, and an infirmity in the original obligation will not do. SINIA TEVAR v. RAJAH STRIMANTA RANGASAMI AIYANGAR, **7 M.H.C. 121.**

(41)—*S.* 53—*Application—Statutes conferring summary remedy are to be strictly applied.*—The terms of s. 53, Act XX of 1866, confine the summaryremedy to obligations making the whole debt payable at one date or by instalments at several dates, and, in the case of an obligation of the latter description, to the recovery of only the amount of each instalment as it falls due. A summary remedy of this nature must be strictly applied. VENITHITHAN CHETTY v. MOOTHIROOLANDI CHETTY, **6 M.H.C. 4.**

(42)—*S.* 53—*Applicable only as between immediate parties.*—The summary remedy under s. 53 of the Registration Act is made applicable only as between the immediate parties to the registered obligation; and there is nothing in the language of ss. 53 to 55 to warrant a distinction in favour of the representative of an obligee. *In the matter of* SUBBUVIYAN, **4 M H.C. 233.** (3 M H.C. 199, *F.*)

(43)—*S.* 53—*Summary application under.*—A summary application under s. 53, Act XX of 1866, cannot be entertained at the suit of the assignee of the obligee. GOUR MOHAN DAS v. RAMRUP MAZOOMDAR, **1 B.L.R. A.C. 42=10 W.R. 84.** [*R.*, 23 W.R. 187.]

(44)—*S.* 53—*Nature of proceedings under.*—Proceedings taken under s. 53 of Act XX of 1866 for the enforcement of specially registered bonds are not suits. A suit pre-supposes there may be a defence. S. 53 of the Act does not permit a defence. JAMNA DAS v. MAHOMED ALI KHAN, **23 P.R. 1874.** (6 W.R. S.C.C. Ref. 11, *F.*)

Registration Act (XX of 1866)—*continued.*

(45)—*S.* 53—*Suit to enforce obligation against representative of one of the original obligors—Lien on surplus sale-proceeds.*—Where a suit to enforce an obligation had to be brought against the representatives of one of the obligor's, and the object of the suit was to enforce a lien upon the surplus sale-proceeds in deposit in the Collectorate, *held* that the suit would not be covered by the provisions of s. 53 of the Registration Act. BOISTUB CHURN DIGPUTTY v. GOBIND PERSHAD TEWAREE, **13 W R. 203.** [*R.*, 9 M.L.T. 235 =8 Ind. Cas. 1072=21 M.L.J. 320=34 M. 188=M.W.N. 1910, 799.]

(46)—*Bond registered under s.* 53, *Act* XX *of* 1866—*Suit on—Instalments — Waiver—Suit, Alteration of.*—Where plaintiff sued for recovering the amount due for two instalments under an instalment-bond registered with an agreement under s. 53, Act XX of 1866, one instalment of which was due more than a year before the institution of suit, and the Court of Small Causes, having found that the bond was not executed by the defendant and was not properly registered, dismissed the suit, the High Court, on a reference, did not allow the plaintiff to waive the first instalment and get a decree in respect of the second instalment only, since it would have the effect of allowing the plaintiff to alter the nature of the suit and obtain payment of a sum of money to which he was not entitled upon the finding come to by the Small Cause Court after hearing the evidence. DHUNNUNJOY GHOSE v. BEMAL DHAR BAGDEE, **17 W. R. 514.**

(47)—*S.* 53—*Production of registered bond with application, not a suit—Jurisdiction.*—Under s. 53 of Act XX of 1866, it is not competent to a Civil Court to pass a decree that the amount due under a registered bond shall be realized out of the property mentioned thereunder, or to pass a decree for the whole amount of the bond on the ground of its having become due by a default to pay an instalment, merely on the production of the registered bond and the petition of the bond-holder. It was not the intention of the Legislature that an application uuder s. 53, founded simply on the production of a registered bond and the bond-holder's petition should be substituted for a regular suit against the property. GRISH CHUNDER CHOWDHRY v. KRISTO SOONDUR SANDYAL, **14 W. R. 277.**

(48)—*S.* 53 — *Hypothecation — Mortgage—Sale in execution.*—A decree in a suit on a bond under s. 53 of Act XX of 1866, can properly only be a decree for money, and not for enforcing any lien against property hypothecated in the bond. Where it appears, on the face of the decree, that although it professed to declare the lien, it was passed under the special provisions of s. 53 of Act XX of 1866, it could only be held valid as a money decree. A purchaser of immoveable property at auction in execution of a money decree acquires merely the rights and interests, which the judgment-debtor had at the time of sale. AKHE RAM v. NAND KISHORE, **1 A. 236, F.B.** [*F.*, 1 A. 240.]

(49)—*S.* 53—*Loan on pledge of immoveable property—Sureties for loan—Liability of sureties before exhausting property pledged.*—Certain borrowers executed a debt-bond undertaking to re-pay the loan with interest and pledging certain immoveable property as security for payment of the debt. In another part of the same instrument certain other person became sureties for the re-payment of the loan, in the event of the loan and interest not being recovered from the moveable and immoveable properties of the borrowers. The lender brought a suit upon the bond against all the subscribing parties and obtained a decree for payment of the sum borrowed with interest with a declaration that the amount should be realised by the sale of the property pledged. The decree was made against all the defendants. *Held*, that, in the circumstances of the case, the Court should not have made any declaration as against the property pledged, but must have passed a simple decree for money in the terms of s. 53 of Act XX of 1866 with the contracted rate of interest and costs. POORNO CHUNDER GHOSE v. GOBIND CHUNDER MOOKERJI, **22 W.R. 28.**

(50)—*S.* 53—*Decree upon bond specially registered under s.* 53 *of Act* XX *of* 1866—*Mofussil Small Cause Court, cognisability by—Second appeal from order in execution.*—A suit upon a bond, specially registered under s. 53 of Act XX of 1866, for less than Rs. 500, is cognisable by a mofussil Small Cause Court ; and no second appeal lies, under s. 586, Civ. Pro. Code, against an order passed upon an execution application in respect of a decree made in such a suit. 14 W.R. 478=6 B.L R. 177 does not govern Small Cause Courts in the mofussil. *Quære* :—Whether an appeal lies at all against such an order in execution proceedings in respect of such a decree? *Note.*—There is a difference of opinion on the question between the Calcutta High Court and those at Bombay and Allahabad. SRI BULLOV BHATTACHARJI v. BABURAM CHATTOPADHYA, **11 C. 169.** [*Appr.*, 18 A. 481=A.W.N. 1896, 160, F.B.; *R.*, 12 C.P.L.R. 12.]

(51)—*S.* 53—*Ambiguous decree—Construction —Mortgage decree — Lien.*—An ambiguous decree must be construed so as to be in harmony with the words of the law. In a decree on a mortgage bond passed under s. 53, Act XX of 1866, it is not competent to the Court to confer a lien in accordance with the bond. ASMA BIBI v. RAM KANT ROY CHOWDHRY, **19 W.R. 251.**

(52)—*S.* 53—*Decree under s.* 53, *Act* XX *of* 1866.—A decree made under s. 53 of Act XX of 1866 has all the effects of a decree passed in a regular suit under the Civ. Pro. Code. GUNGA NARAIN CHATTERJEE v. RADHA KRISHNA DUTT, **25 W.R. 322.**

Registration Act (XX of 1866)—*continued.*

(53)—*S. 53—Decree—Appeal—Decree under section not a decree in regular suit—Limitation Act*, 1871, *arts.* 166, 167.—Although it is clearly just that a party who has covenanted to submit to a summary decree should not be allowed to appeal against such a decree: yet, in the *execution* of such a decree, both parties being exposed to all the ordinary risks and possible injury arising from an erroneous order, there would appear no just cause why the sufferer should be deprived of any of the ordinary remedies which the Civ. Pro. Code provides for a decree holder or judgment-debtor. Accordingly, it was *held* that an appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866. [*F.*, 12 C. 511; *R.*, 10 C. 196, P.C.] Whether a decree made under s. 53 of Act XX of 1866, is to be taken as a decree in a regular suit or not, is provided in the Registration Act itself. The Act in ss. 52 and 53, speaks of the proceeding as a mode of recovering money "in a summary way," and directs that the petition shall be presented "to any Court, which would have had jurisdiction to try a regular suit on the obligation for the amount secured thereof." So, unless it is supposed that the Legislature has used technical terms in different senses at different times, it is quite clear that a proceeding under s. 53 of Act XX of 1866, though in the nature of a suit, is not a regular suit, and that a decree passed in such a proceeding is a decision of a Civil Court other than a decree passed in a regular suit. Accordingly, such a decree was *held* to be governed by art. 166 and not art. 167 of the Limitation Act, 1871. BHIKAMBAT v. JOSEPH FERNANDEZ, **5 B. 673, F.B.** [*R.*, 6 B. 54.]

(54)—*S. 53—Decrees under s. 53 of the Registration Act* (XX *of* 1866)—*Appeal.*—No appeal lay from decrees, or from orders in execution thereof made under s. 53 of Act XX of 1866. BHYRUB CHUNDUR v. GOLAP COOMARY, **3 C. 517.**

(55)—*S. 53—Special registration — Decree sought against personal representatives of deceased obligor.*—Under the Registration Act, on production of the obligation and record, the petitioner is declared to be "entitled to a decree." Reliance is placed upon the special registration as a substitute for any investigation by the Court; but whenever any new parties are introduced or any question arises as to matter subsequent to the registration, it is obvious that the ground for the summary remedy fails. So, under ss. 52 and 53 of Act XX of 1866, a decree could not be passed against the representatives of the deceased obligor. By the majority of the Court (*Holloway and Collett, JJ., dissenting*). PUDIYAPORAYIL MAMY v. MADAKARTH AMMAN KUTTI, **3 M.H.C. 199.** [*F.*, 4 M.H.C. 233.]

(56)—*S. 53, cl. 3—Application for enforcement of bond—Award of interest—Mode of drawing up decree.*—In an application for the enforcement of a bond made under s. 53, cl. 3, Act XX of 1866, the decree should not award interest subsequent to the date thereof, but should be drawn up in strict conformity with that section. THAKOOR BHARIRO SINGH v. BECHOO JOOLAHA, **3 Agra 393.**

(57)—*S. 53—Provision in decree—Rate of interest—Costs.*—No sum as interest from the date of decree to the date of realization could be awarded by a decree under s. 53, Act XX of 1866. It could only award a sum not exceeding that mentioned in the bond together with interest at the rate specified (if any) to the date of decree, and a sum for costs to be fixed by the Court. MAHCUM CHUND v. MANTAB, **3 Agra 318.**

(58)—S. 53—*See* BOND, 5 B.L.R. 167=13 W.R. 252.

(59)—S. 53—*See* PLAINT—MISCELLANEOUS, 19 W.R. 156.

(60)—S. 53—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF — GENERAL, 18 W.R. 199.

(61)—S. 53—*See* SUMMARY PROCEDURE, 10 W.R. 84=1 B.L.R. A.C. 42.

(61-*a*)—S. 53—*See* NOS. 16, 17, 22, 31, 32, 33, 34, 35, 36, 38, 39, 40, *supra.*

(62)—*Ss. 53, 54, 55—Summary procedure under Act XX of 1866—Appeal from order in execution of decree thereunder.*—An appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1866 is not barred by anything in s. 55 of that Act. SRIBULLAV BHATTACHARJEE v. BABURAM CHATTOPADHYA, **12 C. 511, F.B.**

(62-*a*)—S. 54—*See* NOS. 38, 39, 40, 62, *supra.*

(63)—*S. 55—Bar of appeal—Applicability to passing and execution of decree.*—Where s. 55 of the Registration Act, XX of 1866, barred an appeal, it did so equally in matters of execution as in respect of the decree passed.—*Quære*:—Whether a decree passed under s. 53 of the Registration Act is or is not a summary decree within the meaning of s. 22 of Act XIV of 1859. HURNATH CHATTERJEE v. FUTTICK CHUNDER SUMADDAR, **18 W.R. 512.** [*Diss.*, 1 A. 583, F.B., 12 C. 511, F.B; *F.*, 23 W.R., 328, 24 W.R. 225, 3 C. 517.]

(64)—*S. 55—Specially registered bond—Decree—Regular suit—Cause of action.*—A decree obtained by the plaintiff on a specially registered bond under Act XX of 1866 and set aside under s. 55 of that Act, *held* not to bar a regular suit on the bond. UTSHAB NARAYAN CHOWDHRY v. CHITTRA RAKA GUTPA, **8 B.L.R. App. 92.** (6 W.R. Mis. 121, 6 W.R. 11, *Cons.*)

(65)—S. 55—*See* MANAGER—OF ATTACHED PROPERTY, 15 W.R. 477.

(66)—S. 55—*See* RES JUDICATA—CAUSE OF ACTION, 17 W.R. 154.

(67)—S. 55—*See* NOS. 17, 40, 62, *supra.*

Registration Act (XX of 1866)—*concluded.*

(68)—S. 82—*See* NO. 23, *supra.*

(69)—S. 84—*See* NO. 23, *supra.*

(70) S. 100—*See* NOS. 20, 21, *supra.*

Registration Act (VIII of 1871).

[REP., ACT III OF 1877.]

(1)—This circular cancels 7 Circular Orders which have ceased to be necessary since the new Registration Act, VIII of 1871, came into force. **Civ. Cir. No. 18, dated 6th July 1871, 16 W.R. Civ. Cir. 2.**

(2)—Deposit of Will under Act VIII of 1871 (Old Registration Act) is no registration—*See* WILL—MISCELLANEOUS, 10 C 976, P.C.= 11 I.A. 121.

(3)—*S.* 2—*Act* VII *of* 1870—*Act* XX *of* 1866, *s.* 52.—The effect of the first and fourth clauses of s. 2 of the Indian Registration Act of 1871, read with the provisions in sch. I as to the extent of the repeal of Act VII of 1870, is to keep in force all the provisions of Act XX of 1866 relating to the procedure for the recovery in a summary way of the amount of an obligation upon agreements recorded under s. 52 of that Act, before the first day of July 1871. PACHAIPERUMAL CHETTI v. SAVAYYAR AUDONI, **6 M.H.C. 351.**

(4)—*Ss.* 17, 49—*Unregistered mortgage with possession — Subsequent registered mortgage—Priority—Act* I *of* 1872, *s.* 91—*Parol evidence of existence of unregistered mortgage whether admissible* —S. 17 of the Registration Act read with s. 49 of the same Act renders invalid an unregistered mortgage-deed whether accompanied by possession or not, as against a subsequent registered mortgage-deed, and s. 49 precludes the prior mortgagee from relying upon the unregistered deed to prove the mortgage to him (14 W.R. 250, *Diss.*) S. 91 of the Evidence Act (I of 1872) precludes *an unregistered prior mortgagee* from adducing oral evidence in proof of the mortgage to him. CHOWGATTA v. CHATAR SING, **18 P.R. 1878.** (1 B.L.R. F.B. 59, 6 B.H. C.A.C. 59, *R.*) [*F.*, 70 P.R. 1880, 126 P.R 1884; *R.*, 93 P.R. 1883, 90 P.R. 1885, F.B.; *D.*, 2 P.R. 1885.]

(5)—*Ss.* 17, 49—*Unregistered mortgage, admissibility of, to prove money lent.*—When an instrument creates a title or interest in land and is also a security for money lent (as a deed of mortgage of land), it may be received in evidence as a document to prove the money lent, though unregistered. BISHEN SINGH v. SUNDER AND RAM DASS, **40 P.R. 1874.**

(6)—*S.* 49—*Evidence Act* (I *of* 1872), *s.* 92—*Document inadmissible for want of registration —Exclusion of oral evidence to prove its terms —Previous oral transaction leading to execution of document, evidence of—Possession, presumption from.*—The plaintiff claimed occupancy rights in certain land under a gift accompanied with possession. The terms of the gift were embodied in a deed which, for want of registration, was inadmissible by reason of s. 49 of the Registration Act (VIII of 1871). *Held* that oral evidence of the contents of the deed could not be given: nor could the plaintiff fall back upon oral transactions preceding the execution of the document, for proving the gift. *Held*, also, that as the plaintiff's case was not that he was the owner of the land, but that he had acquired an interest falling short of ownership under a transaction effected by a written instrument, and such transaction could not be proved either by the production of the instrument, or by oral evidence, the presumption arising from the fact of possession, taken by itself, could avail him nothing. BADRA v. MAKHNA, **58 P.R. 1877.** [*F.*, 18 P.R. 1878, 123 P.R. 1882.]

(7)—*S.* 49—*Unregistered document—Objection to admissibility, urged in appeal—Mortgage of land for over rupees* 100 *with right to share in produce—Suit for value of produce—Effect of want of registration of mortgage-deed on plaintiff's right.*—Objection to admissibility in evidence of a document on the ground that it is not registered, can be entertained by an Appellate Court, though the objection was not urged in the Court of first instance. Where two plots of land were mortgaged by A to B for sums of over Rs. 100, by two unregistered deeds which provided that on payment of the amounts, the lands were to be released, and meanwhile, half the produce of the lands was to go to each party, *held*; in a suit brought by B to recover the value of his share of the produce for a certain year, that the deeds did not give a right to share in the growing crops independently of an interest in land, but only as accessory to the interest which the mortgage created, and were compulsorily registrable. *Held* also, that though the plaintiff's suit was for money, he could not prove his right to the money claimed without resorting to the mortgage transaction in order to prove his title to the crops, which he could not do by reason of s. 49 of the Registration Act. SARBOLAND KHAN v. CHAND SINGH, **84 P. R. 1877.** [*F.*, 123 P. R. 1882.]

(8)—S. 49—*See* NOS. 4 and 5, *supra.*

Registration Act (III of 1877).

[REP., IN PT., ACT XIII OF 1889; REP., IN PT. AND AM., ACT XII OF 1891, AM., ACT XII OF 1879; SS. 104 TO 107; ACT XIX OF 1883, S. 12 (1) and (3); ACT VII OF 1886; ACT VII OF 1888, S. 65; ACT XVII OF 1899; SUPPLEMENTED, ACT I OF 1880, S. 3; ACT IV OF 1882, S. 54, PARAS. 2 & 3, AND SS. 59, 107 AND 123 (SEE S. 4, AS AMENDED BY ACT III OF 1885, S. 3). REP, (EXCEPT IN BRITISH BALUCHISTAN), ACT XVI OF 1908. DECLARED IN FOREIGN BRITISH BALUCHISTAN, REG. I OF 1890, S. 3.]

(1)—*Future crops are immoveable property.*—According to the Registration Act immoveable property includes any benefit to arise out of land and consequently future crops must be

Registration Act (III of 1877)—*continued.*

classed as immoveable and not as moveable property. RAJA BIJE BAHADUR v. GANOOLAL, 5 **C.P.L.R. 6.** (13 C. 262, *D.*) [*F.*, 5 N.L.R. 21.]

(2)—*Evidence—Document creating interest in land—Inadmissible for want of registration—Admissibility as evidence of debt.*—Although a bond which created an interest in land as security for a debt is inadmissible in evidence if unregistered, it may be adduced as evidence of the debt, and a money decree may be given on the basis of it for the sum secured by it. SEETA KULWAR v. JUHUR NATH PERSHAD, **3 Agra 170.** [*F.*, 9 C. 520, F.B.; *App.*, 3 A. 229, F.B.]

(3)—*Evidence — Unregistered bond affecting land—Suit for personal relief—Admissibility of bond.*—An unregistered bond containing the condition that the lender will get possession of certain land in default of payment by the borrower within a specified time, is admissible in case the lender sues, not to enforce any charge or lien against the land, but for personal relief in the shape of a decree against the defendant for the payment of the bond debt. ESHREE RAI v. BINDOOT RAI, **3 Agra 60.**

(4)—*Registered and unregistered sale-deeds—Possession.*—A purchaser under a registered sale-deed has priority over a prior purchaser under an unregistered sale deed who had, but lost, possession before the subsequent registered deed. GHISU v. AMIRULLA, **A.W.N. 1881, 33.**

(5)—*Registered and unregistered documents—Unregistered documents executed before Act* III *of* 1877.—Documents not compulsorily registrable, executed before the Registration Act of 1877 came into force, will not, if unregistered, take effect against latter registered documents. SHIB CHUNDRA CHAKRAVARTI v. JOHOBUX, **7 C. 870=9 C.L.R. 224.** (2 A. 851, *F.*; 4 C. 536, *Dist.*) [*F.*, 11 C. 661; *Rel. on*, 9 C.W.N. 14; *R.*, 6 A. 164, 13 B. 229, 20 B. 158.]

(6)—*Presentation of insufficiently stamped document for registration—Effect.*—There is no provision in the Registration Act or in the Stamp Act, which lays down that, where a document is presented for registration insufficiently stamped, the presentation shall be no presentation. It is a good presentation, though the actual registration is delayed. SHAMA CHARAN DAS v. JOYENOOLLAH, **11 C. 750.** [*R.*, 3 C.P.L.R. 67.]

(7)—*Patta—"This to remain in force until another patta is granted" — Construction—Lease.*—The words "This is to remain in force until another patta is granted" express an intention to create or regulate the terms of a tenancy beyond the year and from year to year. [*R.* 9 C.P.L.R. 88.] Looking to the language of the Registration Act, the term 'patta' appears to be included in the term 'lease.' A lease for a term, not exceeding five years at a rent reserved not exceeding Rs. 50, is exempted by the Local Government from Registration. VENKATACHELLAM CHETTI v. ANDIAN, **3 M. 368.** [*R.*, 9 C.P.L.R. 88.]

Registration Act (III of 1877)—*continued.*

(8)—*Registration—Interest in land—Value.*—The value of the interest created in immoveable property by a mortgage bond is, for purposes of the Registration Act, that sum by the payment of which the interest could be determined. TIYAGARAJA v. RAMANUJAM. **6M. 422.** [*R.*, 23 M. 105.]

(9)—Public works cess Bengal Act III of 1877—Road cess—Public cess—Income tax—*See* BEN. ACT X OF 1871, 11 C.L.R. 140.

(10)—Compromise, petition of, relating to immoveable property—Registration Act—Judicial proceedings--Transfer of mortgagee's rights to a third party, mortgagee's right to question validity of—*See* COMPROMISE—GENERAL, 6 O.C. 362.

(11)—*See* HINDU LAW—ADOPTION, 19 B. 239.

(12)—*See* IMMOVEABLE PROPERTY, 66 P. R. 1900.

(13)—*See* MAXIMS, 5 Bom. L.R. 995.

(14)—Constructive notice—Registration Act—*See* NOTICE, 7 C. 199.

(15)—*See* SUMMARY DECISION, 10 C. 196=13 C.L R. 385=10 I.A. 119, P. C.

(16)—*See* TRANSFER OF PROPERTY ACT, 1882, s. 54, A. W N. 1885, 201.

(17)—Trees—Moveable or immoveable—Determination of question—*See* TREES, 9 C.P.L. R. 53.

(18)—S. 17—*See* CONTRACT ACT, 1872, s. 23, 139 P.R. 1883.

(19) *Ss.* 17, 23 *to* 26 *and* 77—*Agreement optionably registrable—Date of execution, necessity for—Evidence to prove date, admissibility of—Description of property, sufficiency of—Refusal of executant to admit execution — Execution not voluntary—Limit to enforce registration, maintainability of.*—Disputes had been going on for a long time between the parties to the present suit regarding the right to collect rents of certain properties. The then Sub-Divisional Officer of the division sent for them and, on their reaching his quarters, the Officer asked them to settle their disputes then and there. The plaintiff offered certain terms and the Sub-Divisional Officer told the defendant, that, unless he accepted those terms, he would be sent to *hajut*. Ultimately after being confined for nearly the whole of the day in the bungalow of the Officer, without being allowed for bathing and food, the defendant agreed to sign a compromise and an agreement was written out by the Sub-Divisional Officer, signed by the plaintiff and the defendant and witnessed by the Sub-Divisional Officer and the Assistant Superintendent of Police. The agreement did not contain the date of execution. It gave the names of *Dihis* and *Chuks* of the properties comprised therein and not the names of the districts wherein they were situate. The plaintiff presented the agree-

Registration Act (III of 1877)—*continued.*

ment for registration, admitting his execution thereof. The defendant did not appear before the Sub-Registrar and proceedings to enforce his attendance were unavailing. The Sub-Registrar, therefore, admitted the document for registration as regards the plaintiff but refused to do so as regards the defendant. On appeal, the Special Sub-Registrar affirmed the decision of the Sub-Registrar. Hence the present suit under s. 77. *Held*, there is nothing in the Act requiring a document presented for registration to be dated. Documentary or parol evidence would be admissible to prove when, as a matter of fact, a document tendered for registration was executed. In the circumstances of the case, the description of the properties was sufficient. (4 M.H C. 91, 18 C. 556, *R.*) *Held*, also that, though the agreement was optionally registrable, as the provisions of the Act 'enforcing the appearance of executants and witnesses' are applicable to the case of a document, the registration of which is optional, the refusal of such an executant to admit execution gives rise to a cause of action under s. 77 of the Act. *Held*, further, that the defendant's signing of the agreement under the circumstances of the case was not an 'execution' thereof within the meaning of the Act, indeed it was no 'execution' at all. Execution means voluntary execution, the signing of the document of the executant's free-will. Appeal allowed and suit dismissed. CHANDRA KISHORE MUNSHI v. DINENDRA NATH SANYAL, **1 C.L.J 126.** (6 W. R. Mis. 131, 1 B.L.R. O.C. 47, 4 M.H.C. 425, *D.*).

(20)—*Ss.* 17, 49—*Oral agreement followed by deed of sale.*—The Courts recognise a special mercantile practice as to the creation of an equitable mortgage by the deposit of title deeds, but decisions relating to such contracts are not applicable to ordinary contracts for the transfer of immoveable property. Where the owner of certain immoveable property mortgaged such property on a duly registered mortgage deed and subsequently signed on such deed an endorsement (which is attested) to the effect that the mortgagor had absolutely made over the mortgaged property to the mortgagee, such endorsement—though written, as alleged, after delivery of such property—was intended to be the deed of sale and was tacitly considered by the parties themselves as the "only repository and the appropriate evidence of their agreement," and as such was subject to the provisions of s. 17 of the Registration Act. MA NYEIN THA v. MAUNG KYA GAING, **L. B.R. 1893—1900, 34.** (5 B. 232, 11 B.L.R. 405, *R.*)

(21)—*S.* 17 *and s.* 49—*Deed of compromise—Petition to Court—Document declaring right to immoveable property over Rs.* 100 *in value—Inadmissibility of whole document in evidence—Plaint disclosing a cause of action irrespective of the unregistered document.*—Plaintiff sued under s. 265 of the Contract Act asking for a dissolution of partnership, and the allotment to him of his share in the assets and property of the firm, and appealing to a document

Registration Act (III of 1877)—*continued.*

(which was unregistered) as explaining the relative rights of the parties, and the share he was entitled to. It appeared that the plaintiff had previously filed a suit for dissolution, but having come to terms with the defendant, appeared in Court with the document propounded in the present case, which showed that on certain concessions being made, and notably on certain properties alleged in the case to be joint, or firm properties, being recognised as defendant's sole property, the partnership business should not be dissolved but go on. This document, though headed with the names of the parties and with the form of claim in the suit, was in itself clearly an agreement between the parties, signed by them and witnessed. On the said document being filed, the Court ordered "that as plaintiff withdrew, the suit should be dismissed." *Held*, that the document relied upon in the present suit could not be regarded as a mere petition to the Court conveying information that an agreement had been come to, which agreement was not in the document itself, but existed as an oral agreement apart from and independently of it; and that as the document clearly did "declare," that is define, or arrange, or settle, some question relating to the title to immoveable property, which on the face of the document, though no particular value was set forth, obviously exceeded the limit of Rs. 100 in value, and as it was impossible to separate the parts of the document which required registration from the parts which did not, therefore the whole document was inadmissible for want of registration, and oral evidence could not be taken to supply its place. MUSSAMMAT DEOKI v. KALA, **76 P.R. 1887.**

(22)—*S.* 23—*Period within which document may be registered—Conduct of parties, effect of.*—No conduct of the parties to a document, however much that might alter its character, could affect the term of limitation, prescribed by s. 23 of the Registration Act, within which such document must be registered. NOBAN NUSYA v. DHON MAHOMED, **5 C. 820=6 C.L.R. 136.**

(22-*a*)—S. 23—*See* NO. 19, *supra.*

(23)—*Ss.* 23 *to* 26, 34, 77—*Suit to enforce registration—Relevancy of question of consideration—Appearance of executant before Registrar.*—Suit to enforce registration of an instrument of mortgage. Though the document was presented for registration within four months, the executants did not appear before the registering officer within four months, notwithstanding that summonses were taken out to enforce their attendance. The executants contended that there was no consideration for the document, except to the extent of a small sum, and that, as they did not appear before the registering officer within four months, the document could not be registered. *Held* that in a suit to compel the registration of a document, the question of consideration was wholly irrelevant. *Held* also that the non-appearance of the executants did not bar the institution

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of the suit. The appearance referred to in s. 34 of the Act included voluntary appearance as well as appearance under coercive process. HASSAN ALLI v. EKAMBARAM, **5 M.L.J. 29.**

(24)—Ss. 23 and 26—*See* MUHAMEDAN LAW—GENERAL, 21 P.L.R. 1900.

(25)—S. 24—*See* Nos. 19, 23, *supra*, and No. 32, *infra*.

(26)—S. 25—*See* Nos. 19, 23, *supra* and No. 32, *infra*.

(27)—S. 26—*See* Nos. 19, 23, 24, *supra*.

(28)—S. 34—*See* No. 23, *supra*.

(29)—S. 48—*See* EVIDENCE ACT, 1872, s. 91, L.B.R. 1872—1892, 650.

(30)—S. 49—*See* Nos. 20, 21, *supra*.

(31)—Ss 60, 75—Admissibility of a bond bearing registration endorsement—Presumption—Defective presentation—Second presentation after Judge's order—*See* EVIDENCE ACT, 1872, s. 114, 9 A.L.J. 188.

(31-*a*)—S. 75—*See* No 31, *supra*.

(32)—*Ss.* 76, 77, 23, 24—*Limitation for registration or order of refusal—Denial of execution—Refusal to attend—Limitation for suit under s. 77 of the Act.*—No period is prescribed by Act III of 1877, within which a document which has been admitted for registration may be registered, or within which the order of refusal by the Registrar must be made; but the order of refusal must be made at some time *after* the expiration of the time allowed for admitting the document, except in cases in which there has been an express refusal [*R.*, 25 C. 93.] Where there has been no express denial of execution, but the executant refuses to attend at the office of the Registrar, there is nothing in ss. 76 and 77 to compel that officer to make his order of refusal within the time limited for admission of execution by ss. 23 and 24. [*R.*, 25 C. 93.] The period of limitation can only begin to run when the order of refusal is made, at which time and not before, the cause of action accrues LUCKHI NARAIN KHETTRY v. SATCOWRIE PYNE, **16 C. 189.** (12 B.L.R. 228, 11 C. 750, 11 B.L.R. 20, *Diss.*) [*R.*, 25 C. 93.]

(33)—S. 77—*See* Nos. 19, 23, 32, *supra*.

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[SUPPLEMENTED—ACT I OF 1880, s. 3 (AND SEE ACT X OF 1897, S. 8); ACT IV OF 1882, S. 54, PARAS. 2 AND 3, AND Ss. 59, 107 AND 123 (SEE ACT IV OF 1882, S. 4, AS AM. BY ACT III OF 1883, S. 3, AND SEE ACT X OF 1897, S. 8).]

(1)—*Bond specially registered—Execution of decree obtained thereon—Appeal against order in execution.*—Orders, passed in the execution of decrees, obtained under s. 53 of Act XX of 1866 on bonds specially registered under s. 52

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of the Act are appealable. *Per Stuart, C.J., contra.* WILAYAT-UN-NISSA v. NAJIB-UN NISSA, **1 A. 583, F.B.** (1 A. 377, *Overruled*; 7 W.R. 130 and 18 W.R. 512, *Diss.*) [*F.*, 1 A. 586, 5 B. 673, F.B.]

(2)—*Splitting up of a transaction, validity of.*—Where a person borrowed Rs. 198 and executed two unregistered mortgage bonds for Rs. 99 each on the same date, *held*, that, as there was nothing in the Act which forbade the splitting up of a transaction in this manner, the bonds were valid RAMJI MAL v. CHOTTE LAL, **3 A.L.J. 661=A.W.N. 1906, 281=29 A. 50.**

(3)—*Consideration and not value of property to be taken.*—For the purposes of the Registration Act the amount of the consideration and not the actual value of the property sold should be taken. PUNOO LODHI v. KONDA, **6 C.P.L.R. 55.**

(4)—*Principal amount to be taken for calculating value for purposes of the Act.*—For the calculation of the value of the right, title, or interest dealt with by a document for the purpose of the Registration Act only the principle amount secured by that document is to be taken into consideration. The question of the admissibility of a document to establish a lien at all and the question of the extent to which the document operates to establish a lien are altogether different. MT. SARDAR BAHU v. GOPAL, **6 C.P.L.R. 75.** [*R.*, 10 C.P.L.R. 10.]

(5)—*New law—Rule as to operation.*—A new law innovates no more than is necessary for its own proper operation, and this is especially the case with laws like those as to forms and procedure of a purely positive character. The mere circumstance that they would work more harmoniously with one system than another, is not a reason for implying a repeal of the latter, supposing it to have been the previously subsisting law, unless there be an actual repugnancy. Accordingly, the Registration Act although giving to certain documents a special advantage, is not meant to modify the general law of sale any further. LALUBHAI SURCHAND v. BAI AMRIT, **2 B 299=P. J 57.**

(6)—*Rejection by Court of registered document for non-compliance with Registration Law.*—Where a document which purports to have been registered is tendered in evidence, the Court cannot, except perhaps on proof of fraud having been practised upon the registering officer invalidating the certificate of registration, reject it for non-compliance with Registration Law; but it can deal with all other objections against it on their merits. SHEO SHUNKUR SAHOY v. HIRDEY NARAIN SAHU, **6 C. 25=5 C. L. R. 194.** [*F.*, 4 A. 14=A.W.N. 1881. 105; *R.*, 11 A. 319, F.B.=A.W.N. 1889, 101, 7 C.L.R. 223.]

(7)—*Registered mortgage—Priority—Act* III *of* 1877.—In a suit filed, after the Registration

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Act of 1877 came into force, a registered deed of 1875 was held to have priority over an unregistered deed of 1870. KALLACOLATHURAN v. SUBBAROYA REDDI, **3 M. 73.**

(8)—*Admissibility of unregistered sale-deed—Specific performance* —A document which, for want of registration, is not admissible in evidence, as creating an interest in land, is admissible for the purpose of obtaining specific performance of the contract. Secondary evidence can be let in where a document was not registered for no fault of the plaintiff. NAGAPPA v. DEVU. **14 M. 55.** [*F.*, 10 C.P.L.R. 107, 20 M. 250; *R.*, 5 N.L.R. 70.]

(9)—*Compulsory registration—Effect of.*—A document compulsorily registered is as effectual for the purpose of the Registration Act as a document which has been voluntarily registered. PALLAYYA v. RAMAVADHANULU, **13 M.L.J. 364.**

(10)—*Registration—Registered and unregistered deeds—Priority—Reg.* IX *of* 1827, *s.* 6, *how far repealed—Act* XIX *of* 1843—*Act* I *of* 1843.—The latter portion of the first clause of s. 6 of Reg. IX of 1827, relating to notice of unregistered documents, has been repealed by Act I of 1843, but the first part of that section which, taken together with s. 3 of the same regulation, clearly provides that a deed of sale duly registered shall be preferred to and satisfied before a deed of mortgage unregistered, or registered at a subsequent date, has not been repealed by Act I of 1843, Act XIX of 1843, or any other enactment. PARSHOTAM RANCHOD v. JAGJIVAN MAYARAM, **1 B.H.C. 60.** [*R.*, 7 B.H.C.A.C. 56, 9 B.H.C. 121, 6 B. 168, F.B.]

(11)—*Necessity for registration of an award.*—There is no provision for the Registration Act requiring that an award shall be registered. JAGANNATH v. RAMBUX, **6 C.P.L.R. 95.**

(12)—*Registration Act—Document registered under the provisions of the Act — Gift — Complete when registration effected.*—A document registered in accordance with the provisions of the Registration Act is a registered instrument, and if the document is duly registered in accordance with those provisions, the gift is complete and valid. The law does not require that the registration should be at the instance of or with the consent of the donor. PARBATI v. BAIJNATH PATHAK, **10 A.L.J. 300=35 A. 3.** (19 M. 433, *Cons.*)

——S. 2 (=s. 3 of 1877=s. 3 of 1871=s. 2 of 1866=s. 3 of 1894).

(13)—*S.* 2 (=*Registration Act*, 1877, *s.* 3)—*Mango tree—Standing timber.*—A mango tree is a "timber" within the meaning of s. 3 of the Indian Registration Act, 1877. KRISHNARAO v. BABAJI, **1 Bom. L.R. 489=24 B. 31.**

(14)—*S.* 2 (=*Registration Act*, 1877, *s.* 3)—*Definitions in Registration Acts.*—The definitions in the Registration Acts are expressly given for the purposes of those Acts and ought not to govern the decision of questions raised under other Acts. PANDAH GAZI v. JANNUDDI, **4 C. 665=2 C.L.R. 526.**

(15)—*S.* 17—*Registration—Deed mortgaging "fruit upon trees"—Fruits to be produced, 'not a benefit arising out of land' 'constituting immoveable property.*—From the mortgage deed in this case, it appeared that the only right that the mortgagee was given was to receive two-thirds of the fruit, the mortgagor whose possession was not interfered with taking the remaining one-third. No right was given to the mortgagee to receive possession of the garden under any circumstances or to remove the mortgagor from possession or to exercise any control over the garden. *Held* that the instrument in question was not a compulsorily registrable one under s. 17 of the Registration Act of 1877, because the right to receive a share of fruit to be produced in future could not be deemed a benefit to arise out of land so as to bring it within the definition of "immoveable property" in s. 3 of the Registration Act. BAGU MAL v. BAHAWAL BAKSH, **72 P.R. 1884.** [*R.*, 1 Ind. Cas. 903=5 N.L.R. 21; *D.*, 66 P.R. 1900.]

(16)—*S.* 2 (=*Registration Act*, 1877, *s.* 3)—*Lease of gum of trees—Registration, whether necessary—Transfer of Property Act*, IV *of* 1882, *ss.* 4, 107—*Provisions of the Act supplemental to Registration Act* —As the gum of trees is moveable property, a lease of the right to remove gum from certain trees does not require registration. Under the provisions of s. 4 of the Act, s. 107 has to be construed as supplemental to the Indian Registration Act. Consequently, a lease of moveable property does not require registration. ORR v. KUMARASAWMY, **5 M.L.J. 27.**

(17)—*S.* 2 (=*Registration Act*, 1866, *s.* 2)—A lease granted by a Zamindar to an intermediate holder is not a patta, as defined in s. 3, Madras Act, VIII of 1865, and hence requires registration under Act XX of 1866. RAMASAWMI CHETTI v. THE COLLECTOR OF MADURA, **5 C.L.R. 341, P.C.=2 M. 67=6 I.A. 170=4 Sar. 50.** [*Expl.*, 16 M. 40.]

(18)—*S.* 2—*Bhadekhat Act* XX *of* 1866, *s.* 17.—A *Bhadekhat*, being an agreement between the lessee and the lessor in the nature of counterpart of a lease, is a lease for the purpose of the Registration Act; and a provision in it that the lessee might, after 6 months, remain in occupation at a monthly rent, till the lessor called upon him to quit, will not extend the original term after which the lessee would be only a monthly tenant. The document need not, hence, be registered under s. 17, Act XX of 1866. MARO VITHAL v. TUKARAM *valad* MALHARJI, **5 B.H.C.A.C. 92.** [*Appr.*, 4 C. 61.]

(19)—*S.* 2 (=*Registration Act*, 1877, *s.* 3).—*Quære*:—Whether 'masani' income is im-

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moveable property within the meaning of s. 3, Registration Act. RAMSINGH v. HAR GOBIND, **83 P.R. 1891.** [*D.*, 10 P.R. 1896, 102 P.R. 1900.]

(20)—S. 2—Standing timber—Moveable property—Ss. 3 and 4, General Clauses Act—*See* BEN. ACT VIII OF 1885, ss. 144, 184, 193, sch. III, art. 2, 7 C.L.J. 152.

(21)—S. 2—*See* FRUITS, 3 A. 168.

(22)—S. 2—*See* SMALL CAUSE COURT—MOFUSSIL, JURISDICTION OF—GENERAL, 5 A. 564, F.B. = A.W.N. 1883, 148.

(23)—S. 2—Lease, meaning of—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 105, 107, 8 O. C. 197.

(24)—S. 2—Immoveable property—Right to "collect lac" from forest trees is a right in immoveable property—*See* TRANSFER OF PROPERTY ACT, 1882, s. 107, 5 N.L.R. 21 = 1 Ind. Cas. 903.

(25)—S. 2—Kabuliyat alone if constitutes a lease—Acceptance by lessor and registration—Effect—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 107, 4, 16 C.W.N. 606.

(26)—S. 2—Standing trees—Whether moveable or immoveable property—*See* TREES, 9 Ind. Cas. 478.

(27)—*Ss.* 2, 17 (= *Registration Act*, 1887, *ss.* 3, 17) —*Immoveable property— Right to enter upon a given piece of land and collect dues—Lease—Transfer of Property Act, s.* 107.—A Zemindar leased the right to enter upon a certain land belonging to him on which a weekly fair was held, and to collect the dues, which, but for the lease, the Zemindar would have been entitled to collect. The lease was for more than one year. It was in the form of a *pattah*; but was not registered. *Held*, that the right was a benefit arising out of land and as such, immoveable property within the definition contained in s. 3 of the Act; that, consequently, the *pattah* was compulsorily registrable under cl. (*d*) of s. 17 of the Act, as also under s. 107 of the Transfer of Property Act, that, being unregistered, the deed conveyed nothing to the lease and was inadmissible in evidence. SIKANDAR v. BAHADUR, **A.W.N. 1905, 48 = 2 A.L.J. 208 = 27 A. 462.**

(28)—*Ss.* 2 *and* 17 (= *Registration Act*, 1877, *ss.* 3 *and* 17)— *Unregistered* amalnama *not forming lease or agreement to lease, admissibility in evidence of, in suit for ejectment.*—The question raised in this appeal was whether certain documents produced by the defendant in answer to the plaintiff's claim which was one for ejectment, were inadmissible in evidence for want of registration. The documents were described as *amalnamas* and had been granted to the defendant by the plaintiffs' lessor. By those documents, the defendant was permitted to clear the jungle and hold the land without payment of any rent for 9 years and, on the expiration of that period, the lands were to be measured and assessed and granted on *putta* to the defendant on execution of a *kabuliat* by him. No lease was granted to the defendant in accordance with the *amalnamas* that he was allowed to hold on upon payment of rent. On the point whether the *amalnamas* above mentioned were documents which, having regard to s. 17 of the Registration Act, required registration, *held*, they were neither leases nor agreements to lease within s. 3 of the Act and should, therefore, be admitted in evidence without registration. DAWARKA NATH SAHA v. LEDU SIKDAR, **33 C. 502.** (7 C. 733, *D.*)

(29)—*Ss.* 2, 17 (= *Registration Act*, 1877, *ss.* 3, 17) - *Future rents—"Any other benefit to arise out of land"—Mortgage of future rents of value of over Rs.* 100—*Whether requires registration—Position of mortgagee who had taken an unregistered document—Trespasser.*—Future rents payable in respect of lands are "benefits to arise out of land"; within the meaning of s. 3, Registration Act. A mortgage of future rents, upwards of one hundred rupees in value, can be effected only by a registered instrument. Therefore, a mortgagee of such rents, under an unregistered document, is liable to be evicted as a trespasser, and the document cannot be received in evidence. MANGALASAMY DEVAR v. SUBBIAH PILLAY, **6 Ind Cas. 504 = 8 M. L.T. 91 = 20 M L J. 966.** (27 A. 462, A.W.N. 1905, 48, 2 A.L J. 208, 27 A. 564, A.W.N. 1905, 100, 2 A.L.J. 692, 19 B. 663, 13 C. 262, 10 A. 133, 11 W.R. 171, *R.*)

(30) *Ss.* 2 *and* 17 (= *Registration Act*, III *of* 1877, *ss.* 3, 17, *cl.* (*b*) *and* (*c*)—*Grant of right to cut standing timber for certain years—Admissibility of document embodying said right without registration.*—Plaintiff sued for a declaration of his right to certain standing trees and for an injunction preventing the defendant from cutting the same. Defendant contended that he had a right to cut and carry away the said trees under a *yadast* executed by plaintiff. The *yadast* was to the following effect: "As I have settled a value of Rs 3,400 for the said two shares together with the tank and bed of the said tank so that you may cut and enjoy the trees, etc., and the grass, korai, gum, karuvela nut, etc., from this day till the close of *fasli* 1304, and executed a *yadast* to you on receipt of a note from you promising payment within a period of six months, you will enjoy in the said tank, as mentioned above. Should there be any trees or other materials whatever in the said tank on the 1st day of *fasli* 1305, the above said person shall not interfere with it." The document was not, however registered, though it was to run for more than four years. *Held per Shephard, J.*, that, as the intention was that the defendant should have exclusive enjoyment of the produce named in the *yadast* the document created an interest inimmoveable property. The *yadast* amounted to a lease of immoveable property and not a mere license,

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and as the enjoyment was given for a term exceeding one year, registration of the *yadast* was compulsory. In the absence of registration, the document was not admissible in evidence. Plaintiff was, therefore, entitled to a decree. *Per Best, J.*—The *yadast* was inadmissible in evidence for want of registration only if the suit was for possession of the land. The present suit related to trees standing on the land, which were moveable property according to the definition given in s. 3 of the Registration Act. Consequently, the non-registration of the document was no bar to its admissibility for the purposes of this suit SEENI CHETTIAR v. SANTHANATHAN CHETTIAR, **5 M.L.J. 253.**

(31)—*Ss.* 2, 17, (*d*) (=*Registration Act*, III *of* 1877, *ss.* 3, 17 (*d*))—*Agreement to cut timber, etc., for a certain period.*—An agreement assigning for consideartion a right to cut and enjoy trees, grass, etc., growing on a land for a period of four years is an instrument conveying an interest in immoveable property. If the value of the interest conveyed is more than Rs. 100, the document is compulsorily registrable and, if unregistered, is inadmissible in evidence. SEENI CHETTIAR v. SANTHANATHAN CHETTIAR, **20 M. 58, F.B.=6 M L.J. 281.** [*R.*, 5 N.L.R. 21; *D.*, 28 A. 277=3 A.L.J. 138=A.W.N. 1906, 4.]

(32)—Ss. 2, 17—*See* LIMITATION ACT, 1908, s. 20, 19 B 663.

(33)—Ss. 2 and 17 (*d*)—An undertaking by a tenant to occupy on certain conditions is not a lease within the meaning of—*See* LEASE—GENERAL, 6 M.L.T. 175.

(34)—*Ss.* 2, 17, 49 (=*Registration Act*, 1877, *ss.* 3, 17 (*d*) 49)—*Lease—Agreement to lease—Registration—Admissibility, in a suit for specific performance—Transfer of Property Act*, s. 4—*Trusts Act*, s. 91.—An agreement in writing to grant a lease, which requires registration, cannot be received in evidence in a suit for specific performance of such agreement, whether possession was or was not granted in pursuance of the agreement. (17 M. 456, F.B., *F.*; 17 M. L.J. 218, *Overruled*; 7 M L.T. 278, 5 Ind. Cas. 615, *D*; 14 C.W.N. 65, 5 Ind. Cas. 38, *Diss.*) S. 49 of the Registration Act consists of two parts. It provides first "that no document, required by s. 17 to be registered, shall affect any immoveable property comprised therein." The second part of the section says that such a document "shall not be received as evidence of any transaction affecting such property," *i.e.*, the immoveable property comprised therein. As regards the immoveable property, other than that comprised in the instrument or a transaction in respect thereof, the section contains no prohibition against the admissibility of the instrument. The two parts of the section deal with different subjects. The first part presupposes that the document itself is the transaction or the mode in which it is carried out. The second part relates to cases where the document itself is not the transaction, but is only

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the record of a transaction, or being itself a transaction contains a reference to or a recital of another transaction which affects the immoveable property comprised therein. NARAYANAN CHETTY v. MUTHIAH SERVAI, **8 Ind. Cas. 520.**

(35)—Ss. 2, 17 (*d*), 49—Agreement to lease—Registration, if necessary—*See* SPECIFIC PERFORMANCE, 14 C.W.N. 65=5 Ind. Cas. 38.

(36)—*Ss.* 2, 18 (=*Registration Act*, VIII *of* 1871, *ss.* 3, 18)—*Lease for one year with readiness to hold over — Registration optional.*—A lease for one year certain with an expression, on the tenant's part, of readiness to hold the land longer at the same rent if the landlord should desire it, did not create in the tenant any interest extending beyond one year, and the registration thereof was not compulsory. APU BUDGAVDA v. NARHARI ANNAJEE, **3 B 21.** [*F.*, 17 C. 548; *Appl.*, 8 A. 198= A. W N. 1886, 56. 14 M. 271; *R.*, 3 M. 358, 8 B. 493, 9 C.P.L.R. 88.]

(37)—*Ss.* 2, 47, 49 (=*Registration Act*, 1877, *ss.* 3, 47, 49)—*Effect of unregistered deed of assignment of mortgage decree—Effect of subsequent registration—Limitation Act*, 1877, *art.* 179 (4)—*Step-in-aid of execution—Civ. Pro. Code*, 1882, *s.* 232(=*O.* XXI, *r.* 16, *New Code*).—A decree for sale on a mortgage is not immoveable property as defined in s. 3. An unregistered deed of assignment of such a decree for the sale of the hypothecated property can confer title thereunder, although the deed cannot be used for the purpose of proving such title (s. 49). And if the document is subsequently registered, it can take full effect as from the date of its execution (s. 47). [*R.*, 26 A. 603=A.W.N. 1904, 148, 190 P.L.R. 1905=1 P.R. 1906, 30 A. 238= A.W N. 1908, 99=5 A.L.J. 607, 13 C.W.N. 533 =9 C.L.J. 443.] An application by such assignee, before the subsequent registration, for execution of the decree under s. 232, Civ. Pro. Code, was *held* to be a step-in-aid of execution within the meaning of art. 179 (4) of the Limitation Act (1877). ABDUL MAJID v. MUHAMMAD FAZULLAH, **13 A. 89=A.W.N. 1890, 186.** [*R.*, 13 C.W.N. 533=9 C.L.J. 443; *F.*, 11 Bom. L.R. 1281.]

(38)—*Ss.* 2, 47 *and* 75 (=*Registration Act*, 1877, *ss.* 3, 47 *and* 75)—*Registration of deed—Deed of gift.*—The registration of a document does not depend on the consent of the person executing the document. It depends on the finding of the Registrar that the document has been executed, and that the requirements of the law for the time being in force have been complied with on the part of the person presenting the document for registration so as to entitle the document to registration. There is no exception or limitation to the rule laid down in s. 75 of the Registration Act, the registration shall take effect as if the document was registered when first presented for registration. When the donor has made over the deed of gift

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to the donee giving authority to the donor to present the document for registration, the donor has done all that was necessary to him to make the deed legally complete. PAYAG SINGH v. KAMTA SINGH, **3 O.C. 231.**

— S. 6 = (s. 6 of 1877 = s. 6 of 1871 = s. 8 of 1866 = s. 8 of 1864.)

(39)—S. 6 — *See* HINDU LAW — JOINT FAMILY, 3 W.R. 21.

— S. 7 (= s. 7 of 1877 = s. 7 of 1871 = s. 7 of 1866 = s. 7 of 1864.)

(40)—S. 7—*See* MORTGAGE—REDEMPTION, 27 M. 348.

(41)—*Ss.* 7, 30(*a*), 87 (= *Registration Act*, 1877, *ss.* 7, 30 (*a*), 87) *District Registrar—Sub-Registrar, power of—Registration of a deed concerning lands situated in separate Registration sub district.*—A Sub-Registrar, who was empowered, under s. 7 of the Act, to discharge the duties of a District Registrar, registered a bond which might have been registered by the Registrar at his discretion under s. 30 (*a*) of the Act. *Held*, that the bond was validly registered and that any doubt as to the validity of the registration was removed by s. 87 of the Act. JOGESHWAR NARAIN SINGH v. RAI RADHA RAWAN, **3 C.L.J. 165.** (18 C. 556, *D.*)

— S. 17 (= s. 17 of 1877 = s. 17 of 1871 = s. 17 of 1866 = s. 13 of 1864.)

(41-*a*)—*S.* 17—*Value of interest conveyed, test of.*—For the purpose of the Registration Act, the value of an interest that is conveyed is the consideration mentioned in the sale deed by the parties thereto. VASUDEV MORESHWAR GUNPULE v. RAMA BABAJI DANGE, **11 B.H C.R. 149.** [*F.*, 10 C. 82 = 13 C.L.R. 256; *R.*, 2 B. 97, 2 B. 353, 8 B. 610, 17 B. 235, 6 C.P.L.R. 55, 193 P.L R. 1905 = 1 P.R. 1906, 3 N.L.R. 72.]

(42)—*S.* 17—*Registration—Determination of value.*—The necessity for registration must be determined by the stated consideration, *i.e.*, by the value stated in the instrument. Inadequacy of consideration, so far as it can be considered at all, can only be considered with reference to the *bona fides* of the transaction. ROHINEE DEBIA v. SHIB CHUNDER CHATTERJEE, **15 W.R. 558.** [*F.*, 11 B.H.C. 149, 2 B. 97, 6 C.P.L.R. 55; *Appl.*, 4 C. 61, 5 M. 214, 12 C.L.R. 444, 10 C. 82; *R.*, 2 B. 353, 8 B. 610, 3 N.L.R. 72.]

(43)—*S.* 17 (= *Registration Act*, 1877, *s.* 17)—*Optionally registrable but unregistered, document—Evidence.*—Neither s. 17 of the Registration Act of 1877, nor the corresponding sections of the previous Acts, have the effect of rendering, a document, not compulsorily registrable under the Act of 1864, inadmissible in evidence without registration. RAM COOMAR SINGH v. KISHARI, **9 C. 68.** [*R.*, 18 B. 92]

(44)—*S.* 17 (= *Registration Act*, 1871, *s.* 17 = *Act* XX *of* 1866, *s.* 17 = *Act* XVI *of* 1864,

Registration Act (XVI of 1908, III of 1877, VIII of 1871 XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

s. 13)—*Optional registration — Determination of value—Consideration.*—The value of "the right, title or interest" created by a mortgage under Act XVI of 1864, Act XX of 1866, or Act VIII of 1871, is estimated by the amount of the principal money lent, and without any regard to the duration of the relation of mortgagor and mortgagee, or to the rate or continuance of the interest payable. The words "or in future" which occur in Act XX of 1866 and Act VIII of 1871, have reference to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property. NANA *bin* LAKSHMAN v. ANANT BABAJI, **2 B. 353.** (1 A. 274, *Diss.*) [*F.*, 5 M. 214, 10 C. 82 = 13 C.L.R. 256; *Appl.*, 3 A. 1; *R.*, 23 M. 105, 30 B. 304 = 7 Bom. L.R. 742; *D.*, 8 B. 610, 4 N.L. R. 90.]

(45)—*S.* 17 (= *Registration Act*, 1877, *s.* 17, *sub-ss.* (*b*), (*h*)—*Non-testamentary document—Evidentiary value of.*—Case in which it was held that a non-testamentary instrument which clearly purports or operates to create or declare the right and interest of certain persons in immoveable property of the value of over Rs. 100, in the absence of registration, would be inadmissible in evidence and could not be relied upon for establishing any right thereunder. KALI CHARAN GHOSAL v. RAM CHANDER MANDUL, **30 C. 783.** (22 M. 508, P.C., *R.*) [*R.*, 34 C. 193 = 5 C.L.J. 611, 35 C. 1010 = 12 C.W.N. 854 = = 8 C.L.J. 90; *D.*, 27 P.R. 1906 = 11 P.L.R. 1906.]

(46)—*S.* 17 (= *Registration Act*, 1864, *s.* 13)—*Document creating and transferring right of use of growing trees for a certain period — Interest in immoveable property—Registration Act*, 1864, *s.* 13.—A document which creates and transfers a right of use of growing trees for a certain specified period is a document which purports to create or transfer an interest in immoveable property within the meaning of s. 23 of the Registration Act, 1864, and so cannot be admitted in evidence unless registered. SUKRY KURDEPA v. GOONTAKULL NAGIREDDI, **6 M.H.C. 71.** [*F.*, 5 M.L.J. 253; *R.*, 12 M. 303, F.B., 9 C.P.L.R 53.]

(47)—*S.* 17 (= *Registration Act*, 1877, *s.* 17) —*Documents which are compulsorily registrable not registered—Evidence for a collateral purpose.*—A document of which registration is compulsory under the Registration Act, 1877, may be used as evidence for any collateral purpose—for any purpose other than that of creating or extinguishing a right to immoveable property. BAI GULABBAI v. SHRI DATTAGARJI, **9 Bom. L.R. 393.**

(48)—*S.* 17 (= *Registration Act*, 1877, *s.* 17) —*Registration — Transfer of property under litigation—Promise of transfer—Value of right when not expressed.*—A document containing a promise to transfer property under litigation,

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

if decreed in favour of the executant, is not compulsorily registrable under s. 17 of the Act. In the case of a promise to transfer property under litigation, the value of the property after litigation is over cannot be presumed to have been the value of the right of the party found entitled to it while the litigation continued. GIRJA NAND v. NATHU RAM, **174 P.L R. 1905.**

(49)—*S.* 17 (=*Registration Act*, VIII *of* 1871, *s.* 17)—*Registration—S.* 17 *of the Registration Act.*—The words "present or future," "vested or contingent" in s. 17 of the Registration Act point not to the value or its ascertainment, but to the right or interest in the land, which is to be created as a security. If the charge or interest created is of a value less than Rs. 100, registration is needless. NARASAYYA CHETTI v. GURUVAPPA CHETTI, **1 M. 378.** [*Appr.*, 10 C. 82, 5 M. 214; *R.*, 4 C. 61, 13 C.L.R. 256, 10 C.P.L R. 10.]

(50)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Unregistered document admissible for showing nature of possession under it.—Held*, that an agreement relating to immoveable property, though unregistered, is admissible for the purpose of showing the nature of the defendant's possession under it, though, notwithstanding the same, the defendant is liable to be ejected. VENKATACHARI v. RENGASWAMI IYENGAR, **6 M.L.T. 192=3 Ind. Cas. 223.** (29 M. 336, F.B., *R.*)

(51)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Document containing merely statement of past events.*—A document containing merely a statement of past facts with a promise for the future to act in accordance therewith does not require registration and is admissible in evidence. KOMARGOWDA v. BHIMAJI, **1 Bom. L. R. 61=23 B. 602.**

(51-*a*)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Registration of document—Recitals of memoranda of previous disposition—Document drawn up to evidence partition made at the time.*—Deeds which are mere recitals or memoranda of dispositions of property, which have been previously agreed upon or made, and which do not themselves operate to effect any such disposition, need not be registered. Where a person made a partition of his property, exceeding Rs. 100 in value, among his sons, and there and then drew up to a document to evidence the partition, and there was no evidence to show that there was any previously completed partition or that the document was merely intended to serve as a memorandum of what had been previously arranged:—*Held*, that the document was compulsorily registrable. NIHAL CHAND v. DAVID SASSOON & CO, KARACHI, **15 Ind. Cas. 28=229 P.L.R. 1912 =231 P.W.R. 1912.** (30 P.R. 1884, 184 P.R. 1889, 48 P.R. 1905, 33 P.R. 1905, *Rel. on.*)

Registration Act (XVI of 1908, III of 1877, VIII of 1871 XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(52)—*S.* 17 (=*Registration Act* 1877, *s.* 17)—*Mortgage—Redemption—Interest in immoveable property.*—A document entitling a person to redeem a mortgage of immoveable property on payment of money creates an interest in immoveable property, and its registration is compulsory under s. 17 of the Registration Act. MUTHIA VENKATACHELAPATI v. PYANDA VENKATACHELAPATI, **27 M. 348.**

(53)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Unregistered mortgage deed—Value of interest created by deed—How determined.*—A mortgage deed whereby the principal amount secured was below Rs. 100 was admissible though not registered, since, under s. 17 of the Registration Act, the test was the value of the interest created or otherwise dealt with in the instrument, and such value in the case of a mortgage deed was determined by the principal amount secured by the mortgage and not by the value of the land to which the deed related. JHANDA v. JOWAYA, **29 P.R. 1880.**

(54)—*S.* 17—*Registration—Mortgage to secure sum less than Rs.* 100—*Principal and interest amounting to more than Rs.* 100—"*Value of property.*"—According to the true meaning of the Registration Act "the value of property" is the value of the interest created by the deed; the value of the interest created by a mortgage is the amount of the sum secured by it, and the interest is merely the usufruct of that sum. Therefore, the deed which secures a sum under Rs. 100 does not require registration. PANCHI DASI v. AHMEDULLA, **12 C.L.R. 444.** (4 C. 61, 15 W.R. 331, *R.*) [*F.*, 13 C.L.R. 256; *R.*, 10 C. 82.]

(54-*a*)-*S.* 17—*Agreement relinquishing certain portion of principal and interest on mortgage—Compulsorily registrable—Whether agreement an acknowledgment.*—An agreement executed by the mortgagee, after the date of the mortgage, relinquishing a certain part of the principal and all interest on the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee, was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgment of payment within the meaning of the exception contained in s. 17 (2), cl. 11 of the Registration Act. GOBARDHAN SAHI v. JADUNATH RAI, **11 A.L.J. 253=19 Ind. Cas. 449=35 A. 202.**

(55)—*S.* 17 (=*Registration Act*, XX *of* 1866, *s.* 17)—*Hypothecation bond for Rs.* 99-15-0—*Registration compulsory.*—A bond which secures by the hypothecation of immoveable property the repayment, after four months from the date thereof, of a loan of Rs. 99-15-0, with interest at the rate of 12 per cent. per annum, is an instrument that requires to be registered under s. 17, Act XX of 1866, as the amount thus secured, reckoned up to the date on which its payment is claimable, is manifestly in

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1863, XIX of 1843)—*continued.*

excess of Rs. 100. BABOO DHURMDEO NARAIN SINGH v. BABOO NUND LALL SINGH, **6 N.W.P. 257.**

(56)—*S.* 17 (=*Registration Act*, XX *of* 1866, *s.* 17)—*Mortgage for less than Rs.* 100.—A bond which pledges land for sums to be hereafter advanced not exceeding Rs. 100, is an instrument of which the registration is necessary under the provisions of s. 17 of Act XX of 1866, where the sum actually advanced under it exceeds Rs. 100. J. PERRIN v. J.W. LEDLIE, **15 W.R. 364.**

(57)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Deed of assignment of mortgage—Consideration.*—A deed of assignment of a mortgage for over Rs. 100, for a consideration less than Rs. 100, is not compulsorily registrable. SATRA KUMAJA v. VISRAM HASGAVDA, **2 B. 97.** (11 B.H.C. 149, 15 W.R. 558, *F.*) [*Not F.*, 190 P.L.R. 1905=1 P.R. 1906; *F.*, 10 C. 82=13 C.L.R. 256; *R.*, 2 B. 353, 17 B. 235, 18 M. 454=5 M.L.J. 92; *D.*, 8 B. 610.]

(58)—*S.* 17—*Mortgage bond below Rs.* 100—*Unregistered — Lien with interest exceeding Rs.* 100—*Registered conveyance— Unregistered mortgage—Priority.*—A mortgage bond which purports to be for Rs. 99, with interest at 2 per cent. per mensum, re-payable after 9 months and eleven days, so that the lien created by the bond amounts to at least Rs. 117, does not require registration. (15 W.R. 331, 12 C.L.R. 444, 4 C. 61, 11 B.H.C. 149, 2 B. 97, *ibid.* 353, 1 M. 378, 5 M. 119, *F.*; 3 A. 157, F.B. *Disappr.*) A registered conveyance is entitled to precedence over an unregistered mortgage deed, in the absence of proof that the person claiming under the registered document had notice of the mortgage deed. KARBAN ALI MIRDHA v. PETUMBARI DASI, **13 C.L.R. 256.**

(59)—*S.* 17—*Mortgage-bond under Rs.* 100—*Priority of later registered deed.*—A mortgage bond for a sum less than Rs. 100, though it might swell to more than that amount at the time it becomes re-payable, is not compulsorily registrable. [*Cons.*, 23 M. 105; *R.*, 4 N.L.R. 90.] When, however, such unregistered bond is opposed by a later registered deed, the latter will have priority over the former. KORBAN ALLY MIRDHA v. SHARODA PROSHAD AICH, **10 C. 82.**

(60)—*S.* 17 (=*Registration Act*, 1871, *s.* 17(2)) —*Hypothecation bond — Registration.*—A hypothecation-bond for securing payment of Rs. 50 with interest at 9 per cent. did not mention any due date. When sued on, the money due on the bond by calculation exceeded Rs. 100. *Held* that this circumstance would not necessitate the registration of the bond. KHUDA BAKHSH v. KANIZAN, **A.W.N. 1882, 209.**

(61)—*S.* 17 (=*Registration Act*, 1871, *s.* 17)—*Mortgage.*—A bond charging land with the payment of a principal amount of less than

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

Rs. 100, in which there is no stipulation preventing the debtor from repaying the loan within the time fixed, need not be registered. But, if registered, it is entitled to take effect against a prior unregistered bond, which is not compulsorily registrable. AHMAD BAKHSH v. GOBINDI, **2 A. 216.** [*F.*, 2 A. 688.]

(62)—*S.* 17 (=*Registration Act*, 1866, *s.* 17)—*Mortgage-bond.*—A bond, charging immoveable property for the payment of both the principal and interest, and payable by instalments, under which the first instalment payable within three years with accumulated interest exceeds Rs. 100, creates an interest in immoveable property of the value of Rs. 100 and upwards, and must, under s. 17 of Act XX of 1866, be registered. BANNO v. PIR MUHAMMAD, **2 A. 688.** (2 A. 40, *F.*)

(63)—*S.* 17 (=*Registration Act*, 1871), *s.* 17 (2) —*Mortgage—Suit on unregistered bond charging immoveable property.—By the Full Bench*, (*Stuart, C.J., dissenting*)—For the purposes of registration, the value of a bond charging immoveable property for the payment of a sum of money with interest within a fixed time, is to be estimated by the amount secured for certain by the hypothecation (including principal and interest). *Per Stuart, C. J. contra.* The value of the right in the property assigned by the bond should be the principal amount and nothing else. (2 B. 353, 1 M. 378, *F.*) A suit on an unregistered bond charging immoveable property which is not admissible in evidence for want of registration, must be dismissed. HIMMAT SINGH v. SEWA RAM, **3 A. 157. F.B.** [*Overruled*, 5 A. 447, F.B.; *Not F.*, 10 C. 82=13 C.L.R. 256; *F.*, 3 A. 422; *R.*, 2 N.L.R. 121.]

(64)—*S.* 17 (=*Registration Act*, III *of* 1877, *s.* 17, *cls.* (*b*), (*h*))—*Instrument creating charge in nature of mortgage—Necessity for registration —Admissibility in evidence—Document admissible for certain purposes, may be inadmissible for other purposes.*—A *kararnama* purported to have been executed in June 1885, by which A, in consideration of B's undertaking to pay off the debts due by A's father made over to B her father's house and lands for use and enjoyment, and she agreed to pass a deed of sale for the same, and transfer the *khata* in 1888-1889. The question was whether this *kararnama* was admissible in evidence without registration. It was urged in support of its admissibility that the first portion of the document only recited a fact, and created or declared no right, and that the last portion about the sale and transfer merely created a right to obtain another document, and that, therefore, it fell within the exception provided for by cl. (*h*) of s. 17 of the Registration Act. *Held* that the document required registration, and was inadmissible in evidence for want of it. The first portion of the document was not a mere recital of fact. It created as between the parties to it

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

a charge in the nature of a mortgage. In consideration of B's undertaking, to advance a large sum which A was unable to pay herself, she made over certain property to B for use and occupation. There was no further consideration to proceed from B to A; which circumstance is an important element in ascertaining the nature of the instrument. And the mention of an intention to execute a deed of sale can make no difference, because the document did not merely create a right to demand another document. Documents which require registration and are unregistered, may be admissible in evidence for some purposes, and not admissible in evidence for other purposes. An unregistered mortgage-bond for more than 100 rupees may be admissible in evidence to prove the simple debt or a personal obligation but it is inadmissible in evidence to prove any right to the property affected by the instrument. VANI v. BANI, **20 B 553.** (9 C. 520, 6 B.H.C. 134, 7 B.H.C. 1, 10 C. 315, 4 B. 591, *R.*) [*R.*, 21 B. 704, U.B.R. 1904, 4th Qr., Registration, 1.]

(65)—*S.* 17(=*Registration Act*, 1860, *s.* 17)—*Registration Acts*, XVI *of* 1864, *and* XX *of* 1866—*Unregistered assignment of mortgagee, if admissible to prove personal obligation.*—In a suit by the assignee of a mortgage of immoveable property to recover the amount of the debt from the mortgagor in pursuance of an express contract to pay the debt contained in the mortgage, where the mortgage was executed before the Registration Act (XVI of 1864) came into operation and the assignment was executed after Act XX of 1866 became law, *held—Per Bittleston, Innes, and Collett, JJ.*—As the assignment was an instrument operating to create an interest in immoveable property and as such required to be registered under s. 17 of Act XX of 1866, it was not admissible in evidence in a suit to enforce the personal obligation only. *Per Scotland, C.J.*—An instrument which has the two-fold operation of a simple contract or bond to pay a debt and a collateral mortgage security for the debt, is admissible in evidence for the purpose of proving the simple contract debt. ACHOO BAYAMAH v. DHANY RAM, **4 M. H.C. 378.** [*R.*, 13 M. 281, 13 M. 308; *D.*, 7 M.H.C. 1, 15 M. 336.]

(66)—*S.* 17 (=*Registration Act*, III *of* 1877, *s.* 17)—*Agreement to sell property to mortgagee, in writing not registered—Subsequent purchase with notice of agreement.*—An agreement was made in writing between a mortgagor and mortgagee by which the former undertook to execute a sale-deed of the property to the latter. Subsequent to the agreement, plaintiff purchased the equity of redemption from the mortgagor and sued the mortgagee for redemption. The mortgagee pleaded, in answer, the agreement given to him by the mortgagor and imputed notice of the agreement to the plaintiff. The plaintiff having purchased with notice of the agreement was not entitled to redeem, and the written agreement, though not receivable in evidence (being unregistered) as creating an interest in land, might be used for the purpose of obtaining specific performance of the agreement. ADAKKALAM v. THEETHAN, **12 M. 505.** [*R.*, 14 M. 55, 5 C.P.L.R. 102, 10 C.P.L.R. 107, 29 M. 320, 1 M.L.T. 153=29 M. 336, F.B., 13 C.W.N. 326.]

(67)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Assignment of hypothecation bond—Bond originally for Rs.* 50, *but assigned for Rs.* 176—*Whether registration is necessary.*—Where a hypothecation bond for Rs. 50 was assigned for Rs. 176, the interest having accumulated. *Held* that the assignment requires registration to operate as a transfer of the hypothecation. RAMASWAMI CHETTY v. PAVADAI SAMBAN, **7 M.L.T. 379=5 Ind. Cas. 852.**

(68)—*S.* 17 (=*Registration Act*, III *of* 1877, *s.* 17)—*Transfer of Property Act* (IV *of* 1882), *s.* 54—*Assignment of bond hypothecating crops, valid without registration.*—Where the property hypothecated under a registered bond was not land but only certain crops on it, such hypothecation was one relating to moveable property. Consequently, an endorsement of the bond for the purpose of assigning it over would require no registration, either under s. 17 of the Registration Act, or under s. 54 of the Transfer of Property Act. KALKA PRASAD v. CHANDAN SINGH, **10 A. 20=A.W.N. 1887, 270.** (7 A. 855, 9 W.R. 136, 2 M.H.C. 474, *R.*) [*R.*, 9 C.W.N. 14.]

(69)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Assignment of charge on immoveable property.*—When a charge for a sum exceeding rupees one hundred on immoveable property is assigned by deed, the document requires registration; under cl. (*b*) of s. 17 and the fact that the consideration for the assignment is stated in the deed as less than rupees one hundred does make the registration of the deed optional. RAM SARUP v. MUBARAK SINGH, **190 P.L.R. 1905=1 P.R. 1906.** (23 C. 450, 13 A. 89, *D.*; 2 B. 97, 18 M. 454, *Not F.*; 11 B.H.C. 149, *R.*)

(70)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Release by mortgagee.*—A release executed in writing by a mortgagee in favour of an assignee of a portion of the properties mortgaged, is inoperative unless registered, where the interest sought to be extinguished by it is of the value of Rs. 100 or upwards. IMAM ALI v. BAIJ NATH RAM SAHU, **10 C.W.N. 551=3 C.L.J. 576=33 C. 613.** (2 A. 554, 2 B. 489, 16 W.R. 56, *R.*)

(71)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Practice—Pleadings—Ground not raised in lower Courts or in memorandum of appeal, but raised for the first time in agruments in Chief Court, disallowed.*—*Registration Act* (III *of* 1877), *s.* 17—*Record of occurrences which happened at a public meeting, in the course of which the plaintiff made certain admissions, disclaimers and promises regarding immoveable property,*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

not liable to registration—Evidence—Contract Act (IX of 1872), s. 20—Agreement come to under mistake of fact void—Consideration—Compromise.—A point, not raised in either of the lower Courts or in the grounds of appeal, cannot be allowed to be raised for the first time in arguments in the Chief Court. A document which purports to be merely a record of occurrences, which are said to have happened at a public meeting in the course of which the plaintiff made certain admissions, disclaimers and promises, is not one purpurting to create or declare a right, and, therefore, need not be registered. (51 P.R. 1898, 48 P.R. 1905, 30 P.L.R. 1905, *F.*) An agreement which recites as a fact that a will was executed, while really no such will was executed, is come to under a mistake of fact common to all the parties, and, therefore, void under s. 20 of the Contract Act. A *bona fide* compromise of a real claim is a good consideration, whether the claim would have been successful or not. PAHU LAL v. DAVLAT RAM, **6 Ind. Cas. 651=47 P.W.R. 1910.** (17 B. 457, *R.*)

(72)—*S.*17 (=*Registration Act*, 1877, *s.* 17)—*Endorsement on mortgage-bond relating to specified portion of mortgaged property does not require registration.*—A third party purchased a specified portion of a certain mortgaged property, and paid off a portion of the mortgage-debt. The fact of such payment together with the release of the portion purchased was endorsed on the mortgage-bond. *Held*, that such an endorsement did not require registration. GANGA BAKHSH v. JAGANNATH, **27 A. 305=A.W.N. 1904, 266=1 A.L.J. 693.** (7 A. 820, *F.*)

(73)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Equitable mortgage—Agreement to mortgage.*—Equitable mortgage-deeds, when creating an interest in land of the value of Rs. 100 or more, need registration; but not those that amount only to an agreement to mortgage. Such documents would be admissible in evidence as agreements to mortgage even without registration, though they must be registered for proving equitable mortgages. THE BENGAL BANKING CORPORATION v. S. A. MACKERTICH, **10 C. 315.** [*R.*, 12 M. 505, 5 C.P.L.R. 102, 20 B. 553, 10 C.P.L.R. 107, U.B.R. 1897—1901, Vol. II, 573, 574, 13 C.W.N. 326.]

(74)—*S.* 17 (=*Registration Act*, 1871, *s.* 17)—*Equitable mortgage—Loan and deposit of title-deeds—Promissory note with memorandum referring to deposit of title-deeds—Evidence Act, s.* 91.—The deposit of title-deeds is evidence of an agreement for a mortgage, and an equitable title to a mortgage that is, the title created by the agreement is as good as legal title. The defendant deposited certain title-deeds with the plaintiff as security for the re-payment of a loan on an agreement which was not then reduced to writing. Subsequently on the same day the defendant executed a pro-note for the amount with interest with a memorandum depositing as collateral security the title-deeds by way of equitable mortgage, which was not registered as required by s. 17 of the Registration Act. *Held* that the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of title-deeds, and that the promissory note whether given at the same time or some hours afterwards in pursuance of the understanding between the parties, was not a writing which the parties had made, as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, and therefore did not come under s. 17 of the Registration Act. KEDERNATH v. SAMLOLL KETTRY, **11 B.L.R. 405=20 W.R. 150.** [*F.*, 13 C. 322; *R.*, 10 B. 634, 17 B. 235, L.B.R. 1893—1900, 178, 24 B. 615=4 C.L.J. 102 =10 C.W.N. 276=33 C. 410, 53 P.W.R. 1907; *D.*, 1 B. 190.]

(75)—*S.* 17 (=*Act* VIII *of* 1871, *s.* 17, *cl.* 2)—*Charge.*—An instrument which creates a charge on immoveable property for the payment, in a given time, of Rs. 99 *plus* Rs. 6, interest for 3 months, thus making up over Rs. 100, must be registered under cl. (2), s. 17 of Act VIII of 1871. DARSHAN SINGH v. HANWANTA, **1 A. 274.** [*Diss.*, 2 B. 353, 5 M. 214, 4 C. 61; *F.*, 2 A. 40, 2 A. 688; *Cons.*, 3 A. 1.]

(76)—*S.*17 (=*Registration Act*, 1871, *s.* 17, *cl.* (2)—*Charge.*—A bond, charging immoveable property for the payment on demand of an amount less than Rs. 100, with interest thereon, is only optionally registrable. KARAN SINGH v. RAM LAL, **2 A. 96.** [*F.*, 2 A. 216, 2 A. 688.] *See also* NARASAYYA CHETTY v. GURUVAPPA CHETTI, **1 M. 378=2 Ind. Jur. 168.**

(77 & 78)—*S.* 17 (=*Registration Act of* 1877, *s.* 17 (*b*) *and* (*c*)—*Indorsement of payment on mortgage-bonds—Registration, necessity for.*—The strictest construction should be placed on these prohibitory and highly penal sections, which impose such serious disqualifications for non-observance of registration, and the Court should see that the document objected to comes within the four corners of these provisions. An instrument to come within sub-s. (*b*) of s. 17 must in itself purport or operate to create, declare, assign, limit, or extinguish some right, title or interest of the value of Rs. 100 or upwards in immoveable property, and to come within sub-s. (*c*), it must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such interest as is referred to. In a suit on a mortgage the question for decision was as to the admissibility of an indorsement of payment appearing upon the mortgage bond. *Held*, that the indorsement did not fall within sub-ss. (*b*) or (*c*) of s. 17 of the Act, which require

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

registration and consequently it was admissible in evidence, though not registered. JIWAN ALI BEG v. BASA MAL, **9 A. 108, F.B.=A. W.N. 1886, 310.** (1 B. 197, 2 B. 489, 4 B. 590, 4 B. 126, 14 M.I.A. 129, 6 A. 335; *D.*, 1 A. 442, *R.*) [*R.*, 23 C. 450, 12 C.P.L.R. 96, 24 B. 609, 134 P.L.R. 1902, 71 P.R. 1906=111 P.L.R. 1907, 89 P.R. 1908=145 P.W.R. 1908.]

(79)—*S.* 17 (=*Registration Act*, 1866, *s.* 17) —*Mortgage — Document acknowledging re-payment of consideration money—Registration —Evidence.*—A document acknowledging the re-payment of consideration money advanced upon a mortgage need not be registered. It cannot be treated as an instrument which purports or operates to limit or extinguish any right, title or interest to or in immoveable property within the scope of cl. 2, s. 17 of Act XX of 1866. There is nothing in that Act to prevent that document from being admissible as evidence. SHEIKH GUGUNFUR ALI v. MAHOMED YASEEN, **20 W.R. 334.** [*R.*, 24 B. 609=2 Bom.L.R. 422; *D.*, 1 B. 197.]

(80)—*S.* 17 (=*Registration Act*, 1877, *s.* 17, *cl.* (*h*)—*Letter acknowledging the payment of consideration on account of the creation of certain interest in land.*—An instrument acknowledging the payment of consideration on account of the creation of an interest in immoveable property of over 100 rupees value and not coming within the exception of cl. (*h*), is inadmissible in evidence if it is not registered. RAMASAMI v. RAMASAMI, **5 M. 115.** [*R.*, 12 M. 505, 20 B. 553, 10 C.P.L.R. 107; *D.*, 7 B. 310.]

(81)—*S.* 17 (=*Registration Act*, 1871, *s.* 17)—*Mortgage—Receipt for payment of mortgage money.*—When a mortgagor makes a payment to the mortgagee on account of the mortgage-debt, such payment is one of consideration on account of the extinction of the mortgagee's right within the meaning of s. 17 of the Registration Act, 1871. Therefore, a receipt for such a payment is compulsorily registrable, and cannot be received in evidence if unregistered. IMDAD HUSAIN v. TASADDUK HUSAIN, **6 A. 335=A.W.N. 1884, 107.** (1 A. 442, 2 B. 489, 1 B. 197, 7 B. 123, *F.*; 4 B. 235, *Diss.*; 4 C. 83, *R.*) [*R.*, 24 B. 609, 103 P.L.R. 1905; *D.*, 9 A. 108.]

(82)—*S.* 17 (=*Registration Act*, 1877, *s.* 17 (*n*)) —*Receipt for payment of mortgage-money.*—A receipt for part payment of the mortgage-money which does not purport to extinguish the mortgage is not compulsorily registrable. Though a receipt which purports to extinguish the mortgage is inadmissible in evidence for want of registration, the fact of payment may be proved *aliunde.* AMIR v. BIALA MAL, **91 P. L.R. 1904=39 P.R. 1904.** (A.W.N. 1887, 188, *F.*)

(83)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Receipts passed by mortgagees, whether compulsorily registrable.*—Receipts passed by a mortgagee for several sums, each exceeding Rs. 100, paid on account of the mortgage debt, would be admissible in evidence even though unregistered. Moneys paid towards the mortgage debt cannot be said to be the consideration for the limitation or extinction of a proportionate interest in the land created by the mortgage bond, so as to render receipts passed on such payments compulsorily registrable under cl. (*b*) of s. 17 of the Registration Act of 1877. SHIDLINGAPA v. CHENBASAPA, **4 B. 235.** [*Diss.*, 6 A. 335; *F.*, 5 B. 181; *R.*, 19 B. 36, 24 B. 609, 103 P.L.R. 1905; *D.*, 7 B. 123.]

(84)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Receipt for payment of mortgage money—Oral evidence.*—In an action to recover money due on a mortgage, where the defendants pleaded part payment and tendered in evidence an unregistered receipt for Rs. 280 which showed that the sum of Rs. 280 was paid by them on account of the mortgage debt and they also gave oral evidence in proof of the payment of Rs. 280 towards the mortgage debt, *held* that the receipt did not require registration (9 A. 108 F.B., *Appl.*); also *held* that, if the receipt required registration, oral evidence was admissible to prove the payment acknowledged by the receipt. NABI BAKSH v. MEWA RAM, **A. W.N. 1887, 188.** [*R.*, 39 P.R. 1904=91 P.L. R. 1904.]

(85)—*S.*17 (=*Registration Act*, 1877, *s.* 17(*n*)) — *Receipt extinguishing interest of one only of several mortgagees, admissible without registration.*—In a suit for sale under a mortgage, for the purpose of proving the re-payment of part of the mortgage-money, the defendants-mortgagors produced a receipt which purported to have been executed by one of the several mortgagees for his share of the mortgage-money. The decree of the lower appellate Court passed in favour of the plaintiffs, on the ground that the receipt was one extinguishing the mortgage and consequently was not within the protection afforded by cl. (*n*) of s. 17 of the Registration Act (III of 1877), was reversed, the High Court holding that the receipt, although it purported to extinguish the rights of one of the several mortgagees, did "not purport to extinguish the mortgage" itself, and was, therefore, by reason of the said cl. (*n*), admissible in evidence without registration. SRI RAM v. KESRI MAL, **18 A. 338=A.W.N. 1896, 92.**

(86)—*S.* 17 (=*Registration Act*, III of 1877, *s.* 17 (*c*) & (*h*)—*Receipt by vendee to vendor for money paid for re-purchase—Covenant to execute stamped document for re-sale—Document creating right to immoveable property.*—Plaintiffs sought to recover the property in suit claiming under an admitted sale of it to them by the defendants. Defendants resisted the claim by alleging a re-purchase of the property from the plaintiffs, and, in proof of the re-purchase, produced a receipt passed by the plaintiffs for the consideration paid to them for the re-purchase

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

by defendants. It contained also the recital that the plaintiffs had no longer any interest in the property and would execute a new sale deed on a stamp. Plaintiffs contended that, under cl. (*c*) of s. 17 of the Registration Act, the document required registration. The lower appellate Court had treated the receipt as an agreement falling within cl. (*h*) of s. 17 of the Act not in itself creating or declaring or extinguishing a right, but merely creating a right to a document, which will, when executed, create, declare, or extinguish a right, and reversed the decree passed by the first Court in favour of the plaintiffs. On second appeal, the High Court, disagreeing from the above view of the lower appellate Court, restored the first Court's decree in plaintiffs' favour. The document was one creating, or declaring, or extinguishing at once a right to immoveable property with a super-added covenant to execute a stamped document to the same effect. PARASHRAM v. GANPAT, **21 B. 533.**

(87)—*S.* 17—*Evidence—Receipt for money paid—Money due under sale of immoveable property—Admissibility without registration—Act* VIII *of* 1871, *s.* 17, *cl.* 3.—An instrument acknowledging the receipt of consideration for the conveyance of immoveable property had to be registered under cl. 3, s. 17, Act VIII of 1871, and could not be admitted in evidence without such registration. SREENATH CHURN SOOR v. NILKANTO DEY, **22 W.R. 309.**

(88)—*S.* 17 (=*Registration Act*, 1877, *s.* 17, (*c*)—*Receipt for profits.*— S. 17, cl. (*c*) of the Registration Act, has no application to a receipt given by a pattidar to a lambardar as an acknowledgment for profits paid to him. BHAGWAN DAS v. ALLADEVI, **A.W.N. 1883, 49.**

(89)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Registration—Entry of payment in judgment-debtor's account book signed by decree-holder—"Receipts."*—An entry of payment of a decree amount signed by the decree-holder in the account book kept by the judgment-debtor, is not a receipt in the terms of s. 17 of the Registration Act so as to need registration. TIKA RAM v. RAM CHAND, **A.W.N. 1888, 82.**

(90)—*S.* 17--*Registration--Agreement to execute conveyance—Evidence—Specific performance.*—An *ekrar* given to a lender by a borrower to execute a conveyance of certain landed property, is simply an agreement the registration of which is optional, even though the *ekrar* contains an acknowledgment by the borrower of the receipt of Rs. 100 for that purpose; such agreement may be given in evidence in a suit for the specific performance of the agreement to execute the conveyance for which it stipulates. ASGUR ALI SHIKDAR v. MOTHOORA NATH GHOSE, **15 W.R. 354.**

(91)-*S.*17(=*Registration Act*,1877, s.17)-*Agreement to convey and possession given to transferee —Conveyance by registered deed to transferee who has notice of previous agreement—Estoppel.*—

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

It was agreed amongst certain successful plaintiffs, who by decree of Court had become entitled to a large estate, that a certain relative who had helped them in their suit should have a share in the property, and this agreement was carried out to the extent that this person's name was entered in the village papers as a co-sharer and he was put into possession by consent of the other co-sharers, but no conveyance of the share was executed and registered. Subsequently one of the original donors purported to sell the share so assigned to a person who had notice of the terms upon which it was held by the original donee. *Held*, that this sale, even though carried out by means of a registered instrument, was ineffectual as against the rights of the original donee, inasmuch as the vendor knew that, in equity, he could not have a title to convey, and the vendee also was aware that the vendor could not convey without committing a fraud on the original donee. ANNU MAL v. THE COLLECTOR OF BAREILY, **A.W.N. 1906, 17=3 A.L.J. 100=28 A. 315.**

(92)—*S.* 17 (=*Registration Act*, 1877, *s.* 17 (*b*) (*c*)—*Registration—Sale-deed—Receipt.*— *Held*, that a document of the following description is not a sale-deed falling within the purview of cl. (*b*), but does fall under cl. (*c*) of s. 17 of Act III of 1877 (new Act XVI of 1908) and is compulsorily registrable:—'*bai karki zar-i-bai kul humm yeh chand haruf bataur rasid ke likh diye hain ke sanad ho.*' RAM CHAND v. CHATAR SINGH, **57 P.W.R. 1910=6 Ind. Cas. 645=73 P.L.R. 1910.** (184 P.R. 1889, *R.*)

(93)—*S.* 17 (=*Registration Act*, 1871, *s.* 17) —*Decree for sale of mortgaged property—Assignment.*—The assignment for valuable consideration, of a mortgage decree ordering the sale of the mortgaged property in default of payment, is a deed requiring registration under s. 17 of the Act. GOPAL NARAYAN v. TRIMBAK SADASHIV, **1 B. 267.** [*Diss.*, 23 C. 450; *R.*, 13 A. 89, 17 B. 235]

(94)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)— *Registration—Sale of standing timber—Immoveable property.*—*Held*, that a document which purported a "*theka*" of a certain portion of a forest "for all kinds of trees" for two years was not a document conveying an interest in immoveable property and did not require to be registered. MATHURA DAS v. JADUBIR THAPA, **A.W.N. 1906, 4=3 A.L.J. 138=28 A. 277.** (20 M. 58, *D.*)

(95)—*S.* 17(=*Registration Act*, 1877, *s.* 17)— *Document creating a future right of the value of upwards of one hundred rupees in immoveable property.*—Where M sold property to D by a registered sale-deed for Rs. 399 and on the same day agreed by an unregistered deed to re-transfer the property for Rs. 150 on the last day of Jeth in any year. *Held*, that the latter document not having been registered effect could not be given to it. SURAJ PERSHAD v. PHUL SINGH, **A.W.N. 1906, 180.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(96)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Sale in lieu of dower—Value of property.*— S. 17 of the Registration Act being a disabling section must be construed strictly. Unless a document clearly purports, on the face of it, to affect an interest of greater value than Rs. 100, it lies upon the party affirming the value to exceed Rs. 100 to prove the fact affirmatively. A deed of sale by a husband in favor of his wife in lieu of dower requires registration when the interest affected by the document exceeds Rs. 100. It cannot be treated as mere gift. MUSSAMMAT BHAGAN v. HARI MAL, **90 P.L. R. 1904.** (4 M. 115, 5 A. 65, 7 A. 178, 87 P. R. 1882, *R.*)

(97)—*S.* 17 (=*Registration Act*, 1871, *s.* 17) -*Sale—Advance - Document evidencing Advance —Charge.*—Where, on a sale being decided upon, the vendee advances more than Rs. 100 to the vendor as a portion of the consideration for the sale, and a document is drawn up evidencing an intention to hold the property agreed to be sold as a charge for the money so advanced, such document requires registration. JOY RAM GOSSAIN BHUTTACHARJEE v. KALEE NARAIN ROY, **20 W.R. 291.**

(98)—*S.* 17 (=*Registration Act*, 1864, *s.* 13) —*Unregistered sale-deed—Suit based on.*—A suit for possession brought merely on the basis of an unregistered sale-deed and of the title alleged to be thereby conveyed must necessarily fail for want of proof of any right or title to obtain possession, as such deed is inadmissible as evidence under s. 13, Act XVI of 1864. RAJAH KRISHAN KISHORE CHAND v. MAHOMED ZUKAH-OLL-LAH, **Agra F.B. 148=Ed. 1874, 111.** [*F.*, 15 W.R. 51.]

(99)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Mortgage-decree for Rs.* 100 *or upwards—Sale by unregistered deed—Validity—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 232 *and* 559—*Preferring a second appeal against parties against whom there was no appeal—Application to make parties to appeal after expiry of time.*—A mortgage-decree for Rs. 100 or more is assignable without registration (23 C. 450, 6 C.W.N. 5, *F.*; 9 C. 839, *Cons.*) The validity of an assignment of a decree cannot be questioned after the assignee has been placed on the record as substituted decree-holder. A respondent should not be placed on the record under s. 559 of the Civ. Pro. Code, after the time for appealing against him has expired. In a second appeal no decree can be passed against a respondent against whom there was no first appeal. RAM RATAN CHUCKERBUTTY v. JOGESH CHANDRA BHATTACHARYA, **12 C.W.N. 625.**

(100)—*S.* 17 (=*Registration Act*, 1866, *s.* 17) -*Deed of surrender.*—A deed of surrender of lands of which the party executing it is in possession, is a deed that comes under the provision of cl. 2, s. 17 of Act XX of 1866 The deed is meant to extinguish the interest of the party in the immoveable property, and acknowledge the extinction of his right to such property. BHYRUB CHUNDER DASS v. KALEE CHUNDER CHUCKERBUTTY, **16 W.R. 56.** [*R.*, 33 C. 613=10 C.W.N. 551=3 C.L.J. 576.]

(101)—*S.* 17 — *Easement — Light and air —Document purporting to prevent acquisition of easement — Document relating to immoveable property — Registration not compulsory.*—A document which limits or extinguishes the chance of acquiring an easement of light and air does not require registration; because a chance of acquiring right to light and air is not immoveable property within the meaning of the Registration Act III of 1877, nor can any pecuniary value be put upon it. SULTAN NAWAZ JUNG v. RUSTOMJI NANABHOY, **20 B. 704.** [*Affirm.*, 24 B. 156, P.C.; *R.*, 3 N.L.R. 114, 3 S.L R. 30=1 Ind. Cas. 958.]

(102)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Registration—Compromise of suit embodied in a decree.*—In a suit for possession of certain plots of land reference was made, as part of the evidence in the case, to a compromise in a previous suit relating to other lands, but which dealt also with the lands in suit and had been incorporated into the decree of the Court in the previous suit. *Held*, that such compromise did not require registration and was admissible in evidence. RAGHUBANS MANI SINGH v. MAHABIR SINGH, **A.W.N. 1905, 195=2 A.L J. 564=28 A. 78.** (20 A. 171, 22 M. 508, *R.*; 1 C.L.J. 388, *Cons.*)

(103)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Petition of compromise—Necessity for registration thereof so far as it relates to properties not the subject of litigation.*—The provisions of s. 17 of the above Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or orders made by the Court. A petition of compromise, so far as it relates to properties in dispute, does not require registration, for, such portion of the compromise, becomes merged in the decree passed by the Court, which does not require registration. In so far, however, as the petition gives effect to the settlement touching properties extraneous to the litigation, the decree passed in the suit not being operative, the petition of compromise must be registered, if it affects immoveable property exceeding one hundred rupees in value. BIRBHADRA RATH v. KALPATARU PANDA, **1 C. L.J. 388.** (30 C. 783, 26 I.A. 101, *R.*; 20 A. 171, 25 I.A. 9, *D.*) [*R.*, 5 C.L.J. 611=36 C. 193, 35 C. 1010=12 C.W.N. 854=8 C.L.J. 90.]

(104)—*S.* 17 (=*Registration Act*, 1877, *s.* 17 (*d*) —*Petition of compromise containing a recital of a previous oral agreement for lease — Stamp — Registration —Evidence.*—Where a petition of compromise merely contained a recital of a previous oral agreement for lease: *Held*, that it did not require registration or stamp. It

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

was evidence of an oral agreement, but not an agreement in itself. PITAMBER GAIN v. UDDHAB MONDAL, **12 C.W.N. 59.**

(105)—*S.* 17(=*Registration Act*, 1877, *s.* 17)—*Compromise—Petition in suit affecting immoveable property, necessity for registration of—Admissibility in evidence when unregistered.*—A razinamah stamped with eight-anna Court-fees stamp and presented to a Court in a suit relating to immoveable property of over Rs. 100 in value setting forth the names of the parties and the nature of the suit and containing a prayer to dismiss the suit in accordance with its terms is not a document requiring to be registered under s. 17 of the Act (76 P.R. 1897, 25 M. 553, *D.*) Whether such document actually contains the contract between the parties to it, or whether the agreement was actually made prior to the writing of the document, the latter being merely a memorandum of the oral contract and intended solely as a petition to the Court with a view to its taking action in accordance with the arrangements made out of Courts (95 P.R. 1894, 98 P.R. 1902, *F.*) neither creates nor declares any rights so as to be compulsorily registrable under the section. Moreover, the *razinamah*, in so far as it was submitted to and was acted upon judicially, by the learned Judges, was in iself a step of judicial procedure not requiring registration. KHAIRUL-NISA v. BHADUR ALI. **27 P.R. 1906 =11 P.L.R. 1906.** (22 M. 508, *F.*; 30 C. 783, *D.*)

(105-*a*)— *S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Compromise decree—Covenant to pay annuity—Recital that covenantor was owner of immoveable property—Property made security for annuity—Agreement to relinquish ownership in default of payment of annuity—Claim for annuity — Possession — absence of registration—How far document enforceable.* — A covenant in an unregistered deed, whereby the covenantor, after acknowledging his ownership of the immoveable property under a prior conveyance, agrees to pay a certain annuity to another, and, in the event of default, to relinquish his ownership in the property, can be enforced for payment of the annuity, and for specific performance of the agreement to relinquish, but the document being unregistered, no suit can be maintained on it for possession. KARNAM PARTHASARATHY v. KARNAM BARATHAMMA, **16 Ind. Cas. 881.**

(106)—*S.* 17 — *Partition-deed — Registration—Stamp.—Held*, that a solehnamah filed in a case was in effect a partition-deed and did not require registration or stamp. NEM ROY v. LALMUN ROY, **25 W.R. 376.**

(107)—*S.* 17 (=*Act* XX *of* 1866, *s.* 17)—*Agreement relating to a family arrangement.*—In the case of a document drawn up mainly for the purpose of setting a widow's maintenance, though creating or declaring some right in immoveable property, *held* that, for the purposes of registration under Act XX of 1866, the actual

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

value of the whole of the immoveable property proved to exceed Rs. 100, must not, when there was no evidence to show that the value of the widow's right exceeded that sum be taken to be the value of the right created or declared. NILAVA *kom* RACHAPPA v. RUDRAPA *bin* RACHAPA, **12 B.H.C. 141.** [*D.*, 24 B. 615.]

(108)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Compromise—Muhammadan Law — Family arrangement.—Held*, that a family arrangement in consideration of a cancellation of a *tamilknama*, which provided that J. S. should get the estate with which he had already parted subject to certain conditions during his life and with remainder to certain other persons on his death, was valid under Muhammadan Law. *Held*, also, that a petition containing the above arrangement filed in a suit did not require registration under s. 17, Registration Act, 1877. MUSSAMMAT NURAI BIBI v. GHULAM HASSAN SHAH, **20 P.L.R. 1901.**

(109)—*S.* 17 (=*Registration Act*, 1887), *s.* 17 *cl.* (*i*)—*Award—Instrument of partition.*—An award is exempt from registration, under cl. (i) of s. 17 of the Act, and is not rendered compulsorily registrable, by reason of the fact that it is chargeable with stamp duty as an instrument of partition, under art. 45 of the second schedule of the Stamp Act, 1899. Where the award stated that, out of the entire land of the parties, certain shares were allotted to them by the arbitrators, and the rent due by the tenants was divided in certain other shares, and the award was signed by the arbitrators and also by the parties, to signify their consent to the arbitration and its result, *held*, that the award was not compulsorily registrable. GULAB SINGH v. MOHAR SINGH, **160 P.L.R. 1906.** (9 B. 50, *R.*)

(110)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Award signed by the parties—Partition deed.—Held*, that the award, which was signed by the parties to signify their acceptance of the award, should have been stamped as a Partition deed, and its registration was compulsory under s. 17, Indian Registration Act. RATTAN CHAND v. GHASITA MAL, **P.L.R. 1900, p. 459.** (9 B. 50, *F.*)

(111)—*S.* 17 (=*Registration Act*, 1877, *s.* 17, *cls.* (*b*) *and* (1)—*Agreement to partition—Award creating or declaring title to immoveable property —Whether compulsorily registrable.*—Neither an agreement to effect a partition, nor an award of arbitrators, though creating or declaring title to immoveable property, is compulsorily registrable. TARAKANTA GHOSE v. RAI KISHORI GHOSE, **6 Ind. Cas. 361.**

(112)—*S.* 17 (=*Registration Act*, 1877, *s.* 17 (*b*) —*Registration—Partition deed—Document relating to both moveable and immoveable properties.*—An unregistered instrument of partition relating to both moveable and immoveable properties of the value of one hundred rupees and upwards is inadmissible in evidence for want of

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

registration, and the Court is not at liberty to refer to such portions of it as relate to moveable property. BUA DITTA v. MUSSAMMAT GANGA DEVI, **119 P.L.R. 1906=P.W.R. 1906, p. 10.**

(113)—*S.* 17—*Partition deed on a divorce.*—An instrument whereby a husband and wife on divorce agree to a partition of their assets and debts, and which without any specific mention of immoveable property actually operates to give one or other of the parties an interest of the value of over Rs. 100 in immoveable property forming part of such assets, requires to be registered under s. 17, Registration Act, and if unregistered cannot affect the immoveable property or be received as evidence of any transaction affecting it. MAUNG SHWE BWIN v. MA SON, **L.B.R. 1872—1892, 655.**

(114)—*S.* 17 (= *Registration Act,* III *of* 1877, *s.* 17 (*b*),(*h*)).—Though it contains a clause contemplating the execution of a further deed, a deed of partition between a mother and her son, of moveable and immoveable property above the value of Rs. 100, if not registered, is not admissible in evidence even to prove title to the moveable property. LAKSHMAMMA v. KAMESWARA, **13 M. 281.** [*R.*, 24 B. 615, 119 P.L.R. 1906 ; *D.*, 15 M. 336.]

(115)—*S.* 17 (=*Registration Act,* 1877, *s.* 17) —*Unregistered deed of partition, evidentiary value of suit based on unregistered document inadmissible in evidence, effect of admission of defendants.*—It is no doubt the policy of the Legislature that all documents affecting immoveable property should be registered. Documents, to be admitted in evidence of any transaction affecting immoveable properties, require registration. An unregistered deed of partition is not admissible in evidence to prove the transaction in so far as it affects the immoveable properties divided among the parties, but it is admissible to prove that the co-parceners therein referred to have become divided members. Such document is also admissible to prove the arrangement come to regarding moveables (15 M. 336, *F.*) The admissions of the defendants do not make an unregistered document admissible as evidence in so far as the immoveable property is concerned, nor can secondary evidence be given of its contents, but yet a decree may be given on the admission of the defendants. S. A. SUBRAMANIA IYER v. SAVITRI AMMAL, **4 M.L.T. 354=19 M.L.J. 228.** (3 M.H.C. 342, *R.*) [*D.*, 3 Ind. Cas. 247.]

(116)—*S.* 17 (=*Registration Act,* 1877, *s.* 17) —*Partition of immoveable property already completed—Record in* bahis *of partition what it constitutes—Registration of* bahi *not necessary —Admissible in evidence without registration.*—*Held,* that a record, in the *bahis* of entries containing the details of a partition of immoveable property exceeding the value of Rs. 100 already completed by the parties, does not constitute a deed of partition and consequently, does not require registration. Such entries form merely a memorandum of the transaction already completed and cannot be excluded from evidence for want of registration. GANGOD GIR v. SHAM GIR, **33 P.L.R. 1905 =48 P.R. 1905.** [*Cons. & D.*, 71 P.R. 1906=111 P.L.R. 1907.]

(117)—*S.* 17 (=*Registration Act,* 1877, *s.* 17, *cl.* (*b*) —*Deed providing mode of partition of immoveable property of the value of* **Rs. 100** *to be acquired in future—Explanation of cl.* (*b*) *of s.* 17 *of Act* III *of* 1877—"*Vested*" *and* "*contingent*" *defined—Transfer of Property Act,* IV *of* 1882, *ss.* 19 *and* 21—*Agreement inadmissible—Oral evidence barred—S.* 91, *Indian Evidence Act.*—*Held,* that, in s. 17 (*b*) of Act III of 1877, the clause, "whether in present or in future" belongs to the bunch of infinitives preceding it and not to the nouns "right, title or interest," consequently the "right, title or interest," whether vested or contingent must be a present and not a future, right, title or interest. *Held,* also, that a deed prescribing the mode of partition of certain immoveable property of the value of Rs. 100 or more, to be acquired in future by the parties thereto, does not fall under cl. (*b*) of s 17 of Act III of 1877. *Held* further, that the definition of "vested and contingent" given respectively in ss. 19 and 21 of Act IV of 1882, are applicable to these terms used in s. 17 (*b*) of Act III of 1877. Where an agreement is inadmissible, oral evidence is barred. BHAN SINGH v. THAKAR DAS, **89 P.R. 1908=145 P.W.R. 1908.** (16 P.R. 1895, 82 P.R. 1884, 150 P.R. 1889, 30 B. 304, 30 C. 1016, *R.*)

(118)—*S.* 17—*Registration—Relinquishment by widow of her life-estate of the value of Rs.* 100 *in favour of her deceased husband's reversioners.*—A deed executed by a widow, in favour of her husband's reversioners, relinquishing her life-estate of the value of Rs. 100 or more in immoveable property left by him, requires registration under s. 17 of Act XVI of 1908. SHAHAB DIN v. MUSSAMMAT PANNAH BIBI, **97 P.W.R. 1912=14 Ind. Cas. 749= 92 P.R. 1912.** (12 B.H.C. 141, 7 M.H.C. 228, 3 M. 184, *D.*)

(119)—*S.* 17 (=*Registration Act,* III *of* 1877, *s.* 17, *cl.* (*d*))—*Partnership agreement—Clause entitling partner to redeem mortgage of immoveable property—Admissibility of agreement without registration—Declaration of right of partner—Necessity for execution of further instrument.*—A partnership agreement containing a clause entitling one of the partners to redeem certain mortgaged property belonging to the partnership has to be compulsorily registered under s. 17, cl. (*d*) of the Registration Act, inasmuch as the right created in favor of one of the partners is a right in immoveable property. If unregistered, the agreement is not admissible in evidence. Where the agreement is registered a declaration

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

by the Court of the right of the partner as expressed therein is sufficient, and it is not necessary for the Court to make an order directing the execution of any further instrument. MAUNG PO HTI v. MAHOMED CASSIM, **13 M.L.J. 329, P.C.=30 C. 1016=30 I.A. 230=7 C.W.N 861=5 Bom. L.R. 975=8 Sar. 551.** [*R.*, 89 P.R. 1908=145 P.W.R. 1908.]

(120)—*S.* 17 (=*Registration Act*, 1866, *s.* 17, —*Agreement for lease—Registration.*—An agreement for a lease does not require registration. It does not come under s. 17 of the Registration Act, as it only leads up to a lease. BHAIRABNATH KHETTRI v. KISHORI MOHAN SHAW, **3 B.L.R. App. 1.** (7 W.R. Civ. Rul. 280, *F.*) [*R.*, 7 B.H.C. 45.]

(121)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Lease or agreement to lease, what is not.*—Where a certain document was merely a provision for certain payments to the landlords by way of consideration in addition to those already agreed on, and that in the case of arrears certain interest should be payable, *held*, on a construction of the document, that it did not amount to a "lease or agreement to lease" so as to be inadmissible in evidence without registration. KADERNATH MITTER v. SURENDRO DEB ROY, **9 C. 865=13 C.L.R. 58.**

(122)—*S.* 17 (=*Registration Act*, 1877, *s.* 17,) —*Dowl—Lease or agreement to lease—Varying rent—Registration.*—In considering whether a *dowl* is compulsorily registrable or not, the question to be decided is whether it embodies a special agreement between the parties. If it does, it requires registration, if it does not, registration is not needed. (3 C. 322, 7 C. 703, 7 C. 717, *Cons.*; 24 C. 20, 22 M. 217, *F.*; 5 C. 864, *Cons. & Appl.*) Where, as in this case, the *dowl* (a memorandum showing the rents payable by the tenants, bearing their signature) merely evidences that there has been a commutation of rent, that the rent which was previously payable partly in kind and partly in cash would henceforth be paid in cash, it is not an instrument relating to an interest in immoveable property and does not require registration. HARA PRASAD DAS v. RAM NARAIN CHOWDHURY, **11 C.L.J. 22=2 Ind. Cas. 89.**

(123)—*S.* 17 (=*s.* 13, *Act* XVI *of* 1864)—*Dowl or* amuldaree—*Registration—Oral evidence, admissibility of.*—Neither of the documents, *dowl* and *amuldaree*, which are merely preliminaries to a lease, requires registration under s. 13, Act XVI of 1864. If a party chooses to trust to the uncertainty of oral evidence to support his claim for rent, no written lease having been executed, there is no reason why that evidence if credible and sufficient of itself to prove the existence of an agreement between the parties, should not be admitted

Registration Act (XVI of 1908, III of 1877, VIII of 1871 XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

by the Judge and enable him to give the plaintiff a decree upon his claim. GOLUCK KISHORE ACHARJEE CHOWDHRY v. NUND MOHUN DEY SIRCAR, **12 W.R. 394.** [*F.*, 17 W.R. 509.]

(124)—*S.* 17 (=*Registration Act of* 1871, *s.* 17)—*Evidence, admissibility of*—Doul Fehrist —A *doul fehrist* containing a list of the holdings and rates of rent of the ryots with their signatures, and specifying that these holdings were to continue for seven years, does not constitute a contract to cultivate for that period, and is admissible in evidence without being registered. KARTICKNATH PANDAY v. KHAKUN SINGH, **1 C.L.R. 328.**

(125)—*S.* 17—*Doul Darkhast—Lease and agreement to lease—Registration—Contract in writing.*—A *Doul Darkhast* amounting to nothing more than a proposal to pay a certain rent for land is no lease or agreement for a lease and so does not need registration. But the same proposal, if so accepted that both the proposal and the acceptance constitute a contract in writing, would require registration. LALL JHA v. NEGROO, **7 C. 717.** (14 W. R. 178, 17 W.R. 508, *Diss.*)

(126 & 127) — *S.* 17 — Dowl-darkhast—*Registration.*—A *dowl darkhast* is only a preliminary to a lease and, as such, does not require registration. BIBEE MEHEROONNISSA v. ABDOOL GUNEE, **17 W.R. 509.** [*Cons.*, 7 C. 717; *R.*, 7 C. 703, F.B.]

(128)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*rent-note.*—A Rent-note providing that the tenants may hold the lands as long as they continue to pay rent or perform the service, is a lease of immoveable property which must be registered under s. 17, Indian Registration Act, 1877. PAGI MANIA v. DESAI LALLUBHAI, **2 Bom. L.R. 488.**

(129)—*S.* 17—*Rent-note by lessee—Undertaking to hold at lessor's option—Reservation of annual rents—Registration, if compulory.*—The rent-note executed by the defendant to the plaintiff in this case ran as follows:—"I have this day hired from you two houses. . . . . Rs. 18 have been agreed to be paid to you as rent thereof *per* one year. I am to live therein so long as you allow me to do so." The note was construed as creating only a tenancy-at-will and not a tenancy from year to year. Consequently, although an annual rent was reserved by the instrument, it was not one requiring to be registered as under s. 17, cl. (*d*), of the Registration Act. JIVRAJ GOPAL v. ATMARAM DAYARAM, **14 B. 319.** [*R.*, 9 C.P. L.R. 57; *D.*, 19 B. 150, 9 C.P.L.R. 88.]

(130)—*S.*17 (= *Registration Act*, 1877, *s.* 17), *cls.* (*d*) *and* (*h*) — *Lease— Document creating right to obtain other document.*—A document by which no immediate interest is created—there is no present demise—and which is merely an agreement to create a lease on a future

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

day, the terms of which are to be defined by documents to be executed afterwards, is not a lease, and does not fall under cl. (*d*) of s 17, Registration Act, but is a document creating right to obtain another document within cl. (*h*) of s. 17, and is not compulsorily registrable. PANCHANAN BASU v. CHANDI CHARAN MISRA, **6 Ind. Cas. 443.**

(131)—*S.* 17 (=*Registration Act*, 1877, *s.* 17, *cl.* (*d*), *proviso*)—*Lease — Non-reservation of annual rent—Lease for a term less than five years—Registration, whether necessary.*—The proviso to cl. (*d*) of the s. 17 of the Registration Act requires two conditions for exemption from registration. One of them is that the term does not exceed five years. The other is that the annual rent reserved does not exceed Rs. 50. This latter condition does not mean that there should be an annual rent reserved and that it should not also exceed Rs. 50. It only means that, if an annual rent is reserved, it should not exceed Rs. 50. (4 M. 38, 24 M. 421, 27 M. 43, *R.*) *Quære*:—Whether, in a lease where the term is for a period less than five years, and one consolidated rent, say, a thousand rupees, can it be said that, because there is no annual rent, the annual rent reserved does not exceed Rs. 50. A. VENKATASAWMY CHETTY v. SUPPA PILLAI, **6 Ind. Cas. 382=8 M.L.T. 103.**

(132)—*S.* 17 (=*s.* 17, *Act* III *of* 1877)—*Lease not exceeding five years—Meaning of—Muchalika—Executed to remain in force till fresh one was executed—Exemption from registration.*—The language of the proviso, "the terms granted by which do not exceed five years" in s. 17, Registration Act, means "the terms granted by which are not for a definite period exceeding five years." [*F.*, 17 C. 548, 9 C.P.L.R. 88, 24 M. 421.] A muchalika executed for a fasli, on condition that it should be in force till a fresh one was executed, is a lease, and hence exempted from Registration, if the rent reserved is less than Rs. 50, by virtue of Government notification under s. 17 of the Registration Act. VIRAMMAL v. K. RUNGAYYANGAR, **4 M. 381.**

(133)—*S.* 17 (=*Registration Act*, 1877, *s.* 17, *proviso*)—*Meaning of the proviso—Exemption of leases for a term and reserving an annual rent.*—The meaning of the proviso to s. 17 of the Indian Registration Act, exempting from the operation of the section leases for a term and reserving an annual rent, is that the exemption extends to leases whose term does not exceed five years and the annual rent Rs. 50, so that unless the lease reserves an annual rent the proviso will not apply to it. VENKATASAWMY CHETTI v. SUPPA PILLAI, **4 Ind. Cas. 303=7 M.L.T. 30=33 M. 216.**

(134)—*S.* 17 (=*Act* XX *of* 1866, *s.* 17)—*Zuri-peshgi lease—"Leases of immoveable property for any term exceeding one year."*—A zuri-peshgi lease granted on the advance of a loan for one year, but with a stipulation that it should continue in force, if the loan were not repaid within the period, was held to be a lease coming under "leases of immoveable property for any term exceeding one year" in s. 17 (4) of the Registration Act of 1866, so that registration was compulsory. The leases which were intended to be excluded foom the 4th clause are leases, the term of which was one year certain. BHOBANI MAHTO v. SHIBNATH PARA, **13 C. 113.** [*Diss.*, 17 C. 548; *R.*, 9 C. P.L.R. 88.]

(135)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Lease for life of lessee—Construction—Registration.*—A lease for the life of the lessee is a lease for a term exceeding one year, as it entitled the lessee to hold for more than that period if he live so long. It is not a lease terminable at the end of a year or at the option of the lessor. It, therefore, requires registration under s. 17 (*d*) of Act III of 1877. PARSHOTAM VISHNU v. NANA PRAYAG, **18 B. 109.**

(136)—*S.* 17—*Act* XVI *of* 1864—Kabuliat—*Registration.*—A *kabuliat* executed whilst Act XVI of 1864 was in force need not be registered. HUR CHUNDER GHOSE v. WOOMA SOONDUREE DOSSEE, **23 W.R. 170.**

(137)—*S.* 17—Kabuliat *for specific year—Registration—Act* XX *of* 1866.—A *kabuliat* by a ryot holding under a patta for a specified year, with an agreement between the parties that a fresh settlement should be made at the close of the period, not being a lease for more than a year, but only a lease for one year, does not require registration under Act XX of 1866, although the *kabuliat* contains a clause to the effect that year by year the ryot should pay rent at a specified rate. JUGDESH CHUNDER BISWAS v. ABEDOLLAH MUNDUL, **14 W.R. 68.** [*R.*, 26 W.R. 98.]

(138)—*S.* 17 (=*Registration Act*, 1866, *s.* 17 (4))—Kabuliat—*Lease for one year—Ejectment on certain conditions within a year—Lease for over a year Registration Act* (III *of* 1877), *s.* 17 (1)—*Change in law—Effect on aamissibility.*—In a *kabuliat* executed in 1871, the executant stated that he had taken a house from the owner on a yearly rental of Rs. 3. No term was fixed, but there was a further stipulation that, if called upon, he would yield such services to the zamindar as the latter might require, and in the event of a breach of any one of the above conditions he would be liable to ejectment. *Held*, that, inasmuch as the lessee was liable to be ejected at any time within the period of one year from the execution of the *kabuliat*, the lease was not one for a term exceeding one year and its registration was therefore not compulsory under s. 17 (4) of the Registration Act, 1866. *Held*, further that a document which did not require registration under Act XX of 1866, was not inadmissible evidence by reason of the proviso to the Registration Act, 1877. INTIZAM FATIMA v. ALI BAKSH, **8 A.L.J. 609.** (18 B. 92, 9 C. 68, *F.*)

Registratration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(139)—*S.* 17—*Bombay Survey Act* I *of* 1865, *s.* 36—*Purchaser—Registration—Tender—Collector's refusal to accept rent tendered by defaulter's mortgagee.*—The purchaser at a revenue sale, held in default of the payment of assessment, takes free of all incumbrances, although the revenue authorities, without otherwise depriving the defaulter of his right of occupancy, under s. 36 of the Bombay Survey Act I of 1865, have only sold his right, title, and interest. What operates to create the property recognised as a right of occupancy is the entry of the occupant's name in the Collector's books. A mere memorandum, therefore, declaring a person to be the successful bidder at the sale is not an instrument creating or declaring as interest in immoveable property, and requiring registration under s. 18, Act XX of 1866. The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent, but if he does refuse it and the land is sold, the title of the purchaser is unimpeachable. GHELABHAI BHIKARIDAS v. PRANJIVAN ICHHARAM, **11 B.H.C. 218.** [*F.*, 5 B. 73; *R.*, 1 B. 577.]

(140)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Relinquishment of tenant right for consideration.*—Though a document relinquishing a holding, irrespective of the wishes of the landlord, under s. 12 of the Rent Recovery Act (Madras Act VIII of 1865) does not require registration, yet an instrument, whereby a tenant relinquishes his right to a holding in consideration of the landlord giving up his claim to arrears of rent, falls within s. 17 of the Registration Act and requires registration. The case is not altered by the fact that the landlord did not signify his consent to give up his claim before the instrument was given to him. RANGAYYA APPA RAU v. KAMESWARA RAU, **20 M. 367=7 M.L.J. 59.** [*R.*, 14 C.P.L.R. 29.]

(141)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Endorsement of Devasthanam manager on darkhast application—Agreement to lease—Criterion for registration.*—Where an application for some waste land on darkhast is made to a Devasthanam to which the land belongs, and the Devasthanam manager sanctions the grant by endorsement on the application, communicated to the applicant, the endorsement of the manager must be taken to be an agreement to lease and, therefore, to be subject to the provisions of the Registration Act as if it were a lease. Where the grant does not in terms purport to be for a period exceeding five years, and the rent reserved by it does not exceed Rs. 50 per annum, it need not be registered, as it is exempted from registration by the notification of Government published under that section. Though a lease may, by custom, entitle the grantee to hold permanently, it does not in any way affect the question of registration, for, the criterion for registration is what is expressed on the face of the document. RAMASWAMY AYYAR v. THIRUPATHI NAIK, **27 M. 43.** [*Appl.*, 4 M.L.T. 79.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(142)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Instrument extinguishing tenant rights—Necessity for registration of.*—S. 17 of the Act requires the registration of an instrument extinguishing tenant rights in consideration of a sum of Rs. 100 and upwards. TRILOCHAN GAONTIA v. LACHMAN PADHAN, **14 C.P.L.R. 29.**

(143)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Recognition as* mokuraridar.—Where a document recognises a person as purchaser of a certain *mokurari* right and also creates a perpetual *mokurari* right in his favour, it ought to be registered. AGIN BINDH UPADHYA v. MOHAN BIKRAM SHAH, **30 C. 20=7 C.W.N. 314.**

(144)—*S.* 17—*Contract to execute pottah at a given rent—Default—*Baeenanamah *treated as pottah compulsorily registrable.*—Plaintiffs sued the four defendants, who were brothers, and one of whom was her husband, alleging that they had failed to carry out their contract to execute a mourousee pottah of the suit lands to her. The agreement was stated to be that, on defendants failing to perform their contract the *baeenanamah* was itself to be considered as a mourousee pottah, and she accordingly instituted this suit for possession of the lands. The Principal Sudder Ameen, holding that the document on which the plaintiff based her case was not such a document as under the Registration law was inadmissible in evidence unless registered, refused to give the defendants (the intervenors) whose lease from the plaintiff's lessors was admittedly registered, any preference as against the deed of the plaintiff under the provisions of s. 50 of Act XX of 1866. *Held* that the lower Court was wrong in law. The deed under which the plaintiff sued was nothing more or less than a pottah and the plaintiff had asked for possession only on treating it as such. Under cl. 2, s. 17 of Act XX of 1866, the document, being an instrument creating right in immoveable property, the registration of the same was compulsory and not optional. The defendant's pottah was admittedly registered and was entitled to preference over the unregistered document of the plaintiff, both documents relating to the same property. NUND RAM GHOSE v. MAUNOO BIBEE, **10 W.R. 177.**

(145)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Permanent lease by occupancy raiyat—Registration contrary to Bengal Tenancy Act* VIII *of* 1885—*Effect of registration.*—If any document be registered contrary to an express provision of law, the registration is void and the document must be regarded as unregistered. (26 C. 46, 29 C.148, *Rel. on.*) No sub-lease by an occupancy tenant purporting to create a term exceeding 9 years may be admitted to registration since the passing of the Bengal Tenancy

Registration Act (XXI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

Act. Without registration, a permanent lease is invalid under the Indian Registration Act. Therefore, a permanent lease registered contrary to the provisions of s. 85, cl. (2), is wholly void. FAZEL SHEIKH v. KERAMUDDI SHEIKH, **6 C.W.N. 916.** [*R.*, 8 C.W.N. 136.]

(146)—*S.* 17—*Registration—Lease.*—Where a lease is for only one year, with option to the lessor to allow the lessee to continue his tenure on the old conditions after expiration of the year: *Held* that the absolute right of the lessee is restricted to one; and that the lease is therefore a one year lease, the registration of which is not necessary. MOHUNTO SOUTHO PURSAD DASS v. PARASU PADHAN, **26 W.R. 98.**

(147)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Document—Allotment of lands.*—A document, which after reciting the allotment of lands, contains an agreement to act accordingly, is compulsorily registrable under s. 17 of the Registration Act, 1877. RAMACHANDRA v. DINKAR, **2 Bom. L.R. 800.**

(148)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Deed of assignment of arrears of profits due by* lambardar *to co-sharer—Necessity for registration of—S.* 54, *Transfer of Property Act—Misjoinder of parties.*—An assignee from a co-sharer of arrears of profits due to the latter by a *lambardar*, brought a suit to recover the arrears due. The heirs of the *lambardar*, who lived at the date of assignment, the present *lambardar* and the assignor were impleaded as parties to the suit. It was contended that the suit was bad for misjoinder of parties and that the deed of assignment conferred no title on the plaintiff, since it was not registered. *Held*, that there was no misjoinder of parties inasmuch as the present *lambardar* would be liable only to the extent of the profits collected by him and, under s. 28, Civ. Pro. Code, the parties were rightly impleaded in the suit. *Held*, also, that the deed of assignment did not require registration either under s. 17 of the Registration Act or s. 54 of the Transfer of Property Act, as the arrear was in reality a debt due to the plaintiff's vendors by the *lambardar*. DAMODAR DAS v. GIRDHARI DAS, **A.W.N. 1905, 100=27 A. 564=2 A.L.J. 692.**

(149)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Deed of gift—Voluntary registration by legal representative of donor, effect of the.*—The voluntary registration of a deed of gift by the legal representative of the donor has the same effect, as its voluntary registration by the donor himself in his life-time MEIYYALU NADAN v. ANJALAY, **25 M. 672=12 M.L.J. 409.** [*R.*, 13 M.L.J. 303.]

(150)—*S.* 17—*Act* XVI *of* 1864, *ss.* 13, 17—*Unregistered* hibbanamah *executed prior to Act, admissible in evidence.*—This suit hinged upon a *hibbanamah*. It was admitted that it was executed before the 1st of January 1865, when

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

Act X of 1864 came into operation. The Principal Sudder Ameen refused to admit the *hibbanamah* as evidence because it was not registered. But it was held that the document was admissible because s. 13 applies to deeds executed on or after 1st January 1865, and not to deeds executed before that date. S. 17 contains no penalty for non-registration such as is contained in s. 13. RAMA SOONDUREE DOSSIA v. MADHUB CHUNDER GOOHOO, **8 W.R. 269.**

(151)—*S.* 17 (=*Act* XVI *of* 1864, *s.* 13)—*Compulsory registration*—Amuldustakas—*Contract —Breach—Damages.*—It is impossible that the legislature could have intended s. 13 of Act XVI of 1864 to apply to deeds which are merely preliminary to the main contract or engagement, as the *amuldustak* is, or that deeds which are steps in, or mere parts of a transaction, should be registered before they can be used as evidence. [*F.*, 12 W.R. 394, 3 B.L.R. App. 1; *Appr.*, 17 W.R. 509, 12 B.H.C. 175; *R.*, 7 B.H.C. 45.] In the absence of any suggestion to the contrary, a lessee who is in possession of certain property under a duly registered lease-deed must be taken to be *bona fide*; and he cannot be ousted by a person who is granted a lease subsequently. The latter's remedy is against the grantors only for damages for breach of contract. BUNWAREE LAL v. SUNGUM LAL, **7 W.R. 230.**

(152)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Judicial proceedings.*—The provisions of s. 17 of the Registration Act (III of 1877) do not apply to proper judicial proceedings filed by the parties, whether consisting of pleadings or of orders made by the Court. BINDESRI NAIK v. GENGA SARUM SAHU, **20 A. 171, P.C.=25 I.A. 9=2 C.W.N. 129=7 Sar. 273** [*R.*, 4 O.C. 78, 28 A. 78=A.W.N. 1905, 195=2 A.L.J. 564, 36 C. 193=5 C.L.J. 611, 35 C. 837=12 C.W.N. 849=7 C.L.J. 492, 31 M. 330=18 M.L.J. 1, Note=3 M.L.T. 377, 6 M.L.T. 313=3 Ind. Cas. 701; *D.*, 1 C.L.J. 388.]

(153 & 154)—*S.* 17—*Certificate of sale—Property of more than Rs.* 100 *in value—Admissibility of unregistered certificate--Burden of proof —Allegation in plaint not traversed—Shifting of burden.*—A certificate of sale granted by a Court in respect of property of more than Rs. 100 in value, should be registered, and is otherwise inadmissible in evidence to prove the sale. [*R.*, 10 B.H.C 435, 12 B.H.C. 241, 7 C.L.R. 115, 13 M. 308.] The mere fact that an allegation in a plaint is not traversed by the defendant, does not relieve the plaintiff of the *onus* of proving his case. MULJI BECHAR v. ARUPRAM BECHAR, **7 B.H.C. A. C. 136.**

(155)—*S.* 17 (=*Registration Act*, 1877, *s.* 17) —*Sale-certificates, registration of.*—Sale-certificates granted under s. 259 of Act VIII of 1859 (Civ. Pro. Code) are not compulsorily registrabl

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

under s. 17 of the Registration Act. PROKASH CHUNDER DASS v. TARACHAND DASS, **8 C. 82, F.B. = 12 C.L.R. 1.**

(156)—*S.* 17 (=*s.* 17 (*b*) *of* 1877)—*Sale certificate—Civ.Pro. Code, s.* 316.—A certificate of sale, granted under s. 316 of the Civ. Pro. Code, does not require registration as provided by s. 17 of the Registration Act, for it is not an instrument of the kind mentioned in cl. (*b*) of that section. MASARAT-UN-NISSA v. ADIT RAM, **5 A. 568, F.B. = A.W.N. 1883, 159.** [*R.*, 142 P.R. 1908, F.B.]

(157)—*S.* 17 (=*Registration Act*, 1877, *s.* 17 (*o*)—*Sale certificate granted by Collector—Sale of "B. class" lands—Transfer of title—Registration.*—Sale certificates granted by the Collector in accordance with the rules issued by the Board of Revenue after the sale of "B. class" or surplus lands acquired by Government under the Land Acquisition Act, are sufficient in themselves to transfer the title from the Government to the transferee, and s. 17, cl. (*o*) of the Registration Act is authority for the proposition that such certificates are sufficient to validate the transfer of title to transferee without being registered. SARAT CHUNDER ROY CHOWDHURY v. JATINDRA NATH MOOKERJEE, **35 C. 614.**

(158)—*S.* 17 (=*Registration Act*, III *of* 1877, *s.* 17)—*Security bond given under Civ. Pro. Code, s.* 545 – *Transfer of Property Act, s.* 58—*Order accepting security.*—A security bond, whereby immoveable property exceeding Rs. 100 in value was pledged to the Court. It was signed by the obligor and attested by two witnesses. The Court endorsed thereupon the words "security is accepted." Under these circumstances, it was contended that the deed did not require registration. *Held*, the deed fell under s. 58 of the Transfer of Property Act and required registration under s. 59, as amended by s. 3 of Act VI of 1904 and s. 17 of the Registration Act. *Held*, also, the words "security is accepted" merely meant an intimation by the Court that the property given as security was sufficient for the purpose. NAGARURU SAMBAYYA v. TANJATUR SUBBAYYA, **3 M. L.T. 317 = 31 M. 330.** (32 C. 494, *F.*; 13 M. 1, 203, 22 M. 508, 20 A. 171, *R.*)

(159)—*S.* 17—*Appeal to Privy Council—Security—Stamp—Registration—Objection to stamp based on rules of Revenue Department.*—Where the High Court ordered a judgment-debtor, pending an appeal to Her Majesty in Council, to furnish security within a period of two months, and the judgment-debtor put in a petition just one day before the expiry of the two months, stating that he tendered a certain *dur-putnee* mahal as security and on the next day gave an unregistered security bond, which was rejected by the Judge, *held* that the bond was not required to be registered until the security was accepted by the Court, and the Court should have directed an investigation by a proper officer of the Court into the sufficiency or otherwise of the security. The objection that a security bond is engrossed on an eight anna stamp threaded to other stamps aggregating to the full value, contrary to the rules of the Revenue Department is merely a technical objection and does not affect the merits of the case. MR. A.D. DUNNE v. AMEEROONISSA KHATOON, **13 W.R. 41.**

(160)—*S.* 17 (=*Registration Act*, III *of* 1877, *s.* 17)—*Decree not an 'executed instrument' within the meaning of—Admissibility of decree in evidence without registration.*—The application in this case, was refused on the ground that the decree was an instrument which created an interest in immoveable property, and could not be given in evidence for want of registration. It was *held*, however, on appeal, that it could be admitted in evidence, although not registered. Upon the true construction of the Act of 1871 read with Act X of 1866, the High Court was of opinion that a decree could not be said to be "an executed instrument" within s. 17 of the Act of 1871. But, in any view of that Act, the later Act, III of 1877 expressly excludes such decrees, whether passed before or after the Act, from the operation of compulsory registration. PURMANUNDDAS JIWANDAS v. VALLABDAS WALLJI, **11 B. 506.** [*R.*, 3 O.C. 32, 15 C.P.L.R. 69.]

(161)—*S.* 17 (=*Registration Act*, 1877, *s.* 17)—*Execution sale, evidence of—Sale certificate not admissible for want of registration.*—As between the purchaser and the judgment-debtor, proceedings confirming a particular auction-sale would be sufficient evidence of the sale, quite independently of the sale certificate although it may be inadmissible as not being registered. BENODI LAL GHOSE v. TAMIZUDDIN, **7 C.L.R. 115.**

(162)—*S.* 17 (=*Registration Act*, 1877, *s.* 17), *cl.* (*b*)—*Evidence Act* (I *of* 1872), *s.* 32, *cl.* (6)—*Will — Statement — Words not purporting or operating to extinguish interest in present or future.* —S. 17, cl. (*b*), of the Registration Act, 1877, does not render a passage in a Will inadmissible, where the words do not purport or operate to *extinguish* an interest *in the present or in future*, but only state facts. And the statement contained in the passage would, if proved, be admissible also under s. 32 cl. (6), of the Evidence Act. CHAMANBU v. MULTAN CHAND, **20 B. 562.**

(163)—*S.* 17 (=*Registration Act*, III o 1877, *s.* 17)—*Immoveable property.*—The right to the status of a karnavan cannot be treated as an interest in immoveable property within s. 17 of the Registration Act. SHUPPA MENON v. NARAYANAN, **14 M.L.J 415, F.B.**

(164)—*S.* 17 (=*Registration Act*, 1877, *s.* 17—*Document—Petition for mutation of names.*—The parties to this suit presented a petition in the Revenue Department for mutation of names

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according to a previous agreement. This petition recited the dispute and the terms of the agreement in full. *Held* that this petition was not such an instrument as is contemplated by s. 17 of the Registration Act, and that therefore its registration was not compulsory. NUR ALI v. IMAMAN, **A.W.N. 1884, 40.** [*D.*, 31 A. 13=5 A.L.J. 717=A.W.N. 1908, 264.]

(165)—*S.* 17 (= *Registration Act*, 1877, *s.* 17) —*Petition for withdrawal setting out terms of agreement concerning immoveable property—Registration.*—Where a petition for withdrawal of a suit, upon which the Court ordered the suit to be struck off, sets out the terms of an agreement entered into by the parties, creating rights in immoveable property to the value of over Rs. 100, such an agreement, if unregistered, is invalid, and a suit based upon it is unsustainable. MUTHAYYA v. VENKATARATNAM, **25 M. 553.** [*Expl.*, 7 C.L.J. 492=35 C. 837=12 C. W.N. 849; *R.*, 5 C.L.J. 611=36 C. 193; *D.*, 27 P.R. 1906, 11 P.L.R. 1906.]

(166)—*S.* 17 (= *Registration Act*, 1877, *s.* 17 (*d*)— *Registration—Varying registered document—Transfer of Property Act* (IV *of* 1882), *s.* 107.—A document which varies the amount of rent paid under an existing lease registered as required by s. 17 (*d*). Registration Act, as also the incidents of such payments, namely, the date of payment, and consequences of default of payment, requires registration. The case in so far as it determines that a document embodying an agreement for reduction of rent under a previously existing lease registered under s. 17 (*d*) requires registration, approved. LALIT MOHAN GHOSE v. THE GOPALI CHAUK COAL CO., LTD., **14 C.L.J. 411, F.B.=16 C.W. N. 55=39 C. 284=12 Ind. Cas. 723.** (10 C.L. J. 570, 37 C. 293, *Appr.*)

(167)—*S.* 17,—*Sanad granting* hak—*Regrant of* hak *by endorsement on sanad—Endorsement, if requires registration—Admissibility of other evidence as to alleged re-grant—Evidence Act* (I *of* 1872), *s.* 92, *proviso* 4.—This was a suit brought for a declaration that the *hak* in question was liable to attachment in execution of the plaintiff's decree against his deceased judgment-debtor K. Defendant, the alleged grantor of the *hak* to K, pleaded a re-grant to himself by K, the grantee, relying on an endorsement made by him on the back of the *sanad.* The first Court was of opinion that the endorsement was inadmissible in evidence because, though purporting to extinguish the grant, it was not registered, and, finding that the grant was not rescinded, passed a decree for the plaintiff. *Held* by the High Court, on appeal, that the lower Court was wrong in holding that the endorsement required registration. It did not rescind the grant to K, nor did it, of itself, amount to a new grant back by K. It was simply an endorsement returning the *sanad* to the defendant without passing any interest in property. It was the alleged subsequent transaction between the judgment-debtor

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

K and the defendant which had the effect of passing the property, and that transaction was entirely distinct from the original grant by the defendant, so that it was clearly open to him to adduce other evidence to prove the special case of re-grant set up by him, the case not falling under proviso 4 to s. 92 of the Indian Evidence Act. HERAMBDEV DHARNIDHARDEV v. KASHINATH BHASKAR, **14 B. 472.** [*Appr.*, U.B.R. 1902, 4th Quarter, Evidence, 92; *R.*, 129 P.W.R. 1908; *D.*, 24 B. 615.]

(168)—*S.*17 (= *Registration Act*, 1877, *s.* 17)—*Document not requiring registration when it was executed—Retrospective operation—Construction of section—Admissibility of evidence under Act* III *of* 1877—*Hereditary office dues incidental to—Nature of dues, whether moveable or immoveable property under Act* XX *of* 1866. —S. 17 of Act III of 1877 has no retrospective effect, and it was not the intention of the Legislature that it must be construed as requiring a document to be registered which would not have required registration when it was executed. A document not requiring registration under Act XX of 1866 is not inadmissible in evidence by reason of s. 17, Act III of 1877. Dues incidental to an office such as that of *Desai*, which can be held by a person not a Hindu, were not immoveable property when Act XX of 1866 was enacted. DESAI MOTILAL MANGALJI v. DESAI PARASHOTAM NANDLAL, **18 B. 92.**

(169)—*S.* 17—*See* U.P. ACT I OF 1869, s. 13 (1), 16 C. 556=16 I.A. 53, P.C.

(170)—S. 17—*See* APPELLATE COURT—ADDITIONAL EVIDENCE ON APPEAL, 12 B. H.C. 247.

(170-*a*)—S. 17—Verbal submission to arbitration affecting immoveable property, if valid—Registered agreement to refer to arbitration—Variation—*See* AWARD, 14 C.L.J. 188.

(171)—S. 17—*See* CIV. PRO. CODE, 1908, O. XXI, r. 94, 6 M.H.C. App. 39.

(172)—S. 17—*See* CIV. PRO. CODE, 1908, O. XXI, r. 95, 14 P.R. 1893.

(173)—S. 17—*See* CIV. PRO. CODE, 1908, O. XLI, r. 23, s. 104, O. XLIII, r. 1, 141 P.L. R. 1902=99 P.R. 1902.

(174)—S. 17—Judicial proceedings consisting of pleadings filed by the parties—Orders made by Court—Whether section is applicable—*See* COMPROMISE—GENERAL, 7 C.L.J. 492=12 C. W.N. 849=35 C. 837.

(175)—S. 17—*See* COMPROMISE—GENERAL, 25 M. 553.

(176)—S. 17—Registration of petition of compromise—*See* COMPROMISE—EFFECT OF, 5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913.

(177)—S. 17—Razinama or deed of compromise—Registration—*See* COMPROMISE—MISCELLANEOUS, 90 P.W.R. 1911.

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(178)—S. 17—*See* COMPROMISE—MISCELLANEOUS, 2 C.W.N. 663.

(179)—S. 17—Registration of deed of dower when necessary—*See* CUSTOMS—PUNJAB—ALIENATION, 71 P.W.R. 1910=6 Ind. Cas. 931.

(180)—S. 17—*See* EVIDENCE—SECONDARY EVIDENCE, 4 Bom. L.R. 839.

(181)—S. 17—*See* EXCHANGE, 26 P. R. 1891.

(182)—S. 17—*See* HINDU LAW—ADOPTION, 10 B.H.C. 241, 6 W.R. 133

(183)—S. 17—*See* KABULIAT—GENERAL, 9 W.R. 537.

(184)—S. 17—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 9 W.R. 425.

(185)—S. 17 — Compromise decree — Compromise petition relating to lease of immoveable property—A pleading properly filed by parties—Part of compromise not embodied in the decree—Registration, whether necessary—*See* LEASE—GENERAL, 6 M.L.T. 313=20 M.L.J. 20=33 M. 102=3 Ind. Cas. 701.

(186)—S. 17— *See* LEASE— GENERAL, 7 M.L.T. 298=6 Ind. Cas. 201=8 M.L.T. 69, 25 M. 603, P.C.=29 I.A. 138=12 M.L.J. 479 =6 C.W.N. 665.

(187)—S. 17—*See* LEASE—CONSTRUCTION OF LEASE, 4 N.W.P. 36.

(188) — S. 17 — *See* LEASE — MISCELLANEOUS, 8 A. 405=A.W.N. 1886, 170.

(189)—S. 17—*See* LIMITATION ACT, 1908, art. 80, 10 P.R. 1883.

(190)—S. 17—As amended by Act VII of 1886, s. 17 (*n*)—Receipt extinguishing mortgage—Limitation Act, art. 91—*See* LIMITATION ACT, 1908, art. 91, 103 P.L.R. 1905.

(191)—S. 17—Unregistered sale-deed—Use of the deed for collateral purposes—*See* LIMITATION ACT, 1908, arts. 132, 144, 13 Bom. L.R. 867.

(192)—S. 17—Endorsement on mortgage—Non-extinction of mortgage — Compulsory registration—*See* MORTGAGE—GENERAL, 11 C.L.J. 551=6 Ind. Cas. 159=37 C. 589.

(193)—S. 17—Sale of equity of redemption—Sale-deed when registrable—*See* MORTGAGE—GENERAL, 9 P.W.R. 1912.

(194)—S. 17—Transfer of land in consideration of debt—Mutation of names—Agreement to retransfer—Document creating no right in immoveable property, not compulsorily registrable under s. 17 of Act III of 1877—*See* MORTGAGE—FORM OF MORTGAGES, 21 B. 704.

(195)—S. 17—Usufructuary mortgage below Rs. 100—Proof of debt—Admissibility in evidence—*See* MORTGAGE—USUFRUCTUARY, 7 A.L.J. 71=5 Ind. Cas. 519.

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(196)—S. 17—Immoveable property—Value not shown to be exceeding Rs. 100—Document merely admitting antecedent right—*See* SHAMILAT, 94 P.L.R. 1910.

(197)—S. 17—*See* SPECIFIC RELIEF ACT, 1877, s. 39, A.W.N. 1889, 147.

(198)—S. 17—*See* STAMP ACT, 1862, 14 W. R. 178.

(199)—S. 17—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 4, 105, 107, 5 Ind. Cas. 562.

(200)—S. 17—Agreement to execute a mortgage-deed—Whether such agreement can constitute a charge on immoveable property—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 54 and 100, 28 M. 54.

(201)—S. 17—Grant of assessment—Consideration in shape of services rendered—Sale—Gift—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 56 (6) (*b*), 123, 12 Bom. L.R. 9=5 Ind. Cas. 599=34 B. 287.

(202)—S. 17—Decree for sale on mortgage—Right given by the decree to proceed against other property in default—Unregistered assignment of the decrees—Effect—Election to treat it as money-decree—*See* TRANSFER OF PROPERTY ACT, 1882, s. 90, 11 Bom. L.R. 356=2 Ind. Cas. 516.

(203)—*S.* 17 (*b*)—*Formal deed superseding oral bargain—Registration whether optional.*—Where a formal sale deed which is obviously intended to supersede the oral bargain between the parties previous to the sale and to evidence the contract is executed, the deed is the only proof of the sale and a prior oral contract cannot be proved, if the deed which is compulsorily registrable is unregistered. BUTA SINGH v. GURDIT SINGH, **10 P.R. 1896.** [*R.*, 16 P.R. 1905.]

(204)—*S.*17 (*b*)—*Letter declining to purchase.*—A letter intimating that the writer thereof does not desire to purchase a certain land is not compulsorily registrable, it being only evidence of past conduct and future intentions. BARKATALI v. FAIZ MUHAMMAD, **58 P.R. 1890.** [*R.*, 48 P.R. 1905.]

(205)—*S.* 17 (*b*)—*Sale of equity of redemption to mortgagee—Whether compulsorily registrable.*—Where a property under mortgage for Rs. 400 is subsequently sold by the mortgagor to the mortgagee on receipt of a further sum less than Rs. 100, the registration of the sale-deed is optional. PIR BAKHSH v. MANGAL, **16 P.R. 1892, F.B.** [*Rel. on*, 3 N.L.R. 72.]

(206)—*S.* 17 (*b*)—*Instrument of exchange—Document embodying previous oral contract.*—If the deed was intended by the parties not merely to be a recital of a completed exchange with an agreement for payment of penalty for recission of any of the parties from the contract, but was intended to be the instrument superseding and embodying the oral bargain

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

which precedes every such contract, it will require registration. GURMUKH SINGH v. POHLO, **120 P.R. 1894.** [*R.*, 48 P.R. 1905.]

(207)—*S.* 17 (*b*)—*Sale of right of pre-emption—Creation of right or interest—Registration, optional.*—The subjection of village-lands to right of pre-emption is a burden on the lands in the hands of every holder as the freedom of transfer is restricted thereby. But from this burden no right or interest in the land arises in any other person and so a document of sale of pre-emption right does not require registration. DHANI NATH v. BUDHU, **136 P.R. 1894.** [*R.*, 90 P.R. 1909, 91 P.R. 1909; *Cited*, 133 P.R. 1907=84 P.W.R. 1907=88 P.L.R. 1908, 94 P.R. 1902=134 P.L.R. 1902.]

(208)—*S.* 17 (*b*)—*Right, title or interest—Construction of document.*—The "right, title or interest" contemplated by the section whether in its nature present or future, vested or contingent, must be created at once by the deed in question. A deed which entitles a person to a right to come into existence at a future date, does not come within the section. IMAM BAKHSH KHAN v. KARIM SHAH, **16 P. R. 1895. F.B.** [*R.*, 89 P.R. 1908; *Cons. & D.*, 71 P.R. 1906=111 P.L.R. 1907.]

(209)—*S.* 17 (*b*)—*Construction—Creation of contingent right—Not compulsorily registrable—Property having no value.*—An agreement admitting a person to a share in the interest to immoveable property contingent on his contributing towards the expenses of excavating a water-course does not require registration, there being no creation of a 'present" interest. If the property in respect of which an agreement is entered into has no value (*e.g.*) a ruined 'Kul' or water-course, registration of the deed will not be compulsory. The section must be strictly construed. Unless a document clearly falls within it, it will have the benefit of the doubt and will be admissible in evidence notwithstanding non-registration. SANSAR SINGH v. TILOKA, **51 P.R. 1898.** [*Cons. & D.*, 71 P.R. 1906=111 P.L.R. 1907.]

(210)—*S.* 17 (*b*) (=*Registration Act*, 1877, s. 17 (*b*))—*'Declare,' meaning of—Admissibility in evidence.*—The term 'declare' in the section implies a declaration of will, by which a right is constituted, not a mere statement of fact, such as an acknowledgment by a person in a letter that a partition had taken place previously; such acknowledgment does not constitute the right or the legal relation, and is admissible in evidence even though unregistered. SAKHARAM KRISHNAJI v. MADAN KRISHNAJI, **5 B. 232.** [*R.*, 5 C.P.L.R. 102, L.B.R. 1893—1900, 178, 21 B. 704, 27 B. 452, 33 P.L.R. 1905=48 P.R. 1905, 9 Bom. L.R. 254; *D.*, L.B.R. 1893—1900, 34, 20 B. 553, 24 B. 615, 2 Bom. L.R. 800, P.L.R. 1900, p. 459.]

(211)—*S.* 17 (*b*) (=*Registration Act*, 1877, s. 17, *cl.* (*b*))—*Document creating charge for sum repayable before stated term, valuation of, for purposes of registration—Principal sum borrowed to be the basis.*—In the absence of any custom or special contract precluding repayment, by the mortgagor of *purangadom* principal sum below Rs. 100 lent on a further charge over the property, at any time before the expiration of the period of the original kanom, so that the mortgagor had the right to repay the *purangadom* debt with the interest then in arrears, the document passed by the mortgagor for such debt is not liable to compulsory registration. The amount which determines the value for registration purposes (as well as for the purposes of the Transfer of Property Act, s. 59) is the principal sum secured by the document, irrespective of any interest which may subsequently accrue. The least sum payable under a document being the test as to whether it is compulsorily registrable or not, the principal sum secured by a mortgage-deed is alone to be taken as its value for the purposes of s. 17, cl. (*b*) of the Registration Act, as well in cases in which, the mortgage being redeemable at any time, it is uncertain whether at the time of redemption, principal and interest together will exceed Rs. 100, as in cases in which, the mortgage not being redeemable till expiry of a fixed period, it is certain that at the time of redemption principal together with interest will exceed that amount. KUNHI AMMA v. AHMED HAJI, **23 M. 105.** [*D.*, 4 N. L.R. 90.]

(212)—*S.* 17 (*b*) (=*Registration Act*, 1877, s. 17)—*Instrument appointing new trustee, if should be registered—Civ. Pro. Code* (XIV *of* 1882), *s.* 437—*Order under, effect of—Whether appeal lies against—Trusts Act* (II *of* 1882), *ss.* 73 *and* 75.—An instrument appointing a new trustee under s. 73 of the Trusts Act does not require registration. An order on an application under s. 437, Civ. Pro. Code, 1882, allowing a new trustee to be brought on the record, is in effect one disallowing objection to the continuance of the suit by the new trustee, and, as such, is appealable. The instrument of appointment does not create any rights in the trustee, but such rights are created by the operation of s. 75 of the Trusts Act. The office of trustee is not immoveable property within the meaning of the Registration Act. SUPPIAH THEVAN v. M. KRISHNA RAO, **6 M.L.T. 240=3 Ind. Cas. 435.**

(213)—*S.* 17 (*b*) (=*Registration Act*, 1877, s. 17, *cl.* (*b*))—Nikah-nama—*Assignment by husband in favour of his wife in discharge of dower debt.*—A *nikah-nama* purported to be an assignment by a husband in favour of his wife in full discharge of the dower-debt due to the latter. *Held*, that it was not a composition-deed, but a document which, within the meaning of cl. (*b*), s. 17 of Act III of 1877, purported to create a vested right, title and interest in certain immoveable property admittedly exceeding Rs. 100 in value and was, therefore, one

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

the registration of which was compulsory. MARIAM BEGAM v. SYED MOHAMMAD, **3 O.C. 277.**

(214)—*S.* 17 (*b*) (=*Registration Act*, 1877, s 17 (*b*))—*Agreement—Registration.*—An agreement recited that the parties thereto divided an *inam* village half to half; the junior branch, however, assigned to the senior branch all its *inam* rights over the lands held by the three *mirasi* occupiers mentioned therein, including the right to recover the assessment fixed on them (Rs. 40 a year) and the right of succession to the full ownership thereof should the *mirasi* tenure come or be brought to an end: *Held*, that the agreement fell within the provisions of s. 17 (*b*) of the Indian Registration Act, 1877, inasmuch as it assigned a right, title or interest in immoveable property and the value of the interest assigned "in present or in future" was more than one hundred rupees. Where a document is a declaration of will creating a definite change of legal relation to the property of the persons executing it; such a declaration is compulsorily registrable. ANANDRAV v. JOTI, **2 Bom. L.R. 427=24 B. 615.**

(215)—*S.* 17 (*b*)—*Agreement to refer to arbitration—Registration— Partition of estate settled by written agreement to refer to arbitration—Admissibility of agreement in evidence without registration—Agreement complete before formally written—Terms as a rule settled before writing—Pleader's fee—Costs—Practice.*—In every case where an agreement is reduced to writing, the writing is a record of terms which have already been settled between the parties. Their minds are made up before they advance to the stage of writing, the terms are not settled between them as the writing proceeds, and, therefore, strictly speaking, written agreements, in all cases, are subsequent in point of time to the settlement of the terms which they purport to record. But the two operations of mental agreement and of putting down the terms of the agreement on paper constitute only one transaction. An agreement to refer to arbitration recited *inter alia* "the executants have agreed and consented to divide the estate in dispute and accordingly they appoint.....arbitrators and an umpire and agree that the arbitrators shall partition the estate and thereupon each executant shall obtain proprietary possession of his respective share as declared by the arbitrators." It was found on evidence that this agreement was the only record of matters which had been settled before it was executed, and there was no evidence of any agreement, independent of the instrument, to partition the estate: — *Held*, that the agreement was inadmissible in evidence for want of registration (5 B. 232, 20 B. 562, *R.*) Where a certificate by a pleader of the amount received by him, as his fee was lodged in Court after arguments had commenced, the amount of fee was not allowed as costs. RAGHUBIR SINGH v. UMRAO SINGH, **13 Ind. Cas. 500.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(216)—S. 17 (*b*)—Award effecting partition of immoveable property—*See* CIV. PRO. CODE, 1908, sch. II, rr. 14, 15, 20, 84 P.R. 1907.

(217)—S. 17, cl. (*b*)—Mortgage—Mutation of names objected to—Compromise, varying terms of registered mortgage deed—Suit for redemption—Admissibility of compromise deed in evidence—Terms of registered mortgage deed can be varied only by registered, instrument—*See* EVIDENCE ACT, 1872, s. 2, 5 A.L.J. 717=31 A. 13=A.W.N. 1908, 264=1 Ind. Cas. 558.

(218)— S. 17 (*b*)— *See* EXECUTION OF DECREE— MODE OF EXECUTION, 51 P.R. 1885.

(219)—S. 17 (*b*)—Relinquishment of reversioner's interest—Registration—*See* REVERSIONER, 214 P.L.R. 1911.

(220)—S. 17 (*b*)—S. 59, Transfer of Property Act—Test to be applied to see whether mortgage deed requires or does not require registration— *See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 4 N.L.R. 86.

(221)—*S.* 17 (*b*) (*c*) (*h*)—*Agreement relating to immoveable property of value above Rs.* 100—*Instrument merely reciting a right to obtain another document—Agreement declaring joint and equal right to promisee in decree giving to promisor title to half of a well.*—The unregistered document on which the present suit was based declared that certain persons were sharers in a decree for half of a certain well in respect of which the writers of the deed had obtained a decree as pre-emptors, for which half share, the former persons had paid to them, the sum of Rs. 850. It explained why those persons were not parties to the plaint in the suit, and stating that cross-appeals were pending by the parties in the Court of the Commissioner, went on to provide that it was agreed thereby that, when the appeals shall have been decided, whatever shares the writers may get, they would have a registered conveyance duly prepared and cause mutation of names to be made in favour of the persons named therein. It was held that the suit of the plaintiffs must fail because the agreement was an instrument compulsorily registrable under s. 17 of the Registration Act. (*Symth J., dissenting*).—The document did not fall under cl. (*h*) of s. 17 of the Registration Act. It did not merely create a right to obtain another document which would when executed declare or assign a right, title or interest of the kind described in cl. (*h*); the instrument did, on the other hand, in itself declare that the promisees were jointly and equally interested with the promisors in the decree which gave to the latter a title to half the well named in the deed on payment of Rs. 700. The document was held to fall within cl. (*c*) of s. 17 of the Act, inasmuch as the receipt of a consideration on account of the declaration of a title or interest in immoveable property of the value of Rs. 100

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

and upwards was thereby expressly acknowledged. MALIK KARIM BAKSH v. MUHAMMAD BAKSH, **82 P.R 1884.** [*R.*, 37 P.R. 1888, 183 P.R 1889, F B., 184 P.R. 1889, 48 P.R. 1905 =33 P.L.R. 1905, 89 P.R. 1908=145 P.W.R. 1908.]

(221-*a*)—*S.* 17 (*b*) (*c*) (*h*)—*Document declaring and limiting rights of parties in land—Registration.*—The question in this case was whether the document in question did in fact declare an interest in land of the value of more than Rs. 100, or merely create a right to obtain another document declaring such an interest and thus fell under cl. (*h*) of s. 17 of the Registration Act. The document clearly purported to declare and limit the rights of the parties in the land, and though it contemplated the execution of a further instrument, it could not be said merely to create a right to obtain such further instrument. It therefore fell within s. 17 (*b*) of the Registration Act III of 1877, and not within the exception in cl. (*h*) of that section and, under s. 49, it could not affect the land or be received as evidence of any transaction affecting the land. BELLA SINGH v. BARA, **82 P. R. 1884, Note.**

(222)—*S.* 17, *cls.* (*c*) *and* (*h*) (=*Registration Act*, III *of* 1877), *s.* 17, *cls.* (*b*) and (*h*)—*Document giving right to obtain another document.*—An *ikrarnamah*, by which certain tenants conjointly agreed that they would sign and have registered *kabuliyats* in respect of rents, *held*, not to fall under cl. (*b*), but under cl. (*h*), as a document merely creating a right to obtain another document. PERTAP CHUNDER GHOSE v. MOHENDRA NATH PURKAIT, **17 C. 291=16 I.A. 233, P C.=5 Sar. 444.** [*R.*, 26 B. 617; *D.*, 13 C.W.N. 326.]

(223)—*S.* 17 (*b*, *c*, *n*) (=*s.* 17, *cls.* (*b*, *c*, *n*), *Registration Act*, 1877)—*Registrable documents—Mortgage—Satisfaction.*—Instruments acknowledging receipt of money paid in satisfaction of such a right as is referred to in cl. (*b*) to s. 17 of the Indian Registration Act, 1877, and not acknowledging receipt of moneys paid as the consideration for the extinction of such a right by a new act of will, are not compulsorily registrable. Similarly, endorsements or receipts acknowledging satisfaction of a mortgage by the payment of the whole mortgage-money are not compulsorily registrable under cl. (*n*) of the section. The cl. (*n*) indicates that an operative instrument which not merely evidences the satisfaction of a mortgage, but which is a transaction annulling an interest by a new act of will between the parties, is compulsorily registrable. The distinction is as follows: a payment made in discharge of an existing obligation, as in paying off a mortgage-debt according to its tenor, is a payment made in satisfaction of that obligation—and is not technically "consideration" paid in order to obtain the extinction of that obligation. In other words, the extinction of an obligation, when it is effected by the performance or satisfaction of the obligation according to its terms, follows from the terms of that obligation, and is not induced by any new consideration. Neither cl. (*c*) nor cl. (*n*) of the section requires registration in respect of the mere satisfaction of performance of the pre-existing obligation. These clauses require registration only when money is paid as consideration for a novation or a new agreement by a fresh act of the parties, the effect of which is to do away with the old obligation, not by accepting performance thereof, but on receiving a sum paid for the benefit of the new agreement. MAHAMAD KASAM v. RANU YESUJI, **9 Bom L.R. 254.**

(224)—*S.* 17, *(b) & (h)* (=*Registration Act*, III *of* 1877, *s.*17, *cls.* (*b*) *and* (*h*))—*Agreement to give another deed—Admissibility in evidence when unregistered.*—If an agreement, without itself creating any rights in immoveable property, merely gives a right to the other party to obtain another deed, under certain circumstances, it will fall within cl. (*h*) and will be admissible in evidence, without registration in a suit for specific performance BURJORJI CURSETJI PANTHAKI v. MUNCHERJI KUVERJI, **5 B. 143.** [*F.*, 7 B. 310, 24 C. 20; *R.*, 12 M. 505, 10 C P.L.R. 107, 21 B. 704, 22 B. 788, U.B.R. 1897—1901, 379, 1 N.L.R. 147, 13 C.W.N. 326=4 Ind. Cas. 85=6 M.L.T. 368; *D.*, 20 B. 553; *R.*, 19 M.L.J. 228.]

(225)—*S.* 17 (*c*) (=*s.* 17 (*c*), *Registration Act*, 1877)—*Result of agreement to extinguish mortgage-debt Registration.*—When the result of an agreement is to extinguish the mortgage debt and to convert the lien under the mortgage-bond into one under that document, the agreement is one of which registration, under the terms of cl. (*c*) of s. 17 of the Registration Act, is compulsory. If such agreement is not registered, it is inadmissible in evidence. TARAN SINGH HAZARI v. RAMRATAN TEWARI, **31 C. 89.**

(226)—*S.* 17 (*c*) (=*Registration Act of* 1877, *s.* 17, *cl.* (*c*))—*Receipt for money paid, registration of.*—A receipt, which acknowledges part-payment of a sum due under a hypothecation deed, does not fall under s. 17 (*c*) of the Act, unless the fact is referred to as a consideration for a contractual engagement, whereby the interest created by the prior registered instrument is limited or extinguished. A mere receipt does not acknowledge the receipt or payment of a consideration. VENKAYYAR v. VENKATASUBBAYYAR, **3 M. 53.** (1 A. 442, *Diss.*; 7 M.H.C. 4, *Appr.*) [*R.*, 19 M. 288, 24 B. 609.]

(227)—*S.* 17 (*c*)—*Registration Act*, 1877, *s.* 17 (*c*)—*Agreement to renew kanom and to credit a sum as renewal fee—Admissibility in evidence.*—The promise, contained in an agreement to renew a kanom, to credit as renewal fee a sum of money found due by the landlord to the tenant, is not an acknowledgment of money paid for the creation of an interest in

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843) —*continued.*

land within the meaning of s. 17 of the Registration Act. Even if it were so, such an unregistered document would be admissible in evidence since the agreement to renew the kanom can be severed from the acknowledgment. KRISHNAN NAMBUDRI v. RAMAN MENON, **20 M. 484.**

(228) — *S.* 17 (*c*) (= *Registration Act*, III *of* 1877, *s.* 17. *cl.* (*c*)) — *Unregistered receipt of mortgagee—Admissibility in evidence.*—An unregistered receipt given by a mortgagee to a mortgagor for sums paid on account of the mortgage-debt, was held admissible in evidence under cl. (*c*). s. 17 of the Registration Act 1877. ANNAPA v. GANPATI AND VISHNU, **5 B. 181.** (4 B. 235, *R.*) [*F.*, 19 B. 36; *R.*, 24 B. 609 = 2 Bom. L.R. 422.]

(229) — *S.* 17, *cl.* (*c*)—*Receipt for portion of purchase money—Not compulsorily registrable.* — A receipt reciting that the executant thereof sold certain land to the executee for a larger sum, over Rs. 100, and reciting that the same (the receipt) was for a part of the consideration for the sale and that the balance would be received at the time of registration, *held*, not to contain the terms of the sale itself and to be admissible though unregistered; oral evidence of the terms of the contract of sale also held admissible. SANGAM LALL v. MUSSAMMAT SIKANDAR JEHAN BEGAM, **183 P.R. 1889, F.B.** [*R.*, 48 P.R. 1905.]

(230)—S 17, cl. (*c*)—*See* PRE-EMPTION—GENERAL, 36 P.L.R. 1903 = 9 P.R. 1903.

(231)—S. 17 (*c*)—Receipt for money paid prior to sale—Registration—*See* PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 54 P.L.R. 1910 = 8 Ind. Cas. 233.

(232)—*S.* 17. (*i and v*)—*Application setting out compromise—Registration.*—Where a petition does not purport or operate of itself to create or declare any interest in the property but is merely an application in a pending suit setting out a compromise orally arranged by the parties and asking the Court to decide the case in accordance therewith, it does not require registration and the acceptance of the arrangement will in no way alter its character so as to render it compulsorily registrable. INDRAJ v. MOUJA, **97 P R. 1895.** [*R.*, 48 P.R. 1905, 27 P.R. 1906 = 11 P.L.R. 1906.]

(233)—*S.* 17, *cl.* (*d*) (= *s.* 17, *cl.* (*i*), *Registration Act*, 1877)—*Transfer of Property Act*, IV *of* 1882, *ss.* 107, 117 —*Lease reserving annual rent of less than Rs.* 50 *for indefinite period —Lease deed not registered—Admissibility.*—Suit to recover rent due under an unregistered instrument of lease of a betel garden reserving an annual rent of Rs. 38. No definite period was fixed in the lease deed for the determination of the lease. The question was as to the admissibility of the lease deed for want of registration. *Held*, that the term of the lease might no doubt have continued beyond five years in the event of neither party determining it in the meanwhile, but as either party might determine it before five years, it could not be said to be a lease for "a term exceeding five years" and inasmuch as the annual rent was below Rs. 50, its registration was optional under cl. (*c*) of s. 18 of the Registration Act. *Held* also that, as the lease for the cultivation of betel is, according to the usage and custom of the country, an agricultural lease falling as such under s. 117 of the Transfer of Property Act, it is not governed by s. 107 of the Act. Consequently, its registration was optional under the Indian Registration Act. MURUGESA CHETTY v. CHINNATHAMBI GOUNDAN **24 M. 421.** (17 M. 98, *Not F*; 4 M. 381, *F.*) [*R.*, 25 M. 627.]

(234)—*S.* 17 (*d*) (= *s.* 17 (*d*), *Registration Act*, 1877)—*Lease exceeding one year—Registration.* —A lease, under which the lessor agrees to let his premises for a period of one year and also agrees "not to increase the rent nor to have the premises vacated for further two years if the said tenant wish to occupy it for that period," is not compulsorily registrable under the provisions of s. 17 (*d*) of the Registration Act, 1877. YOUSAF v. POLEOLOGO, **8 Bom. L.R. 580.**

(235)—*S.* 17, *cl.* (*d*) (= *Registration Act*, 1877, *s.* 17, *cl.* (*d*))—*Lease reserving yearly rent—Creation of tenancy from year to year.*—A lease on which a yearly rent is reserved as contemplated by s. 17, cl. (*d*) of the Act must be one which on the proper construction of it would create a tenancy from year to year. CHIMAN BOO v. HYDERALI, **9 C P.L.R. 57.** (14 B. 319, *App.*; 8 A. 405, *R.*)

(236)—*S* 17, *cl.* (*d*) (= *Registration Act*, 1877, *s* 17, *cl.* (*d*)) — *Lease for no definite term—But determinable at tenant's option— Registration compulsory.*—A lease which fixes no definite term but which creates a tenancy determinable only at the option of the tenant is a document which requires registration. MANNA OJHA v. DADAN CHOBE, **9 C.P.L R. 88.** (3 M. 358, 4 M. 381, 14 M. 271, 8 A. 405, 13 C. 113, 3 B. 21, 8 B. 493, *R.*)

(237)—*S.* 17 (*d*) (= *Registration Act*, 1877, *s.* 17 (*d*) *proviso, notification issued under—Leases falling within s.* 107 *of Transfer of Property Act.*—The proviso to s. 17 (*d*) of the Registration Act must be restricted to cases not falling under s. 107 of the Transfer of Property Act, which absolutely requires the registration of the leases referred to therein. Consequently, leases under the above s. 107, are compulsorily registrable, notwithstanding the Government notification issued under the proviso to clause (*d*), s 17 of the Registration Act. VAIRANANDA NADAR v. MIYAKAN ROWTHER, **21 M. 109.** [*R.*, 6 M.L.T. 175 = 32 M 532.]

(238)—*S.* 17, *cl.* (*d*) (= *Registration Act*, III *of* 1877, *s.* 17, *cl.* (*d*)—*Lease exceeding one year*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

—*Lease for year with option of renewal—Correspondence constituting lease.*—Where a correspondence constitutes a contract leasing premises for more than a year, that correspondence must be registered, although a final document may be contemplated. A lease for one year, which provides that the tenant should have the option of a renewal for a second year, is not a lease for a term exceeding one year under s. 17 (*d*), Registration Act (III of 1877), so as to render its registration compulsory. A. C. BOYD v. A. KREIG, **17 C. 548.** (*Hand* v. *Hall*, 2 Ex. D. 355, *F.*) [*Diss.*, 9 C.P.L.R. 88.]

(239)—*S.* 17 (*d*) (=*Registration Act*, XVI *of* 1864, *ss.* 13, 14)—*Act* X *of* 1862—*General exemptions—Surrender by tenant to his landlord.*—A document which is substantially a surrender by a tenant of his interest in land to his landlord, was held to be exempt from stamp duty under the general exemption clause in Act X of 1862. JADAV RUGHNATH v. RAIJI HIMMAT, **9 B H.C. 246.**

(240)—*S.* 17 (*d*) (=*Registration Act*, 1877, *s.* 17 (*d*))—*Lease for building purposes—Scope of agent's authority—Minor—Ratification—Compensation for building materials.*—This was a suit to eject the defendants from a piece of ground owned by the plaintiff. During his minority the manager of his estate had leased the ground to the defendants who had built a house on a portion of it. It was pleaded by the defendants that the plaintiff was bound by the lease and the permission to build given by the manager, the plaintiff on attaining majority had ratified the lease, and the defendants were at least entitled to compensation for building materials. *Held*, that it was beyond the scope of the manager's authority to let the ground for building purposes and such authority could not be presumed, the plaintiff was not bound by the lease, and the permission, if any was given, was not for the plaintiff's benefit. *Held*, further, that from agent's accepting rent from the defendants and from plaintiff's silence, after attaining majority it could not be inferred that the plaintiff had ratified the manager's acts. *Held*, also, that the defendants were not entitled to any compensation, but they could be allowed reasonable time to remove the materials. *Quære*—Whether an appellate Court has authority to admit in evidence an unstamped document which was impounded under the provisions of the Stamp Act. RANZOR SINGH v. CHIPPAL, **P.L.R. 1900, p. 303=37 P.R. 1900.**

(241)—*S.* 17 (*d*)—*Lease — Unregistered — Tenancy at will—Fixing of annual rent.*—The mere recital of an annual rate of rent in a lease, determinable at any time at the will of the lessor does not make it a "lease reserving a yearly rent" within the meaning of this subsection so as to render it compulsorily registrable. But it will be compulsorily registrable if the term is extensible at the option of the tenant since, in the latter event, the lease is not limited to one year. MUHAMMAD MASAM KHAN v. MUSSAMMAT BAKHTAWAR, **70 P.R. 1895.**

(241-*a*)—*S.* 17 (*d*), *proviso—Rent in kind—Applicability*—The proviso to s. 17, cl. (*d*) of the Registration Act is not confined in its operation to money rent, but also applies to rent payable in grain. SAKKI REDDI APPALASAMY v. PAKKURTI VENKATASAMI NAIDU, **11 M.L.T. 405=M.W.N. 1912, 919=15 Ind. Cas. 682.**

(242)—S. 17 (*d*)—Whether unregistered deeds, executed by proprietary body owning *shamilat* land, alleged to create *mugarraridari* rights, admissible in evidence—*See* CUSTOM—PUNJAB—SHAMILAT LAND, 189 P.L.R. 1908.

(243)—S. 17 (*d*)—Unregistered dastak allowing plaintiff to take possession of land for cultivation—Document not a lease within the meaning of this section—*See* BEN. REG. XI OF 1825, s. 4, cl. 1, 8 C.L.J. 538=13 C.W.N. 267 =4 Ind. Cas. 511.

(244)—*S.* 17 (*e*) (=*Registration Act*, 1877, *s.* 17 (*e*))—*Composition deed—Conveyance—Assignment of a portion of property—Some creditors only signing the deed—Rights of the other creditors.*—The "composition deed" contemplated by s. 17 (*e*) of the Registration Act must in substance be of the nature of a composition, not a conveyance. Where a debtor transfers his property to a creditor or creditors in consideration of the debts *i.e.*, where he parts with his rights absolutely, the transaction may partake of the nature of a composition but in reality and substance it is not a composition but a conveyance. It is otherwise where with the consent of his creditors he parts with his property in favour of a trustee for the purpose of paying the composition upon the claims and the trustee is authorized to deal with the property for that purpose. Hence, where certain immoveable and moveable property of the debtor and his account books are vested in the trustee for the purpose of paying his creditors and there is no conveyance of the immoveable property of the debtor to the creditors, the deed amounts to a composition deed, and need not be registered under s. 17 (*e*) of the Registration Act. If a person assigns *part* only of his property in trust of creditors, then if the transaction is *fair* and *bona fide*, and in the ordinary course of business, or upon the pressure of the creditors, it is not open to objection; but if the settlor contemplates bankruptcy or even thinks it probable, though not inevitable, and wishes to give an undue preference to certain creditors over others, it is fraudulent and constitutes an act of bankruptcy. A composition deed for the benefit of all the creditors may be signed by some only of the creditors. The creditors who have not signed can take benefit under the deed but they cannot impugn it except on the ground that it represents a sham or fictitious transaction. MALUKCHAND v. MANILAL, **6 Bom. L. R. 296=28 B. 364.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(245)—*S.* 17 *cl* (*d & h*)—*Agreement to sell land —Not registered—Construction of document.*—T agreed to sell the land in dispute to R under a written agreement dated 17-4-1889, the consideration for the sale being the discharge of a mortgage debt due on the land and a certain amount paid in cash to the vendor. The agreement was not registered. It recited that the cash was paid on the day of the agreement, that the mortgage debt due on the land may be discharged by R at any time he liked, and that a sale-deed must be executed by T. T brought the present suit for enforcing the agreement. The lower Court *held* that the suit must fail, because the agreement in question operated as an assignment of the equity of redemption and should not be admitted in evidence for want of registration. The plaintiff appealed to the High Court. *Held*, upon a proper construction of the document, that it did not amount to an assignment of the equity of redemption and that, under s. 17, cl. (*h*) of the Registration Act (1877) it need not be registered. SHRIDHAR BALLAL KELKAR v. CHINTAMAN SADASHIV MEHENDALE, **18 B. 396.**

(246)—*S.* 17, *cl.* (*h*) (=*Registration Act*, III *of* 1877, *s.* 17, *cl.* (*h*))—*Bargain-paper for purchase of immoveable property, not compulsorily registrable.*—A document would come within the exception in cl (*h*) of s. 17 of Act III of 1877 if it does not "itself," by its express terms, create a certain interest in immoveable property, but expressly contemplates the creation of such an interest by a subsequent document. So a mere bargain-paper or agreement for the purchase of immoveable property of a value upwards of Rs. 100, need not be registered, and, such an agreement creating no right to the property itself, is admissible in evidence, though unregistered by reason of the said Act, s. 17, cl. (*h*). CHUNILAL PANALAL v. BOMANJI MANCHERJI MODI, **7 B. 310.** [*F.*, 18 B. 396; *R.*, 21 B. 704, 10 C.P.L.R. 107; *D.*, 20 B. 553.]

(247)—*S.* 17, *cl.* (*n*) (=*Registration Act*, 1877, s. 17, *cl.* (*n*))—*Receipt.*—Though a receipt given by a mortgagee purporting to extinguish the mortgage requires registration, yet, when the language of the receipt does not indicate any intention to extinguish or limit the mortgagor's interest, it does not require registration. UPPALAKANDI KUNHI KUTTI ALI HAJI v. KUNNAM MITHAL KOTTAPRATH ABDUL RAHIM, **19 M. 288.** [*F.*, 9 Bom. L.R. 254.]

(248 & 249)—*S.* 17 (*n*) (=*Registration Act*, 1877, *s.* 17 (*n*))—*Receipt of payment—Evidence —Appropriation of payments.*—An unstamped and unregistered receipt of payment under a mortgage can be used as evidence of payments as also of appropriation of them, because it makes no variation of the contract itself but only a modification of the account in consequence of payments. LAKSHMAN v. DAMODAR, **2 Bom. L.R. 422=24 B. 609.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(250) — *S.* 17, *cl.* (2) (=*Act* VIII *of* 1871, *s.* 17, *cl.* 2.)—*Questions directly and substantially in issue in a former suit—Civ. Pro. Code, s.* 13—Res judicata—*Admissibility of letter reducing tenant's rent.*—In a previous suit brought by the plaintiff against the defendant for possession of a certain village, the principal question was whether the defendant held a perpetual lease of the village. A letter was produced by which the plaintiff's predecessor in title had agreed to reduce the rent of the defendant. The suit was dismissed on the ground that the defendant held a perpetual lease of the village. The plaintiff brought another suit against the defendant for arrears of rent, in which the said letter was again produced. It was contended by the plaintiff that the letter was not genuine and and was not receivable in evidence under cl. (2), s. 17 of Act VIII of 1871. The District Judge refused to go into the question of the genuineness of the letter and held that it was admissible in evidence. *Held*, that the question of the genuineness of the letter was directly and substantially in issue in the former suit and was therefore under s. 13 of the Civ. Pro. Code, *res judicata* between the parties. When a landlord reduces the rent of a tenant, it cannot be said that his title to, or, interest in, the land held by his tenant is to any extent extinguished. *Held*, therefore, that the letter did not require any registration under cl. (2) s. 17 of Act VIII of 1871, and was admissible in evidence. MUBARAK ALI v. DEPUTY COMMISSIONER, BARA BANKI, **2 O.C. 250.**

(251)—*S.* 17, *cls.* 2, 3 (=*Act* VIII *of* 1871, *s.* 17, *cls.* 2 & 3)—*Mortgage—Receipt for payment—Evidence.*—A document intended to be a receipt for payment of money due on a mortgage and purporting to extinguish the same, fell within cls 2 and 3, s 17, of the Registration Act XX of 1866, and also of Act VIII of 1871, and was compulsorily registrable; and, when unregistered, was inadmissible in evidence of any transaction affecting any property comprised therein. The payment of the original mortgage-debt and the extinguishment of the mortgagee's lien, may be proved by oral testimony of witness, or by other evidence legally admissible. MAHADAJI v. VYANKAJI GOVIND, **1 B. 197.** [*F.*, 6 A. 335; *Appl.*, 2 B. 489, 7 B. 123; *D*, 9 A. 108, 24 B. 609.]

(252)—*Ss.* 17, *cls.* 2, 3, 49 (=*Registration Act*, 1871, *s.* 17, *cls.* 2, 3 *and s.* 49)—*Sale—Memorandum of receipt of consideration—Admissibility in evidence, if unregistered*—Plaintiff sued to recover possession of certain land from one of the defendants. She pleaded that he had sold the land to her, and in support of this plea tendered in evidence a "*yadi*" or memorandum purporting to be executed by him to her, reciting the sale and acknowledging the receipt of Rs. 483 in part payment of the price. This "*yadi*" bore a one anna receipt stamp and was not registered. *Held* that the "*yadi*" being unregistered, was by

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

s. 17, cls. 2 and 3, and s. 49 of Act VIII of 1871, inadmissible in evidence. MAHAD *bin* DANAPA v. DARI *bin* BALEE, **1 B. 196, Note.** [*R.*, 1 B. 197.]

(253)—*S.* 17, *cl.* (3)—*Release—Stamp—Registration.*—A letter, by which a person releases his right to the security of certain immoveable property hypothecated to him, cannot operate as a release and be received in evidence, unless duly stamped and registered. SAFDAR ALI KHAN v. LACHMAN DAS, **2 A. 554.** [*R.*, 17 B. 235, 33 C. 613=10 C.W.N. 551=3 C.L.J. 576.]

(254)—S. 17 (2) (XI) — Mortgage deed — Endorsement of payment of mortgage money—Registration — *See* MORTGAGE — GENERAL, 111 P.L.R. 1911.

(255)—S. 17—*See* Nos. 27, 28, 29, 30, 31, 32 33, 34, and 35, *supra* and Nos. 514, 515, 516, *infra.*

(256)—*Ss.* 17, 18 (=*Registration Act*, 1871, *ss.* 17, 18)—*Registration.*—A document, by which the obligor, in consideration of a loan of a sum less than Rs. 100, agrees to lease certain lands to the obligee for one year, and undertakes to be responsible for any damages arising from failure to comply with the terms of such agreement and hypothecates immoveable property till the conditions of the agreement should be fulfilled, is a hypothecation bond for the amount of the loan; and there being no stipulation for interest or any other sum by which the principal amount may be augmented, and the damages stipulated for depending on a contingency which may or may not happen, and respecting which nothing can be anticipated at the time of registration, the document is one which does not require registration. But it could not be used to enforce a lien against property hypothecated to any extent greater than the amount of the loan. (1 A. 274, *Observed on.*) *Per Stuart, C. J.*—Such an instrument is essentially a usufructuary mortgage. *Per Oldfield*, J.—On the pleadings in the case, it is unnecessary to decide whether it should have been registered as a lease. BASANT LAL v. TAPESHRI RAI, **3 A. 1.** [*R.*, 5 A. 447, 10 C.P.L.R, 10, 12 C.P.L R. 96.]

(257)—*Ss.* 17, 18 (=*Registration Act*, 1866, *ss.* 17, 18)—*Deed of partition — Compulsory registration—Proof.*—The provision for optional registration in s. 18 is not superseded but supplemented or qualified by that in s.17; and so, a deed of partition is not excluded from the operation of s. 17, by being amongst those enumerated in s. 18. A deed of partition of immoveable property though it does not create, at least declares an interest therein, and where its value exceeds Rs. 100, it must be registered under s. 17, for its admission as evidence. Proof of the document may be, however, superfluous and dispensed with, where the defendant admits in his written statement its terms and the relations thence arising. SHANKER RAMACHANDRA v. VISHNU ANANT, **1 B. 67.** [*R.*, 14 B. 516, 24 B. 615.]

(258) — *Ss.* 17, 18 (= *Registration Act*, 1866, *ss.* 17, 18).—An agreement to deposit certain deeds and to execute a proper agreement is not a document coming within the meaning of cl. 2, s. 17, Act XX of 1866, but one the registration of which is optional, and which falls under the description in cl. 7, s. 18 of the Registration Act. MARK RIDDED CURRIE v. S. V. MUTU RAMAN CHETTY, **3 B L.R. A.C. 126=11 W R. 520.** [*R.*, 15 W. R. 354, 12 B.H.C. 175, 7 N W.P. 124.]

(259)—*Ss.* 17, 18 (=*Act* XX *of* 1866, *ss.* 17, 18)—*Lease undertaking to pay rent so long as lessor leaves land with lessee—Registration if necessary.*—The engagement in the *kabuliyat* in this case was, on its acceptance by the landlord, an agreement under which the tenant might claim possession for one year. But, as the undertaking was to pay rent only so long as the landlord left the land with the tenant, there was no interest created by way of lease extending beyond one year, and the *kabuliyat* therefore did not require registration under Act XX of 1866, s. 17. JAGJIVANDAS JAVHERDAS v. NARAYAN **8 B 493.** [*Appr.*, 14 M. 271; *R.*, 9 C.P.L.R. 88.]

(260)—*Ss.* 17 *and* 18 (=*Registration Act*, III *of* 1877, *ss.* 17 *and* 18)—*Transfer of Property Act*, IV *of* 1882, *s* 54—*Hypothecation for Rs.* 87.—Under s 8 of Act IV of 1882, the transfer of a debt passes to the transferee the securities for the debt; but what is sold is primarily not the charge, but the debt. The assignment, being of a claim for less than Rs. 100, falls within the provisions of s. 18 of the Registration Act, and need not be registered. The words "other intangible thing" in s. 54 of Act IV of 1882 might include a charge, but construed with reference to the context should be taken to mean interests of the nature of reversions. The distinction between the two classes of property mentioned in the section was with a view to preserve a similar distinction created by ss. 17 and 18 of the Registration Act. The assignment of a charge for less than Rs. 100 does not require registration. It would be very anomalous if the transfer of a hypothecation should require registration when the original hypothecation did not require it. SUBRAMANIAM v. PERUMAL REDDI, **13 M. 454=5 M L.J. 92** [*Diss.*, 24 M 449; *R.*, 25 M. 396; *D.*, 1 P.R. 1906=190 P.L.R. 1905.]

(261)—*Ss.* 17 *and* 18 (=*Registration Act*, 1877, *ss.* 17, 18)—*Maintenance right—Release—Registration.*—A Hindu widow's right to maintenance is a mere possibility, and does not constitute an interest, vested or contingent, in the immoveable property of the undivided family, within the meaning of the Registration Act of 1866 and a release thereof does not require registration under cl. 2, s. 17 of the Act.

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

[*D.*, 24 B. 615.] *Semble.*—The releases and partition deeds mentioned in cl. (7), s. 18, are intended to be documents not relating to immoveable property. Releases affecting immoveable property, over Rs. 100 in value, are registrable under cls. 2 and 3 of s. 17. KALPAGATHACHI v. GANAPATHI PILLAI, **3 M. 184.** [*D.*, 24 B. 615.]

(262)—*Ss.* 17, 18 (=*Registration Act*, III *of* 1877, *ss.* 17, 18)—*Agreement to remit rent.*—An agreement to vary the terms of a tenancy with reference to the amount of rent to be paid by the tenant does not relate to an interest in immoveable property, and does not require registration. OBAI GOUNDAN v. RAMALINGA AYYAR, **22 M. 217=8 M.L.J. 256.** [*F.*, 2 Ind. Cas. 89; *R.*, 24 B. 609.]

(263)—*Ss.* 17, 18—*Instruments of gift of immoveable property—Registration—Act* XX *of* 1866, *ss.* 17, 18.—All instruments of gift of immoveable property must be registered, whatever be the value of the property. PUTONA KOLITA v. MUTIA KOLITA, **2 B.L.R. App. 46=11 W.R. 334.**

(264)—Ss. 17, 18—*See* LEASE—GENERAL, 24 C. 20.

(265)—*Ss.* 17 (*d*) *and* 18 (*c*) (=*Registration Act*, III *of* 1877, *s.* 17 (*d*) 18 (*c*))—*Lease—Registration.*—Where a lease set forth that a house was let to the tenant for a term of one year at a certain rent, and the lessee who executed it further declared that he would continue to pay the annual rent every year, and that if he should fail to pay the rent in any year, the lessor should be at liberty to recover the rent through Court, it could not be contended that the lease was for more than one year, that the lessee was entitled to occupy the house and the lessor was not entitled to eject him therefrom, so long as he continued to pay the rent. It would properly be held to be a lease for one year only, and thus falling under s. 18 of the Registration Act, it was admissible in evidence without registration. Subsequent to the period, the tenant could only be held to be a tenant at will and could be ejected. KHAYALI v. HUSAIN BAKHSH, **8 A. 198=A.W.N. 1886, 56.** [*F.*, 17 C. 548, 9 C.P.L R. 88.]

(266)—*Ss.* 17, *cl.* 2, 18, *cl.* 7 (=*Registration Act*, XX *of* 1866, *s.* 17, *cl.* 2, *s.* 18, *cl.* 7)—*Instrument of partition—Registration, option or compulsory.*—The registration of a deed of division of immoveable property of the value of more than Rs. 400, executed by members of an undivided Hindu family, is optional under cl. 2, s. 17 of Act XX of 1866, and a suit will not lie to compel registration. PROCEEDINGS, 9TH DECEMBER 1870, **6 M H.C. App 9.**

(7)—*Ss.* 17, 18, 21, 25 *and* 77 (=*Registration Act*, 1877, *ss.* 17, 18, 21, 24 *and* 77)—*Document evidencing relinquishment of a share by a daughter to her father in his property—Registration—Refusal to register on the ground that the document did not contain sufficient description of the property—Discretion of the Registrar—Jurisdiction of Civil Court—Right of heir to succeed—Vested or contingent estate—Transfer of Property Act* (IV *of* 1882), *ss* 6, 19, 21—*Indian Succession Act* (X *of* 1865), *s.* 107.—A document, executed by a daughter in favour of her father (the parties being Mahomedans) provided that in consideration of her receiving Rs. 9,000 she had relinquished all her rights and claims to any property there may be on her father's death. This document was presented to the Sub-Registrar of Bombay for registration; the registration fee was taken and payment thereof was endorsed on the document. The registration was subsequently refused on the ground that the document did not contain a sufficient description of the immoveable property to which it related (s. 21 of the Indian Registration Act, 1877). In a suit under s. 77 of the Act: *Held*, (1) that the document cannot be treated as relating to property, much less can it relate to immoveable property, capable of being described and identified; and s. 21 of the Act cannot apply to it. (2) That even taking the document as relating to immoveable property, it contains not only a sufficient but the only description that can be given of it. (3) That the document does not fall within the category of any of the documents mentioned in s. 17 of the Indian Registration Act, but that it falls within cl. (*d*) or cl. (*f*) of s. 18 of the Act. Where a Sub-Registrar or a Registrar has exercised his discretion under s. 24 or s. 21 of the Indian Registration Act and accepted a document for registration, though subsequently he refuses to register it, the Court in a suit under s. 77 of the Act has no power to enquire into the propriety of his finding and discretion as to such acceptance. The discretion under s. 21 of the Indian Registration Act, 1877, arises only where a non-testamentary document "relates to immoveable property." Where it does not relate, the section cannot apply and the discretion cannot arise. And into this question it is open for a Civil Court to inquire in a suit under s. 77 of the Act. ABDOOL HOOSEIN v. GULAM HOOSEIN, **7 Bom. L.R. 742=30 B. 304.**

(268)—*Ss.* 17, 18, 49, 73, 74, 75—*Act* XX *of* 1866, *ss.* 2, 49, 84—*Registration of deeds—Denial of execution.*—An instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question—for what, in equity, did presently operate as a sale of the property—is an instrument, which by Act XX of 1866, s. 2, is required to be registered, and cannot be received in evidence under s. 49 if it has not been registered. Where a person who is alleged to have executed a deed denies before the Registering officer that the deed was executed by him, the Zilla Judge, having regard to the provisions of s. 84 and the form of the petition given in the schedule to the Act, ha

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

jurisdiction to determine such a question. FATI CHAND ZAHU v. LILAMBER SINGH DAS, **9 B.L.R. 433, P C.=16 W.R P C. 26=14 M.I. A. 129=2 Suther. 467=2 Sar. 709.** [*F.*, 20 W. R. 291, 22 W.R. 309, 1 B. 190, 2 B. 489; *R.*, 4 B. 126, 7 B. 310; *D.*, 12 B H C. 175, 2 C. 131 =3 I.A. 221=26 W.R. 50 P.C., 9 A. 108, F B.]

(269)—*Ss.* 17, 18, 50 (=*Registration Act*, 1877), *ss.* 17, 18, 50, — *Registration Act* (1871), *ss.* 18, 50—*Registered and unregistered instruments—Priority — Retrospective effect.*— Under the Registration Act, 1871, a subsequent registered instrument, compulsorily registered, does not take effect, with respect to the property affected by it, as against a prior unregistered instrument affecting the same property, which is optionally registrable. [*F.*, 7 C. 570; *R.*, 13 B. 229.] The provisions of s. 50 of the Registration Act, 1877, have no retrospective effect. BHOLA NATH v. BALDEO, **2 A. 198.** [*R.*, 6 B. 168, F.B.]

(270) —*Ss.* 17, 19 (=*Registration Act*, 1871, *ss.* 17, 19)—*Assignment of mortgage—Power of attorney.*—An assignment in writing of a mortgage for over Rs. 100 whether legal or equitable, required registration under ss. 17 and 49 of the Registration Act. A power of attorney enabling one to recover certain mortgage debts for one's own benefit amounted virtually to an assignment of the mortgage and as such required registration. GANPAT PANDURANG v. ADARJI DADABHAI, **3 B 312.** [*R*, 12 B. 122, 13 A. 89, 17 B. 235, 34 C. 427=4 C.L.J. 495=11 C.W. N. 1.]

(271)—*Ss.* 17, 21, 49 (=*Registration Act*, 1877, *ss* 17, 21 *and* 49.)—*Attorney, power of, to create a charge on immoveable property.*—Where a power of attorney was executed by A in favour of B to enable B to recover the rents and profits of the properties of which A was the administrator, in order to pay off an amount advanced by B to A as such administrator: *Held*, that in as much as the document was entered in Book IV instead of Book I, it was not registered according to the provisions of the Registration Act, and therefore could not affect immoveable property. SRIMATI INDRA BIBI v. JAIN SIRDAR AHIRI, **7 C.L J 149=12 C.W N. 316=35 C. 845.** (7 C. 196, *R.*)

(272)—*Ss.* 17, 23 *to* 26 *and* 77—*Agreement optionally registrable—Date of execution, necessity for—Evidence to prove date, admissibility of — Description of property, sufficiency of—Refusal of executant to admit execution—Execution not voluntary—Limit to enforce registration, maintainability of.*— Disputes had been going on for a long time between the parties to the present suit regarding the right to collect rents of certain properties. The then Sub-Divisional Officer of the division sent for them and, on their reaching his quarters, the Officer asked them to settle their disputes then and there. The plaintiff offered certain terms and the Sub-Divisional Officer told the

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

defendant, that, unless he accepted those terms, he would be sent to *hajut*. Ultimately after being confined for nearly the whole of the day in the bungalow of the Officer, without being allowed for bathing and food, the defendant agreed to sign a compromise and an agreement was written out by the Sub Divisional Officer, signed by the plaintiff and the defendant and witnessed by the Sub-Divisional officer and the Assistant Superintendent of Police. The agreement did not contain the date of execution. It gave the names of the *Dihis* and *Chuks* of the properties comprised therein and not the names of the districts wherein they were situate. The plaintiff presented the agreement for registration, admitting his execution thereof. The defendant did not appear before the Sub-Registrar and proceedings to enforce his attendance were unavailing. The Sub-Registrar, therefore, admitted the document for registration as regards the plaintiff but refused to do so as regards the defendant. On appeal, the Special Sub-Registrar affirmed the decision of the Sub Registrar. Hence the present suit under s. 77. *Held*, there is nothing in the Act requiring a document presented for registration to be dated. Documentary or parol evidence would be admissible to prove when, as a matter of fact, a document tendered for registration was executed. In the circumstances of the case, the description of the properties was sufficient (4 M.H C. 91, 18 C. 556, *R.*) *Held*, also that, though the agreement was optionally registrable, as the provisions of the Act 'enforcing the appearance of executants and witnesses' are applicable to the case of a document, the registration of which is optional, the refusal of such an executant to admit execution gives rise to a cause of action under s. 77 of the Act. *Held*, further, that the defendant's signing of the agreement under the circumstances of the case was not an 'execution' thereof within the meaning of the Act, indeed it was no 'execution' at all. Execution means voluntary execution, the signing of the document of the executant's free-will (6 W.R. Mis. 131, 1 B. L R.O.C. 47, 4 M.H.C. 425, *D.*) Appeal allowed and suit dismissed. CHANDRA KISHORE-MUNSHI v. DINENDRA NATH SANYAL, **1 C.L. J. 126.**

(273)—*Ss* 17, 23 (1, 2), 34, 49, 77 (=*Registration Act*, 1877, *ss.* 17, 23. 34, 49 *and* 77)—*Indian Evidence Act, s.* 91—*Suit to enforce registration—Registration invalid—Personal covenant on the loan.*—Plaintiff instituted a suit for an order to the Sub-Registrar to register a deed of mortgage executed to him by the defendants for money lent, and obtained a decree to the effect, that the defendants "do perform their part of the contract in registering the mortgage bond by appearing within one month after date of the decree before the Sub-Registrar and admitting execution and receipt of consideration therefor; and the Sub-Registrar do on application register the deed, whether the signatories admitted execution and receipt of consideration

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or not." The deed was registered in accordance with the decree, though it was not presented for registration within the 30 days as directed by the decree. In a suit on the mortgage deed for sale of the mortgaged property, it was held, (1) that as the first suit was not brought under the conditions required for the filing of a suit under s. 77 of the Registration Act, the decree obtained in that case would not have the effect of exempting the document registered under it from the necessity of compliance with the provisions of the Act, (2) that it was competent to the Court to decide as to the validity of the registration, (3) that, as the document in the case was not registered in accordance with the provisions of ss. 23 and 34 of the Act, it could not be received in evidence for affecting the mortgaged property as provided by s. 49 of the Act, (4) that the plaintiff was precluded by s. 91, Evidence Act from proving the existence of the mortgage by any other evidence than the mortgage deed, (5) and that as the deed contained a personal covenant to repay the debt a personal decree for the amount might be passed. MAUNG KYAW AND MA SAN HMWE v. SITHAMBARAM CHETTY, **4 L B R. 88.** (3 A. 397, 9 C. 150, 11 Bur. L.R. 166, 20 A. 512, *F.*; 2 A. 46, 16 A. 303, 2 I.A. 210, 2 C.L R. 428, *R.*) [*R.* 4 L.B.R. 263.]

(274)—*Ss.* 17, 28, 49 (= *Registration Act*, 1877 *ss.* 17, *cl.* (c), 28, 49.)—*Money bond—Mortgage-deed—Registration—Limitation.*—Where a deed of mortgage is registered by a Registering Officer within whose territorial jurisdiction the property mortgaged is not situate, it cannot be effective as a mortgage-deed. But the deed being registered, the person suing thereon will be entitled to a mere money-decree, on the footing that it is a simple registered money-bond, even though the suit is brought more than three years after, but within six years. JOGINEE MOHUN CHATTERJEE v BHOOP NATH GHOSAL, **29 C. 654 = 6 C.W.N. 856.** (14 C. 449 = 18 C. 556, *Rel on*; 7 C.L R. 223, *Expl*) [*Apol.*, 1 N.L.R. 112; *R.*, 16 C.P L.R 141.]

275)—Ss. 17, 42—*See* CERTIFICATE OF SALE, 3 M. 37, F.B.

(276)—*Ss.* 17, 47) (= *Registration Act*, 1877, *ss.* 17, 47)—*Execution—Registration When a registered deed begins to operate — Priority — Non-payment of consideration in full—Mortgage —Right of mortgagee to recover portion of debt advanced.*—Defendant No. 1 executed a document to plaintiff on one-anna stamp mortgaging his property to the latter for a sum of money, a part of which was due to the latter by the former and the balance was payable in cash. This deed provided that, within fifteen days, a regularly stamped-mortgage-deed was to be executed and registered. Defendant No. 1, did not attempt to receive the balance from plaintiff; but, on the contrary, sold some portion of the property mortgaged to defendant No. 2 and another portion to defendant No. 3 and registered the deeds. Sometime after, plaintiff got the deed on the one-anna stamp paper executed in his favour compulsorily registered by paying stamp-duty and penalty. Plaintiff now sued to recover so much of the consideration money as was due to him as a debt, by sale of the property mortgaged to him. It was contended for the defence (1) that the deed executed in plaintiff's favour was not a complete mortgage-deed; (2) that the plaintiff was only entitled, under that deed, to get a mortgage-deed at a later date; (3) that the deed on the one-anna stamp could not, and did not create any charge; (4) that the plaintiff's deed having, in any event, been registered after the registration of the deeds in favour of the defendants, Nos. 2 and 3, it was not entitled to priority over them; and (5) that the plaintiff's non-payment of the balance payable in cash affected the nature of the document. *Held*, (1) that notwithstanding the recital in the deed that, later on, a regularly stamped deed would be executed to plaintiff, the deed executed on the one-anna stamp created an actual mortgage on its date, that the deed evidenced a present demise; that such was the intention of the parties was gatherable from the other terms in the deed and that, consequently, the deed began to operate as a present demise on mortgage from its date (10 B. 101, *F.*) (2) that the non-payment of the balance did not affect either the nature of the deed or the right of the plaintiff to recover what was originally due to him as a debt on the security of the property, since the defendant had a right, if he chose to assert it, to recover the unpaid mortgage-money; (3) that, on registration, the deed of the plaintiff began to operate, not from the date of registration but from the date of execution thereof (29 B. 42 *F.*) and (4) that the deed of the plaintiff was, consequently, entitled to priority over those of the defendants Nos. 2 and 3. MOTICHAND v. SAGUN, **29 B. 46.**

(277)—*Ss.* 17, 48 (= *Registration Act*, 1877, *ss.* 17, 48)—*Letters embodying contract of sale, not compulsorily registrable under Equitable title under prior contract of sale, effect of notice of, on subsequent purchaser—Receipt passed for consideration received.*—In this suit based on the plaintiff's equitable title under a contract for sale, for cancellation of some subsequent sales by his vendor to the defendants and for compelling the vendor to execute the sale agreed to by him, the contract for sale to the plaintiff was proved partly by two letters, and partly by oral evidence of the payment of earnest money to complete the bargain; and the letters were held to be not compulsorily registrable documents within the meaning of s. 17 of the Registration Act (VIII of 1871) and therefore not to be within s. 49 of the same Act, and consequently not excluded by it from being received in evidence. The written receipt passed by the vendor acknowledging payment to him of part of the consideration

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money was held to fall within cl. 3 of s. 17 of Act VIII of 1871, it having been a distinct acknowledgment of the receipt of consideration on account of the creation of a right, title or interest in immoveable property of value above Rs. 100. The said clause would include within its scope a payment of a part of the consideration as well as a payment of the whole of it. The provision in s. 48 of Act VIII of 1871 that a document, duly registered under it, shall take effect against an oral agreement unaccompanied by possession, cannot be applied to a registered document which has been given, accepted and registered in fraud of a third party, similar to the registered deed given by the first defendant and accepted by the other defendants in this case, with full notice of the prior contract for sale to the plaintiff by the first defendant and with the deliberate intention of defrauding the plaintiff The reason for the exception made by the said s. 48 in favour of an oral agreement accompanied by possession is that, by such possession, the parties who rely on a subsequent registered deed had, or might, if they had been reasonably vigilant, have had, previously to entering into their contract with the vendor and to their taking a conveyance, notice, by the fact of such possession, that there was some prior claim to the property; and consequently, in cases where the subsequent vendees have had actual notice of the previous oral agreement, the above object of the Legislature fully obtains, even when such agreement has not been followed by possession. WAMAN RAMCHANDRA v. DHONDIBA KRISHNAJI, **4 B 126, F.B.** [*F.*, 6 C. 534, 13 M. 324; *Appr.*, 13 C 70, 4 L.B R. 26; *R.*, 6 B. 168, F B., 7 C 753, L B.R. 1872—1892. 151, 9 B 427, 9 M. 119, 16 M. 148, 17 B. 235, 27 B 452, 142 P.R. 1908. F.B., 35 C. 34=11 C. W.N 983=6 C L.J. 273, F.B.; *D.*, 9 A. 108, F.B., 71 P.R. 1906=111 P.L.R. 1907.]

(278)—*Ss.* 17, 48—(*Registration Act, ss.* 17 (*d*), 48) — *Notice.* — The mere registration of a mortgage deed does not affect a subsequent mortgagee with constructive notice of its existence so as to preclude him from claiming priority in respect of his mortgage. MADRAS BUILDING CO. v. ROWLONDON, **13 M. 383.** [*Appr.*, 7 C.W.N. 11.]

(279)—Ss. 17, 48—Mofussil property—Mortgage by deposit of title-deeds with creditor's agent in Calcutta—Sub mortgage by deposit of the mortgage-deed does not require registration —*See* EQUITABLE MORTGAGE, 10 C.W.N. 276=33 C. 410=4 C.L.J. 102.

(280) — *Ss.* 17, 49 (= *Registration Act,* 1877, *ss* 17, 49)—*Unregistered mortgage, recital in, admitting liability—Whether admissible in evidence.*—A recital in an unregistered mortgage deed, which is sufficiently distinct and separate to be considered as an unqualified admission of a certain liability as subsisting, is admissible as an acknowledgment of the original debt, though, under s. 49 of the Registration

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Act, it cannot be received as evidence of a transaction affecting the real property. SYAD MUHAMMAD KHAN v. JAISUKH AND JAISUKH v. SYAD MUHAMMAD KHAN, **88 P.R 1880.** [*Appl.*, 80 P.R. 1881; *R.*, 20 P.R. 1888; *D.*, 17 P R. 1881.]

(281)—*Ss.* 17, 49 (=*Registration Act,* 1877, *ss.* 17, 49)—*Authority to adopt being in writing and not contained in a Will—Registration compulsory.*—An authority to adopt given to a widow by her husband, if it is in writing and not contained in a Will, must be compulsorily registered, and, unless registered, is inoperative to confer such authority. SOMASUNDARA MUDALI v. DURAISAMY MUDALI, **27 M. 30.**

(282)—*Ss.* 17, 49 (=*Registration Act,* 1866, *ss.* 17, 49)—*Civ. Pro. Code, s.* 259—*Execution sale —Sale certificate—Registration—Admissibility in evidence.*—A certificate of sale, issued under s. 259 of the Code, is an instrument within the meaning of ss. 17 and 18 of the Registration Act XX of 1866 and as such it requires registration. An unregistered sale certificate is not only inadmissible in evidence but invalid under s. 49 of that Act (*Hicks* v. *Powell,* L.R. 4 Ch. 741, *R.*) When such certificate is not registered, other evidence cannot be let in to prove the sale. PADU MALHARI v. RAKHMAL, **10 B H C. 435.** (7 B.H C. 136, *R.*) [*F.*, 7 B. 254; *Appr.*, 12 B.H.C. 247; *R.*, 12 B. 589; *D.*, 10 B. 444.]

(283)—*Ss.* 17, 49 (=*Registration Act,* 1877, *ss.* 17 (*b*), 49)—*Award by arbitrator, making partition of immoveable property of over Rs.* 100, *compulsorily registrable—Secondary evidence of, inadmissible under s.* 91, *Evidence Act.*—Where two co-parceners, by agreement, appointed a sole arbitrator to effect a partition of their joint ancestral property and consented that the partition effected by the arbitrator, by taking the bids of the parties for the property, will be accepted, and the award was thereon made and written up on the back of the said agreement (which was not registered), *held,* that the document was intended to be, and was regarded by the parties as, an instrument declaring rights in or to immoveable property and that, since it did 'operate to declare' such rights in immoveable property of value exceeding Rs. 100, it was an instrument compulsorily registrable, and being unregistered, not receivable in evidence and that further, by reason of s. 91 of the Indian Evidence Act, it was not open to the parties to prove the partition, independently of the document, by oral evidence *aliunde.* AJIMAT SINGH v. KALWANT SINGH, **71 P.R. 1906=111 P L. R 1907.** (4 B. 126, 13 M. 255, 9 A. 108, 48 P. R. 1905, 175 P L R. 1905, *D.*)

(284)—*Ss.* 17, 49 (=*Registration Act,* 1877, *ss.* 17 *and* 49)—*Deed of adoption—Transaction affecting immoveable property.*—*Held,* that an unregistered deed whereby plaintiff relinquished all claims to the land in suit in favour of defendant No. 3, whom in the said deed he expressly acknowledged as the adopted son of one

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Kutba, could not be admitted in evidence, to prove the relinquishment of right to land, or the admission of adoption, as the consideration for the deed was over Rs. 100, and admission of adoption in such cases is to all intents and purposes equivalent to an acknowledgment of the title of the person named in the deed as adopted to the property comprised in it; the adoption was held to be transaction which very materially affected immoveable property. ALI BAKHSH v. RAUSHAN, **P.L.R. 1900, p. 481 = 102 P. R. 1900.**

(285)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Compromise recording contract of pre-emption—Not embodied in decree—Not admissible without registration.*—A *Sulahnama* filed in a suit, in so far as it purports to create a right of pre-emption, is a transaction affecting immoveable property, and as such requires registration. Where such a document was not registered, no evidence of its contents could be given to establish a claim of pre emption. KASHI KUNBI v. SUMER KUNBI, **7 A.L.J 206 = 32 A. 206 = 5 Ind. Cas. 234** [*R.*, 13 O.C. 241.]

(286)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Document compulsorily registrable, registered by mistake in Book 4—Mistake not to affect parties—Document to be treated as properly registered—Endorsement releasing mortgaged property for a cash consideration—Endorsements need registration.*—A release, whereby a father relinquished his share in the immoveable and moveable property in favour of his son, was presented for registration. The document contained no description of the property released, but it was capable of identification. The release was accepted by the Registrar and registered not in Book I but in Book IV, that is to say, not in the book kept for the registration of documents compulsorily registrable under s. 17 of the Registration Act. *Held*, that the release must be considered as having been duly registered; since, the error of the Registrar in registering the document in a wrong book should not be allowed to prejudice the parties. At the back of a deed of conveyance, an endorsement was made by the mortgagee that the property covered by the conveyance was released in consideration of the payment by the mortgagor of a sum of money. The endorsement was not registered: *Held* that, in view of the provisions of s. 49 of the Registration Act, 1877, the endorsement was not admissible in evidence of either the redemption of the property or of the nature of the original transaction between the parties. PARASHARAMPANT SADASHIVPANT v. RAMA YELLAPPA LAKUNDI, **11 Bom. L.R. 1321 = 34 B 202 = 4 Ind. Cas. 588.**

(287)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss* 17, 49)—*Immoveable property not subject-matter of suit—Compromise deed affecting—Non-registration of deed—Effect.*—Where, in a prior suit, it was, by the terms of a compromise, settled, *inter alia* that both the lands sued for then and the lands which form the subject-matter of the present suit should be divided into two moieties and that the plaintiff should take one moiety and the defendant the other, and the agreement of compromise was not registered under Act III of 1877, and where, thereafter, a decree was passed in terms of the compromise so far as it related to the property which was then sued for. *Held*, that the agreement of compromise could not affect the title to properties now in question on account of its inclusion in the compromise. (20 A. 171, 22 M. 508, *Expl.*; 28 A. 78, 33 M. 102 = 7 M.L.T. 313, *Doubt*; 1 C.L.J. 388, 30 C. 783, 36 C. 193, *F.*; 34 C. 456, *D.*; 25 M. 553. 29 M. 365, 32 A. 206, 31 A. 13, *R.*) Where any portion of a *razinamah* has not passed into a decree or order of Court, a mere recital of it or its inclusion in pleadings put before the Court will not bring it under the terms of s. 17, cl. 1, Registration Act, 1877, and the document cannot affect the immoveable property compromised therein. RAVULAPARTI CHELAMANNA v. RAVULAPARTI RAMA ROW **10 M.L.T 232 = 21 M L.J. 870 = 2 M.W.N. 1911, 265 = 12 Ind. Cas. 317.** (15 M. 19, 15 M. 378, 9 C. 586, *R.*)

(288)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Unregistered hypothecation bond—Admissibility as evidence of money-obligation.*—Where, in a bond for money which also charges immoveable property as collateral security for its repayment, the personal covenant is separable from the hypothecating clauses, the bond, though its value exceeds Rs. 100, may be received in evidence to prove the personal liability, though, for want of registration, it may not be admissible to prove and enforce the hypothecation. *In the matter of the petition of* SHEO PAL v. PRAG DAT MISR, **3 A 229, F.B.** [*F.*, A. W.N. 1881, 138, 4 A. 3, 11 C.L.R. 166; *R.*, 4 C.L.J. 510; *D.*, 4 A. 232, 102 P.R. 1900.]

(289)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Unregistered bond for payment of money mortgaging immoveable property—Admissibility of bond in evidence in suit for money—Limitation Act*, 1877, *sch.* II, *art.* 66.—A bond for the payment of money, by which immoveable property is mortgaged by way of conditional sale as security for a loan, and in which it is provided that interest should be paid annually and the principal at the end of five years, and that in default of such payments, the obligee may apply for foreclosure, involves a personal obligation of the obligor distinct and severable from the obligation in respect of the property, and is therefore, even though unregistered, admissible as evidence in support of a claim to enforce the money obligation. It would also be admissible, in proof of the fact, that the debt was not exigible until after the expiry of five years from the date of

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the loan. (3 A. 529, F.B., *F*) [*R.*, 13 M. 281] Art. 66 of sch. II of the Limitation Act is not applicable to a suit to enforce the money obligation contained in such a bond, for it is not a *single* bond, that is to say, a bill or written engagement for the payment of money, without a penalty. LACHMAN v. KESRI, **4 A. 3 = A.W.N. 1881, 93.** [*R.*, 13 M. 281.]

(290)—*Ss.* 17 *and* 49 (= *Registration Act* 1877, *ss.* 17, 49)—*Effect of a registered instrument confirming a prior one of the same purport not registered.*—An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s. 17, sub-s. (*b*), of Act III of 1877), being unregistered, was ineffectual to affect the title of the purchaser. Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered In a suit in which the ownership of the property was contested, *held*, that the fact of the prior deed not having affected the property, being unregistered, was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the object of the Registration Act. ALEXANDER MITCHELL v. MATHURA DAS, **8 A. 6, P.C. = 12 I A. 150 = 4 Sar. 663.** (*On appeal from*, **4 A. 206.**) [*F.*, 4 Bom. L.R. 893.]

(291)—*Ss.* 17, 49 (= *Registration Act*, 1877, *ss.* 17 (*d*), 49—*Covenant in unregistered lease—Suit for specific performance.*—Where an unregistered lease of a house for three years contains a covenant by the lessee that on a certain event happening he will purchase the house, and that event happens: the lessor cannot enforce the covenant by a suit for specific performance, as the covenant is part of and dependent on the lease for three years, and therefore cannot be put in evidence for want of registration. SAMBAYYA v. GANGAYYA, **13 M. 308.**

(292)—*Ss.* 17, 49 (= *Registration Act*, 1866, *ss.* 17, 49)—*Instrument accidentally destroyed by fire soon after execution and before registration—Suit by purchaser to compel vendor to execute another instrument sustainable.*—S. 49 of the Registration Act was intended to prohibit the reception in evidence by any Court of an instrument liable to compulsory registration under s. 17 of the Act, which the parties had neglected to register in the manner and within the time required by the other provisions of the Act. But where an instrument the registration of which is compulsory under s. 17 of the Registration Act, is destroyed by fire accidentally soon after its execution and before registration, s. 49 of the Act does not apply, and secondary evidence of the contents of the unregistered instrument is admissible. [*F.*, 14 M. 55.] Where an instrument of sale the registration of which is rendered compulsory by s. 17 of the Registration Act, is destroyed accidentally by fire soon after its execution and before registration, a suit lies by the purchaser to compel the vendor to execute another instrument to the same effect as that which had been destroyed. NYNAKKA ROUTHEN v. VAVANA MAHOMED NAINA ROUTHEN, **5 M.H.C. 123.** [*R.*, 20 M. 19, 20 M. 250.]

(293)—*Ss.* 17, 49 (= *Registration Act*, 1864, *s.* 13)—*Registration—Evidence.*—In a suit for recovery of possession of land on the allegation that it had been sold to the plaintiff by the defendant under a bill of sale which had been duly registered and was not disputed by the defendant, the defendant produced an unregistered *ikrarnama* by the plaintiff, for proving that the sale was not absolute, but only by way of mortgage, and alleged that the terms of the bill of sale were qualified and explained by the *ikrarnama*. *Held* that the *ikrarnama* was inadmissible in evidence, as it had not been registered under s. 13, Act XVI of 1864, but that the Court might look at other and independent evidence, *viz.*, the acts and conduct of the parties, to throw light on their intention. SHEIKH PARABDI SAHAW v. SHEIKH MOHAMED HOSSEIN, **1 B.L.R A.C. 37.** (3 M I.A. 317, *R.*) [*R.*, 17 M L J. 469.]

(294)—*Ss.* 17, 49 (= *Registration Act*, 1877, *ss.* 17, 49)—*Occupancy-tenancy—"Immoveable property"—Mortgage.*—The interest of an occupancy-tenant in his holding is an interest in immoveable property. A bond hypothecating such interest is therefore one hypothecating immoveable property, and as such, when its value, estimated by the amount secured, exceeds Rs. 100, must be registered. And a suit based on an unregistered bond of such value for the enforcement of the lien purporting to be created by it, must be dismissed as the bond cannot be received in evidence. NABIRA RAI v. ACHAMPAT RAI, **3 A. 422.** (3 A. 157, *F.*)

(295)—*Ss.* 17, 49 (= *Registration Act*, 1877, *ss.* 17, 49)—*Instrument affecting moveable and immoveable property.*—An unregistered agreement which provides for the distribution of moveables as well as immoveable properties between certain parties, is not inadmissible in evidence in a suit by one of them for the recovery of his share in the moveables. THANDAVAN v. VALLIAMMA, **15 M. 336 = 2 M.L.J. 130.** [*F.*, 4 M.L.T. 354.]

(296)—*Ss.* 17, 49 (= *Registration Act*, 1871, *ss.* 17, 49)—*Registration of receipts—Inadmissibility of unregistered receipts—Admissibility of parol evidence, though receipt inadmissible.*—A receipt for payments made towards a bond, hypothecating immoveable property, must be registered under s. 17, Limitation Act, 1871. [*F.*, 6 A. 335; *Not F.*, 4 B. 235; *Diss.*, 3 M. 53, 9 A. 108, F B.; *R.*, 24 B. 609, 100 P.R. 1902.] An unregistered receipt is not admissible in evidence to prove the payment, under s. 49, Registration Act. In such a case, parol evidence is nevertheess admissible. DALIP SINGH v. DURGA PRASAD, **1 A. 442.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(297)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss* 17, 49)—*Registration Act*, III *of* 1877, *application of—Covenant for title running with land—Admissibility of unregistered document containing assignment of interest in immoveable property Suit for damages for breach of covenant for title.*—The provisions of the Registration Act III of 1877, were held to apply to all documents tendered in evidence on or after 1st April, 1877, when it came into force. A covenant for title running with the land, being in itself a transaction affecting the land within the meaning of s. 49 of the Registration Act, the instrument containing it, if coming within any of the cls. (*a*) to (*d*) of s. 17, must be registered before it is admissible in evidence for the purpose of proving the existence of such covenants, unless it comes within the exceptive cls. (*e*) to (*l*) of s. 17, and in particular within cl. (*h*). [*R.*, 13 A. 89; *Appl.*, 18 B. 745; *D.*, 18 B. 92.] An unregistered document containing covenants for title though embodying "a transaction affecting immoveable property," is admissible in evidence in a suit for damages for breach of such covenants, provided that the document is conformable to the requirements of the exceptive cl. (*h*) of s. 17 of the Registration Act III of 1877. (1 B. 190, *D.*) But, where the evidence of the covenant is contained in a document *itself* purporting to assign an interest in immoveable property, and the effect of the covenant itself cannot be got at without looking at the portion of the document which contains the assignment, the document is not excepted by cl. (*h*) of s. 17 from the necessity of registration, and ought not to be received in evidence, even for the purpose solely of proving the covenant for title. RAJU BABU v KRISHNA RAU RAMACHANDRA, **2 B. 273.** [*Appl.*, 18 B. 745; *D.*, 18 B. 92; *R.*, 7 B. 310, 21 B. 704.]

(298)—*Ss.* 17 & 49 (=*Registration Act*, 1877, *ss.* 17, *cls* (*b*) & (*d*), 49)—*Lease for quarrying limestone—Admissibility of unregistered lease for quarrying limestone.*—In a suit for possession of certain land from which the plaintiff alleged that he had been dispossessed by the defendant, the question was whether two deeds under which the plaintiff and the person through whom he claimed were authorised to quarry limestone from the said land for a certain period required registration. *Held*, that, the deeds were leases and as such required registration under s. 17, cl. (*d*) of the Registration Act (III of 1877); that they were inadmissible in evidence; and that under s. 49 of the Act they could not legally be held to "affect any immoveable property comprised" in them, nor could other evidence be given of their contents. SHAIKH KARAM HUSAIN v. RAM GOPAL, **7 O.C. 231**

(299)—*Ss.* 17, 49 (=*Registration Act*, 1866, *ss.* 17, 49)—*Mortgage—Evidence.*—So far as a *byewil-wafa*, or deed of conditional sale, is a mortgage, it creates an interest in immoveable property and its registration is compulsory under cl. 2, s. 17 of the Indian Registration Act, but so far as it is a covenant or agreement for the re-payment of the money lent on a particular day, it is not an instrument requiring registration, and it is admissible in evidence notwithstanding the provisions of s. 49. NILMADHAB SING DAS v. FATTEH CHAND SAHU, **3 B L.R. A.C. 310=12 W R. 222.** [*F.*, 12 W.R. 435.]

(300)—*Ss.* 17, 49 (=*Registration Act*, 1866, *ss.* 17, 49)—*Registration—Unregistered deed of sale—Admissibility in evidence as receipt.*—A bill of sale contains two things, *viz.*, an acknowledgment of the receipt of money, and a conveyance of the property sold, and such a document, though unregistered, is admissible as evidence in the *former character.* A portion of an unregistered document requiring registration is admissible in evidence, when such portion does not relate to immoveable property. (3 B L.R. A.C 310 *Rel. on.*) SHIB PRASAD DAS v. ANNA PURNA DAYI, **3 B L.R.A C. 451=12 W. R. 435.**

(301)—*Ss.* 17, 49 (=*Registration Act*, 1864, *s* 13)—*Deed relating to immoveable property—Evidence—Registration.*—A deed whereby a defendant undertook to pay monthly a certain sum "for the use and hire of a steam-engine, boiler, and machinery sheds and a bungalow," is one relating to immoveable property. Such a document is not admissible in evidence without registration under s. 13, Act XVI of 1864. WINTERSCALE v. GOPAL CHUNDRA SEAL, **3 B L R. O C 90**

(302)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Evidence Act*, *ss.* 62, 64, 65, 91, 99—*Secondary evidence of a compulsorily registrable but unregistered document, inadmissible—Transfer of Property Act*, s. 56 (b) (6) *equitable principle contained in, applied.*—Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence (1 B L R. 58, *F.*; 7 W.R. 112, *R.*; 14 M. 55, *D.*) A compulsorily registrable, but unregistered, deed of sale of specified property cannot affect the property, and cannot be used to prove the sale, though it is admissible for collateral purposes. (26 C. 334, 17 M. 456, 4 M.L J. 199, 14 M. 55, 20 M. 450, *R*; 1 N. L.R. 47, *Commented on.*) The plaintiffs, having agreed to convey a house to T, received the purchase-money, executed a sale-deed, which was left unregistered, and subsequently brought a suit for possession of the house. On default of the plaintiffs to produce the sale-deed, secondary evidence was let in to prove the sale, and the suit was dismissed. *Held*, on second appeal, that, under s. 17 of the Registration Act, the deed was compulsorily registrable, and s. 49 made it inadmissible to prove the sale. S. 91 of the Evidence Act prohibits the admission of secondary evidence of sale

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deed. The whole of s. 65, Evidence Act, presupposed that, but for one or other of the barriers stated therein, the document would have been capable of proving its contents under ss. 64 and 62, Evidence Act. *Held*, that plaintiffs remained owners of the house. *Held*, also that had the contract of sale taken place within three years of the suit, the contract might have been a valid defence against plaintiffs' claim for possession. (13 C.P.L.R. 163, *F.*; 29 M. 336, *D.*, 17 C.P.L.R. 19, *R.*) *Held*, also, on the equitable principle contained in s. 56 (6) (*b*) of the Transfer of Property Act, the plaintiffs must pay back the purchase-money as a condition precedent to the recovery of the house. GANGABISAN v. TUKARAM, **5 N L R. 70=2 Ind. Cas 244.** (28 B 466, *Appl.*; 1 N.L.R. 47, *R.*) [*F.*, 6 N.L R. 98.]

(303)—*Ss.* 17, 49 (=*Registration Act*, 1864, *s.* 13)—*Registration—Deed pledging land.*—The registration of a bond for the re-payment of money, in which land is pledged as collateral security, is not compulsory under s. 13, Act XVI of 1864. GOPAL PRASAD v. NANDARANI, **1 B L.R. A.C. 192=10 W.R. 252.** [*F.*, 6 B. H.C. O C. 134, 3 B L.R. A.C. 310=12 W.R. 222; *R.*, 4 M.H.C. 378]

(304)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Admissibility in evidence—Parol evidence—Partnership.*—The plaintiff claimed the lands in suit under two mortgage-deeds executed by the owners in 1860 and 1870 respectively. His case was that these mortgages were in favour of a money-lending firm; that several changes of partners occurred, on which occasions these mortgages were treated as partnership property; that the plaintiff's father S was admitted as a partner as evidenced by three letters dated 1874, A, B and C; that some time after this, P and S remained the only partners and that, on a division between them, these two mortgages were assigned to the share of S, and that by means of partition after S's death they became the sole property of the plaintiff, who claimed as mortgagee in possession. The lands were attached by the first defendant in execution of decrees against one of the mortgagors, and the plaintiff did not succeed in raising the attachment. The plaintiff filed this suit to establish his rights under the two mortgage-bonds. The defendants contended that the plaintiff had no interest under the two mortgage-bonds and that the letters relied on by the plaintiff were not admissible in evidence, not having been registered. *Held* that there was sufficient parol evidence to show that the plaintiff's father was at first admitted as a partner, and subsequently treated as a partner, and that as such partner the mortgages in question ultimately fell to his share at the final division; that if and when the position of the plaintiff's father as a partner was thus established, his right to the property followed by operation of law and no other proof of title was required. *Per Jardine, J.*—To lay down

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

that the three letters in question which deal generally with the assets, moveable and immoveable, without specifying any particular mortgage or other interest in real property, require registration, would in the present state of the authorities, go too far. Such letters are not "instruments of gift of immoveable property," but rather disposals of a share in a partnership of which the business is money-lending and the mortgage securities merely incidental thereto. *Per Telang, J.*—Although a partner's share does not include any specific part of any specific item of the partnership property, still, where the partnership is entitled to immoveable property, such share does include an interest in immoveable property, and, therefore, every instrument operating to create or transfer a right to such a share requires to be registered under the Registration Act. The letters in question, not being registered, are inadmissible in evidence to prove directly a transfer of the share of one of the partners to S. JOHARMAL v. TEJRAM JAGRUP, **17 B. 235.**

(305)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17 (*d*), 49)—*Mortgage — Mortgagee with power to assign the lands leasing out in perpetuity — Registration — Second appeal.*—A mortgagee with power to assign the lands gave the defendant a lease in perpetuity of the lands in question at a rent of eight annas per acre. *Held*, the instrument giving the right to hold the land in perpetuity was a lease within s. 17 (*d*) of the Registration Act, to which the exception referred to in the proviso to the section did not apply, and that the lease, not having been registered, could not under s. 49 of the Act be received in evidence. (27 M. 43, *R.*) *Held*, also that it was open to the High Court in second appeal to dispose of the case on the ground of non-registration of the document on which the defendant relied, although the point was not discussed by the lower Courts and it was not clear that the point was taken in the Courts below. SRINIVASA AIYANGAR v. PARTHASARTHY AIYANGAR, **4 M.L.T. 79.**

(306)—*Ss.* 17, 49—*Usufructuary mortgage—Receipt acknowledging extinction of interest—Registration—Act* VIII *of* 1871, *s.* 17, *cl.* 3—*Parol evidence—Receipt.*—A receipt by a usufructuary mortgagee acknowledging receipt of consideration of over Rs. 100 for surrendering the mortgaged lands is compulsorily registrable, and is not admissible as evidence for the purpose of affecting the property, without registration. But parol evidence is admissible to prove receipt of money. SOORJO COOMAR BHUTTACHARJEE v. BHUGWAN CHUNDER ROY, **24 W.R. 328.**

(307)—*Ss.* 17, 49—*Act* XX *of* 1866, *s.* 17, *cl.* 4—*Unregistered kubooleut suit on, whether maintainable—Liability of tenant.*—The registration of a kubooleut for a house when its term exceeds 12 months is compulsory, as it is defined in s. 2 of Act XX that a kubooleut is a

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

lease within the meaning of the Act; and consequently, a person cannot sue for the rent stipulated to be paid under such a kuboolent when it has not been registered. But the person in possession of the house is bound to pay reasonable compensation for the use and occupation of it, although no strict legal tenancy has been created by the unregistered document. PUROMA SOONDUREE DOSSEE v. PROHLAD CHUNDER DASS, **12 W.R. 289.**

(308)—*Ss* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Contract for sale of land not registered— Subsequent sale in execution of decree—Payment of earnest money at time of contract—Subsequent execution of conveyance—Rights of vendee.*—The defendants claimed the land in suit under an unregistered contract for sale of the same dated 22-1-1891. In execution of a decree against the owners of the land, the land was attached on 11-2-1891 and sold to the plaintiff at Court auction in 1892. *Held*, that the contract for sale not having been registered as required by s. 17, cl. (*b*), of the Registration Act (III of 1877) it would not in any way affect the land contracted to be sold thereunder. It would not operate to transfer the ownership and it cannot be received in evidence of any transaction affecting the land, *i.e*, it cannot be used to show that the ownership had passed from the vendor to the purchaser. So, at the time the property was attached in execution of the decree, it was the property of the judgment-debtors, and the plaintiff being the purchaser thereof at Court auction, had a good title thereto. [*D*, 24 B 400=2 Bom. L R 220, 26 A 266=A.W. N. 1904, 8.] A contract for sale of a certain land reciting that, on the date thereof, Rs. 100 had been received as earnest-money, and providing that, within 2 months, the vendors should execute a proper conveyance and thereupon receive the balance of the purchase money and give up possession of the property sold, falls within cl. (*h*) of s. 17 of the Registration Act (III of 1877). It does not create any right, title or interest in immoveable property, but merely creates a right to obtain another document, and gives the vendee a right against the vendor personally to call for a conveyance and possession on paying the balance of the purchase-money. HORMASJI MANEKJI DADACHENJI v. KISHEN PURSHOTEM, **18 B. 13.**

(309)—*Ss.* 17, 49 (=*Registration Act*, 1871, *ss.* 17, 49)—*Agreement for purchase of immoveable property contemplating a future conveyance—Payment of earnest-money.*—A "bargain paper" for the purchase of immoveable property worth more than Rs. 100, under which the execution of a future conveyance is to be made, need not be registered. JUSAB HAJI JAFAR v. HAJI MUHAMMAD, **12 B.H.C. 175.** [*F.*, 4 C.L.R. 257; *D.*, 1 B. 190; *R.*, 7 B. 310.]

(310)—*Ss.* 17, 49 (=*Registration Act*, 1871, *ss.* 17, 49)—*Suit on covenant in compulsorily registrable, but unregistered, mortgage-deed—Inadmissibility in evidence.*—Where the plaintiff sued for a money-decree on a covenant in a compulsorily registrable, but unregistered, mortgage-deed, the deed, being in its terms indivisible and disclosing one transaction only, which the plaintiff must necessarily prove for making out his case, was held inadmissible in evidence, altogether, to prove a fact, for which registration is not necessary. 4 B.L.R., 18, F.B., *distinguished* on the ground that it was decided under the provisions of Act XX of 1866 and that the document in that case was divisible in its nature. MATTONGENEY DOSSEE v. RAM NARAIN SAD KHAN, **4 C. 83=2 C L.R 428.** [*D*, 5 C. 611, 3 A. 229, F.B., 11 C.L.R. 166, 15 M. 253, 15 M 336; *R.*, 6 A 335=A.W. N 1884, 107, 13 M. 281, 13 A. 89; *Diss.*, 4 C.L.J. 510.]

(310 *a*)—*Ss.* 17, 49 (=*Registration Act*, 1877, *ss.* 17, 49)—*Registered* kabuliat—*Rent it can be varied up by unregistered document—Letter reducing rent, if admissible—Guardians and Wards Act* (VIII *of* 1890), *s.* 29—*If such letter may be granted by guardian.*—A document, which embodies an agreement for reduction in the amount of rent under a previously existing registered lease, requires registration. (12 Ind. Cas 723=39 C. 284=16 C W.N. 55=14 C.L.J. 411, *F.*) The defendants executed a registered *kabuliat* in favour of the plaintiffs for 1304 to 1309 inclusive. In *Assin* 1310, the defendants obtained a letter from the plaintiffs' *naib* and certificated guardian by which the rent was reduced from Rs. 87 odd to Rs. 37 odd, on the ground that the entire land was not fit for cultivation: *Held*, that the letter required registration, and not being registered, it could not be received as evidence of any transaction affecting property under s. 49 of the Registration Act. *Obiter dictum:*—The plaintiffs' guardian was within his rights in writing a letter of this nature, as the transaction appeared to be a lease for a period not exceeding five years, and, therefore, was not forbidden by s. 29 of the Guardians and Wards Act. GANENDRA MOHAN CHOWDHURY v. GYA PROSAD TEWARI, **16 Ind. Cas 52.**

(311)—Ss. 17, 49—*See* HINDU LAW—ADOPTION, 27 M. 30.

(312)—Ss. 17 and 49—Unregistered lease—Admissibility to prove adverse possession—*See* LIMITATION—GENERAL, 17 M L.J. 469=3 M.L.T. 187.

(313)—Ss. 17, 49—Document severable in parts—Some parts not requiring registration—Admissibility in evidence—Agreement between mortgagee and mortgagor for managing mortgaged property for remuneration—Registration—*See* MORTGAGE—REDEMPTION, 13 Bom. L.R. 162.

(314)—Ss. 17 and 49—Mortgage with possession—Second mortgage by an unregistered deed to secure a fresh advance—Delivery of property—Necessity for registration—*See* MORTGAGE—REDEMPTION, 11 O.C. 248.

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843) *—continued.*

(315)—Ss. 17, 49—Deed effecting or declaring partition—Registration—*See* PARTITION—GENERAL, 6 Ind. Cas. 346=12 C.L.J. 25.

(316)—Ss. 17, 49—*See* RIGHT OF SUIT—MISCELLANEOUS, 3 M.H.C. 342.

(317)—Ss. 17 and 49—Registration of sale deed in Berar—*See* SALE—GENERAL, 3 N.L.R. 72.

(318)—Ss. 17 and 49—*Aposhnama* setting off one decree against another — Registration—Admissibility in evidence—*See* TRANSFER OF PROPERTY ACT, 1882, s. 118, 11 C.W.N. 342.

(319)— *Ss.* 17 (*b*), 49 (= *Registration Act*, 1877, *s.* 17 (*b*), 49)—*Assignment of mortgage-decree—Evidence, admissibility of deed of assignment in.*—A deed of assignment of a mortgage-decree is not compulsorily registrable, even though the consideration for the assignment is more than Rs. 100, the subject of the assignment (*i.e.*, the decree) not being immoveable property. [*F.*, 12 C.W.N. 625; *Not F.*, 1 P.R. 1906=190 P.L.R. 1905.] A deed of assignment of a mortgage-decree is admissible in evidence, without registration, under s. 49, Act III of 1877. GOUS MAHOMED v. KHAWAS ALI-KHAN, **23 C. 450** (1 B. 267, *Diss.*; 9 A. 108, *R.*)

(320)—*Ss.* 17 (*b*) *and* 49—*Compromise reciting previous agreement—"Declare" meaning of—Admissibility in evidence.*—The word "declare" in s. 17 (*b*) is equivalent to "define" or "authoritatively set forth" and a mere recital of the fact which had already contracted about does not tantamount to a 'declaration' or assignment, etc., of a right to or in immoveable-property. WAZIR ALI v. ASA RAM, **95 P.R. 1894.** [*R.*, 48 P.R. 1905, 27 P.R. 1906=11 P.L.R. 1906; *Cons. & D.*, 71 P.R. 1906=111 P.L.R. 1907.]

(321)—*Ss.* 17 (*d*) *and* 49 (= *Registration Act*, 1877, *s.* 17, *cl.* (*d*), *and s.* 49)—*Agreement for lease — Evidence.* — A document although it purports to be a mere agreement for a lease, does require registration under cl. (*d*) of s. 17 of the Registration Act, 1877, if the agreement in question operated as a present demise, and without such registration is inadmissible in evidence under s. 49 of the Act. The circumstance of the document providing for a *pucka* agreement to be drawn in future, no doubt, may have an important bearing on the question whether an actual demise was intended, but it is not conclusive. The question always depends on the paramount intention of the parties to be gathered from the agreement as a whole. In the present case, the agreement in question dated 8th October, 1882, provided that the lease was to commence from the 1st October—a date already passed,—and that the rent was to commence from that day. It was, therefore, held to operate as a present demise and hence that it could not be used in evidence without registration. PURMANANDAS JIWANDAS v. DHARSEY VIRJI, **10 B. 101.** [*Not F.*, 14 C.W.N. 65, 11 C.L.J. 548; *R.*, 6 Bom. L.R. 690=29 B. 46; *D.*, 13 C.W.N. 326.]

(322)—*Ss.* 17, *cl.* (2), 49 (=*Registration Act*, 1871, *ss.* 17, *cl.* (2), 49) — *Mortgage.* — For the purposes of registration, the value of the interest created by a mortgage of immoveable property is not the amount of the principal, but such amount with the interest thereon payable at the time fixed in the bond. RAJPATI SINGH v. RAM SUKHI KUAR, **2 A. 40** (1 A. 274, *F.*; 2 B. 353, *Diss.*; 1 M. 378, *Differed from*) [*Diss.*, 5 M. 214; *F.*, 2 A. 688.]

(323)—*Ss.* 17 (2, 3) *and* 49 (=*Registration Act*, 1871, *s.* 17, *cls.* 2, 3 *and s.* 49)—*Acknowledgment of receipt of consideration.*—A document acknowledging the receipt of Rs. 100, part of the consideration money, though contemplating the execution, *in futuro*, of a deed of sale of certain immoveable property, operates of itself to create an interest in the property of the value of Rs. 100 and upwards, and, therefore, under cls. 2 and 3 of s. 17 of the Act, requires registration; and cannot be admitted in evidence under s. 49 of the Act, if unregistered, in a suit for compelling the execution of the sale deed. VALAJI ISAJI v. THOMAS, **1 B. 190.** (12 B.H.C. 175, 7 B.H.C. 67, 11 B.L.R. 405, *D.*) [*F.*, 1 B. 197; *Appl.*, 2 B. 489, 5 M. 115; *R.*, 7 B. 310; *D.*, 2 B. 273, 4 B. 126, F.B., 5 C.P.L.R. 102.]

(324)—*Ss.* 17, 49, 18 (=*Registration Act*, 1864, *ss.* 13, 16)—*Lease for more than a year.*—A lease-deed was in the following terms:—"I, P, having taken (premises described) on a monthly rent of one and a half annas, for my personal use as a dwelling, it is agreed that I shall pay the aforesaid rent month by month. Secondly, if I find it necessary to erect any fresh buildings on the aforesaid premises, I shall do so from materials found on the spot at my own expense; the owner of the premises shall have nothing to do therewith. Should I neglect to pay the aforesaid rent, the owner shall be at liberty to realize the same, and have the premises vacated, and at such time I shall have no claim as regards the buildings erected as aforesaid by me, nor shall I raise any objection or excuse thereabout; and if the landlord finds it necessary to have the premises (buildings and land) vacated, he shall give me fifteen days' prior notice. I shall thereupon vacate the premises immediately and pay all such arrears of rent as may then be due without any objection or excuse. I have received back two former leases which I have destroyed. *Held* that the lease was not for a period exceeding a year, and therefore did not require registration. HANSO v. HAR NARAIN, **A.W.N. 1886, 115, F.B.**

(325)—*Ss.* 17 (*h*), 50 (=*Registration Act*, III *of* 1877, *ss.* 17 (*h*), 50)—*Unregistered agreement, reciting an agreement to sell immoveable*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

property—Admissibility—Specific Relief Act, s. 27—Subsequent transferee with knowledge of prior contract—Suit to enforce specific performance.— An unregistered agreement on an one-anna stamp, reciting an agreement to sell immoveable property and acknowledging receipt of earnest money, comes within s. 17 (*h*), Act III of 1877, and is admissible in evidence notwithstanding non-registration. If, in a suit for specific performance, a prior unregistered agreement to sell, coming within s. 17 (*h*), Act III of 1877, is opposed by a later registered sale-deed relating to the same property, the latter deed cannot prevail over the former, if the vendee took his sale-deed with notice of the prior unregistered agreement. HURNANDUN SINGH v. JAWAD ALI, **27 C. 468.** [*R.*, 15 P.R. 1908=27 P.W.R. 1908=97 P.L.R. 1908.]

(326) — *Ss.* 17, 50 (=*Registration Act*, 1877, *ss.* 17, 50)— *Mortgage— Value of mortgage — Deed for purposes of registration — Registered and unregistered documents.—Held* by the majority of the Full Bench (*Straight and Oldfield, JJ., dissenting*)—For the purpose of deciding whether a mortgage of immoveable property is optionally or compulsorily registrable, its value must be considered to be the principal sum secured by it. (3 A. 157, F.B., *Overruled*). *Held*, accordingly, by the Division Bench, that, under s. 50 of the Registration Act, 1877, a document compulsorily registrable under the Registration Act, 1871, which was registered under that Act, had priority, as regards the property comprised in it, over another document relating to the same property, which was optionally registrable under that Act, and was not registered. HABIBULLAH v. NAKCHED RAI, **5 A. 447, F B.=A. W.N. 1883, 87.** [*R.*, 23 M. 105, 4 N.L.R. 90.]

(327) — *Ss.* 17 *and* 50 (=*Registration Act*, 1877, *ss.* 17 *and* 50)—*Registration—Notice— Possession.*—Registration operates only as a constructive notice; this notice, however, does not extend to the unregistered document recited on the registered document. *Per Batty, J.*—(1) Possession amounts to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property without ascertaining the nature of the claim of him in possession, does so at his own risk. (2) The general consensus of opinion of all the High Courts in India is that possession is at least very cogent evidence of notice, which a purchaser cannot with safety disregard; and that s. 50 of the Registration Act, 1877, does not do away with the effect of notice in favour of the registration to which *ceteris paribus* it gives preference. The result of the Bombay decisions is that no purchaser can protect himself merely by registering his document of title, against the title of a person in possession of the subject-matter, and if he ignores that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession is proved to have. In Bombay decisions, the reason for withholding preference from the subsequent registered purchase is based not on the doctrine that registration is constructive notice, for the prior alienation was in most of them unregistered, but upon the long established and undisputed principle that a purchaser is always bound by all the equities of a third party in possession, because possession presupposes title and, therefore, is notice which ought to put a purchaser on enquiry. TAJUDIN v. GOVIND, **5 Bom. L. R. 144=27 B. 452.**

——S 18 (=s. 18 of 1877=s. 18 of 1871=s. 18 of 1866=s. 16 of 1864).

(328)—*S.* 18 (=*Registration Act*, 1864 *s.* 16, *cl.* 7,—"*Deed, bond, contracts or obligation*" *scope of the expression under —Promissory note —Limitation Act* (XIV *of* 1859) *s.* 1, *cl.* 10 —The expression "deed, bond, contracts or obligation" in cl. 7, s. 16 of Act XVI of 1864, is not limited in its application, but includes a promissory note, which must, therefore, be registered. A promissory note, executed at a time when Act XVI of 1864 was in force, is governed, in respect of limitation, by the provisions of cl. 10, s. 1, Act XIV of 1859. THE OFFICIAL ASSIGNEE ON BEHALF OF PEARY CHAND MITTER v. A. B. FRASER, **14 W R. O. C. 51.**

(329)—*S.* 18 (=*Registration Act*, 1866, *s* 18) —*Simple bond—Interest in immoveable property —Collateral security Evidence—Registration* —Where an instrument purports to create an interest in immoveable property only as a collateral security, and is also a simple contract of bond for the payment of the principal debt, and the instrument is sought to be given effect to as a simple contract only, it is admissible in evidence in a suit to recover the debt, though it is unregistered. So far as it is a contract for the payment of money, it is an instrument the registration of which is made optional by s. 18, Act XX of 1866. VELLAYA PADYACHY v. MOORTHY PADYACHY, **4 M. H.C. 174** [*Overruled*, 4 M.H.C. 378, F.B.; *F.*, 6 B.H C. 134, 7 B.H.C 1, 9 C. 520, F.B.; *R.*, 13 M. 281, L.B.R. 1893—1900, 124]

(330)—S. 18—*See* NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES, 6 B.L.R. App. 40=14 W.R.O.C. 51.

(331)—S. 18—*See* NOS. 36, 256 TO 269, 324, *supra*.

(332)—Ss. 18, 19 and 49— *See* PLAINT—AMENDMENT OF PLAINT, 68 P R. 1886.

(333) — *Ss.* 18, 50 (= *Registration Act*, 1866, *s.* 18, *cls.* 1 *and* 2, *and s.* 50) —*Registered instrument and unregistered instrument only optionally registrable—Priority.*—Under s. 50, a registered instrument, the registration of which was compulsory, has no effect against a prior unregistered instrument, the registration of which was optional, being for a sum

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

under Rs. 100. SHAIKH RYASUTULLA v. DOORGA CHURN PAL, **15 B.L.R. 294=24 W.R. 121.** [*F.*, 4 C. 536=3 C.L.R. 434 ; *R.*, 5 C. 336=4 C. L.R. 257, 7 C. 753=10 C.L.R, 129.]

(334)—*Ss.* 18 *and* 50 (=*Registration Act*, 1877, *ss.* 18 (*a*) *and* 50)—*Registered sale-deed—Prior unregistered mortgage—Priority.*—Under ss. 18 (*a*) and 50, a registered sale-deed prevails over the prior unregistered mortgage. ARTHA NAHAKO v. BHAGAWAN NAHAKO, **4 M.L.T. 64.**

——S. 19 (=s. 19 of 1877=s. 19 of 1871=s. 19 of 1866=s. 24 of 1864.)

(335)—*S.* 19 (*d*) (=*Registration Act*, III *of* 1877, *s.* 19, *cl.* (*d*))—*Exemption of certain documents executed by or in favour of Government.*—A letter from the Agent to the Governor-General to the Nawab of Murshidabad announcing the latter's position and income and informing him that he was to have State lands and jewels, *held*, to be exempt from Registration, as it operated as a grant by Government. HASSAN ALI v. CHUTTURPUT SINGH DUGARH, **19 C. 742.** (9 C. 704, *F.*)

(336)—S. 19—*See* Nos. 270, 332, *supra*, and No. 788, *infra.*

——S. 20 (=s. 20 of 1877=s. 20 of 1871=s. 20 of 1866=s. 35 of 1864.)

(336-*a*)—*Ss.* 20, 55, 59, 73 (=*Registration Act*, 1866, *ss.* 20, 60, 67, 84)—*Dispute—Reference to District Court—Denial of receipt of part consideration, no ground for refusal by District Court—One of two instruments describing property by reference to the other—No ground for refusing registration—Question under Act—Intention and not technical forms should be considered—Refusal of executing party to attest apparent alteration of instrument after execution—No ground for refusing registration.*—Where an executing party to a document appears before the registering officer and admits execution, but refuses to sign on the back of the instrument as admitting the execution or do any other act towards its registration, the registering officer cannot, without the order of the District Court under s. 84 of Act XX of 1866, proceed with the registration of the instrument, as the provisions of ss. 60 and 67 could not be complied with. Denial of the receipt of part of the consideration money by the executing party is not a sufficient ground for the District Court refusing registration under s. 84 of the Act. Where two instruments are contained on the same paper, and relate to the same property, and are both presented for, and in all other respects are entitled to, registration, it is not a sufficient ground for refusing registration that in the second document the property is described only by reference to the first. As the Registration Act is applicable generally throughout India, it would not have been the intention of the Legislature that the right to registration should depend in any case upon

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

the use of any formal or technical expressions in the instruments offered for registration; whenever any question arises under the Act as to the nature or effect of any instrument, or the sufficiency of any description contained in it, the Court must endeavour to gather from the words used what the parties intended by them, and give effect to that intention just as if it had been expressed in the most formal and technical manner. Although a discretion is given by s. 20 to the registering officer, the exercise of that discretion is manifestly subject to review by the District Court upon a petition under s. 84, and where there is no suggestion that there has been any improper alteration of the instrument after execution, and the only difficulty arises from the refusal of the executing party to attest an apparent interlineation, blank, erasure or alteration, the Court ought not to refuse registration on that ground. The interlineation does not of itself render the document non-registrable. *In the petition of* T. VENKATASAMI NAIK, **4 M.H.C. 101.**

(337)—*Ss.* 20 *and* 72—*Refusal to register—No appeal.*—If the Sub-Registrar merely refused to take up the document for registration, no appeal will lie to the Registrar against the order. VELAMBAL ACHI v. GOVINDASAMI ODAYAR, **M.W.N. 1912, 452=15 Ind. Cas. 370.** (5 C.L.R. 517, *R.*)

——S. 21 (=s. 21 of 1877=s. 21 of 1871=s. 21 of 1866.)

(338)—*S.* 21 (=*Registration Act*, 1877, *s.* 21)—*Errors in description of the property—Sufficient identification—Registration not vitiated.*—The registration of a document is not vitiated, merely by an error in the description of the property, if the description is sufficient to identify it. PARSOTAM DASS v. PATESRI PARTAB NARAIN SINGH, **11 A.L J. 241=18 Ind. Cas. 923=35 A. 250.** (10 A.L J. 33, *R.*)

(338-*a*)—S. 21—*See* Nos. 267, 271, *supra*, and NO. 788, *infra.*

(339)—*Ss.* 21 *and* 22 (=*Registration Act*, III *of* 1877, *ss.* 21, 22)—*Sufficiency of description of property—Necessity for description of local character—Deed of partition—Necessity for schedule of property.*—The description of property, in order to be sufficient within the meaning of s. 21 of the Registration Act, need not be of a local character ; it is enough if it be sufficient to identify the property. A deed of partition of "family properties" between a father and his sons was presented for registration. The Registrar thought that a schedule of the properties was necessary and required the parties to supply the deficiency. When the schedule was added, one of the sons refused to sign the schedule. He, however, admitted execution of the document. The Registrar having refused registration of the document on the ground that there was not a sufficient description of the properties in it, a suit was brought for compulsory registration thereof

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

Held that the description of the properties as "family property" was sufficient and the instrument by itself without the schedule should have been registered. NARASIMHA NAYANEVARU v. RAMALINGAMA RAO, **10 M. L.J. 104** [*Appl.*, 31 B. 202=11 Bom. L.R. 1321=4 Ind. Cas. 588.]

(340)—*Ss.* 21, 22, 76 (=*Registration Act*, 1877, ss. 21, 22, 76)—*Refusal to register—Suit to enforce registration—"Sufficient to identify the same"*—Jai dad—*Scope of s.* 21—*Letter relating to immoveable property.*—The provisions of s. 21, Registration Act, are positive and imperative, and not merely directory. The object of registering a document is to give notice to the world that a document has been executed and is in force. The object of the statute would be to a great extent nullified, and innocent persons would be exposed to great hardship and loss, if the words could be treated as purely directory. Hence, where a letter purported to transfer immoveable property and was presented as a non-testamentary document for registration, which was refused on the ground that it contained no description of the property "sufficient to identify the same," *held* that the refusal was under the circumstances proper. MAULVI SAYID MAHMUD v. MUHAMMAD ZUBAIR, **6 A.L.J. 627=6 M.L.T. 5 =3 Ind. Cas. 506=31 A. 523.**

(341)—*Ss.* 21, 25, 34, 74, 77 (=*Registration Act*, 1877, ss. 21, 25, 34, 74, 77)—*Document referring to prior document—Both documents whether registrable as one—Exercise of discretion by Registrar under s.* 24, *Court cannot enquire into—Second period for presentation given by s.* 34.—Exhibit A in this case was an agreement of equitable mortgage of lands and exhibit B was an agreement to register A and in case of failure to do so to pay up the amount secured by A. Registration of A was not effected. Document, Exhibit B, was presented for registration subsequent to four, but within eight months from its date and was accepted for registration under s. 24 of the Act. On denial of execution by the defendant, registration was refused as against him. On suit filed under s. 77 of the Registration Act, decree was passed directing registration, and such decree was held not to be erroneous merely because of its not containing the particulars prescribed by s. 21. The agreement Exhibit B was a personal agreement on the part of the signatories to register a certain specified document. It was a mere personal covenant to do a particular act in reference to another document and did not itself constitute a document "relating to immoveable property" within the meaning of s. 21 of the Registration Act. With regard to the objection that the Registrar should not have directed that the document should be accepted for registration after the lapse of four months from its execution without inquiring whether the non-presentation within four months was owing to urgent necessity or unavoidable accident, it was *held* that it was not competent to the Court to inquire, under ss. 74 and 77 of the Act, into the propriety of a direction under s. 24 made by a Registrar that a document shall be accepted for registration. As to the other objection that the plaintiff did not, as required by s. 34 of the Act, appear before the registering officer within the extended time allowed by s. 24, the Court decided that the proviso to s. 34 allows an applicant a further period of four months within which to appear, subject to the conditions set out in the *proviso*. In the result, there was no ground of objection established to the decree so far as it directed registration. With regard to the further direction that Exhibit A was to be copied into the register as an annexure to Exhibit B, it was *held* that if A was in the nature of a schedule or appendix to B, the two documents could be registered as one, but as they were two essentially distinct documents separately stamped and executed to effect different objects, the decree ought not to have directed that Exhibit A should be registered as an annexure to Exhibit B and it should, therefore, be varied to that extent. TULLOKCHAND v. GOKULBHOY, **21 B. 724.** (*Appeal from Fulton, J.*, 21 B. 69.) [*Appl.*, 30 B. 304=7 Bom. L.R. 742; *R.*, 22 B. 849, 21 P.L.R. 1900.]

(342)—*Ss.* 21, 28, 35, 49, 60 (=*Registration Act*, III *of* 1877, ss. 21, 28, 35, 49, 60)—*Registration made in contravention of the Act—Description of property erroneous and misleading.*—*Held*, by a majority of the Full Bench.—Registration made in contravention of the provisions of the Registration Act would be invalid. Non-compliance with the provisions of s. 21, such as description of property, covered by an instrument, so erroneous and misleading as to be insufficient for purposes of identification, and want of territorial jurisdiction in the officer registering the document, will render registration invalid and of no effect. A mere endorsement to the effect that the document was registered could not render the registration valid for the purposes of affecting the immoveable property covered by the instrument. A party, presenting a document for registration, should not be made liable for the mistake of the Sub-Registrar. *Per Petheram, C.J., contra.*—Inasmuch as the document had been registered by the Sub-Registrar of Bhagalpur, who exercised and performed the duties of the Registrar of Bhagalpur, and to whom the Sub-Registrar of Bankura was subordinate, the want of jurisdiction under the circumstances might be regarded as removed; the provisions of s. 28 of the Act being directory only, the registration of the document was valid. The description of the property was in fact sufficient to identify the property. BAIJ NATH TEWARI v. SHEO SAHOY BHAGU, **18 C. 556, F.B.** [*F.*, 29 C. 654=6 C.W.N. 856, L.B.R. 1893—1900, 577; *Appl.*, 1 N.L.R. 112; *R.*, 18 M. 364, 16 C.P.L.R. 141=11 Bom. L.R. 1321; *Diss.*, 1 C.L.J. 126; *D.*, 23 M. 580, 6 C.W.N. 329, 3 C.L.J. 165.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(343)—*Ss* 21, 39, 73 (=*Registration Act*, 1866, *ss.* 21, 40, 84)—*Duty of Court—" The revenue officer in whose jurisdiction the person whose attendance is desired may be," meaning of.*—The only two things which, by s. 21 Act XX of 1866, are absolutely required as conditions without compliance with which registration is prohibited, are 1st, that the instrument shall contain a description of the property sufficient to identify it; and, 2ndly, that if the instrument contains a map or plan, then, a copy or copies of that map or plan shall accompany the instrument when presented for registration. The other provisions of the section are directory only, indicating the intention of the Legislature as to the kind of description ordinarily to be required, but not importing the absolute necessity of strict compliance therewith in order to entitle an instrument to registration, if the description which is given be sufficient to indentify the property. [*R.*, 1 C.L J. 126.] Upon a petition under s. 84 of Act XX of 1866, the Court is bound to ascertain whether the description is sufficient to identify the property, notwithstanding the failure to supply some particular point mentioned either in s. 21 or the rules. It is not necessary that the executing party should attend in Court, pursuant to the notice served upon him under s. 84, in order to authorize the Court to order the registration of the instrument. The Court is not bound under s. 84 to direct registration of the instrument even if satisfied that the requirements of the law have been complied with. But, in the exercise of this discretion, the Court ought not to refuse registration unless very clearly satisfied that the registration will work injustice. The verified statement, in the petition for registration, of the execution of the instrument, is not, when the executing party fails to appear in Court, sufficient proof of the execution, in order that the Court may direct registration. The words in s. 40 of Act XX of 1866, " The Revenue Officer in whose jurisdiction the person whose attendance is desired may be," mean the chief Revenue Officer of the district, *viz.*, the Collector, or, if, in any defined sub-district, a Sub-Collector has all the powers of the Collector, then, in that sub-district, the Sub-Collector. *In the matter of the petition of* NARAINASAMI PILLAI, **4 M.H.C. 91.**

(344)—*Ss.* 21, 48, 49, 51 (=*Registration Act*, III *of* 1877, *ss.* 21, 48, 49, 51)—*Certificate of registration, effect of—Non-observance of provisions of s.* 21—*Rights of third parties how far affected.*—The word " registered " in s. 49 of the Registration Act has reference only to the act of registration by the registration officer. A certificate required by s. 60 renders the document admissible in evidence. The mere fact of registration is not, however, sufficient to cure defects arising from non-observance of the requirements of s. 21, so as to affect property not specifically described and which has passed into the hands of third parties, though, as against the executant of the document, it might be enforceable on the principle *certem est quod certum reddi potest.* Where the cousin of a deceased Hindu executed an agreement in favour of the latter's widow relinquishing in her favour all his rights in the self-acquired property of the deceased, and the agreement was registered in book No. 4 without sufficient description of the property concerned, the purchaser of the property from the cousin was preferred to the purchaser from the widow. NARASAMMA v. SUBBARAYUDU, **18 M. 364.** [*R.*, 16 C.P.L.R. 141; *D.*, 23 M. 580.]

(345)—*Ss.* 21, 60, 88 (=*Registration Act*, III *of* 1877, *ss.* 21, 60, 88)—*Description of property written at foot of document and signed by assignee only—Registrar accepting it and registering it—Effect.*—S. 21 of the Indian Registration Act, 1877, does not particularise where the description shall be contained. Where the description of the property was only given at the foot signed by the assignee, but the Registrar thought that the provisions of the law were sufficiently complied with, and the document was registered and a certificate to that effect was given under s. 60 of the Act, *held* that the error in accepting the document for registration, if error there was, could not be held to invalidate the registration. It was not the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21 or 36 of other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general word " defect in procedure" in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. SHEKH ADAM ISUFBHAI v. JAMNADAS RANCHORDAS, **17 B. 94.** (15 B.L.R. P.C., 228, 11 A. 319, *R.*).

——S. 22 (=s. 22 of 1877=s. 22 of 1871.)

(346)—S. 22—*See* Nos. 339, 340, *supra.*

——S. 23 (=s 23, paras. 1 and 2 of 1877= s. 23 of 1871=ss. 22 and 23 of 1866= ss. 17 to 20 of 1864).

(347)—*S.*23 (=*Registration Act* XVI *of* 1864, *ss.* 15, 18) — *Registration of documents after expiry of period prescribed—Power of Registrar.* —Under Act XVI of 1864, a Registrar could not register a document after the expiry of the time specified in s. 18, whether under a decree of Court or otherwise, except in cases which came under the provisions of s. 15 of that Act. MONMOHINEE DOSSEE v. BISHEN MOYEE DOSSEE, **7 W.R. 112.** [*Appr.*, 10 W. R. 51=1 B.L.R. F.B., 58; *Rel. on*, 5 N.L.R. 70=2 Ind. Cas. 244, 7 B.H.C.O.C. 45, 9 B. H.C. 121.]

(348)—*S.* 23—*Registration of mortgage out of time by altering date—Lessee from executant*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

if may question validity of mortgage registered out of time—Estoppel—Where a mortgage-deed had been presented for registration more than four months after the date of its execution and its registration had been secured by the executant altering the date of the instrument. *Held*, that, even assuming that the deed had been wrongly registered, there being no fraud, the mortgagor would be estopped from taking the objection. *Held*, further, that lessees from the mortgagor who took their leases after the registration of the mortgage are, in the absence of fraud, equally estopped with the mortgagor from taking the objection. GOPAL CHANDRA CHUCKERBUTTY v. SURENDRO KUMAR ROY CHOWDHURY, **16 C.W.N. 585.**

(349)—*S.* 23—*Registration Act*, XVI *of* 1864—*Suit to enforce registration—Presentation for registration in time, necessary to support suit.*—A suit to compel the registration of a deed cannot be maintained in respect of a deed which has not been presented for registration within 4 months from the date of its execution. OOJUL MUNDUL v. HERASUTOOLLAH MUNDUL, **7 W.R. 150.**

(350)—*S.* 23—*Act* XVI *of* 1864, *s.* 17—*Refusal to register deed of sale—Suit to enforce registration when maintainable against vendor—Express condition or contract to register.*—This suit was brought to compel the registration of a deed of sale. The lower Courts held that, as the value of the property was under Rs. 100, registration was not compulsory, and dismissed the suit. The High Court further observed that the law nowhere provides that, if the Registrar, for any cause, refuses to register a document presented for registration under Act XVI of 1864, it is open to the applicant to bring a suit against his vendor to enforce registration, unless there be an express condition in the document itself or any other contract to register. MUSST. SOORNUM BUTTY v. MUSST. BOODHESSUREE, **10 W.R. 313.**

(351)—S. 23—*See* Nos. 272, 273, *supra*, and No. 788, *infra*.

(352)—Ss. 23 and 24—*See* CIV. PRO. CODE, 1859, s. 272, 6 B L.R. 174=14 W.R. 363.

(353)—*Ss.* 23, 24, 34, 71, 76, 73 (=*Registration Act*, VIII *of* 1871, *ss.* 23, 34, 71, 73)—"*Refusal to register*"—*Duty of Registrar.*—S. 34 does not expressly say that in the event of the parties not appearing before the Registrar within the time allowed he is to "refuse to register" the document. It merely says that the document shall not be registered. It is clear, however, that in such a case, when the document has been presented in due time, the registering officer must "refuse to register," just as in cases falling under the latter clauses of s. 35, and must record the reasons for the refusal. The order of refusal should be made at once, as soon as it is apparent that the prescribed time has gone by, and the executing parties have not appeared. The party desiring registration must be taken to have known the time within which registration ought to be completed, and should apply to the Registrar at once, either to register, or refuse to register, so as to enable him within thirty days to take proceedings. *In the matter of the* REGISTRATION ACT, 1871, and *in the matter of* BUTTOBEHARY BANERJEE, **11 B.L.R. 20.** [*Diss.*, 15 C. 538, 16 C. 189.]

(354)—*Ss.* 23, 24, 60, 87, 89 (=*Registration Act*, 1877, *ss.* 23, 60, 87, and 89)—*Certificate of sale, whether compulsorily registrable — Civ. Pro. Code*, 1877, *s.* 316—*Certificate of registration, effect of.*—A sale certificate granted under s. 316 of the Civ. Pro. Code, is not a compulsorily registrable instrument. Although s. 316 of the Civ. Pro. Code, says that the sale certificate shall bear "the date of the confirmation of the sale," that provision cannot alter the *fact* of execution or the time when the certificate is actually executed, which is the starting point from which the four months mentioned in s.23 of the Registration Act must be computed. The certificate of registration is conclusive proof that a document has been registered according to law. HUSAINI BEGAM v. MULO, **5 A. 84=A.W.N. 1882, 183.**

——S. 24 (=s. 23, para 3 of 1877=s. 23 last para of 1871=ss. 22 and 23 last para of 1866).

(355)—S. 24—*See* Nos. 272, 352, 353, 354, *supra* and No. 788, *infra*.

——S. 25 (=s. 24 of 1877=s. 24 of 1871=s. 24 of 1866).

(356)—*S.* 25 (=*Registration Act*, 1877, *s.* 24)—*Registration of deed after time on payment of penalty—Registrar's finding as to circumstances accepted.*—Where the sale-deed in suit was presented for registration within six months of execution, and was registered on payment of a penalty under s. 24 of the Act, the vendor admitting execution, but pleading that only Rs. 10 out of Rs. 1,000 sale consideration had been paid: *Held*, that the effect of s. 24 is to allow registration within 8 months of execution under certain circumstances, and the Registrar's finding, that such circumstances existed, must be accepted; accordingly that the validity of the registration could not be in question in the suit instituted by the vendee nearly five years after registration. KHAIR MUHAMMAD v. ABDUL GHAFFAR KHAN, **44 P.R. 1901.** (10 B.H.C. 98, 93 P.R. 1883, *D.*)

(357)—*S.* 25(=*Registration Act*, 1877, *s.* 24)—*Procedure on acceptance of document for registration—Court not competent to enquire into exercise of discretion by Registrar—Presentation for registration of a document annexed with another—Suit to compel registration.*—The defendant T and another M executed two documents, one of which A secured re-payment of money charg-

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

ed by mortgage on certain immoveable property, and the other, B, was an agreement to register A and, in case of failure to do so, to pay the amount secured by A. Document A was never registered as against defendant T. Document B which was presented for registration more than four months from its date but within eight months, and was accepted for registration under s. 24 of the Registration Act. T appeared but declined to admit execution, and registration was refused as against him. This suit was then filed under s. 77 of the Registration Act praying for a decree directing the document to be registered. Defendants pleaded that the Registrar had acted illegally in accepting A for registration under s. 24 of the Act without making any inquiry as to the ground for the failure to present it within four months. The Court was, however, of opinion that it had no jurisdiction to enquire into the exercise of the Registrar's discretion under s. 24. In this case, the plaintiff when applying to the Registrar alleged that he had failed to present the document within time by reason of unavoidable accident. It was for the Registrar to decide whether he will accept the mere statement of the applicant as sufficient or will make enquiry with a view to verifying that statement, and where the Registrar thinks it proper to accept such statement of the applicant as sufficient, it is not open to the Court to say that his action was *ultra vires.* With regard to the registration of document B it was held that B, being a registrable document of admitted execution, and having been presented and accepted under s. 24, ought to be registered, the document A, which was annexed to it by the use of the word "accompanying" in the agreement, being copied out as an annexure. GOKULBHOY MULCHAND v. TULLOCKCHAND HARNATH, **21 B. 69.** [*R.*, 30 B. 304=Bom. L.R. 742.]

(358)—S 25—*See* Nos. 267, 272, 341, *supra*, and No. 788, *infra.*

(359)—*Ss.* 25 *and* 77 (=*Registration Act*, 1877, *ss.* 24, 77)—*Order under s.* 24 *refusing to accept document of for registration—Suit under s.* 77—*'Refuse to register' and 'refuse to accept for registration' distinction between.*—An order passed by a District Registrar under s. 24 of the Registration Act refusing to direct a document to be accepted for registration is entirely different from an order refusing to register. No suit is maintainable under s. 77 of the Act against an order of refusal under s. 24. Acceptance for registration is not the same as admitting to registration. Refusal to accept is not therefore refusal to register within ss. 76 and 77 of the Act. The condition with which s. 77 begins, *viz.*, "where the Registrar refuses to order the document to be registered" is not one which attaches to refusal to give the direction for which s. 24 makes provision at his discretion. GANGAVA v. SAYAVA, **21 B. 699.** [*R.*, 10 M.L.J. 104, 30 B. 304=7 Bom. L.R. 742.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

——S. 26 (=s. 25 of 1877=s. 25 of 1871).

(360)—S. 26—*See* No. 272, *supra.*

——S. 27 (=s. 27 of 1877=s. 27 of 1871=s. 26 of 1866=s. 20 of 1864).

(361)—*S.* 27 (=*Registration Act*, 1877, *s.* 27)—*Suit, to obtain registration of document, Government, whether necessary party—Jurisdiction of Court—Registration Act* (III *of* 1877), *s.* 27, *decree in suit under, appealability of.*—To a suit under s. 77 of the Registration Act, on the ground of an erroneous order, there is no reason why the Registrar or the Government should be made a party. The order is made against one of the parties interested in the deed and in favour of the other; and the former, being dissatisfied, naturally has, for his adversary, not the officer who adjudged between them, but, the opposite party in the earlier contention. The Registrar or the Government not being a necessary party, the proper *forum* for such a suit is the Court of the lowest competent jurisdiction and not the District Court. A decree in a suit of the above description is appealable. A decree of a Court in a suit is subject to appeal under s. 540 of the Civ. Pro. Code, except in cases where it has been otherwise expressly provided, and, it has been nowhere provided that no appeal shall lie from a decree under s. 77 of the Registration Act. WISHWAMBHAR PANDIT v. PRABHAKAR BHAT, **8 B. 269.** [*R.*, 11 B. 519.]

——S. 28 (=s. 28 of 1877=s. 28 of 1871=s. 29 of 1866=s. 21 of 1864)

(362)—*S.* 28 (=*Registration Act*, 1877, *s.* 28)—*Portion situate in British India and another portion out of British India.*—A person can have his document registered in a district in British India where a portion of the property is situate, although the other portion of the same may be situate outside British India and in the territory of a Native State. GOPAL v. ANNABHAT, **2 Bom.L.R. 608 = 25 B. 50.**

(363)—*S.* 28 (=*Registration Act*, 1877, *s.* 28)—*Registration at a place where a portion only of the property is situate—Validity of registration at a place where the property found not to belong to the executant situate—Fraudulent transfer—Transfer of Property Act* (IV *of* 1882), *s.* 53—*Consideration not a necessary test of* bona fides—*Creditors, deed executed in order to defraud—Intention to defraud makes whole deed inoperative.*—Under the Registration Act, it is not the duty of a registering officer to inquire into the title of the person registering the document. The fact that the deed relates to a property situate within the jurisdiction of the registering officer is enough to give him jurisdiction, and the validity of the document on the ground of registration cannot be questioned on the basis that the executant had no title to the property situate within the jurisdiction of th tering officer. Where a transaction

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

to have been effected with the object of preventing the property from being made available for the claims of the outside creditors, the transaction, even if with consideration, cannot be upheld. The deed, being merely a colourable transaction, cannot be treated as a genuine document, even if a portion of the consideration had been found to have been paid. The deed must, therefore, be set aside in its entirety. In order to ascertain whether a transaction is fraudulent or not, we must look to the dominant or principal motive of the transferee. JANKI BIBI v. BISHESHAR NATH, **7 Ind. Cas. 614.** (24 C. 825, 1 C.W.N. 665, 34 C. 999, 6 C. L.J. 410, 11 C.W.N. 889, 25 B. 202; *F.*, 35 C. 1051, 7 C.L.J. 586, 12 C.W.N. 761, *D.*)

(364)—*S.* 28 (=*Registration Act*, 1877, *s.* 28)—*Transfer of decree — Place of registration of transfer—Objection by judgment-debtor.*—Where the instrument transferring a mortgage decree was registered at a place where a small portion only of the mortgaged property was situate, the judgment-debtor could not object to the transfer, on the ground that the registration was not effected at a place where the substantial portion of the mortgaged property was situate, the matter being one between the transferor and the transferee. GULZARI LAL v. DAYA RAM, **9 A. 46.** (7 A. 590, *Diss.*)

(365)—*S.* 28 (=*Registration Act*, 1877, *s.* 28)—*Registration — Mortgage-bond—Inclusion of property to which mortgagor has no title—Registration not invalid—Mortgage-decree—Interest after decree--Discretion of Court - Interference by Appellate Court.*—Where an item of property, to which the mortgagor has no title, is included in a mortgage-bond, that circumstance is not sufficient to justify a Court in holding that, in fact, there is no such property covered by the deed situated within the jurisdiction of the Sub-Registrar as would give that officer power under the law to register the bond, and that the registration is invalid. (18 C. 556, 16 I.A. 12, 11 A. 136, *R.*) The allowance of interest after the date of the decree is a matter of discretion with the Court; and if the Court has allowed interest at six per cent. per annum and not at the bond rate, after the expiry of the period for payment of the money, it is not right for the Court of appeal to interfere without good and sufficient reasons. BROJA GOPAL MOOKHERJEE v ABINASH CHANDRA BISWAS. **5 Ind. Cas. 127=14 C.W.N. 532.**

(366)—S. 28—*See* JURISDICTION—CAUSES OF JURISDICTION, 7 M.H.C. 176.

(367)—S. 28—*See* Nos. 274, 312, *supra.*

(367-*a*)—*Ss.* 28, 49, 50, 87—*Registration in wrong sub-Registry office—Effect—Validity—Registration—What it means and includes—Object of—Whether intended to give notice to strangers—Provisions of the Act—Breach of—Consequences — Curable defects—S.* 87 *of the Act 'registered'—In accordance with the provisions of the Act—'Duly registered'—Meaning of the terms—Jurisdiction—Facts constituting absence of—Knowledge of both parties of—Estoppel*—Onus *of proof.*—When a document has been accepted for registration, its improper acceptance on the ground of its having been presented by the wrong person or to the wrong Sub-Registry office is not a defect of an essential character, after the Registrar has satisfied himself of the due execution of the document and made the endorsements required by ss. 58 and 59 and does not render the registration invalid. (4 A. 14, 6 C.25, 14 C. 449, 2 I.A. 210, 18 C. 556, 35 C. 845, 34 B 202, 11 A.L.J. 241, 10 A.L.J. 33, 29 C 654, 18 M. 364, 7 A. 590, *R.*) Meaning of the terms 'registered in accordance with the provisions of this act' in s. 49 and 'duly registered' in s. 50 considered. Registration includes the getting made and the making of certain endorsements, making the certificate of registration and the copying of the documents in the register book and the filing of the map or plan if any in Book No. 1. The substantial portion is apparently complete with the making of the certificate of registration. Registration is an act of the Registrar and being an act of an administrative character, any error committed by him may be regarded as an error of procedure. S. 87 may not be sufficient to validate an act of registration violating any express provision of the act prohibiting it in certain circumstances or any conditions expressly laid down as necessary before the act can be done; but there is no reason why it should not cover any defect where there is nothing in the Act indicating that it is regarded as of a radical character making the registration ineffective. The primary object of registration is to check forgery and provide good evidence of the genuineness of written instruments (8 A. 6, 18 C. 556, 2 I.A. 210, *Rel.*) and not to give information to third parties of transactions affecting immoveable properties. Rules for determining as to what should be regarded as the consequence of non-compliance with statutory requirements that something shall be done in a particular manner or in a particular form, without expressly declaring what shall be the consequence of such non-compliance, pointed out. The rule that there can be no estoppel where a statutory requirement is violated, would apply if both parties in the present case were aware that the locality of the property is not within the jurisdiction of the Sub-Registrar to whom the document was presented. Where the jurisdiction of an officer depends on certain facts and the ascertainment of those facts is primarily the duty of one of the parties, there seems to be no reason why he should not be estopped from denying those facts as against one who derives his title from him. No rule of public policy is violated by applying the rule of estoppel in such a case. VEERAPA CHETTY *alias* VELLIAN CHETTY v. KADIRESAN CHETTY, **24 M.L.J. 664=14 M.L.T. 237=M.W.N. 1913, 525.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(368)—*Ss.* 28, 49, 60 (= *Registration Act*, 1877, *ss.* 28, 49, 60)—*Mortgage — Registration of mortgage-deed in district in which the mortgaged property is not situate—Admissibility of document in evidence of money obligation.*—Where a document which purports to have been registered is tendered in evidence, the Court cannot reject it for non-compliance with the provisions of the Registration Law. (Opinion of *Broughton, J.*, in 6 C. 29, *F.*) A mortgagor whose misrepresentation has led to such erroneous registration, cannot, in a suit against him by the mortgagee, be permitted to object to the admissibility of such document, for, such objection would not have been available but for his own wrongful act. HAR SAHAI v. CHUNNI KUAR, **4 A. 14 = A.W.N. 1881, 105.** [*F.*, A.W.N. 1882, 175, 4 A. 384; *R.*, 11 A. 319, F.B., 16 C.P.L.R. 141.]

(369)—*Ss.* 28, 49, 60 (= *Registration Act*, 1871, *ss.* 28, 49)—*Registration made at wrong office—Effect.*—Where a son who had full knowledge of a mortgage-deed and a rent agreement executed by his father and registered in a sub-district office within the local jurisdiction of which the property was not situate, though it was situated in the same district, objected to the admissibility of these documents as they had been registered in contravention of the provisions of s. 28 of the Registration Act (VIII of 1871), the Chief Court held that registration made in good faith should not be treated as invalid merely by reason of the terms of the Registration Act even in some substantial respects not having been complied with; that their registration was not null and void merely by reason of contravention of s. 28 of the Act; and that they were registered documents within the meaning of s. 49 of the Act. KASAMBRI DAS v. KIDARNATH, **67 P.R. 1883.** [*Rel. on*, 44 P.R. 1898; *D.*, 51 P.R. 1886.]

(370)—*Ss.* 28, 49, 60, 87, 38—*Act* XX *of* 1866, *ss.* 17, 36, 49—*Registration of lease deed when executant's representative denied execution—Such deed whether duly registered.*—The registration of a lease-deed by a registering officer in spite of the representative of the executant denying its execution, at the time of registration, is invalid as it contravenes the provisions of s. 36 of the Registration Act. There is a difference between a registered instrument and a duly registered instrument; it would be wrong, and would lead to abuse, which the Act was intended to prevent, to rule that a document which had been improperly registered should have the same effect as one duly registered. MAHOMED ALTAF ALI KHAN v. RAJAH PERTAB SINGH, **5 N.W.P. 91.**

(371)—*Ss.* 28, 61, 65, 66 (= *Registration Act*, VIII *of* 1871, *ss.* 28, 64, 65, 66)—*Where documents should be registered—Publicity.*—Ss. 64, 65 and 66 of the Act contain provisions as to the publicity of the registration of a document relating to immoveable property where the property is situate in more districts than one; and the object of the Legislature in making these provisions appears to be that it should be sufficient under s. 28 of the Act that the registration be made in the place where *some* portion of the property—*not a substantial* portion, but any portion of the property—is situate, leaving it to the office to do the rest. HARI RAM v. SHEODAYAL MAL, **11 A. 136 = 16 I.A. 12 = 5 Sar. 281.**

(372)—*Ss.* 28, 64, 65, 85 (= *Registration Act*, 1877, *ss.* 28, 64, 65, 85)—*Registration, of document comprising properties in several sub-districts.*—A document is not invalid merely because, only a small portion of the property comprised under it is situate in the sub-district where registration has been effected. DALCHAND v. LAHIRI, **1 C.P.L.R. 11.** (7 A. 590, *Diss.*; 1 A. 465, *R.*)

(373)—*Ss.* 28, 87 (= *Registration Act*, 1871, *ss.* 28, 85)—*Registration, place of—"Whole or some portion of the property."*—The object of the Legislature in enacting s. 28 of the Registration Act, 1871, was that the registration of a document should have some reference to the locality of the property to which the document relates; and this would be defeated unless the words, "some portion of the property" in that section are interpreted so as to mean some *substantial* portion, and not merely some portion however small. *Held*, therefore, that a deed of mortgage—of two entire villages and shares in fourteen villages in District A, a village in District B, and an insignificant piece of land measuring 500 square yards in District C, which was registered in the last District, was not properly registered in accordance with the provisions of s. 28 of the Registration Act. *Per Mahmood, J.*—Such irregularity cannot be cured by s. 85 of the Act, which refers only to defects in the appointment or procedure of the registering officer. And while that section is addressed to the registering officer, the imperative provisions of s. 28 are addressed to the parties presenting documents for registration. Therefore, s. 85 of the Act which is intended to cure defects in the appointment or procedure of the registering officer cannot cure irregularities committed under s. 28. SHEO DAYAL MAL v. HARI RAM, **7 A. 590 = A.W.N. 1885, 46.** [*Diss.*, 9 A. 46, 1 C.P.L.R. 11.]

——S. 30 (= s. 30 of 1877 = s. 30 of 1871 = s. 31 of 1866 = s. 32 of 1864).

(374)—S. 30—*See* No. 41, *supra.*

(375)—*Ss.* 30, 71, 72, 73 (= *Registration Act*, 1866, *ss* 32, 82, 83, 84)—*Refusal of Sub-Registrar to register—Appeal.*—Where a document, which a Registrar, had a discretion to receive and register, was tendered for registration to a person S, who was duly officiating for the Sub-Registrar in the absence of the latter, his order of refusal to register was an order passed by him as Sub-Registrar within the meaning of s. 83 of Act XX of 1866 and an appeal

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

against his order lay to the Registrar-General. Even if S's order was properly a refusal to exercise the authority given him by the first part of s. 32, the Act did not give any appeal to the District Court against such a refusal. Nor did such order of refusal fall under the operation of s. 84 and it was also not an order made under s. 82. There was, therefore, no appeal to the District Court. SARKIES v. SANGRAM SINGH, **6 B.L.R. 578, Note=14 W. R. 194.**

(376)—*Ss.* 30, 72, 73 (=*Registration Act*, 1866, s. 32, 83, 84)—*Refusal to register—Jurisdiction—Registrar — Sub-Registrar.*—The proviso in s. 83, Act XX of 1866, applies solely in the case where the Registrar for a district including a presidency town, passes an order on an application which relates to such a portion of his district as is not included in a sub-district. The consequence of this proviso is that the order so passed becomes an order of the Sub-Registrar, and is not within the words of s. 84 which give a right to a person aggrieved by a Registrar's order to apply by petition to the District Court; but in such a case an appeal first lies to the Registrar-General. *Held*, in this case, that, there being no evidence that the premises, the subject of the deed of sale, were situated in a part of Calcutta not formed into a sub-district, the Court would infer that the order was made by the Registrar as Registrar, not as Sub-Registrar. The Registrar was justified in refusing to register the deed, on the ground that the vendor, one of the parties to it, while admitting the execution of the deed, refused to endorse it. *In the matter of* BRAJANATH PYNE AND ARMALA DASI, **3 B.L.R. O C. 60=12 W.R. 386, Note.** (1 B.L.R. F.B. 58, *D.*) [*R.*, 12 W.R. 385, 12 W.R. 560.]

—S. 31 (=s. 31 of 1877=s. 31 of 1871=s. 33 of 1866=s. 65 of 1864.)

(376-*a*)—*Ss.* 31, 32, 52 *and* 87—*Presentation by a person who was not an agent of the executant—Registration invalid—Procedure—Invalid presentation not a question of.*—A mortgage-deed was presented for registration by the husband of a *pardanashin* lady, who was admittedly not a duly authorized agent, to the Sub-Registrar of Tahsil, Bareilly. The Sub-Registrar sent the document to the Departmental Sub-Registrar for its attestation by the executant. The Departmental Sub-Registrar went to the house of the lady and she admitted execution before him. The document was then sent back to the Sub-Registrar of Tahsil, Bareilly, who registered it. *Held* that, as the husband of the lady had no authority to present the document for registration, and as the Departmental Sub-Registrar had no authority to receive the document for registration, there was no valid presentation of the deed, and it had not been validly registered. KHALIL-UD-DIN AHMAD v. BANNI BIBI, **10 A.L.J. 440, F.B.=35 A. 34=17 Ind. Cas. 274.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(377)—*Ss.* 31, 87 (=*Registration Act.* 1871, *ss* 31, 85)—*'Intending to register' meaning of—Registration at residence of party executing, validity of—Irregularity* --In this case, the registration of a document was alleged to be invalid on the ground that the Sub-Registrar allowed it to be presented at the residence of one of the executants, and it was *held* that there was no irregularity whatever, and that, assuming there was, it would be covered by the provisions in s. 85 of the Registration Act VIII of 1871. Under s. 31 of the Act, it is open to the registering officer, on special cause being shown, to attend at the residence of any person *intending to register* a document. The words 'person intending to register' in the above section include as well a party executing the document as the one in whose favour it is executed, and the question of the sufficiency of the 'special cause' for the purposes of the section is one for the registering officer to determine, and his decision on the point cannot be called in question. ISAK MAHAMAD v. BAI KHATIJA, **6 B. 96.**

—S. 32 (=s. 32 of 1877=s. 32 of 1871=s. 34 of 1866=s. 28 of 1864).

(378)—*S.* 32 (=*Registration Act*, 1877, s. 32)—*'Presented' meaning of.*—The word presented has a technical meaning in s. 32 of the Registration Act. Where the executants are 'present' acquiescing in the handing over of the document to the Registrar for registration, no matter by whom the physical act is performed, the document is 'presented' within the meaning of the Act. NATHUMAL v ABDUL WAHID KHAN, **9 A.L.J. 362=14 Ind. Cas. 812=34 A. 355.**

(378-*a*)—*S.* 32—*Preseionntat for registration.*—Where it is shown that, prior to the registration of the document by the duly authorized official, a person, who is competent to present the document for registration, was present before that official assenting to the registration, the requirements of the Registration Act are sufficiently complied with. ATMA RAM v. UGRASAIN, **11 A.L.J 99=35 A. 134=18 Ind. Cas. 697.** (23 A. 233, 10 A.L.J. 510, *R.*)

(378-*b*)—*S.* 32—*Presentation by a servant of the mortgagor in the presence of mortgagor—Presentation valid.*—Where a mortgage-deed is handed over to the Sub-Registrar by a person other than the mortgagor, in the presence of the mortgagor and at the time of registration the mortgagor is present assenting to the registration of the document with full knowledge of what was being done in the office of the Sub-Registrar, *held* that the presentation is a valid presentation within the meaning of s. 32 of the Registration Act. KARTA KISHEN v. HARNARAIN CHAND, **10 A.L.J. 510=17 Ind. Cas. 466=35 A. 72.** (34 A. 355, *F.*; 23 A. 233, *D.*; 34 A. 331, *Not F.*)

(379)—*S.* 32 (=*Registration Act*, 1877, s. 32)—*Document left with defendant—Suit whether*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

maintainable to compel registration—Instrument to be registered inadmissible to prove contract.—The document whose registration was sought to be obtained in this suit was an agreement or *kabuliyat* passed by the plaintiff by which he agreed to take certain premises of the defendants on lease on certain terms. It was signed by the plaintiff alone and given by him to the defendants. It was argued, for the plaintiff, that the defendants were bound by s. 32 of the Registration Act to lodge the document for registration, but it was held that that section only empowers certain persons to present documents for registration, on the assumption that the documents are in their possession or under their control at the time, and imposes no obligation on any person to produce a document for registration. It was further contended that, as the object of the suit was to compel registration, the unregistered instrument of agreement could be given in evidence to prove the contract between the parties, but it was held that, as the document was sought to be given in evidence not for a collateral purpose but to establish the contract of lease itself, it could not be received or used as evidence for the purpose of establishing the contract between the parties in which, as such, the plaintiff was interested, and which he was, therefore, entitled to have registered. HURJIVANIRJI v. JAMSETJI NOWROJI, **9 B. 63.** [*R.*, 11 B. 691 ; *D.*, 17 M. 456=4 M.L.J. 198, F.B]

(380)—*S.* 32—*Act* VIII *of* 1871, *s.* 34—*Execution of document by agent—Appearance before registering officer—Agreement to let—Execution by agent—Necessity for signature of principal.*—Where a document was executed by an agent on behalf of his principal, it is sufficient that the agent appears before the registering officer to acknowledge execution and it is not necessary that the principal should appear. Where an agreement to let is executed by an agent, there is no necessity for the signature, of the principal to the agreement. A valid agreement to let is created even without the principal's signature. BISSENDOYAL AND HURDOYAL v. FERDINAND SCHLÆPFER, **22 W.R. 68.**

(380-*a*)—S. 32—*See* NO. 376-*a*, *supra.*

(381)—*Ss.* 32, 33—"*Presented.*"—Where a lady, the executant of a bond, went herself to the Registration office in a *doli*, when the document was handed over to the Registrar by her own father who held no power-of-attorney, duly authenticated under s. 33 of the Act, and she then and there admitted execution and receipt of consideration ; *held*, that the presentation of the document so made amounted to a proper presentation within the meaning of s. 32. WILAITI BEGAM v. FAZAL HUSSAIN KHAN, **9 A.L.J. 148=13 Ind. Cas. 961.**

(382)—*Ss.*32, 33, 60, 87 (= *Registration Act of* 1877, *ss.* 32, 33, 60 *and* 87)—*Registration*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

of document by duly authorized agent—Registration of document, defect of procedure in—Decree duly registered under Registration Act, limitation for application for execution of—Limitation Act, sch. II, *art.* 179 (6)—*Execution of decree.*—In a suit brought by R. S. for money lent to the defendants a decree was passed on the 10th April 1889, which directed that the defendants should pay the plaintiff the decretal money in twenty annual instalments with interest on the same, and that in case of default in payment of any instalment or the interests due thereon the plaintiff should bring to sale certain immoveable property and recover the whole amount due to him etc., etc. Under the compromise of a dispute relating to the estate of R S. One R became the owner of the decree of which she made a gift to the appellant. The appellant applied for execution of the decree on the 27th April 1900. He alleged that default was first made in payment of an annual instalment on the 10th April 1896, but he also alleged that as a certified copy of the decree had been registered, the period of limitation for the application was under art. 179 (6) sch. ii, Indian Limitation Act, 6 years, which began to run from the 10th April 1896. He produced a certified copy of the decree which purported to have been registered on the 2nd July 1889. It bore on it the certificate referred to in s. 60 of Act III of 1877 which was in these terms :—"This document was presented in the office of the Sub-Registrar of Unao on 2nd July 1889.....I have satisfied myself as to the execution of this document, namely, copy of decree prepared in the Court of the Subordinate Judge of Unao. Therefore it is registered." The copy was presented for registration under a power-of-attorney. It was not disputed that the copy of the decree was presented for registration by an agent of R.S. named S.B. under a general power-of-attorney, dated the 31st Janaury 1880, which was not executed before and authenticated by the Registrar, or Sub-Registrar within whose district or sub-district R.S. resided, as required by s. 33 of the Registration Act (III of 1877). The Court of first instance held the decree to have been duly registered, regard being had to the provisions of s. 87 of Act III of 1877. The District Judge held that the registration of the document was invalid. *Held*, that the persons legally entitled to present a document for registration, the persons "having title" to move the Registrar, are the persons specified in s. 32 of Act III of 1877, and no others. The agent of the persons mentioned in s. 32, if he is not duly authorised by a power-of-attorney, such as s. 33 declares shall alone be recognized, is not a person legally entitled to present the document for registration or a person "having title" to move the Registrar. It is the circumstance that he is the particular kind of agent described in s. 32, which entitled him to present the document for registration, and not the

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

mere fact that he is an agent. *Held*, therefore, that S.B. was not a person legally entitled to move the officer, who registered the copy of the decree, to register it; that on the presentation by him of the copy to be registered, the Registrar could not legally exercise his jurisdiction; that the registration on such a presentation of the document could not be deemed to be mere defect in the registering officer's procedure which was covered by s. 87, but was invalid; that the document could not therefore be deemed to be registered within the meaning of art. 179 of the Limitation Act; and that the period of limitation for the application for the execution was three years. ATAL BIHARI LAL v. HIWANCHAL SINGH, **6 O.C. 9.**

(383)—*Ss.* 32, 33, 87 (= *Registration Act*, 1877, *ss.* 32, 33, 87)—*Mortgage bonds—Presentation for registration by general attorney unauthorized for the purpose. Presence of executants at registration—Validity of registration.*—Two mortgage deeds were executed in 1882 and 1892 respectively. The deed of 1882 was presented for registration by Nathu Mal who was described as the general attorney of the mortgagee. The deed of 1892 was presented by Maula Baksh who was described as the *karinda* of the mortgagors. A search of the register of powers of attorney from 1878 to 1886 resulted in the discovery of a power of attorney in favour of Nathu Mal dated a few days before deed of 1882, which, however, did not authorise him to present documents for registration. There was no search of the register of powers of attorney from 1886 to 1892. The executants of both deeds attended the registration office when the document were registered but it was not proved that they were present when the documents were presented. *Held*, that the presumption in favour of the validity of the registration proceedings had been rebutted in the case of the document of 1882, but that, as there was no proof of any search having been made for powers of attorney between 1886 and 1892, the presumption in favour of the validity of the proceedings must prevail in the case of the document of 1892. The provisions of ss. 32 and 33 of the Registration Act of 1877 are not open to the lax interpretation that it does not really matter by whom the document is presented for registration, provided the executan appears before the Registering Officer and admits execution, and the provisions of s. 87 of the Act cannot be invoked in aid of the validation of registration proceedings done in violation of the express provisions of ss. 32 and 33. JAMBU PRASAD v. AFTAB ALI KHAN, **9 A.L.J. 420 = 34 A. 331 = 15 Ind. Cas 881.**

(384)—*Ss.* 32, 33, 87 (= *Registration Act*, 1877, *ss.* 32, 33 *and* 87)—*Validity of registration—Power of attorney—Authority of registering officer.*—One Daulat Ram, after selling certain immoveable property to Mussammat Ram Bai, the mother of the plaintiff, on the 6th August 1900, sold the same property again on the 12th August, 1900, to the defendant. The latter sale-deed was duly registered on the 13th August, 1900 and on the same day, the sale-deed of the 6th August, 1900, was presented for registration by a pleader acting under a power of attorney from Mussammat Ram Bai. The power of attorney admittedly was not executed or authenticated in accordnce with the provisions of s. 33 of the Registration Act. The Registering Officer, however, took no notice of the defect; and after summoning Daulat Ram, who admitted execution, registered the sale-deed of the 6th August on the 17th November 1900. *Held* that the document of the 6th August had not been legally registered. The terms of ss. 32 and 33 of the Registration Act are imperative and proper presentation by an authorised agent is an indispensible foundation of the registering officer's jurisdiction; nor was the error of the Sub-Registrar a mere defect in procedure that could be cured by s. 87 of the Registration Act or by the fact that the executant, when summoned by the registering officer, consented to the registration of the sale deed of the 6th August. ISHRI PARSHAD v. BAIJNATH, **A.W.N. 1906, 195 = 3 A.L.J. 743.**

(385)—*Ss.* 32, 34, 87 (= *Registration Act*, 1877, *ss.* 32, 34, 87)—*Jurisdiction or power of Registrar necessity to invoke—Presentation for registration by one not entitled to present it—Not a mere defect In procedure—No power to register—Deed invalid.*—A registrar has no power or jurisdiction to register a deed unless he is moved by some person entitled to present it for registration under s. 32 of Act III of 1877, *i.e.*, by some person having a direct relationship to the deed. A person holding a general power of attorney from the deceased executant of the deed is not entitled to present it for registration after the death of the executant. [*Appl.*, 28 A. 707 = A.W.N. 1906, 195, = 3 A.L.J. 743; *R.*, 26 A. 57, 5 C.L.J. 188, 13 C.W.N. 722; *D.*, 30 C. 265.] The absence of any party legally entitled to present a deed for registration is not merely a defect in procedure falling under s. 87 of Act III of 1877, but goes to the jurisdiction of the Registrar, and renders the deed invalid. MST MUJIB-UN NISA v. ABDUL RAHIM, **5 C.W.N. 177 = 28 I.A. 15 = 23 A. 233, P.C. = 11 M.L.J. 58 = 3 Bom. L.R. 114 = 7 Sar. 829.** [*R.*, 13 C.W.N. 722.]

(386 & 387)—*Ss.* 32, 73, 74, 76 *and* 77 (*Registration Act*, 1877, *ss.* 32, 73, 74, 76 *and* 77)—*Registration—Refusal to register by Sub-Registrar on the ground of denial of execution—Refusal by Registrar to direct registration, without making inquiry—Suit to enforce registration, maintainability of.*—*Held*, that all that is necessary to establish, in order to maintain a suit under s. 77 of the Registration Act, is a refusal to register by a Sub-Registrar, an application to the Registrar within time, and a refusal by him. *Held*, further, that the fact that the Registrar has not held a full enquiry under s. 73 or has taken a wrong view of the law

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843) —*continued.*

when holding an inquiry under that section does not bar the suit PARTIT SINGH v. RAM SINGH, **11 O.C. 353.** (24 A. 402, *R.*)

——S. 33 (=s. 33 of 1877=s. 33 of 1871=s. 35 of 1866=s. 28 of 1864).

(388, 389)—*S.* 33 (=*Registration Act*, 1877, *s.* 33)—*Power of attorney - Not executed before the Sub Registrar -Authentication - Presentation of document by the attorney—Validity of such presentation.*—A *purdanashin* lady executed a power of attorney and signed it before its presentation to the Sub-Registrar. The Sub-Registrar went to her house, satisfied himself that she had voluntarily executed it and authenticated the document by a certificate to the effect that he had so satisfied himself. *Held* that the requirements of s. 33, Registration Act, were carried out. *Held*, further the presentation of a mortgage-deed for registration by the agent, who acted under such a power of attorney, was a valid presentation. CHHUTTAN LAL v. SHIAM PARSHAD, **7 A.L.J. 157=32 A. 179=5 Ind. Cas. 766.**

(390)—*S.* 33 (=*Registration Act*, 1877, *s.* 33) (*a*)—"*Reside,*" *meaning of—Civ. Pro. Code*, *s.* 17, *Expl.* I.—The meaning of the word "reside" in s 33, cl. (*a*) of Act III of 1877 may be taken to be similar to the meaning given to the same word in s. 17, explanation I, of the Code of Civil Procedure and must be distinguished from the meaning of the words "domicile or domicil". RAM KUBER v. HAR CHARAN, **A.W.N. 1896, 170.** (A.W.N. 1892, 155, *R.*)

(391)—*S.* 33 (*a*)—*Power of attorney for registration of document—Stamp -Act* XVIII *of* 1869, *sch.* II, *art.* 13—*Art.* VIII *of* 1871, *s.* 33 (*a*).—For a power of attorney for registration of a document in a Registration Office, a stamp of 8 annas is sufficient under art. 13, sch. II of the General Stamp Act, (XVIII of 1869. KESHAV KASINATH, *In re*, **9 B.H.C. 43.**

(392)—S. 33—*See* BUDDHIST LAW—ALIENATION, L.B.R. 1893—1900, 37.

(392-*a*)—S. 33 — *See* NOS. 381 to 384, *supra.*

(393)—*Ss.* 33, 49, 60, 87 (=*Registration Act*, 1866, *ss.* 35 (*c*), 49, 68, 88)—*Registration—Presentation of document by agent under defective power of attorney—Validity of registration.*—Where a document bore the certificate required by s. 68 of Act XX of 1866, showing that it had been registered, *held*, that it was to be treated as a registered document, although the person who presented it for registration was an agent holding a power of attorney not executed and authenticated as required by law, and therefore not recognizable under that Act for the purposes of s. 34. (15 B.L.R. 228=L.R. 2 I.A. 210=24 W.R. 75 and 1 A. 465=L.R. 4 I. A. 166, *R.*) A person who is himself responsible for any defect in the registration of

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

a document cannot be allowed to object to the validity of its registration. IKBAL BEGAM v. SHAM SUNDAR, **4 A. 384.** (4 A. 14, *F.*) [*R.*, 11 A. 319, 6 O.C. 9, F.B., 26 A. 57=23 A.W.N. 195.]

——S 34 (=s. 34 of 1877=s. 34 of 1871=s. 36 of 1866=s. 29 of 1864.)

(394)—*S* 34 (=*Registration Act*, 1877, *s.* 34)—*Registrar refusing to register owing to non-presentation of document within four months allowed by law -Remedy -Suit for execution of fresh document.*—When the Registrar refuses registration of a document under s. 34 of the Registration Act on the ground that it was not presented for registration within the four months allowed by law, a suit to compel the registration of the original document on account of the refusal of the Registrar to register it would lie, but a suit for the execution of a fresh document is not maintainable. PALNI GOUNDAN v. PARAMASIVA GOUNDAN, **6 M.L.J. 263.** (16 M. 341, *F.*)

(395)—*S.* 34—*Certificate of registration—Irregular presentation -Effect.*—Where a document bears the certificate that it has been registered, an irregularity of procedure in registration, such as the presentation of the document by an unauthorised person, or registration taking place in the absence of the executant, or failure to conform to the provisions of this section, will not render the registration invalid and the document inadmissible in evidence. BHAGAT SINGH v. GAUHAR, **77 P.R. 1890.** (15 B.L.R. 228, *F.*)

(396)—S. 34—*See* NOS. 273, 341, 353, 385, *supra.*

(397)—*Ss.* 34, 35 (=*Registration Act*, 1866, *s.* 36)—*Registrar, duty of.*—The duty of the Registrar when an instrument is presented at the proper Registration Office, by any person executing or claiming under the same is clearly stated in the 36th section. Thus, if the parties to a deed appear in person before the Registrar, he has simply to ascertain whether the deed has been executed by the persons by whom it purports to have been executed. The language of s. 36 is distinctly imperative and leaves no option whatever to the Registrar. The Registrar has no legal training to enable him to deal judicially with the equities which may arise as between a party claiming to have a deed registered, and one who, having executed the deed, either denies his solemn admission therein contained or contends that he ought not to be bound by the deed till something is done by the opposite party. Under Act XX of 1866, a Registrar has no power to refuse to register a deed, on the ground that the full consideration therein mentioned has not been paid. *In the matter of* BRINDABAN CHANDRA SHAW, **1 B L.R. O.C. 47.** (1 Ind. Jur. 240, *F.*) [*R.*, 17 P.R.Cr. 1871; *D.*, 1 C.L.J. 126.]

(398)—*Ss.* 34, 35 (=*Registration Act*, VIII *of* 1871, *ss.* 34, 35—*Registration of sale-deed when*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843) *continued.*

one executant does not admit its execution—Sale-deed whether admissible as evidence of sale transaction.—Unless a deed be registered in accordance with the substantial provisions of the law of registration, it must be regarded as unregistered, though it may in fact have been improperly admitted to registration. A deed of sale which has not been registered according to law cannot be received in evidence of the sale transaction therein set forth, and a suit brought to enforce such sale is not maintainable. A sale-deed purporting to have been executed by three persons, was presented for registration. Only two of these persons appeared and admitted execution, and stated that the document had been executed without the knowledge or authority of the third party. *Held* with reference to the provisions of ss. 34 and 35 of the Registration Act VIII of 1871, that the registering officer was not warranted in registering it. BAIJNATH v. MAHOMED IRADAT, **7 N.W.P. 185.**

(399)—*Ss* 34, 35 (=*Registration Act*, 1866, *s.* 36)—*Act* X *of* 1859, *s.* 105—*Sale of under-tenure—Fraud—Registration—Refusal to register.*—Plaintiff having purchased at an execution sale the right, title and interest of tenant in an *istemrari jote*, obtained from the zemindar a pottah which he sought to register according to law. The zemindar appeared at the Registry Office and admitted the execution of the pottah but did not assent to its being registered, whereupon the Registering Officer withheld registration. Afterwards the zemindar sued the sold-out tenant for arrears of rent, obtained an *ex parte* decree and in execution sold and bought the tenure. He was then put in possession notwithstanding the protest of the plaintiff, who now sued to be restored to possession. *Held*, that it was the duty of the Registering Officer to register the pottah notwithstanding the executant's refusal of consent. *Held*, also that the zemindar took nothing by his purchase and was bound to give way to a *bona fide* purchaser. MOJAN MOLLO v. DULA GHAZI KULAN, **12 B.L.R. 492, Note.**

(400)—*Ss.* 34, 35, 71 (=*Registration Act*, 1866, *ss.* 36, 82)—*Improper registration—Suit for enforcement of deed—Procedure.*—Where a deed was improperly registered with reference to the provision of s. 36, Act XX of 1866, a suit for the enforcement of the deed was maintainable, and, as registration had not been refused under s. 82, the procedure prescribed in the sections following was not possible. UNMOLE SINGH v. RAM BHUNJUN MISSER, **3 Agra 407.**

(401)—*Ss.* 34, 77 (=*Registration Act*, 1877, *ss.* 34, 77)—*Suit in Civil Court for registration of document—Maintainability.*—S. 34 of the Registration Act is expressly subject to s. 77, which latter section it is that enables the Civil Court to direct registration of a document. And s. 77 does not provide any time within which parties are to appear to admit execution. To maintain a suit under s. 77, it is only necessary that there must be a refusal by the Sub-Registrar to register, an appeal within time to the Registrar and a refusal by him, and a suit within one month from the date of the Registrar's order refusing registration. The non attendance of the executing party within four or eight months is not fatal to a suit in the Civil Court under s. 77, and registration can be made after eight months. SHAMA CHARAN DAS v. JOYENOOLAH, **17 C. 750.** (3 A. 397, 9 C. 150 and 9 C. 851, *Considered.*) [*F.*, 15 C. 538; *Rel. on.*, 16 C. 189; *R.*, 18 M. 255, 24 A. 402=A.W.N. 1902, 99.]

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(402)—*Ss.* 34, 77 (=*Registration Act*, 1877, *ss.* 34, 77)—*Limitation for registration after acceptance by registering officer.*—Under the Registration Act, there is no time fixed for registering an instrument presented and accepted for registration, though the instrument must necessarily be presented for registration within a prescribed time from its execution. SATCOURIE PYNE v. LUCKEY NARAIN KHETTORY, **15 C. 538.** (15 B.L.R. 228, 11 C. 750, *F.*; 11 B.L.R. 20, *Not F.*) [*R.*, 5 M.L.J. 29, 18 M. 255.]

(403)—*Ss* 34 *and* 87—*Registration contrary to s.* 34 *of the Registration Act, not void—Registration Act, s.* 87, *defect in procedure cured by.*—*Held*, that the registration of a document contrary to the strict provisions of s. 34 of the Registration Act, is not *ipso facto* void. Failure to comply with the provisions of that section may amount to no more than a mere defect in procedure which is cured by s. 87 of the Act. RAMJI MAL v. SAIYED WAZIR HUSAIN AND SAIYED AHMAD ALI, **14 O.C. 207=11 Ind. Cas 925.** (24 W.R. 75, 1 A. 465, 23 A. 233, 93 P.R. 1883, *R.*)

——S. 35 (=s. 35 of 1877=s 35 of 1871=s. 36 of 1866=s. 29 of 1864.)

(404)—*S.* 35 (=*Registration Act*, 1877, *s.* 35) *—Gift to wife—Registration by the donor himself, if necessary—Admission of execution by wife as 'donors' representative.*—A Hindu executed a deed of gift in favour of his wife and died and the deed was subsequently registered at the instance of the widow. *Held*, the widow being entitled in the circumstances of the case to letters of administration to the estate of the donor, was *prima facie* qualified to admit execution of the document as his "representative" within the meaning of s. 35 of the Act, the fact, that she herself was the donee under the document being immaterial. BHABATOSH BANERJEE v. SHEIKH SOLEMAN, **10 C.W.N. 717=33 C. 584=4 C.L.J. 340** (23 M. 580, *R.*)

(405)—*S.* 35 (=*Registration Act*, 1877, *s.* 35) *—Registration of document as against person denying execution—Admissibility in evidence.*—The registration of a document by the Sub-Registrar as against a person denying execution thereof, is *ultra vires* and illegal. The document cannot be admitted in evidence as against

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

the party denying execution. RAZI-UN-NISSA v. SABIR HUSSAIN, **26 A. 57=A.W N. 1903, 195.** (1 A. 465, 25 A. 337, 23 A. 233, *R.*)

(406)—*S.* 35 — *Admission of execution by representatives of donor—Error of registering officer in procedure, registration not rendered invalid by.*—On the plaintiff's contention that the deed of gift relied on by the defendant was not duly registered and therefore inadmissible in evidence, because all the three sons by the deceased donor and not one of them only should have admitted the execution before the registering officer and s. 60 could only apply and render documents admissible in evidence when the terms of s. 35 had been complied with, it was *held* that assuming that the three sons should have joined in admitting the execution of the document and that the registering officer was in error in considering the only son that appeared as sufficiently representing the deceased donor, such error and the consequent non-compliance with the provisions of s. 35 constituted only a defect of procedure in the course of registration which was not therefore rendered invalid on that account. PAKRAN v. KUNHAMMED, **23 M. 580.** [*R.*, 33 C. 584=10 C.W.N. 717=4 C.L J. 340, 13 C.W.N. 722.]

(407)—*S.* 35—*Patta—Registration—Act* XX *of* 1866, *s.* 36—*Consent.*—Under s. 36 of Act XX of 1866, it is the duty of the Registering Officer to register a patta (the execution whereof is admitted), whether the executant asks or consents to it or not. MAGON MALLO v. DOOLA GAZEE KOOLAN, **19 W.R. 198.**

(408)—*S.* 35 (=*Registration Act*, 1877, *s.* 35)—*Mortgage-bond executed by major son and father for himself and minor son—Registration on admission of executants, validity of, as against minor son's share.*—The mortgage-bond sued on in this case had been executed by a Hindu father for himself and as guardian and next friend of a minor son of his, and by his adult son and registered on the admission of the two executants. The fact of the debt was not disputed and there was no allegation that the debt was incurred for any purpose which would exempt the minor son from the pious obligation of paying it. There was no such defect in the registration of the mortgage-deed as could prevent its affecting the share of the minor son as well, and the mortgagee was therefore held entitled to a decree for sale of the whole of the property mortgaged under the deed. KESHO DEO v. HARI DAS, **21 A. 281 F.B.=A.W.N. 1899, 59.**

(409)—*S.* 35 (= *Registration Act*, 1871, s. 35)—*Construction—Improper registration—Effect of.*—The words of the section, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed, which purports to be executed by several persons, if any one of these persons deny the execution or appears to be under any disability; such a construction, however, would cause great

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

difficulty and injustice, which it cannot be supposed the Legislature contemplated; and would be inconsistent with the language and tenor of the rest of the Act. The words of the section, must, therefore, be read distributively, and be construed to mean that the registering officer shall refuse to register the document quoad the persons, who deny the execution of the deed, and quoad any persons, who appear to be a minor, an idiot or a lunatic: There appear to be no reason for extending the clause further than this, so as to destroy the operation of the deed as regards those, who admit the execution and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso to the 23rd section of the Act shows that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it. [*Appl.*, 5 A. 599=3 A W.N. 155; *R.*, 8 C. 597, F.B., 26 A. 57=23 A.W.N. 195, 11 A. 319, 18 M. 364, 21 A. 281, F.B.=19 A.W.N. 59, 6 C.W. N. 329.] The fact that some of the provisions of the Registration Act have not been complied with, does not render the registration of a document invalid. MUHAMMAD EWAZ v. BIRJ LAL, **1 A. 465, P.C.=4 I.A. 166=3 Sar. 735.** (15 B.L.R. 228=2 I.A. 210=24 W.R. 75, *R. & Appr.*; N.W.P. 1875, p. 185, *R.*) [*Appl.*, 13 B. 449, 18 C. 556, F.B., 23 M. 580; *D.*, 7 A. 590, 23 A. 233, P.C., 5 C.L.J. 188; *R.*, 6 B. 96, 4 A. 384, 1 C.P.L R. 11.]

(410)—*S.* 35 (=*Registration Act*, 1877, *s.* 35)—*Execution of bond by father on minor son's behalf—Registration of bond without minor being represented—Effect on minor's rights in property.*—Where, in the case of a bond executed by a father on behalf of his minor son, the minor was not represented on the registration of the bond, such bond could not affect the minor's rights or interests in the property comprised in it. SHANKAR DAS v. JOGRAJ, SINGH, **5 A. 599=A W.N. 1883, 155.** (1 A. 465, P.C.=4 I. A. 166, *R.*) [*Overruled*, 21 A. 281, F.B.=A. W.N. 1899, 59.]

(411)—*S.* 35 (=*Registration Act*, 1877, *s.* 35)—*Object.*—The object of s. 35 of the Registration Act is that, if the registration authorities refuse to register on the ground that the executant is a minor, the question of minority may at once be brought into a Civil Court and there determined. CHUNEE MUL JOHARY v. BROJO NATH ROY CHOWDHRY, **8 C. 967=11 C.L.R. 315.**

(412)—*S.* 35—*Party applying for registration—Compliance with s.* 29 *of Act* XVI *of* 1864—*Registrar bound to register on—Regular suit to be maintained for compelling Registrar to register*—The Registrar to whom a deed is presented for registration has nothing whatever to do with its recitals or its possible operation as regards third parties who are not parties to it. Where he has no doubt that the instrument has really been executed by those by whom it purports to have been executed, it is clearly his

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

duty to register it. The High Court therefore directed the Registrar to register the deed if the parties had complied with the provisions of s. 29 of Act XVI of 1864. By the express words of s. 15 of Act XVI of 1864, "a regular suit" must be brought in order to compel a Registrar to register. Observing that the lower appellate Court was wrong in having proceeded with the matter as a miscellaneous application, the High Court treated the matter as it had come before it on special appeal in the regular course. MUTUKDHAREE LAL v. SHAIK FUZUL HOSSEIN, **6 W.R. Mis. 131.** [*D.*, 1 C.L.J. 126.]

(413)—S. 35—*See* MINOR—CONTRACTS BY MINORS, 21 C. 872.

(414)—S. 35—*See* NOS. 342, 397 to 400, *supra* and NOS. 7, 88, *infra.*

(415)—*Ss.* 35, 40, 41 (=*Registration Act*, 1877, *ss.* 35, 40, 41)—*Presentation of will for registration after death of testator—Inquiry as to disability of testator.*—Where a will is presented for registration after the death of the testator, the rules laid down in s. 35 of the Act for an enquiry as to the testator's minority or sanity do not apply. ARUMUGAM PILLAI v. ARUNACHELAM PILLAI, **20 M. 254.**

(416)—*Ss.* 35, 73, 74, 75, 87 (=*Registration Act*, 1877, *ss.* 35, 73, 74, 75 *and* 87)—*Registration of—Document under orders of District Registrar, time for presentation, extension of—Procedure, defect of—Registration after fixed period, effect of—Indian Limitation Act* (XV *of* 1877), *s.* 5, *if applies to Registration Act—Registration, invalidity of, may be impeached by a person interested, though no party to the deed.*—The Registering officer has no jurisdiction to register a document, presented after the lapse of thirty days from the date of the order passed by the District Registrar, under the first paragraph of s 75 of the Registration Act, even if the time for such presentation is extended by a subsequent order of the District Registrar. It is not a mere matter of procedure. A document, registered after the said period of thirty days, is not validly registered, and creates no title. (2 I. A. 210=15 B.L.R. 228, 4 I. A. 166=11 A. 465, *D.*; 23 A. 233, *R.*) The order of the District Registrar, directing the registration of a document, after the lapse of thirty days from the date of the order passed by him under the first paragraph of s. 75 of the Registration Act, is *ultra vires.* S. 5 of the Limitation Act has no application to such a case, and time for registration cannot be extended under the section. Where a person is affected by a deed which he impeaches as not duly registered, it is open to him to take the objection, although he was no party to the deed. BABAN SAHAI v. UDIT NARAIN *alias* NAND KISHORE LAL, **5 C.L.J. 188.** (32 I. A. 113=27 A. 217, *D.*)

(417)—*Ss.* 35, 73, 76, 77 (=*Registration Act*, 1877, *ss.* 35, 73, 76, 77)—*Denial of execution, meaning of—Sub-Registrar exercising Registrar's powers.*—The case of an executant not appearing in obedience to the summons of a Sub-Registrar to admit execution, is tantamount to denial of execution, within the meaning of ss. 35 and 73 of the Registration Act. (11 B. 691, 5 C. 445, 16 C. 189, *R.*) Where a special Sub-Registrar, exercising the functions of a Registrar, refuses registration on the ground of the executant's non-appearance within eight months to admit execution, his order of refusal will be tantamount to the order of the Registrar, and a suit will lie to compel registration under s. 77, Registration Act. KUDRATHI BEGUM v. NAJIBUNNESSA, **25 C. 93.** [*F.*, 29 A. 284 = A.W.N. 1907, 46=4 A.L.J. 171.]

(418)—*Ss.* 35, 75, 77 (=*Registration Act*, 1877, *ss.* 36, 75 *and* 77)—*Contract of sale followed by conveyance—Suit to enforce such conveyance without resort to procedure under Registration Act.*—Where a contract of sale is followed by a conveyance, it is not incumbent on the vendee to take steps under the Registration Act to compel the registration of the conveyance, before suing in the Civil Court for such registration. The sections of the Registration Act, relating to procedure, to be followed for the registration of documents, are merely permissive, and do not exclude a suit for the enforcement of a contract, which includes an obligation to register the deed executed in pursuance of such contract. RAM GHULAM v. CHOTEY LAL, **2 A. 46.** [*Diss.*, 9 C. 150, 16 M. 341; *F.*, 16 A. 303=A.W.N. 1894, 94; *R.*, 4 L.B.R. 91, 24 A. 402; *D.*, 3 A. 397, F.B.]

——S. 36 (=s. 36 of 1877=s. 36 of 1871=s. 37 of 1866=s. 21 of 1864.)

(418-*a*)—S. 36—*See* NOS. 421, 777-*a*, *infra.*

(419)—*Ss.* 36, 39, 49 (=*Registration Act*, 1866, *ss* 36, 40 *and* 49)—*Decree-holder's application for execution by sale of lands of judgment-debtor—Objection of purchasers—Deed improperly registered, effect of—Irregularity in procedure, objection to.*—The Registration Act of 1866 contains powers for compelling the attendance before the Registrar of persons whose presence is necessary for the due registration of deeds. Consequently a registering officer is not authorized to register a deed of sale in the absence of the vendors and their agents, merely because he is satisfied that there has been a sale pursuant to previous agreement. Unless a deed has been registered in accordance with the provisions of the Registration Act, it must be regarded as unregistered, though in fact, it may have been improperly admitted to registration. A decree-holder cannot be delayed or prejudiced in proceeding to execution by any incomplete arrangements between his judgment debtors and third persons to which he is a stranger. Objection to the irregularity of the Court of first instance in not framing issues

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

before decision, is of no effect if the party objecting has not been substantially injured by such irregularity. SAH KOONDAN LALL v. MAKHUN LALL, **1 N.W.P. 247.**

(420)—*Ss.* 36, 73, 77—*Registration—Refusal by Sub-Registrar to register—Appeal to Registrar—Whether suit for registration in Civil Court maintainable.*—A sale-deed was presented for registration, but the executants did not appear before the Sub-Registrar who reported the fact to the Registrar and was directed by the latter not to register it. Registration was accordingly refused. An appeal against that order to the Registrar was dismissed. It appeared that the summonses issued by the Sub-Registrar to the executants had been returned unserved. The vendees brought a suit for registration of the document. *Held*, that the suit was maintainable, the refusal by the Sub-Registrar to register not being based upon denial of execution. KHADIM HUSAIN v. BHARAT SINGH, **9 A.L.J. 234=34 A. 315=14 Ind. Cas. 433.** (16 C. 189, *D.*)

——S. 37 (=s. 37 of 1877=s. 37 of 1871=s. 38 of 1866.)

(421)—*Ss.* 35, 36, 73 (=*Registration Act* III *of* 1877, *ss.* 35, 36, 73)—*Non-appearance on summons under s.* 36, *whether amounts to denial of execution within s.* 35.—The failure of a party executing a document to appear in obedience to a summons issued to him under s. 36 of the Registration Act (III of 1877) and duly served on him, is equivalent to a denial of execution by him for the purposes of s. 35 of the Act, so as to render it the duty of the registering officer to 'refuse to register' the document under the provisions of that section, and thus enable the party seeking registration to take further proceedings to have the document registered under Chap. 12 of the Act. A refusal to admit execution is a denial within the meaning of the Act, and a wilful refusal or neglect to attend and admit execution, in obedience to a summons for that purpose, should be deemed to be a refusal to admit, and, therefore, a denial. S. 35 contains nothing to the effect that the denial or refusal to admit must be in the presence of the registering officer. The object of the Act is that all documents of a certain description shall be registered as soon as possible after their execution, and it would not further but defeat such object, if it were held that a person executing a document requiring registration and successfully evading or deliberately disobeying the process of the registration office can prevent the document being registered. *In re* SHAIK ABDUL AZIZ, **11 B. 691.** [*Appr.*, 5 M.L.J. 29, 25 C. 93; *R.*, 18 M. 255, 2 O.C. 77.]

——S. 39 (=s. 39 of 1877=s. 39 of 1871=s. 40 of 1866=s. 34 of 1864.)

(422)—S. 39—*See* NOS. 343, 419, *supra.*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

——S. 40 (=s. 40 of 1877=s. 40 of 1871=s. 44 (except the last clause of 1866=s. 46 of 1864.)

(423)—S. 40—*See* NO. 415, *supra.*

(424)—*Ss.* 40, 44, 45, 57, 43—*Registration Act*, 1866, *ss.* 44, 46, 65—*Deposit of will—Probate—Jurisdiction.*—N made a will and deposited it with the Registrar of Assurances at Bombay under a sealed cover under s. 44 of the Registration Act, 1866. On N's death, his executors applied to the Registrar to deliver over to them the original will in order to enable them to apply for grant of probate thereof. The Registrar refusing to part with the original Will, gave an authenticated copy thereof under the seal of his office. On the motion of the applicants, the executors, for an order to the Ecclesiastical Registrar, directing him to issue a citation, under the seal of the Court, to the Registrar of Assurances, to bring in and deposit with the Ecclesiastical Registrar the original Will, *held* (i) that it is in the High Court alone that the *factum* of the Will could be tried and determined, and that for that purpose it was absolutely necessary that the original Will itself should be brought into the Court; (ii) that a mere copy of it would not be sufficient; (iii) that the High Court has the power to call upon the Registrar-General of Assurances, as well as upon anybody else, to bring a Will in his custody into Court; and (iv) that the Registrar-General of Assurances should not give up any will when applied to by a party interested in its production, but should wait for an order of Court; and (v) that the proper procedure for him under the present circumstances would be to make a copy of the Will for his archives and make a note on it that the original had been removed into the High Court by its order to that effect. *In the goods of* NAGINDAS, **3 B.H. C. O.C. 135.**

——S. 41 (=s. 41 of 1877=s. 41 of 1871=s. 76 of 1866.)

(425)—S. 41—*See* NO. 415, *supra.*

—— S. 42 (=s 42 of 1877=s. 42 of 1871=s. 44 of 1866=s. 46 of 1864.)

(426)—S. 42—*See* NO. 275, *supra.*

——S. 43 (=s. 43 of 1877=s. 43 of 1871=s. 77 of 1866=s. 47 of 1864.)

(427)—S. 43—*See* NO. 424, *supra.*

—— S. 44 (=s. 44 of 1877=s. 44 of 1871=s. 45 of 1866=s. 48 of 1864.)

(428)—S. 44—*See* NO. 424, *supra.*

—— S. 45 (=s. 45 of 1877=s. 45 of 1871=s. 46 of 1866=S. 49 of 1864.)

(429)—S. 45—*See* NO. 424, *supra.*

——S. 47 (=s. 47 of 1877=s. 47 of 1871=s. 47 of 1866=s. 67 of 1864.)

(430)—*S.* 47 (=*Registration Act*, 1877, *s.* 47) —*Registration—Priority—Date of the deed—*

Advocate High Court Jammu & Kashmir Srinagar.

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

Date of registration— Possession.—Where two deeds bearing different dates are each registered on different days, the priority as between them is ascertained with reference to the dates of the deed and not with reference to the date on which they were respectively registered. This priority is not influenced by the fact that the party having the later deed is in possession of the property. NARAYAN v. LAXUMAN, **6 Bom. L.R. 687=29 B. 42.**

(431)—*S.* 47 (=*Registration Act*, 1877, *s.* 47) —*Several deeds of sale registered — Priority according to date of execution.*—The sale-deed executed in favour of the plaintiff, in this case, was executed before, but registered subsequently to, that of the defendant. Plaintiff's claim under his deed was rejected by the lower Courts, but the High Court held that, as both the deeds of sale were registered according to law, they would operate as from the respective dates of their execution in accordance with s. 47 of the Registration Act, and the plaintiff's claim was therefore superior to that of the defendant. Also it was clear that the defendant had notice of the plaintiff's equitable title to the lands under the sale-deed executed to him SANTAYA MANGARSAYA v. NARAYAN, **8 B. 182.** [*Appr.*, 1 L.B.R. 293; *R.*, 20 B 158, 27 B. 408, 29 B. 42=6 Bom. L.R. 687; *D.*, 30 A. 238= A.W.N. 1908, 99=5 A.L.J. 607.]

(432)—*S.* 47—*Compulsory registration of document after time—Defect in procedure—Defect whether curable by s.* 87, *Registration Act* (III *of* 1877)—*Right of third party to question registration—Recital of consideration in registered document—Effect—Subsequent denial.* —Where a document which had been executed on the 7th October 1879, was actually presented for registration and registered on the 13th January 1881, it was held that, as the document was presented for registration 15 months after execution, it was not on the date capable of registration; that the defect was not cured by the provisions of s. 87 of the Registration Act, as the defect was one which affected the authority of the registering officer to register at all; and that it was open to a person not a party to the suit in which a decree for compulsory registration of a document was passed, and whose rights as mortgagee under a registered deed were then in existence, to dispute the validity of such registration so far as it affected his interests. (24 W.R., P.C., 75, 60 P.R. 1877, *D*; 10 B.H.C. 98, *F.*; 5 C 820, 4 A. 206, 7 W.R. 150, *R.*) [*Appl.*, 21 P.L.R. 1900; *D.*, 44 P.R. 1901, 14 O.C. 207=11 Ind. Cas. 925.] Where a registered mortgage-deed contained a recital that the consideration had been paid in full, and bore an endorsement by the registering officer that the mortgagor had admitted receipt of the same in his presence, the subsequent denial of the receipt of the consideration by him was held not sufficient to rebut the presumption of payment. BHAGAT SINGH v. RAM NARAIN, **93 P.R. 1883.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(433 & 434)—*S.* 47 (=*Registration Act*, 1877, *s.* 47)—*Registered sale-deed subsequent to optionally registrable but unregistered mortgage—Decree on prior mortgage—Right of purchaser not affected—Purchase with notice of encumbrance—Estoppel.*—Under s. 47 of the Act the operation of a registered document as against unregistered document takes effect from the moment of execution. So, where subsequent to the execution of an optionally registrable but unregistered mortgage the property was sold by a registered sale-deed, the prior unregistered deed ceased to operate as regards the property comprised therein from the date of the subsequent registered deed, and a decree afterwards obtained on the document which had ceased to operate could not revive its operation. But if the subsequent purchaser took the property with full notice of the prior unregistered encumbrance he was estopped from claiming as against the mortgagee. MIRAN PINJARA v. RAMASA, **6 C.P.L.R. 112.** (6 M. 88, *Not F.*; 7 A. 88, *F.*) [*R.*, 8 C.P.L.R. 109.]

(435)—S. 47—Execution of mortgage-deed—Attachment of obligation—Deed when operates —*See* MORTGAGE—GENERAL, 15 C.L.J. 61.

(436)—S. 47—*See* NOS. 37, 38, 276, *supra.*

(437)—*Ss.* 47, 49, 50(=*Registration Act*, 1877, *ss.* 47, 49, 50)—*Registration—Competing registered documents—Priority—Delay in effecting registration—Notice.*—As between two innocent purchasers both under registered documents, the one whose conveyance was first executed has the prior right without regard to the dates on which the two documents were registered. Delay in effecting registration when registration is effected within the period allowed by law, cannot possibly be held to amount to negligence so as to bring the case within the rule of estoppel. There is no authority for the proposition that if the subsequent purchaser has no notice of the prior purchase his title will prevail over that of the prior purchaser. MAUNG MYAT THU v. MAUNG THA ZAN, **1 L.B.R. 293.** (2 B. 343, 8 B. 182, 7 C. 753, 6 M. 148, 9 B. 427, 10 C. 1073, 20 M. 250, *R.*)

——S. 48 (=s. 48 of 1877=s. 48 of 1871= s. 48 of 1866).

(438)—*S.* 48 (=*Registration Act*, 1877, *s.* 48) —*Oral mortgage—Registered sale-deed.*—One Bahadur mortgaged lands to the plaintiffs orally by way of conditional sale and the mutation of names was effected in the Revenue Records but possession was not delivered to the plaintiffs. Bahadur, the mortgagor, brought a suit for redemption of the mortgage and obtained a decree permitting him to redeem on payment of Rs. 201. On appeal the amount was raised to Rs. 529. Before the expiry of the period fixed by the Original Court for the payment of Rs. 201, Bahadur sold the land to one Amir Chand by a registered sale. The plaintiff's suit for foreclosure of the mortgage

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

was dismissed on the ground that proper proceedings under the Regulation (XVII of 1806) had not been taken. Plaintiffs now sued for the recovery of Rs. 529 by sale of the mortgaged lands. It was contended on behalf of Amir Chand, the vendee, that the plaintiff's mortgage being oral and unaccompanied by possession, the registered sale in his favour must take effect against the mortgage, under s. 48, Indian Registration Act, III of 1877. *Held*, that s. 48, Indian Registration Act, III of 1877 was not applicable to the circumstances of the case and the plaintiffs were entitled to the relief claimed on the ground that the mortgage was an accomplished fact, given effect to in the Revenue Records and had been considered by the Courts which had given decrees referring to it, all before the sale-deed in favour of Amir Chand was executed. SHANKAR DAS v. RAM DAS, **P.L.R. 1900, p. 131.** (115 P.R. 1890, *D.*)

(439)—*S.* 48 (=*Registration Act*, 1877, *s.* 48) —*Oral sale of property mortgaged with possession—Subsequent sale by a registered document —Priority.*—Land in dispute was mortgaged with possession for Rs. 99. After the mortgage it was verbally sold for Rs. 175 to another person, but the mutation of names in the Revenue register as regards the sale was refused to the vendee on the ground that he had not redeemed the land from the mortgagee. Subsequent to the oral sale the land was sold to the plaintiff for Rs. 270 by a registered deed. *Held*, that the intermediate transfer was not protected against the subsequent registered deed by s. 48 of the Registration Act 1877, because it cannot be held that the transfer was accompanied or followed by delivery of possession. *Held*, also, that the said section refers only to delivery of possession of the property itself, and could not be taken to cover the transfer of the rights of the mortgagor remaining, *i.e.*, the right to redeem the property. RAM DAS v. SANWANA RAM, **P.L.R. 1900, p. 352=10 P.R. 1900.** (13 M. 324, *R.*)

(439-*a*)—*S.* 48—*Oral agreement to sell—Subsequent registered sale-deed to a third person with notice of agreement—First agreement can be specifically enforced—Priority of registered agreement—Notice.*—An oral agreement to sell property, even though not accompanied or followed by delivery of possession, would be protected against a subsequent sale of the same property effected by means of a competing registered instrument, if the person claiming under the latter had in fact notice of such agreement. BALDEO PRASAD v. PRAG DAS, **11 A.L.J. 137=18 Ind. Cas. 533.**

(440)—*S.* 48 (=*Registration Act*, 1877, *s.* 48) —*Equitable mortgage constituted by deposit of title-deed—Priority over subsequent registered charge.*—An equitable mortgage constituted by a deposit of title-deeds of certain property, is not "an oral agreeement or declaration relating to such property" under s. 48 of the Registration Act, so that it would have priority even

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

against a subsequent written and registered charge. COGGAN v. POGOSE, **11 C. 158.** [*F.*, L.B.R. 1893—1900, 660, 33 C. 410=10 C.W.N. 276=4 C.L.J. 102; *Commented upon*, L.B.R. 1872—1892, 555.]

(441)—*S.* 48 (=*Registration Act*, 1877, s. 48)—*Oral agreement to sell in favour of incumbrancer —Subsequent registered sale to third party--Effect of sale—Delivery of possession—Transfer of Property Act—Effect on s. 27 of Specific Relief Act.*—Where a mortgagor agrees to sell by an oral contract, the mortgaged property to the mortgagee in possession, and subsequently sells the same by a registered conveyance to a third party with notice of the incumbrance and the oral contract to sell, the mortgagee is entitled to specifically enforce the oral contract, notwithstanding the subsequent registered sale. The mortgagee's possession under the incumbrance together with the agreement to sell is equivalent to delivery of possession within the meaning of the Registration Act, s. 48. Neither Act IV of 1882 (Transfer of Property Act) nor the Registration Act, nor the decisions as to the effect of notice with reference to s. 50 of the last mentioned enactment, override the doctrine of equity embodied in s. 27 of the Specific Relief Act. KANAN v. KRISHNAN, **13 M. 324.**

(442)—*S.* 48 (=*Registration Act*, 1877, *s.* 48)—*Registered sale with notice of prior agreement—Rights of purchaser.*—Notwithstanding s. 48 of the Registration Act, a party who purchases, even under a registered deed, with notice of a prior agreement for sale, shall not be allowed to retain the property, as against the person claiming under the prior agreement. CHUNDERNATH ROY v. BHOYRUB CHUNDER, **10 C. 250.** (7 C.L.R. 481, *F.*; 5 C. 336=4 C.L.R. 257, *R.*) [*R.*, 9 M. 119, 13 M. 324, 4 L.B.R. 26.]

(443)—*S.* 48 (=*Registration Act*, 1877, *s.* 48)—*Oral agreement to sell—Constructive possession —Priority.*—An oral agreement to sell certain land, when accompanied by the attornment of the tenants to the purchaser at the request of the vendor, is sufficient to prevail against subsequent registered documents relating to the same property, and the conditions of s. 48 of the Registration Act are satisfied by such possession. PALANI v. SELAMBARA, **9 M. 267.** [*Appr.*, 13 M. 324.]

(444)—*S.* 48 (=*Registration Acts*, 1866 *and* 1871, *s.* 48) — *Registered instrument — Oral hypothecation.*—Whether under s. 48 of the Registration Act, 1866, or under s. 48 of the Act of 1871, an oral hypothecation, not accompanied or followed by possession of the property charged, cannot prevail against a registered sale-certificate in respect of the same property. NATHU RAM v. PHULCHAND, **6 A. 581=A.W. N. 1884, 183.**

(445)—*S.* 48 (=*Registration Act*, 1866, *s.* 48)—*Possession—Title—Parol agreement.*—Though a purchaser under a parol agreement may, in some cases of immoveable property,

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

and in all cases of moveable property, rely upon his title against the former owner, that title will not avail him in any case against a rival registered purchaser, whether the property be moveable or immoveable. By a "declaration" as distinguished from an "agreement," in s. 48, Act XX of 1866, is meant a declaration of his wishes by the owner with reference to his property not amounting to a contract, and which the maker is at liberty to recall, whereas by an "agreement" is meant something which, if correct in point of form, is binding on the maker. The strict provisions of the Registration Act as to registration do not apply where possession of the thing to be transferred is given by the owner to the transferee. As a general principle of law, the fact of obtaining possession affects the title, and has, in all systems of law, European and Oriental, been always treated as a most important element in the acquisition of title. SELAM SHEIKH v. BAIRDONATH GHATAK, **3 B.L.R. A.C. 312 = 12 W.R. 217.** [*F.*, 14 W.R. 250, 9 B.H.C. 147; *Appr.*, 47 P.R. 1871; *R.*, 2 B. 299 = P.J. 1880, 57, 12 W.R. 456; *D.*, 21 W.R. 421, 5 C. 336 = 4 C.L.R. 257, 7 C. 753 = 10 C.L.R. 129.]

(446)—*S.* 48 (= *Registration Act*, 1866, *s.* 48) —*Registered sale-deed--Parol sale accompanied with possession.*—The plaintiff sued the defendant for recovery of possession of a house sold to him by a registered sale-deed by its owner. The defendant pleaded that he was in possession of the house under a prior oral sale by the owner, that he had paid the purchase-money and that a formal deed of sale was agreed to be passed to him. *Held*, that the registered sale-deed would have priority over the verbal sale accompanied with possession. BHANDU *valad* RAJARAM v. DAMAJI *valad* JIVAJI, **6 B.H.C., A.C. 59.** [*Expl.*, 7 B.H.C. O.C. 45; *Doubted*, 9 B.H.C. 121.]

(447)—*S.* 48 (= *Registration Act*, 1866, *s.* 48) —*Possession under unregistered lease—Priority.* Under s. 48, where possession has been given under an unregistered lease, and such lease is dealt with merely as a parol contract, a registered lease to another party cannot prevail against it. NARSINGH PORKEAT v. MUSSAMMAT BEWA, **5 B.L.R. App. 86 = 14 W.R. 250.** [*F.*, 9 B.H.C. 147; *Appr.*, 20 W.R. 287; *Cons.*, 5 C. 336 = 4 C.L.R. 257; *Expl.*, 7 C. 753 = 10 C. L.R. 129; *R.*, 9 B.H.C. 121.]

(448)—*S.* 48—*Possession—Notice—Transfer of debt accompanied with delivery of possession—Subsequent conveyance by registered deed—Priority.*—A, the owner of a house worth more than Rs. 100, made it over to the defendant in satisfaction of a debt, and put the defendant in possession. Subsequently, A sold the house by registered deed to the plaintiff, who then sued for possession. *Held*, that, as the house was given over to defendant in satisfaction of a debt, and the defendant was in possession, the plaintiff must be deemed to have had notice of defendant's right. MAUNG SIT YIN v. MUNG BIN, **12 Ind. Cas. 905.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(449 & 450) — *S.* 48 (= *Registration Act*, 1864, *s.* 48)—*Applicability of section to transactions completed before Act came into force.*—S. 48 of the Registration Act of 1864 did not apply to transactions which became perfected before the Act came into force. So, where a lien was created before the 1st January, 1865, by means of a verbal agreement, the subsequent execution of a Gujerati document (unregistered) after the Act came into force, in respect of the same transaction, did not affect the validity of the prior transaction which had become perfected. JIVANDAS KESHAVJI v. FRAMJI NANABHAI, **7 B.H.C.O.C. 45.** [*R.*, 4 B. 126, F.B., 8 Ind. Cas. 178, F.B.]

(451)—*S.* 48 (= *Registration Act of* 1871, *s.* 48) —*Registered document as against oral agreement or declaration—Priority—Necessity for transfer of possession.*—The provision of s. 48 of the Registration Act of 1871, that documents relating to any property duly registered should take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration had been accompanied or followed by delivery of possession, did not apply where there was no such alteration or transfer of possession. KIRTY CHUNDER HALDAR v. RAJ CHUNDER HALDAR, **22 W.R. 273.** [*R.*, 2 B. 299, 4 C. L.R. 257.]

(452 & 453)—*S.* 48—*Scope—Oral agreement —Written agreement followed by possession.*—This section refers only to oral agreements followed by possession and does not include the case of an unregistered document the registration of which is compulsory. Such document, when not registered has no effect whatever and cannot be admitted in evidence under any circumstances. GHANSHAM DAS v. HEMRAJ, **92 P.R. 1890.**

(454)—*S.* 48 (= *Registration Act*, 1877, *s.* 48) —*Equitable mortgage—Mortgage by deposit of title-deeds—Executory agreement — Registered instrument—Priority.*—An equitable mortgage is not an oral agreement within the meaning of s. 48 of the Registration Act. "A mortgage by deposit of deeds is a complete act and not an executory agreement." S. 48 of the Registration Act is therefore not inapplicable to such a transaction. The holder of a registered instrument does not by virtue of that section take priority against an equitable mortgage by deposit of title-deeds. MAUNG SAN YA v. A. S.S.P.L. VENKETACHELLUM CHETTY, **L.B. R. 1893—1900, 660.** [*F.*, 14 Bur. L.R. 211.]

(455)—S. 48—Mortgage by deposit of title deeds—Whether it is something more than a mere oral agreement or declaration—*See* EQUITABLE MORTGAGE, 14 Bur. L.R. 211.

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(456)—S. 48—Application of doctrine of notice—*See* SALE—GENERAL, 4 L.B.R. 26.

(457)—S. 48—*See* NOS. 277 to 279, 344, *supra.*

(458)—*Ss.* 48, 50 (=*Registration Act*, 1877, *ss.* 48 *and* 50)—*Oral agreement—Subsequent registered agreement—Notice—Priority—Specific performance—Delivery of possession whether necessary.*—The equitable doctrine that a subsequent registered sale-deed cannot be pleaded as a defence to a suit for specific performance on a prior unregistered document under s. 50 of the Act, if the holder of the registered document has notice of the latter, is equally applicable to a prior oral agreement to sell under s. 48 of the Act. (25 M. 11, *R.*) The provision as to delivery in s. 48 of the Act does not preclude the party to the oral agreement from relying on the doctrine of notice, when there has been no delivery of possession. THIMMAJAMMA v. ABDULLA SAHIB, **17 M.L. J. 319.**

(459)—*Ss.* 48, 50 (=*Registration Act*, 1877, *ss.* 48, 50)—*Preference between innocent purchasers—Registered and unregistered deed—Oral alienations of immoveable property.*—The only reasonable construction of s. 50 of the Registration Act (III of 1877) is that, where property under the value of Rs. 100 is purchased by two innocent purchasers, the one by a registered and the other by an unregistered deed, and there is no fraud shown, or other circumstances, which, in equity, would protect the unregistered purchaser against the registered, the title of the latter shall prevail—*Per Garth, C.J.* (9 W.R. 547, 10 W.R. 36, 10 B L.R. 380, 15 B.L.R. 296, 12 B.H.C.A.C. 179, *R.*) [*Cons.*, 8 C. 597, F.B.; *Disc.*, 15 M. 73; But see 16 M. 148, F.B.; *F.*, 5 N.L.R. 82 ; *R.*, L.B.R. 1872—1892, 151, 5 M. 139, 10 C. 424, 13 C. 70.] S. 50 of the Registration Act applies to the case of the two innocent purchasers, giving the preference to the one, who has taken the greater precaution to secure his title (by registration), but not to the case of a subsequent purchaser, who registers, but who, at the date of his purchase, had *actual notice* of a prior unregistered purchase. *Pontifex, J.* [*D.*, 7 C. 753, 10 C. 250; *R.*, 6 B. 168, 6 B. 515, 8 A. 540, 6 C.P.L.R. 112.] The broad doctrine that a purchaser under an unregistered deed, who has obtained possession, would have priority as against a subsequent purchaser, under a registered deed, is not deducible from s. 50 of the Registration Act and the qualification cannot be imported into the section. The words relating to possession inserted in s. 48 of the Registration Act are only a declaration of the law limiting the operation of oral alienations ; the only oral alienations of which the law can take notice, in competition with registered instruments, are those which are properly established by evidence of possession. An oral agreement for the sale or letting of land, coupled with possession, is protected by s. 48 as against a subsequent registered deed. FUZLUDEEN KHAN v. FAKIR MAHOMED KHAN, **5 C. 336=4 C.L.R. 257.** [*D.*, 6 C. 534=7 C.L R. 487.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

—S. 49 (=s. 49 of 1877=s. 49 of 1871=s. 49 of 1866=s. 13 of 1864.)

(460)—*S.* 49 (=*Registration Act*, 1877, *s.* 49)—*Unregistered deed—Local rules requiring registration—Admissibility in evidence.*—An unregistered deed of 1866 which ought to have been registered under the Punjab local rules contained in Judicial Commissioner's Circular No. 11 of 1859, not being affected by the provisions of Act III of 1877 which was in force at the time the deed was tendered in evidence, was held admissible in evidence. There is nothing in s. 49 of Act III of 1877 which excludes as inadmissible or renders inoperative an instrument executed in the Punjab in 1866. NANAK v. CHALU, **10 P.R. 1880.** (46 P.R. 1869, *R.*)

(461)—*S.* 49—*Registration in wrong office—Admissibility in evidence.*—The mere fact that a compulsorily registrable mortgage-deed is registered in a wrong Registry office does not render it inadmissible in evidence as against a purchaser at an execution sale of the mortgaged land who, not knowing that such land was subject to mortgage does not plead that he was misled by the deed not being registered at the proper office or that he was induced to purchase because, on enquiry at the latter office he learnt that there was no outstanding encumbrance. BASHESHAR DAS v. BHAGWAN DAS, **44 P.R. 1898.**

(462)—*S.* 49—*Registered deed—No possession—Validity.*—No possession is necessary to render valid a registered mortgage deed. BALAJI NARAYAN v. RAMACHANDRA, **11 B.H.C. 37.**

(463)—*S.* 49—*Unregistered document—Evidence—Admissibility.*—An unregistered document, if followed up by possession, may be used as evidence of that possession. LALLA GOPEE CHAND v. SHAIKH LIAKUT HOSSEIN, **25 W.R. 211.** [*Diss.*, 17 M.L.J. 469; *R.*, 27 B. 515, 33 B. 610.]

(464)—*S.* 49 (=*Registration Act*, 1866, *s.* 49)—*Object—Mortgage-deed not registered—Personal covenant to pay—Evidence—Admissibility.*—The object of the Legislature in s. 49 of the Registration Act, XX of 1866, was that no document should be received in evidence as a document affecting an interest in land unless it should have been registered ; but it was not the intention that such a document should not be admissible in evidence for a purpose for which registration was not necessary. Therefore a mortgage-deed which is compulsorily registrable is admissible as a bond simply for the purpose of enforcing against the obligor personally the payment of money secured by it, though it is not admissible as evidence to prove that the

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

obligee was entitled to the security of the land. LACHMIPAT SING DUGAR v. MIRZA KHAIRAT ALI, **4 B.L.R.F.B. 18=12 W.R. 11.** [*F.*, 7 B.H.C. A.C. 1, 2 N.W.P. 860, 6 B.L.R. App. 69, 9 C. 520, F.B., L.B.R. 1893—1900, 125; *R.*, 4 Bom. L.R. 883; *D.*, 4 C. 83, 9 B. 63; *Expl.*, 5 C. 611.]

(465)—*S.* 49 (=*Registration Act*, 1877, *s.* 49)—*Unregistered mortgage for over Rs.* 100—*Suit for breach of contract—Admissibility of unregistered deed in evidence.*—Defendant executed to plaintiff an unregistered mortgage-deed of immoveable property for Rs. 800. The deed provided that the plaintiff ought to be in possession for a certain number of years and enjoy the usufruct in lieu of interest. Plaintiff's case was that she was in possession under the mortgage for a certain number of years and that, thereafter, she was unlawfully dispossessed by the defendant. Hence she claimed damages as for breach of contract. *Held*, that, under s. 49 of the Act, the deed of mortgage being inadmissible in evidence, the plaintiff was not in a position to prove by other evidence, what the terms of the contract were and that the suit was, consequently, unsustainable. BALAJI TELI v. MT. BANA BAI, **1 N.L.R. 47.** (4 A. 232, 18 B. 745, *F.*; 17 M. 456, *D.*) [*F.*, 5 N.L.R. 21; *R.*, 5 N.L.R. 70.]

(466)—*S.* 49 (=*Registration Act*, 1877, *s.* 49)—*Mortgage deed unregistered—Admissibility of such deed to prove that money had been borrowed.*—The defendant executed a usufructuary mortgage in favour of the plaintiffs. The consideration was paid off, but the deed was not registered, nor did the defendant deliver up possession to the plaintiffs. The plaintiffs brought this suit for possession or for the recovery of money they had paid: *Held*, that the mortgage deed, being unregistered, was inadmissible in evidence as a deed of mortgage, but that it was admissible for the limited purpose of proving the fact that money had been borrowed. JADOO CHAUBE v. BHAGWAT CHAUBE, **2 Ind. Cas. 516=7 A.L.J. 71.** (3 A. 229, 4 A. 232, 26 A. 178, 4 A. 3, 15 M. 304, 22 C. 444, *R.*)

(467)—*S.* 49 (=*Registration Act*, 1877, *s.* 49)—*Unregistered mortgage deed with implied personal covenant to repay—Suit to enforce personal obligation—Admissibility of deed in evidence.*—A mortgage deed, which, by law, is required to be registered, can be used in evidence, in a suit to enforce an implied personal covenant to repay the money advanced, although the same could not be used as evidence in a mortgage suit. MYAT THIN v. P.C.V.E. KASU VISVANATHAN CHETTY, **4 L.B.R. 52.** (15 M. 336, 9 C. 520, P.J.L.B. 124, *F.*)

(468)—*S.* 49—*Mortgage — Registration—Jurisdiction.*—An unregistered mortgage bond dealing with property of the value of more than 100 rupees could be sued upon only as a common money bond, and the Courts cannot, even

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with the consent of parties, treat it as a mortgage or make any decree thereon affecting the property mortgaged. SHIBO SOONDURREE DEBIA v. SOUDAMINEE DEBIA, **25 W.R. 78.**

(469)—*S.* 49—*Mortgage — Compromise in course of mutation proceedings—Registration.*—Where the law requires a registered instrument, in order to the effecting of a certain transfer of property by way of sale, mortgage, exchange or gift, such transfer can only be effected by registered instrument or by decree of a competent Court. Where, in a dispute between the plaintiff and her two sisters for mutation of names in the Revenue Courts, a compromise was entered into, whereunder they were ordered to be recorded proprietors of the property in dispute in equal shares, *held* that the order of the Revenue Court did not confer title, and the petition of compromise was not admissible in evidence under s. 49, Registration Act. RUSTAM ALI KHAN v. GAURA, **8 A.L.J. 918=33 A. 728=12 Ind. Cas. 109.**

(470) — *S.* 49 (=*Registration Act*, 1866, *s.* 49)—*Payment of mortgage-debt — Endorsement of payment on mortgage-bond—Endorsement not registered—Admissibility in evidence.*—The plaintiff hypothecated certain land to the defendant by a duly registered instrument, and subsequently paid off the debt and received back the instrument. At the time of payment, the defendant made an endorsement on the bond to the following effect—"25th Kartike of Sukla. Rupees two hundred and sixty three, principal including interest, was received on account of this bond, and there is, therefore, no lien whatever." Sometime afterwards plaintiff discovered that what he had paid in redemption of the mortgage claim was in excess of what was due, and he brought a Small Cause suit to recover the amount overpaid, tendering in evidence the endorsement on the bond. The objection was taken that the endorsement not being registered was not receivable in evidence, under s. 49 of the Registration Act of 1866. The District Munsiff dismissed the suit upon the ground that the endorsement was not signed by the defendant and was, therefore, not admissible in evidence, but referred to the High Court the question whether the evidence was rightly excluded. *Held* that the fact of there being no signature to the endorsement was no objection to its reception as confirmatory evidence of the sum received by the defendant. *Per Scotland, C.J.*—The endorsement was admissible for the purpose for which it was offered, although not registered, the endorsement not being used as evidence of the creation or discharge of an obligation, but merely as confirmatory proof of a fact provable by oral evidence although stated in writing. *Per Innes, J.*—The endorsement was admissible evidence, its reception not being precluded by the provisions of the Registration Act. VENKATARAMA NAICK v. CHINNATHAMBU REDDI, **7 M.H.C. 1.** [*F.*, 3 M. 53; *R.*, 19 M. 288; *D.*, 1 B. 197, 3 C.W.N. 922.]

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(471)—*S.* 49 (=*Registration Act*, 1877, *s.* 49) —*Unregistered mortgage-bond—Evidence of personal liability—Construction.*—A compulsorily registrable but unregistered deed, embodying a personal undertaking to repay money borrowed and also a hypothecation of property as security, is admissible in evidence to enforce the personal liability. [*D.*, 102 P.R. 1900; *Cons.*, L.B.R. 1893—1900, 124; *R.*, 10 C. 315, 13 A. 89, 15 M. 336, 20 B. 553, U.B.R. 1904, 4th Quarter. Registration, 1, 19 M.L.J. 584, 32 M. 410=5 Ind. Cas. 1.] The words "shall be received as evidence of any transaction affecting land" in s. 49 mean "shall be received as evidence of any transaction so far as it affects land." ULFATUNNISA v. HUSAIN KHAN, **9 C. 520, F.B.=12 C.L.R. 209.** [*F.*, 8 P.R. 1891, 4 L.B.R. 52.]

(472)—*S.* 49—*Mortgage of immoveable property—Unregistered document if and when admissible in evidence.*— An unregistered bond whereby immoveable property is pledged by way of collateral security is admissible in evidence where effect is sought to be given to it for the purpose of obtaining a decree for money due under it. TUKARAM VITHOJI v. KHANDOJI MALHARJI, **6 B H.C.O.C. 134.** [*R.*, 2 B. 273, 9 C. 520, 14 B. 577, 15 B. 183, 20 B. 553, 20 B. 408.]

(473)—*S.* 49 (=*Registration Act*, 1877, *s* 49) —*Unregistered mortgage bond containing also a personal undertaking—Divisibility of document —Admissibility in evidence.*—An unregistered bond, containing a personal undertaking to repay money borrowed and also a hypothecation of land above Rs. 100 as a security, may be used in evidence to enforce the personal obligation. It is unnecessary to consider whether a document of this kind embodies only a single transaction or may properly be said to contain two. MA THA v. MA SHWE HNIT, **L.B.R. 1893—1900, 124.**

(474)—*S.* 49(=*Registration Act*, XX *of* 1866, *ss.* 17, 18, 49)—*Mortgage bond—Suit for money decree—Evidence.*—Where, under a bond, land is pledged as a mere collateral security, and the bond is, to all intents and purposes, a simple bond for money lent, its registration is optional and it is not one of the instruments defined in cl. 2, s. 17, of the Registration Act, and it can be received in evidence in a suit for money in which a simple money decree is sought. WOODOY CHAND JANA v. NITYE MUNDUL, **9 W.R. 111.** [*F.*, 12 W.R. 222, 6 B.H.C.O.C.J. 134; *Appl.*, 10 W.R. 252=1 B. L.R.A.C. 192; *R.*, 7 B.H.C. A.C. 1.]

(475)—*S.* 49 (=*Registration Act*, 1871, *s.* 49)—*Receipt releasing mortgage, if admissible without registration.*—The design of the Registration Act would be entirely defeated if a document, introduced in a suit as of a kind not requiring registration, could then forthwith be employed for purposes which the law intends to be effected only by registered instruments. So, a document called a receipt but meant to operate as an actual release of a mortgage of immoveable property, cannot have such an operation unless it was registered, as required by s. 49 of the Registration Act, VIII of 1871. BASAWA AND GURBASAWA v. KALKAPA SHARHANA AND SIDOJI, **2 B. 489.** [*F.*, 6 A. 335=A.W.N. 1884, 107; *Appl.*, 7B. 123; *R.*, 4 B. 235, 19 B. 36, 103 P.L.R. 1905, 33 C. 613 =10 C.W.N. 551=3 C.L.J. 576; *D.*, 9 A. 108, F.B.=A.W.N. 1886, 310, 24 B. 609=2 Bom. L.R. 422.]

(476)—*S.* 49—*Mortgage — Suit to recover money—Plea of discharge—Pleadings—Production of mortgage deed—Whether necessary.*—Where in a suit to recover a certain sum of money alleged to have been advanced on a mortgage of land, the defendant admitting receipt of the money pleads subsequent discharge, it is not necessary for the plaintiff to produce the deed of mortgage at all after such admission by the defendant, as the only question on the pleadings is whether the amount has been repaid or not. NIAZ GUL v. RAM DITTA, **52 P.R. 1883.**

(477)—*S.* 49 (=*Registration Act*, 1864, *s.* 13)—*Sale—Sale-deed not registered—Purchase money paid—Repudiation of contract—Suit for possession.*—Defendant executed in favour of the plaintiff a bill of sale in respect of the lands sued for, after receiving from him the full amount of the purchase money agreed upon. Afterwards, the defendant repudiated the contract, and refused to give effect to it by making over to the plaintiff the possession of the property sold, and the sale-deed was not registered. In a suit by the plaintiff to recover possession of the land sold to him. *Held* that the plaintiff would be entitled to succeed if he could satisfactorily establish by other evidence the payment of the consideration-money and the execution of the sale. In this country, where there is no such legislative enactment in existence as the Statute of Frauds in England, titles to property can pass from one person to another by virtue of a contract not reduced to writing. There is nothing in the Hindu, Mahomedan or Regulation Law to invalidate such a contract. There is nothing in s. 13 of Act XVI of 1864 which says that no contract purporting to create or transfer any right, title or interest in land, shall be recognised by the Civil Courts, unless the same is reduced to writing. *Held* also that the plaintiff was entitled to show that the document was not registered, not from any fault of his own, but from the fraudulent conduct of his adversaries. MEER HELALOODDEEN v. CHOWDHRY ABDOOL SUTTAR, **9 W.R. 351.** [*D.*, 9 W.R. 528.]

(478)—*S.* 49 (=*Registration Act*, XX *of* 1866, *s.* 49)—*Sale of immoveable property by registered deed—Prior sale of same property by unregistered deed—Suit for possession by purchaser under registered deed—Admissibility of admissions before registration officer to prove prior sale.*—The plaintiff sued to recover certain

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immoveable property sold to him by the first defendant by registered deed of sale. Defendants two to four pleaded a sale to them by the same party, the first defendant, on a prior date, and that the first defendant after receiving consideration in full, had improperly refused to have their deed of sale registered. The provisions of s. 49 of the Registration Act of 1866 having precluded the reception in evidence of the prior unregistered instrument of conveyance, the lower Courts held that certain admissions made by the first defendant in an enquiry held before the Registration Officer were admissible in evidence to prove the prior sale. The suit was therefore dismissed with costs. *Held* that the admissions made by the first defendant were evidence against plaintiff, as made by one from whom plaintiff derived his title, but the provisions of the Registration Act precluded any effect being given to the sale evidence by such admissions; there being a writing, the sale could not be proved by mere oral evidence. *Per Innes, J.*—The term "instrument" in s. 49 of Act XX of 1866 was used on the understanding that the writing was not merely evidence of the transaction, but was the transaction itself. SOMU GURUKKAL v. RANGAMMAL, **7 M.H.C. 13.** [*F.*, 4 B. 89; *R.*, 7 M. 226, 13 M. 281, 119 P.L.R. 1906, 6 C.L.J. 167.]

(479)—*S.* 49 (=*Registration Act*, 1877, *s.* 49) —*Suit for possession—Plea of adverse possession —Plea of sale under unregistered sale—Sale-deed if admissible as evidence of admission of plaintiff's subsisting title—Burden of proof.* —In a suit for possession of a house and for arrears of rent, defendant denied the tenancy and pleaded adverse possession till 1875 and also claimed under an unregistered sale executed in his favour in that year by the plaintiff's predecessor in title, which he had accepted in order to avoid further dispute. Plaintiff denied this sale-deed. *Held* that the sale-deed being unregistered could not be admitted in evidence, and it was not open to the plaintiff who denied the sale, to make use of the sale pleaded by the defendant as an admission by the latter of his subsisting right at the date of the sale. Nor was there any admission by defendant that plaintiff's right had subsisted up to 1875, for so far from admitting plaintiff's title the defendant pleaded adverse possession. The burden of proof was on the plaintiff to show that the defendant's possession was not adverse, and that he was plaintiff's tenant. Though the defendant's sale-deed was inadmissible, he could fall back on his plea of adverse possession. NIHAL CHAND v. TEJU, **74 P.R. 1883.** (121 P.R. 1882, 122 P.R. 1882, *R.*)

(480)—*S.* 49 (=*Registration Act*, 1871, *s.* 49) —*Certificate of sale not registered, suit not maintainable by holder of.*—Plaintiff holding an unregistered certificate of sale sued for possession of the property sold. The suit was held able to dismissal on the ground that the

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unregistered certificate was, by reason of s. 49 of the Registration Act, useless and inadmissible in evidence of the sale of the property comprised in it. The fact that the plaintiff subsequently obtained a certificate, got it registered and filed it in Court, could not make any difference. The registered certificate of a date later than that of the plaint in the suit could not be admitted in evidence in support of such suit, although the certificate might perhaps enable him to bring another action. HARKISANDAS NARANDAS v. BAI ICHHA, **4 B. 155,** [*R.*, 17 B. 375; *D.*, 6 B. 139 10 B. 444.]

(481)—*S.* 49 (=*Registration Act*, 1877, *s.* 49) —*Agreement of sale accompanied with possession.*—An agreement of sale accompanied with possession is entitled to priority over a registered deed of sale subsequently executed. HARI v. HIRA, **2 Bom. L.R. 110.** [*F.*, 3 Bom. L.R. 246.]

(482)—*S.* 49 (=*Registration Act*, 1877, *s.* 49) *Priority between unregistered and registered deeds—Auction-purchaser, Rights of.*—A purchaser in possession under a registered sale-deed has priority over a person who claims under a prior unregistered mortgage unaccompanied with possession, of which the purchaser has no notice; and if in a suit brought upon the mortgage, to which the purchaser under the registered deed is no party, the property is sold in execution of the decree obtained against the mortgagor, the auction-purchaser is in no better position than the mortgagee, in whose rights he stands. KARBASAPPA v. DHARMAPPA, **2 Bom. L.R. 223.**

(483)—*S.* 49—*Registration Act* (XX *of* 1866), *ss.* 17, 49—*Interest in immoveable property, document creating—Admissibility as evidence.*—A document which purports to create a lien upon property as collateral security for money lent by giving the lender a right to have the property brought to sale, and to recover out of the proceeds the amount of money lent, principal and interest, is one which creates an interest in immoveable property, within the meaning of s. 17 of the Registration Act, and, as such, is not receivable in evidence without registration. KALA CHAND MUNDUL v. GOPAL CHUNDER BHATTACHARJEE, **12 W.R. 163** [*D.*, 7 B.H. C. O.C. 45.]

(484)—*S.* 49—*Lease—Registration.*—A lease for more than a year is not the less a lease for more than a year because a condition is attached to the consideration, or that the full term for which it is executed may be lessened on the payment of a sum of money by the lessor. It cannot therefore be used as evidence in any Court unless it is registered. BUKSH ALI BOOHEAN v. SREEMUTTY NUBOTARA, **13 W.R. 468.**

(485)—*S.* 49—*Lease for more than a year —Registration — Evidence.*—A lease of immoveable property for a term exceeding one

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year cannot be received in evidence without registration. MUSSUMAT MOONA v. JEY MUNGUL SINGH, **4 N.W.P. 164.**

(486)—*S.* 49—*Unregistered lease—Suit based on right of occupancy.*—In the above case, it was *held* that the plaintiff's claim for possession was not in any way affected by the circumstance that the lease held by him was not registered and could not be produced in evidence. For the plaintiff's claim was based on his right of occupancy and could be maintained without any necessity for the production of the lease. SAWANTEE v. SEWA RAM, **2 N.W.P. 35.**

(487)—*S.* 49 (=*Registration Act*, 1877, *s.* 49) —*Agreement to give lease unregistered - Admissibility of, in evidence in suit for specific performance.*—In a suit for specific performance of an agreement to give a lease, the document containing the lease does not require registration, to be admissible in evidence, where it is only used for the purpose of proving the contract, for the breach of which the action is brought. SRINIVASACHARYULU v. VENKATARAJU, **17 M.L J. 218** (17 M. 456. *F.*) [*Diss.*, 21 M.L.J. 44, F.B.=8 Ind. Cas. 520= 9 M.L.T. 142; *F.*, 14 C.W N. 65; *R. Cited*, 7 M.L.T. 278.]

(488)—*S.* 49—*Kubooleut—Registration.*—In a suit for rent, where the defendants admit the debt but plead payment, the non-registration of the kubooleut is no ground for dismissing the suit, but it may be objected to when the kubooleut is tendered as evidence on a disputed point. SYUD REZA ALI v. BHIKUN KHAN, **7 W.R. 334.**

(489)—*S.* 49 (=*Registration Act*, 1877, *s.* 49)-. *Unregistered kabuliyat—Admissibility in evidence.*—A kabuliyat which requires to be registered, but which is unregistered, is admissible in evidence to prove the contract contained therein, when the party relying on it does not assert his title under the incomplete kabuliyat, but complains of the breach of contract on the part of the other party in refusing to register the kabuliyat and give him cowle, and also in disturbing his possession. RAJA OF VENKATAGIRI v. NARAYANA REDDI, **17 M. 456=4 M.L. J. 198, F.B.** (9 B. 63, *D.*) [*F.*, 17 M L.J. 218; *R.*, 15 C.P.L.R. 33, 1 N.L.R. 47, 5 N.L.R. 70.]

(490)—*S.* 49—*Rent—Kabuliat for one year—Suit for rent of another year—Reaistration.*—A kabuliat for a particular year cannot form the basis of an action for rent for the subsequent year. If there is a provision in a kabuliat extending its term to more than one year, the document is not admissible in evidence without registration. KISTO KALEE MOONSHEE v. AGEMONA BEWA, **15 W.R. 170.**

(491)—*S.* 49—*Recovery of possession under Act* XIV *of* 1859, *s.* 15—*Suit for declaration of itle*—Kobala *unregistered—Evidence.*—Where he defendants have recovered possession of the tank in dispute under s. 15 of Act XIV of 1859, the plaintiff, in order to recover possession from the defendants, must establish his title. If the plaintiff's title is derived by an unregistered *kobala*, it cannot be given in evidence, nor can it affect any property comprised in it. KALEE CHURN MUNDUL v. HURADHUN PAL, **20 W. R. 310.**

(492)— *S.* 49 (=*Registration Act*, 1866, *s.* 49)—*Letter creating interest in land.*—The defendant executed a bond in favour of the plaintiff and sent the following letter to the plaintiff with the title-deeds relating to a house belonging to the defendant: "I have the pleasure of handing to you the title-deeds of a house, 56, Lower Circular Road, as a collateral security for the Rs. 20,000 (twenty thousand rupees) which falls due this day. Please accept them from my manager, and kindly enlighten me for its safe destination." *Held* that the letter was one creating an interest in land and should be registered. Without registration it would be inadmissible in evidence. DWARKA NATH MITTER v. S.M. SARAT KUMARI DASI, **7 B.L.R. 55.** [*R.*, 10 B. 634, 33 C. 410=4 C.L. J. 102=10 C.W.N. 276; *D.*, 20 W.R. 150=11 B.L.R. 405.]

(493)—*S.* 49—*Evidence — Admissibility — Unregistered document—Registration compulsory.*—It is doubtful whether a plaintiff can rely upon a document which is not registered as it ought to have been and which is therefore not admissible in evidence under the Registration Act. DEB NARAIN MUNDUL v. BEHAREE LALL GHOSE, **18 W. R. 329.** [*R.*, 19 B. 36.]

(494)—*S.* 49 (=*Registration Act*, 1877, *s.* 49) —*Registration—Unregistered document—Money debt.*—Where an unregistered document contains an admission of debt and at the same time a mortgage of property to the extent of Rs. 100 by way of security for repayment, it can, when divisible, be received as evidence to establish the debt, but not for the purpose of enforcing the charge on the land. MAING WUT AND MI BWIN v. KO NYAUNG AND MI SIN, **L.B.R. 1872—1892, 195.** (4 C. 83, *D.*; 4 B.L.R. F.B., 18, 5 C. 611, *F.*) [*R.*, L.B.R. 1893—1900, 124, U B.R. 1904, 4th Qr., Registration 1; *F.*, U.B.R. 1897—1901, Vol. II, 375.]

(495)—*S.* 49—*Unregistered deed — Reception in evidence—S.* 73, *Contract Act*—"*Masani.*"—According to s. 49, a document compulsorily registrable but not registered shall not be received in evidence of a transaction affecting immoveable property. But, it can be used to enforce a right to receive compensation on breach of contract, though specific performance could not be enforced. *Quære*:—Whether 'masani' income is immoveable property within the meaning of s. 3, Registration Act. RAM SINGH v. HAR GOBIND, **83 P.R. 1891.** [*D.*, 10 P.R. 1896, 102 P.R. 1900.]

(496)—*S.* 49—*Compulsorily registrable document unregistered — Evidence of collateral purpose — Admission of adoption.*—A deed

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inadmissible in evidence for non-registration in proof of relinquishment of land cannot be admitted in evidence for proving an admission of an alleged adoption contained therein, the title to the land depending on adoption. ALI BAKHSH v. RAUSHAN, **102 P.R. 1900.** (9 C. 520, 3 A. 229, 80 P.R. 1881, 83 P.R. 1891, *D.*; 50 P.R. 1893, *F.*)

(497)—*S.* 49 (=*Registration Act*, 1871, *s.* 49) —*Unregistered bond, admissibility of—Suit to enforce personal obligation.*—Under the provisions of s. 49 of Act VIII of 1871, an unregistered bond, though immoveable property is, by its terms made collateral security, is admissible in evidence in a suit to enforce the personal liability of the person executing the bond. It is only excluded where it is offered as evidence of a transaction affecting immoveable property. STRI SESHATHRI AYYENGAR v. SANKARA AYAR, **7 M.H.C. 296.** [*F.*, 5 M. 119; *Appr.*, 15 M. 336, 13 M. 308.]

(497-*a*)—*S.* 49 (=*Registration Act*, 1877, *s.* 49) —*Admissibility of compulsorily registrable deed for collateral purposes—Limitation Act*, 1877. —A compulsorily registrable but unregistered deed can be admitted in evidence for a collateral purpose—*e.g.*, for showing that there has been an acknowledgment of liability on the part of the executant sufficient to prevent a claim from being barred by limitation. MUGNIRAM v. GURMUKH ROY, **26 C. 334.** [*R.*, 5 N.L.R. 70, U.B.R. (1904), 4th Quarter, Registration 1.]

(498)—*S.* 49—*Suit on unregistered agreement —Admissibility of deed as evidence of acknowledgment of personal pecuniary liability—Indivisible transaction.*—The purchasers of certain land paid the pre-emptors a certain sum of money in consideration of the latter forbearing to urge their claim. The pre-emptors executed a document, in which it was provided that, if any of them sued to enforce their rights they should forfeit their share in the money received with half as much again. The pre-emptors notwithstanding this agreement instituted a suit for pre-emption, and obtained a decree. The purchasers then sued to recover the money forfeited as above. The defendants denied execution, and the sole question in the case was whether the document being unregistered was admissible in evidence to enforce personal liability. *Held*, that the document could not be received in evidence. In order to succeed, the plaintiffs were bound to prove (*a*) an obligation not to prosecute the claim for pre-emption; and (*b*) its breach. The former could not be established without the document which could not be received in evidence for want of registration, and consequently the suit failed. SANTA v. WASSAWA SINGH, **59 P.R. 1890.** [*R.*, 89 P.R. 1908.]

(498-*a*)—*S.* 49 — *Sale-deed — Unregistered letter written on the same day—Admissibility of latter to prove sale intended to operate only as*

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mortgage—Suit for possession of immoveable property—Decree with condition to restore money received—Propriety—Equitable relief—Contract Act, *s.* 65.—M executed a deed of mortgage in P's favour in 1894. In 1896, with respect to the same property M executed a deed of sale in P's favour for Rs. 8,000 and odd. On the same day when the deed of sale was executed, a document in the shape of a letter which was unregistered was written which showed that the transaction between the parties was intended to be an usufructuary mortgage and not a sale. In 1900, P sued on the usufructuary mortgage and the suit was dismissed for want of registration of the letter. M instituted the present suit for the recovery of the same property, on the ground that no property passed to P because the parties never intended the sale-deed to be effective as a sale deed. The lower Court decreed M's suit on condition that he should make over to P whatever money he received under the deed. *Held* that the lower Court was competent to pass a decree imposing the condition which it did. There is nothing in s. 65 of the Contract Act which suggests that the Court has no such power, and independently of the Contract Act it lies perfectly within the competence of the Court, in a case of this nature, to impose a condition which would do complete justice between the parties. Even, in cases in which the relief sought is not strictly speaking an equitable relief, the Court has the power in a proper case to refuse to grant a decree to the plaintiff except on terms indicated by obvious considerations of justice. (9 A. 340, *F.*) The above principle is analogous to that embodied in several statutes of the Indian Legislature, for instance, s. 41, Specific Relief Act, s. 55, sub-s. 6, cl. (*b*), Transfer of Property Act, and s. 86, Trusts Act. (12 M.L.T. 264, 17 M. 232, *R.*) *Per Abdur Rahim, J.* (*Miller, J. dissenting*).—The letter written contemporaneously with the sale-deed can be admitted in evidence to prove that the sale-deed was not intended to be given effect to. Neither s. 92 of the Evidence Act, nor s. 49, Registration Act, would apply to the present case so as to prohibit the admissibility of the letter in evidence. The main object of the Registration Act is to prevent documents of a certain class having any effect unless they are registered. The primary object of the Act is not to deal with questions of evidence pure and simple. (17 M. 456, F.B., *R.*) *Per Miller, J.*—*Held* that the letter is not admissible in evidence because s. 49 of the Registration Act forbids its admission. The transaction which was sought to be proved by the letter was a mortgage and that is a transaction affecting immoveable property, though the document for want of registration did not have any effect. (7 M.L.J. 469, *R.*) Not only was the purpose to prove a transaction which does affect immoveable property, but the purpose of proving it was to affect immoveable property to enable the plaintiff to distrub the possession and replace

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

it by his own. MUTTA VENKATACHELLAPATHI v. PYINDA VENKATACHELLAPATHI, **23 M.L.J. 652=12 M.L.T. 579=17 Ind. Cas. 987.**

(499)—*S.* 49—*Registration Act*, 1866, *ss.* 17, 18—*Unregistered document creating interest in land—Suit on personal covenant—Admissibility of document in evidence.*—An instrument creating an interest in land, and which required registration, was not registered. The document contained a promise to pay the money borrowed. The creditors sued to recover the money only. *Held* that, notwithstanding the absence of registration, the document was admissible in evidence. SANGAPPA *bin* NINGAPA v. BASAPPA *bin* PARAPPA, **7 B.H. C.A.C. 1.** [*F.*, 9 C. 520=12 C.L.R. 209; *Expl.*, 2 B. 273; *R.*, 19 B. 36, L.B.R. 1893—1900, 124; *D.*, 20 B. 553.]

(500)—*S.* 49 (=*Registration Act*, 1877, *s.* 49)—*Unregistered document, admissible for showing statement regarding adverse possession.*—A document inadmissible under s. 49 of the Registration Act, 1877, cannot be used as evidence of delivery of possession. But, an unregistered document inadmissible for the purpose of affecting immoveable property or of any transaction affecting such property may yet be looked to not in any way creating a title, or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the nature of the adverse possession which was set up by a person whose claims were admittedly limited to the rights enumerated in such document. A document inadmissible under s. 49 of the Registration Act, 1877, cannot be used for the purpose of showing what are the terms consented to or as evidence of any implied transaction affecting the property. But if it is allowable for the defendant to plead adverse possession of a limited interest, or if independent evidence, proves that adverse possession has been enjoyed not of an absolute interest but of an interest limited by definitive conditions, those conditions form an inseparable part of the adverse possession proved. And if the conditions are described in terms which are definite in themselves but which distinctly specify the conditions to be those contained in a certain book, enactment, set of rules or other document, such document must be looked to, not for the purpose of making it operative, but to show especially what was really included in the language used to describe those conditions. FATESINGHJI v. BAMANJI, **5 Bom L.R. 274=27 B. 515.**

(501)—*S.* 49 (=*Registration Act*, 1877, s. 49)—*Unregistered document, admissibility in evidence—Plea of forgery.*—The provisions of s. 49, Act III of 1877, do not affect the existence of an unregistered document, nor do they absolutely prevent the document from being received in evidence, as for instance, in a case where a document, not registered, was sought to be

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declared null and void, on the ground that it was a forgery. The provisions of s. 49 merely barred the Court from receiving the document in evidence of the transaction referred to in it. It is still open to the Court to examine the document, to compare the handwriting of the alleged executant and the like, to consider the probabilities of the case, and try, as best it might, the fact of its execution. GOBIND RAI v. DHARAM DAS, **A.W.N. 1881, 138.**

(502)—S. 49—*See* CHAMPERTY, 150 P.R. 1889.

(503)—S. 49—Novation—Fresh contract contained in a deed which, though compulsorily registrable, was not registered—Effect—*See* CONTRACT ACT, 1872, s. 62, 14 Bom. L.R. 26.

(504)—S. 49—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 2 N.W. P. 160.

(505)—S. 49—Proof of title—Unregistered deed of sale—*See* EVIDENCE—SECONDARY EVIDENCE, 1 C.L.R. 542.

(506)—S. 49—*See* EVIDENCE—SECONDARY EVIDENCE, 6 M. 117.

(507)—S. 49—*See* LEASE—MISCELLANEOUS, 8 A. 405=A.W.N 1886, 170.

(508)—S. 49—Unregistered document—Effect of non-registration on its admissibility in evidence for collateral purposes—*See* LIMITATION ACT, 1908, s. 19, 5 C. 215=4 C.L.R. 361.

(509)—S. 49—*See* MAHOMEDAN LAW—DOWER, A.W.N. 1885, 19.

(510)—S. 49—Unregistered document which is compusorily registrable—How far admissible in evidence—*See* MAINTENANCE, 7 M.L.T. 278=5 Ind. Cas. 615.

(511)—S. 49—*See* MORTGAGE—GENERAL, 1 Ind. Cas. 1, F.B.=32 M. 410=19 M.L.J. 584.

(512)—S. 49—*See* TRANSFER OF PROPERTY ACT, 1882, s. 54, 2 Ind. Cas. 413.

(513)—S. 49—*See* Nos. 34, 35, 37, 268, 271, 273, 274, 280 to 324, 332, 342, 344, 367-*a*, 368, 370, 393, 419, 437, *supra*, and No. 788, *infra*.

(514)—*Ss.* 49 *and* 17—*Unregistered mortgage deed, suit for money due on—Deed whether admissible as acknowledgment of subsisting liability under original debt.*—Defendant executed a mortgage-bond to plaintiff for balance of account and the present suit brought on the bond was dismissed by the first Court because the deed of mortgage was not registered. On appeal, the Commissioner held that the deed, though not admissible to charge the land, was admissible to prove the debt. Defendant on appeal contended that the mortgage-deed did not create any right for plaintiff to sue for the money due or make the defendant in any way personally liable. Plaintiff claimed that he

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had a right to sue for the original debt due to him, and that the bond must be accepted as an acknowledgment of the liability reviving the period of limitation, treating the recital in the deed as an acknowledgment separable from the mortgage; but the Chief Court held that the plaintiff not having sued on the old accounts offering the bond as a proof of acknowledgment, the present suit brought by him to enforce the bond itself must fail. CHUHAR v. WAZIRA, **17 P.R. 1881.** (88 P.R. 1880, 89 P.R. 1880, *Cited.*) [*D.*, 80 P.R. 1881.]

(515)—*Ss.* 49 *and* 17—*Unregistered hypothecation bond—Loan and pledge—Single but not indivisable transaction — Bond admissible to prove defendant's personal liability, but not hypothecation.*—The document refused to be admitted in evidence by the Court below, was evidence of a single but not indivisible transaction, namely, of a loan and a pledge to secure the loan. There was a distinct undertaking by the defendant to re-pay the money lent, and the portions of the document which related to the pledge were capable of being struck out or treated as non-existent without impairing the portion containing the personal undertaking of the defendant. Consequently it was held that, as regards the pledge, the document not being registered, was, by reason of s. 19 of the Registration Act, inoperative and inadmissible to prove the pledge, but that it was admissible to prove the transaction so far as it affected the defendant's personal liability. KHUDDU MAL v. KUNJI LALL, **80 P.R. 1881.** (88 P.R. 1880, *F.*; 60 P.R. 1880, 89 P.R. 1880, 17 P.R. 1881, *D.*) [*R.*, 10 P.R. 1883, 20 P.R. 1888; *D.*, 102 P.R. 1900 = P.L.R. 1900, p. 481.]

(516) Ss. 49 and 17—*See* PLAINT—AMENDMENT OF PLAINT, 131 P.R. 1883.

(517)—*Ss.* 49, 50 (=*Registration Act*, 1864, *s.* 68)—*Registered and unregistered deeds — Priority—Optional and compulsory registration.*—S. 68, Act XVI of 1864, distinctly lays down that, even with regard to that class of deeds the registration of which is optional, registered deeds will be entitled to preference over unregistered ones. The practical distinction between the two classes of deeds, namely, those the registration of which is compulsory and those the registration of which is optional, amounts to this, that the former, if unregistered, will not be received in evidence at all, but the latter will be received in evidence, notwithstanding the absence of registration, though they must give way to registered documents of subsequent dates relating to the same property. MUNSOOR ALI v. AZMUT ALI, **9 W.R. 282.** [*F.*, 4 B.L.R. App. 73; *Cons.*, 14 W.R. 318; *R.*, 9 B.H.C. 121.]

(518)—*Ss.* 49, 50 (=*Registration Act*, 1877, *ss.* 49, 50)—*Transfer of Property Act* (IV *of* 1882), *s* 54—*Unregistered deed of purchase—Subsequent purchase by another person with notice of prior unregistered purchase - Priority.*—An unregistered deed of sale in respect of immoveable property does not create any interest in the purchaser. A subsequent purchaser by registered deed is entitled to priority, even if he had notice of the abortive purchase by unregistered deed. HAJEE ZACKARAYA SETT v. CHUNNU PANDARAM, **9 Ind. Cas. 65 = 9 M.L.T. 270.** (29 M. 336, 16 M.L.J. 395, 1 M.L.T. 153, F.B., *R.*)

(519)—*Ss.* 49, 50 (=*Registration Act*, 1877, *ss.* 49, 50)—*Notice - Fraud—Optional registration — Effect —Priority.*—Though, where the prior instrument is optionally registrable, mere notice may not deprive a person claiming under an instrument subsequently executed and registered, of the priority given him by the Act, inasmuch as the prior instrument was effectual to create a title, a participation in fraud by the person claiming under the second instrument will deprive him of the benefit of the provision which was aimed at the prevention of fraud. NARASIMULU v. SOMANNA, **8 M. 167.** [*R.*, 16 M. 148, F.B.]

(520)—*Ss.* 49, 50—*Registration Act—Execution of kobala—Subsequent grant of mokurruree lease to third person — Fraudulently getting possession of kobala by executant — Suit to recover kobala — Mokurrurudar's claim to be made party.*—The defendant executed in favour of the plaintiff a kobala in respect of the plaint property. Subsequently, the defendant, having changed his mind, did not register the kobala and fraudulently got back the document. He then executed a mokurruree lease in favour of a third person. Thereupon the plaintiff, having already obtained possession of the property, sued to recover the kobala for the purpose of registration and use. *Held* that the plaintiff's claim was not barred by the provisions of the Registration Act. The plaintiff's case having been established, the mokurruree lease, though registered, could not prevail as against the plaintiff's claim. *Held* also that it was proper for the Court to have allowed the mokurrureedar to be made a party to the suit as the claim of the plaintiff would be established in one suit against the person claiming through the defendant a priority over the plaintiff's right. MEER SHUMSHARE ALI v. SYUD LUTAFUT KUREEM; LALLA THAKOOR SAHOY v. SYUD MAHOMED LOOFOOLLAH, **18 W.R. 504.** [*D.*, 24 W.R. 320.]

(521)—*Ss.* 49, 50 (=*Registration Act*, 1866, *ss.* 49, 50) — *Registration — Priority.* — An unregistered contract of sale, though not such as absolutely to require registration according to s. 49, Act XX of 1866, in order to be admissible as evidence (even if sufficiently complete to pass rights of property from the vendor to the purchaser), cannot have any priority against any other authentic instrument of conveyance executed afterwards by the

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vendor and duly registered. MOFUZEL HOSSEIN v. GOLAM AMBIAH, **10 B.L.R. 381, Note=10 W.R. 196.** [*Appl.* 15 W.R. 239=6 B.L.R. App. 1 ; *R.*, 5 C. 336=4 C.L.R. 257.]

(522)—*Ss.* 49, 60 (=*Registration Act*, 1877, ss. 49, 60)—*Certificate of Registration—Erroneous procedure in presenting or admitting execution, effect of.*—Where a document is registered as a fact and bears a certificate thereon to the effect that it has been registered, a mere irregularity in the process of registration, such as want of qualification in the person presenting it for registration and admitting execution thereof, does not invalidate the registration nor render it inadmissible in evidence. HARDEI v. RAM LAL, **11 A. 319=A.W.N. 1889, 101.** (4 A. 14, 384, A.W.N 1882, 175, 183, 6 C. 25, 4 I.A. 166, 2 I.A. 210, 16 I.A. 19, *R.*) [*Diss.*, 6 O.C. 9; *R.*, 17 B. 94, 20 A. 392, 23 M. 580, 26 A. 57; *D.*, 18 M. 364.]

(523)—*Ss.* 49, 60, 66 *to* 68(=*Registration Act*, 1866, s. 49)—*Registration after completion of all formalities—Expression of intention of registering officer to reject document—Validity of registration—Certificate of registration—Memorandum of registering officer noting defect in title of transfer—Effect of memorandum on validity of registration.*—Where a document was registered after all the requirements of the law had been fulfilled, an expression of his intention to reject the document made by the registering officer in a report was no impediment to the passing of the title under it, as it was a well-registered document within the meaning of s. 49 of Act XX of 1866. Under Act XX of 1866, registration was complete when all the requirements stated in ss. 66 to 68 of the Act had been fulfilled. A certificate by the registering officer that the document was registered is *prima facie* evidence that those requirements have been fulfilled. Where, after the registration of a kobala, the registering officer made a memorandum on the back of the document to the effect that he was not satisfied with the title of the person conveying, such memorandum did not in any way affect the registration of the document. MUSSAMUT ROHIMOONNISSA v. SHAIKH ABDULLAH KHAN, **22 W.R. 319.**

(524)—*Ss.* 49, 71, 72, 73, 74, 75 (=*Registration Act*, 1866, *ss.* 49, 82 *to* 84)—*Act* VIII *of* 1859, *ss.* 1, 15—*Suit—Contract—Registration—Secondary evidence.*—A suit was brought to establish the plaintiff's right to certain lands alleged to have been purchased by him. A written *kobala*, or bill of sale, had been executed ; but it was refused registry, because the defendant appeared at the Registry Office and declared that the contract had not been completed. The plaintiff claimed to prove the contract of sale by oral evidence, and sued for possession of the property covered by the contract. *Held* by the majority (*Mitter, J.*, *dissenting*) that the suit could not be maintained so long as the *kobala* remained unregistered, and that secondary evidence of its contents was not admissible; and that the plaintiff should have taken steps to establish his right to have the written contract registered under the provisions of s. 84 of the Registration Act, XX of 1866. SHEIKH RAHMATULLA v. SHEIKH SARIUTULLA KAGCHI, **1 B.L.R.F.B. 58=10 W.R. F.B. 51.** (7 W. R. 112, 1 Agra F.B. 148, *F.*; 10 M.I.A. 220, 540, *Commented on*; 9 W.R. 351, 8 W.R. 423, *Cited.*) [*F.*, 3 B.L.R., App. 49, 6 B.H.C.A.C. 59, 20 W.R. 110, 24 W.R. 320, 9 C. 150; *Appr.*, 12 W.R. 385, 4 B.L.R.A.C. 65, 47 P.R. 1871, 9 B. 63; *Rel. on*, 5 N.L.R. 70=2 Ind. Cas. 744, 746 ; *R.*, 2 B.L.R.A.C. 105, 10 W.R. 483, 3 B.L.R. App. 125, 46 P.R. 95, 2 N.W.P. 160, 8 A. 540 ; *Cited*, 7 B.H.C. O C. 45 ; *Com. upon*, 9 B H.C. 121 ; *D.*, 3 B.L.R.O.C. 60, 15 W.R. 189, 7 C. 753.]

(525)—*Ss.* 49, 87—*Defect in procedure—Validity of registration.*—Where a sub-registrar accepts for registration a document and registers the same without the appearance and admission of one of the executing parties but upon evidence called for by him, *held* that the irregularity or defect was merely one of procedure, and as such did not render the registration null and void. MAUNG TUN v. MAUNG PAW U, **L. B. R. 1893—1900, 27.** (11 B. 691, 15 B.L R. 234, *R.*)

(526)—*Ss.* 49, 87 (=*Registration Act*, 1877, ss. 49, 87)—*Death of executant—Registration at the instance of one of several heir—Validity—Document if binds immoveable property.*—A document, which was presented for registration by one of the heirs of the deceased executant and registered, is not precluded by s. 49 of the Registration Act from affecting the immoveable property specified in it, although the registration might have been irregular. *Quære.*—Whether s. 87 of the Registration Act, which cures defects in the procedure of the registering officer, can be extended also to cure the shortcomings of persons who apply to have documents registered. SRIMATI SUJAN BIBI v. SRIMATI ASAFA KHATUN, **13 C.W.N. 722=4 Ind. Cas. 69.** (23 M. 580 ; *F.*; 23 A. 233, *R.*)

S. 50 (=s. 50 of 1877=s. 50 of 1871=s. 50 of 1866=s. 60 of 1864.)

(527)—*S.* 50 (=*Registration Act*, 1877, *s.* 50)—*Registration Acts*, XVI *of* 1864, XX *of* 1866, VIII of 1871 *and* III *of* 1877—*Priority between registered and unregistered documents—Optional and compulsory registration—Retrospectivity of enactments, rule as to.*—Under the Registration Acts prior to Act III of 1877, the registration of documents compulsorily registrable did not give them preference over unregistered documents subject to optional registration. S. 50 of Act III of 1877 first introduced that preference but this section has no retrospective effect,

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and the new preference over *such* unregistered documents accorded to registered documents is confined to documents registered under that Act, *viz.*, Act III of 1877. [*R.*, 6 B. 168, 13 B. 229, 20 B 158.] The safest rule for the interpretation of statutes is, that the Legislature, while possessing the power to divest existing rights, is not to be understood as intending to exercise that power retrospectively to any greater extent than the express terms of or necessary implication from its language requires. (*Moon* v. *Durden*, 2 Ex. Ch. 22. *Williams* v. *Smith*, 4 H and N. 559, 2 B. 18, 4 I.A. 127. *R.*) ICHHARAM KALIDAS v. GOVINDRAM BHOWANI SHANKAR, **5 B. 653.** (4 I.A. 127, *R.*)

(528)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Retrospectivity of statutes, rule as to.*—Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation. Applying this principle, s. 50 of Act III of 1877 should not be construed as having any retrospective effect. Before Act III of 1877 became law, a compulsorily registrable document had no priority over a document the registration of which was merely optional. S. 50 of the Act ought to be so read as not to affect rights acquired and existing under previous Acts. *Held*, therefore, that a deed of a sale of a certain land for Rs. 297 executed and registered on 20th March 1877, when Act VIII of 1871 was in force, cannot acquire any priority over an unregistered mortgage deed of the same land with possession executed on 18th March 1867, the former being compulsorily registrable and the latter only optionally registrable KANITKAR v. JOSHI, **5 B. 442.** [*F.*, 6 B. 495; *R.*, 6 B. 168, 5 B. 653, 13 B. 229, 20 B. 158.]

(529)—*S.* 50—*Section how far retrospective.*—In the Punjab, a document registered after this Act came into force would have priority over unregistered deeds executed after Act VIII of 1871 came into force but not over those executed before that Act. A transfer is not fraudulent merely because the transferee had notice of a prior unregistered transfer. DHAN MAL v. GANGA RAM, **95 P.R. 1893.** (115 P.R 1890, *R.*; 34 P.R. 1876, *D.*)

(530)—*S.* 50 (=*Registration Act* 1877, *s.* 50) —*Unregistered and registered sale deeds—Priority—Possession—Notice.*—A sale deed registered under Act III of 1877 takes precedence of unregistered deeds previously executed, the registration of which is optional; and the circumstance that the former was executed before Act III of 1877 came into force makes no difference. If, however, the subsequent registered purchaser has notice of the right of the prior purchaser whose deed has not been registered when he purchased, he cannot without fraud rely upon a purchase from a person whom he knew at the time to have no title; and in that case he cannot claim the advantage given him by s. 50 of the Registration Act. (5 C. 336, *F.*) Possession being one of the indications of ownership may in many cases be sufficient notice to the second purchaser, to put the duty of enquiry upon him, but to opetate as notice, knowledge of the possession should be brought home to him. GHULAM NAUKSHBAND v. MIRA KHAN **159 P.R. 1883.** (8 C. 597, 608, *R.*) [*Overruled*, 115 P.R. 1890 F.B.; *Appr.*, 126 P.R. 1884, 56 P.R. 1900=26 P.L.R. 1900; *D.*, 90 P.R. 1885, F.B.]

(531)—*S.* 50—*Scope—Competition for priority.*—S. 50 of the Registration Act applies to instruments of which the registration is optional, giving priority between such instruments to the one which is registered. HAMED BUX v. BINDR ABUN, **2 N.W.P. 37.** [*F.*, 24 W.R. 121; *R.*, 6 B. 168 F.B.]

(532)—*S.* 50—*Act* XX *of* 1866, *ss.* 18, 50, 100 —*Scope—Registration.*—S. 50, Act XX of 1866 does not vitiate titles acquired prior to the passing of that Act, merely because the instruments on which they rest are not registered. Where, before the new Registration Law was passed, a bill of sale was executed, full consideration was paid, and the purchaser has obtained, and remained in possession *bona fide*, for eleven years, *held* that a subsequent sale, duly registered under Act XX of 1866 which was in force at the time of its execution, did not prevail against, or affect, the title which the purchaser under the prior unregistered deed had acquired. GIRIJA SINGH v. GIRIDHARI SINGH, **1 B.L.R.A.C. 14=10 W.R. 65.** [*Appr.*, 22 W.R. 3; *R.*, 11 W.R. 128, 47 P.R. 1871, 2 B. 299, 6 B. 168, F.B.; *D.*, 19 W.R. 279, 7 C. 753.]

(533)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Application.*—It was not intended by s. 50 of the Registration Act to enable the vendor to sell his property more than once. On the true construction of that section, the instruments in competition must be taken to be those relating to the same property, though not necessarily executed by one and the same person, as the intention was to enable intending purchasers for value to rely on the registration books as a certain index of prior titles and incumbrances. The real scope of s. 50 of the Act is limited to cases in which the party in possession can only rely on an unregistered instrument. KRISHNA ASARI v. SIVA SUBRAMANIA PILLAI, **1 M.L.J. 43.**

(534)—*S.* 50 (=*Act* III *of* 1877, *s.* 50)—*Registration.*—S. 50 of the Registration Act of 1877 does not operate so as to exclude, on the ground of their non-registration, instruments executed, before Act XVI of 1864 (the first of the present

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series) came into operation. TIRUMALA v. LAKSHMI, **2 M. 147.** [*F.*, 5 M. 139, 20 B. 390, 28 A. 607=3 A.L.J. 320=A.W.N. 1906, 113; *R.*, 7 C. 753, 1 N.L.R. 158.]

(535)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Registration—Priority—Policy of Registration Acts.*—As between an unregistered mortgage of property to A in 1872, a registered mortgage of the same to B in 1876, and an unregistered sale of the same to A in 1877, the priority is to the registered document of 1876, though both the documents of 1876 and 1877 were optionally registrable; and though Act VIII of 1871, under which the document of 1876 was registered was repealed, the right of that document to defeat the prior document of 1872 was unaffected. [*R.*, 8 A. 540, 16 M. 148, 7 O.C. 342.] There has been a continuous policy, commencing with Act XVI of 1864, to allow registered documents, to defeat prior and subsequent unregistered documents, though optionally registrable, relating to the same property. MUTHANNA v. ALIBAG, **6 M. 174.**

(536)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Purchaser in possession under unregistered sale deed—Subsequent registered purchaser—Priority—Notice, doctrine of.*—Where a person purchasing land under a registered deed with the knowledge that another person has been in possession as an earlier purchaser with a defective title, his deed of sale not being registered, comes into Court, and claims priority over the latter, under s. 50 of the Registration Act (III of 1877), he is estopped by the law from urging that the prior deed is invalid and void because it is not registered; and the question whether the first deed is one of which the registration is compulsory or only optional, does not affect the principles on which the doctrine of "notice" is founded. AKBAR v. PREM SINGH, **2 P.R. 1885.** [*Diss.*, 90 P.R. 1885, F.B.; *D.*, 14 P.R. 1885, 15 P.R. 1908=97 P.L.R. 1908.]

(537)—*S.* 50—*Mortgage—Registration--Claim under unregistered mortgage—Registration Act* (III *of* 1877), *ss.* 49, 50—*Presumption of ownership from possession—Evidence Act, s.* 91.—The owner of certain property mortgaged it for more than Rs. 100 by means of an unregistered deed. After his death, his heir sued for possession of the property free from any incumbrance. The defendant claimed under his mortgage. *Held* that the document, being unregistered, was inadmissible in evidence, and with reference to s. 91 of the Evidence Act, its place cannot be supplied by any oral evidence, as the mortgage had no existence independently of the document which purported to create it. It was argued, however, that the possession left with the defendant should be deemed to afford a presumption of ownership right in him, and he was accordingly entitled to succeed, but it was *held* that, as the defendant advanced no claim as *owner*, there was no rule of evidence that would apply setting up a presumption in his favour. MUSHKA KHAN v. JAFIR KHAN, **126 P.R. 1884.** (18 P.R. 1878, *R.*) [*F.*, 14 P.R. 1885; *Appr.*, 90 P.R. 1885.]

(538)—*S.* 50—*Mortgage—Possession—Purchase—Registration.*—Where a mortgagee in possession of the mortgaged properties became purchaser of the same for the amount secured by the mortgage, under a deed of sale which was neither stamped nor registered, *held* that the mortgagee could fall back upon his mortgage, and recover the amount thereof, in preference to a subsequent purchaser of the same property, whose deed of sale was both stamped and registered. HIRACHAND BABAJI v. BHASKAR A. SHENDE, **2 B.H.C. 198.** [*R.*, 5 B.H.C. 147, 9 B.H.C. 121, 4 B. 70, 6 B. 168]

(539)—*S.* 50—*Registration—Priority—Registration Act* (XIX *of* 1843).—A registered deed (though subsequent in date) is entitled to priority over a prior unregistered verbal contract. [*Cons.*, 9 B.H.C. 121.] *Held* that a person cannot claim under an unregistered prior verbal contract to the detriment of a party holding *bona fide* under a subsequent registered deed. KOYLASH CHUNDER CHATTERJEE v. GOPAL CHUNDER CHATTERJEE, **1 W.R. 78.**

(540)—*S.* 50—*Act* XX *of* 1866—*Registration—Possession.*—A registered deed could not prevail against an unregistered deed under which possession had been delivered to the alienee. NAGESH BHAT v. BALVANTRAV, **9 B.H.C. 151, Note.** [*R.*, 6 B. 515, 27 B. 452.]

(541)—*S.* 50—*Registration Act*, XX *of* 1866 —*Priority of unregistered as against registered deed—Nature of proof required.*—Where a defendant set up an unregistered deed as against the claim of the plaintiff under a registered deed of later date, it was necessary for the defendant to show that the transaction on which he relied was a genuine one, and complete in every respect, and followed by peaceful possession before the passing of the Registration Act of 1864. MUNSOOR ALI v. WOOMED ALI, **22 W. R. 12.**

(542)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Registered and unregistered document, competition between.*—In a competition between a document which is compulsorily registrable and registered and one which is optionally registrable and unregistered, the former will prevail, whether the unregistered document be of the same nature as the registered document or not, unless the person claiming title under the unregistered document proves that the person who took the registered document took it with notice of his title. SHRISH CHANDRA ROY v. MUNGRI BEWA, **9 C.W.N. 14.** (7 C. 570, 10 B. L.R. 380, 13 C. 70, 16 M. 148, 25 M. 1, 10 B. 105, 27 B. 452, 19 A. 145, 25 A. 366, *Rel. on.*)

542-*a*)—*S.* 50—*Registered and unregistered documents—Priority — Unregistered document*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

not invalidated nor rights under it extinguished. —A purchaser at an auction-sale held in execution of a decree on a registered mortgage only takes the right, title and interest of his mortgagor, and if there is a previous valid unregistered mortgage on the same property, the debt secured by the latter is recoverable from the surplus, if any, left after the satisfaction of the registered mortgage. S. 50 of the Registration Act provides that a registered document takes effect as regards the property comprised therein against an unregistered document relating to the same property, but the unregistered one is neither invalidated nor are the rights of the mortgagee thereunder altogether extinguished. DHAN PAL SINGH v. BUDH SINGH, **11 A.L.J. 291=35 A. 271=19 Ind. Cas. 783.**

(542-*b*)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Priority between registered and unregistered deeds—Same property.*—R executed an unregistered mortgage, deed in favour of G on August 21, 1894. R executed another unregistered mortgage-deed in favour of B in respect of the same property on May 30, 1896. B brought a suit for sale on his mortgage and got a decree. In execution of his own decree, he purchased the property. His son sold the property to B K, and the latter's heir sold it to I. B K's heir, however, sold the full right of ownership in the property, and the sale-deed in favour of I was registered. In a suit for sale on his mortgage by G, *held* that I had priority over G's unregistered mortgage. ISHRI PERSHAD v. GOPI NATH, **10 A.L.J. 222=34 A. 631=17 Ind. Cas. 19.**

(543)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) — *Unregistered document optionally registrable — Subsequent registered document — Notice—Priority. — Held*, that s. 20 of the Indian Registration Act, 1877, will not avail to give the holder of a subsequent registered deed, priority in respect of his deed over the holder of an earlier unregistered deed, not being a compulsorily registrable deed, if, in fact, the holder of the registered deed has, at the time of its execution, notice of the earlier unregistered deed. SHANKAR DAS v. SHER ZAMAN, **26 P. L. R. 1900=56 P. R. 1900.** (115 P. R. 1890, *Overruled.*) [*R.*, 7 P. R. 1901, Rev.= 43 P.L.R. 1901; *Cited*, 4 P. R. 1901, Rev.= 106 P.L.R. 1901.]

(543-*a*)—*S.* 50—*Priority—Unregistered prior mortgage—Purchase at auction-sale—Sale by the purchaser by means of a registered instrument—Re-sale by the vendee to the vendor by a registered instrument.*—R made an unregistered mortgage by way of conditional sale without possession in favour of B in 1896. G purchased the mortgaged property in execution of a simple money-decree in 1905. In 1910, G sold the property to the appellants by means of a registered deed, and the appellants in their turn sold a portion of it back to G by a registered deed. R brought a suit for foreclosure upon his mortgage: *Held*, that the appellants were entitled to rank in priority over the unregistered mortgage in favour of R, inasmuch as they had no notice of it; *held* also that, in respect of the re-sale to him, G was entitled to priority over R, because he had no notice of the mortgage; and he was bound by it as auction-purchaser, as there was no conflict between the mortgage and his purchase, and he was not protected by s. 50 of the Registration Act. RAM LAL v. BACHCHA SINGH, **10 A.L.J. 614=16 Ind. Cas. 625.** (12 B.H.C. 241, *R.*)

(544)—*S.* 50 — *Registration — Priority—Act* XIX *of* 1843—*Proof of authenticity of document.* —Priority of registration would afford priority of title under Act XIX of 1843, only when the authenticity of the document is proved. GANDHAREE DEBIA v. SONATAN PANDAY, **10 W.R. 215.**

(545)—*S.* 50 (=*Registration Act*, 1871, *and* 1877, *s.* 50)—*Registered and unregistered documents—Priority. — Per Stuart, C.J.*—Under the explanation to s. 50 of the Registration Act, 1877, a document compulsorily registrable and registered under the Act of 1871, takes effect, as regards the property comprised in it, against a document relating to the same property, optionally registrable, but not registered, under that Act. DORI LAL v. UMED SINGH, **6 A. 164=A.W.N. 1884, 29.** (2 A. 431, 2 A. 951, *Observed on*; 4 A. 227, *Diss. & F.*)

(546)—*S.* 50—*Regsitered and unregistered documents—Priority—Deeds of different descriptions.*—Registration of a deed gives priority over one not registered. This general rule is not applicable to deeds of different descriptions. KHETTUR BALSEE v. GOUR HURREE, **W.R. 1864, 387.**

(547)—*S.* 50—*Registration Act*, 1866—*Unregistered deeds.*—A registered document of posterior date is not to prevail over an earlier unregistered deed where the transfer under such deed has been perfected by possession. This principle was held not to extend to a case in which, after such possession, the claimant under the unregistered deed had been dispossessed by the opposite party. ISSUREE DOSSEE v. LALL BEHAREE HOLDAR, **21 W.R. 421.**

(548)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Effect of passing of Act on sales valid before.* —S. 50 of the Registration Act was not intended to invalidate sales, which were valid, when the Act came into force. DASHRATH v. MT. TANI, **1 C.P.L.R. 105.**

(549)—*S.* 50 (=*Registration Acts*, III *of* 1877, *s.* 50, *and* VIII *of* 1871)—*Registered and unregistered documents.*—A document, the registration of which under Act III of 1877, is compulsory, and which is registered thereunder, takes effect in respect of the property comprised in it against a document relating to the same property, executed while Act VIII of 1871 was

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

in force, the registration of which under that Act was optional, and which was not registered thereunder. KALLAN v. SHANKAR LAL, **A. W.N. 1881, 76.**

(550)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Prior unregistered bond—Subsequent registered bond—Decree on first bond.*—The appellants sued the respondents to enforce a lien created by a registered bond, dated 21st May, 1872. The respondents became in 1877 the auction-purchasers of the hypothecated property in execution of a decree passed on the 8th July, 1873, on the basis of an unregistered bond dated 20th April, 1872. *Held*, that, as the prior bond was an unregistered one, the appellants were entitled to plead the provisions of s. 50, Registration Act, nor would the decree passed subsequent to the date of the registered bond hold the respondents. BALDEO PRASAD v. GANGA PRASAD, **A.W.N. 1881, 30.**

(551)—*S.* 50—*Unregistered mortgage-deed—Subsequent registered sale-deed — Priority—Notice.*—Where in a suit for possession by the purchaser of an occupancy tenure by a registered deed, the defendant pleaded that he was already in possession by a prior *unregistered* deed of mortgage, it was held that the prior deed, the registration of which was not optional, did not affect the land by its not being registered; that the doctrine of notice did not under the circumstances of the case apply; and that the title of the defendant as mortgagee did not exist in any way. MATHRA v. GURDITTA, **14 P.R. 1885.** [*Appr.*, 90 P.R. 1885, F.B.; *R.*, 143 P.R. 1889.]

(552)—*S.* 50 (=*Registration Act*, 1871 *and* 1877, *s.* 50)—*Registered and unregistered instrument—Priority.*—Under s. 50 of the Registration Act, 1877, a document registered under it takes effect, in respect of the property comprised in it, as against an optionally registrable but unregistered document relating to the same property, executed while the Registration Act, 1871, was in force. ABDUL RAHIM v. ZIBAN BIBI, **5 A. 593=A.W.N. 1883, 136.** (2 A. 851, *F.*) [*R.*, 13 B. 229.]

(553)—*S.* 50 (=*Registration Act*, 1877, *s.* 50)—*Conflict between unregistered and registered deeds under Act* VIII *of* 1871.—A compulsorily registrable deed registered under Act VIII of 1871, did not take priority over an unregistered deed, whose registration was optional under the same Act. KANHAIYA LAL v. BANSIDHAR, **A.W.N. 1884, 136.** [*Appl.*, 13 A. 288, F.B =A.W.N. 1891, 63; *R.*, 8 A. 23=A.W.N. 1885, 310, 7 A. 888].

(554)—*S.* 50 (=*Registration Act*, 1871, *s.* 50) —*Registered and unregistered documents—Precedence.*—Where plaintiff based his right on an unregistered document, dated 8th Dec. 1873, the registration of which was optional under Act VIII of 1871, and defendant claimed under deeds severally dated 15th August 1874, 21st August 1875 and 3rd October 1876, and all these deeds required registration and were registered under Act VIII of 1871, *held* that plaintiff's document was entitled to precedence over the defendant's documents, that s. 50 of the Registration Act of 1871 gives preference to registered documents, of which the registration is optional over unregistered documents, and that, as here the registration of the defendants' documents was compulsory, the defendant's documents had no precedence over plaintiff's documents. KARAMAT ALI v. MUHAMMAD MOHSIN. **A.W.N. 1886, 15.** (4 A. 227, F.B., 6 A. 165, *F.*)

(555)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Registered and unregistered documents—Act* XVI *of* 1864.—Under the Explanation to s. 50 of the Registration Act 1877, an unregistered deed executed before Act XVI of 1864 came into force, is neither invalidated by, nor postponed to, a deed registered under Act IX of 1871. RAM BARAN RAI v. MURLI PANDEY, **3 A. 505.** [*R.*, 6 B. 168, F.B.]

(556)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Registered and unregistered documents—By the Full Bench (Stuart, C.J., doubting).*—S. 50 of the Registration Act, 1877, does not confer upon documents registered under former Registration Acts, precedence over all unregistered documents of which, at the time of their execution, registration was either optional or not required. As between documents executed before Act III of 1877 came into operation, their relative positions to one another remain upon the footing provided for them by the Registration Law in force when they were executed. SRI RAM v. BHAGIRATH LAL, **4 A. 227, F.B. =A.W.N. 1882, 19.** (2 A. 851, F.B., *Observed on.*) [*F.*, 6 A. 164=A.W.N. 1884, 29; *D.*, 6 A. 164=A.W.N. 1884, 29, 7 A. 577=A.W.N. 1885, 115.]

(557)—*S.* 50 (=*Registration Act*, 1866, *s.* 50) —*Optionally registrable instruments—Priority of registered instruments.*—Under s. 50 of the Registration Act, 1866, a prior unregisteredreinstrument will be defeated by a subsequent gistered instrument, where both are optionally registrable. VENKAYYA v. KOTAYYA, **6 M. 153.**

(558)—*S.* 50 (=*Registration Act*, 1871, *s.* 50) —*Priority.*—Under s. 50 a registered document takes effect as against a prior unregistered document, followed by possession, even though the document is one which does not require registration. BIMARAZ v. PAPAYA, **3 M. 46.**

(559)—*S.* 50 (=*Registration Act*, 1877, *s.* 50)—*Optional and compulsory registration—Act* VIII *of* 1871.—A registered document, compulsorily registrable under Act III of 1877, takes effect, as regards the property comprised in it, against an unregistered document of a prior date relating to the same property, optionally registrable under Act VIII of 1871, which was then

Registration Act (XIV of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

in force. KUAR GIR PRASAD v. BANSI, **2 A. 431.** [*F.*, 7 C. 570; *Cons.*, 6 A. 164 = A.W.N. 1884, 29; *R.*, 6 B. 168, F.B., 20 B. 158, 1 N.L. R. 158.]

(560)—*S.* 50 (= *Registration Act*, 1877, *s.* 50)—*Optional and compulsory registration—Act* VIII *of* 1871—*Act* I *of* 1868 (*General Clauses*), *s.* 6.—Under s. 50 of the Registration Act, 1877, a document compulsorily registrable and registered under that Act takes effect, in respect of the property, comprised in it, as against an unregistered document relating to such property, executed while the Registration Act of 1871 was in force, and optionally registrable under that Act. S. 6 of the General Clauses Act (I of 1869) has no saving effect in such a case. LACHMAN DAS v. DIP CHAND, **2 A. 851, F.B.** [*F.*, 7 C. 570, 5 A. 593 = A.W.N. 1883, 136, 11 C. 661; *Cons.*, 4 A. 227, F.B. = A.W.N. 1882, 19, 6 A. 164 = A.W.N. 1884, 29; *R.*, 6 B. 168, F.B., A.W.N. 1881, 127, 18 B. 92, 20 B. 158, 27 B. 452; *D.*, 7 A. 577 = A.W.N. 1885, 115.]

(561)—*S.* 50 (= *Registration Act*, III *of* 1877, *s.* 50)—*Act* VIII *of* 1871—*Registered and unregistered documents—Priority.*—A document, the registration of which under Act III of 1877 was compulsory and which had been registered thereunder, took effect as regards the property comprised therein, as against a document relating to the same property, the registration of which, under Act VIII of 1871, was optional, and which had not been registered under that Act. GOBIND RAM v. BATASO, **A.W.N. 1883, 104.** (2 A. 851, *F.*)

(562)—*S.* 50 (= *Registration Act*, 1877, *s.* 50)—*Registered and unregistered deeds—Priority—Notice—Possession as evidence of notice—Registration Act*, III *of* 1877, *ss.* 49, 50.—The priority conferred by s. 50 of the Registration Act on a registered document of the kinds mentioned therein cannot be claimed where the person in whose favour the subsequent document was executed had *notice* of the prior title of another person. Such notice may be actual or constructive, but it is only in cases where the notice is clearly proved so as to make it fraudulent in the transferee to take and register a conveyance in prejudice to the known title of another that the registered deed ought to be set aside. The fact of possession having been transferred to the first transferee is important on the question of notice. Where it is proved that the first purchaser was in possession of the land at the time of the second sale, the second purchaser should be called upon to explain whether he made any and what enquiry from the first purchaser as to the circumstances of his possession, and unless he can satisfactorily account for this possession, as not necessarily involving any notice of the first purchaser's title as purchaser, he cannot rely on his registered deed to resist the first purchaser's claim. If the first purchaser was not in possession at the date of the second sale, the Court should inquire whether the second purchaser had any other kind of notice of the factum of the first sale. The rule that a subsequent registered deed cannot prevail over a prior unregistered deed when the person claiming under the registered deed has notice of the prior conveyance of the first purchaser, cannot apply to cases where the unregistered deed is one of which registration is compulsory. In such cases the provisions of s. 49 of the Registration Act are imperative and the document shall not affect the immoveable property comprised therein or be received as evidence of such transaction affecting such property. Unless therefore in such case the first purchaser can rely simply on the fact of possession having conferred an indefeasible title by prescription upon him, he would be in the position of being unable to adduce his title by purchase, and on proof of the vendor's existing title in the property, he would have to surrender his possession to the person who had obtained a valid conveyance of the estate from the former proprietor. AZIZ v. LADA SINGH, **102 P.R. 1883.** [*Overruled*, **115** P.R. 1890, F.B.; *R.*, 126 P.R. 1884, 2 P.R. 1885, 90 P.R. 1885, F.B., 90 P.R. 1885, Note, 56 P.R. 1900 = 26 P.L.R. 1900, F.B.]

(563)—*S.* 50 (= *Registration Act*, 1877, *s.* 50)—*Conflict between prior unregistered and subsequent registered deeds of sale—Priority—Notice.*—In a conflict between a prior unregistered deed of sale and a subsequent registered deed of sale of the same property, priority cannot be claimed in respect of the subsequent registered deed where the purchaser under it had notice of the previous sale. GURADITTA v. JOWALA SHAH, **102 P.R. 1883. Note.**

(564)—*S.* 50 (= *Registration Act*, 1877, *s.* 50)—*Registration, optional and compulsory—Unregistered documents—Priority—Old Act of* 1864, —*Benefit under* s. 50, *conditions of.*—As between a document, optionally registrable under the Act of 1864 and not registered thereunder, and a document compulsorily registrable under the Act of 1877 and duly registered thereunder (both documents having been executed when the respective Acts were in force and relating to the same property), *held*, the registered document took effect against the unregistered one under s. 50 of the Act of 1877. (2 A. 851 and 7 C. 570 = 9 C.L.R. 224, *Refd. to & Followed.*) The only difference between the above case and the 2 All. case is, that in the latter the unregistered document was executed when the Registration Act of 1871 was inforce; while, in the above case, the unregistered document was executed while the Act of 1864 was in operation. All that a person seeking the benefit of s. 50 of the Registration Act of 1877 is required to prove is, that his document is a document of the kind mentioned in the first clause of the section; that it has been duly registered under the Act; and that it covers the same property as that covered by any

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

unregistered document, against which it is contended that his document shall take effect. It is not necessary for him to show that he is claiming from a common vendor. GUNGA RAM GHOSE SIRDAR v. KALIPODO GHOSE, **11 C. 661.**

(565) — *S.* 50 (= *Registration Act*, 1877, *s.* 50) — *Registration —Priority between a purchaser of* 1878 *and an unregistered mortgagee of* 1872.—A registered sale-deed of 1878 is entitled to have priority over an unregistered hypothecation-deed of 1872, which is optionally registrable by virtue of s. 50 of the Registration Act. MADAR v. SUBBRAYULU, **6 M. 88.** [*F.*, 8 A. 23 ; *Appr.*, 13 A. 288 ; *R.*, 8 A. 540, 16 M. 148, 18 B. 355, 20 B. 158, 9 M. 119, 9 M. 495 ; *D.*, 10 B. 105.]

(566)—*S.* 50 (= *Registration Act*, III *of* 1877, *s.* 50)—*Sale of property under unregistered document—Possession given to vendee—Subsequent sale under registered document--Notice--Priority —Registration Act.*—A subsequent purchaser of immoveable property under a registered document with notice that the same property had been sold to another under an earlier unregistered deed, who had also obtained possession, is not entitled to priority over the latter, notwithstanding the provisions of s. 50 of the Registration Act, III of 1877. KODU v. RAMAPAT, **A.W.N. 1885, 57.**

(567)—*S.*50 (= *Registration Acts*, VIII *of* 1871 *and* III *of* 1877, *s.* 50)—*Prior unregistered document, possession under, notice to subsequent registered mortgagee.*—Plantiff's claim to the land in this case was based on his registered mortgage-deed dated 19th September 1877 executed to secure Rs. 250. Defendant set up an unregistered deed of sale for less than Rs. 100 which was of a prior date, *viz.*, the 1st of April 1877, and pleaded that he had been put in possession at the time of the sale to him, and had since occupied as owner. *Held* that, if the defendant was in possession when the mortgage-deed was executed to plaintiff, or plaintiff had otherwise notice of the defendant's purchase, he could derive no advantage from the registration of his mortgage, the registration of the title of, or possession by, a prior purchaser or mortgagee being notice of his title to subsequent purchasers and mortgagees. DUNDAYA v. CHENBASAPA, **9 B 427.** [*Disappr.*, 7 C.W. N. 11; *F.*, 10 B. 105, 16 M. 148=3 M.L.J. 54, F.B., 5 N.L.R. 82=3 Ind. Cas. 58; *Appr.*, 12 B. 569 ; *R.*, 20 B. 158, 20 B. 290, 22 B. 213, 26 B. 538, 27 B. 452, 1 L. B. R. 293, 6 Bom. L. R. 1043.]

(568)—*S.* 50 (= *Registration Act*, 1877, *s.*50)—*Notice to subsequent purchaser.*—S. 50 of the Registration Act, 1877, affects alike documents which it is optional, as well as those which it is compulsory to register, and the fact that the purchaser under the registered deed had notice of the prior unregistered transaction does not

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

alter the effect of the registered deed. NALLAPPA v. IBRAM, **5 M. 73.** (5 C. 336, *Dis.*) [*Overruled*, 16 M. 148, F. B.; *F.*, 5 M. 139, 6 M. 88, 6 M. 174, 115 P.R. 1890 F.B.; *R.*, 10 C. 424, 8 M. 167, 9 M. 119, F.B., 10 B. 105, 8 A. 540, 20 B. 158.]

(569)—*S.* 50 (= *Registration Act*, 1877, *s.* 50)—*"Former part of this section"—Registered purchaser—Notice of prior agreement to sell.*—The words "former part of this section" in s. 50 of the Registration Act, 1877, refer to the whole preceding portion of the section. [*R.*, 16 M. 148.] A registered purchaser of land, who buys with notice of a prior unregistered contract by his vendor to sell the same land to the plaintiff, cannot resist a suit for specific performance on the plea of registration. KADAR v. ISMAIL, **9 M. 119.** [*F.*, 13 M. 324 ; *R.*, 12 M. 505, 16 M. 148, F.B.]

(570)—*S.* 50 (= *Registration Act*, 1877, *s.* 50) —*Registration, not notice of unregistered documents from which registered holder derives title —Parties claiming under registered document, priority of.*—Under a registered deed, dated 2nd April, 1894, the first and the second defendants, the sons of V, sold their lands to the third defendant. Such registered sale deed was held to take effect in priority, as regards the properties comprised in it, as against an unregistered convevance dated 23rd March 1876 executed by V in favour of H, who by a deed of gift had transferred the property to plaintiffs' vendor. The deed of gift and the sale to the plaintiffs being registered documents long prior to the registered sale-deed of April 1894, it was argued that they took precedence over the latter deed of 1894. This argument was held to be untenable. Plaintiffs and their grantors were mere strangers to the land unless they could rely upon the unregistered conveyance by V to H in 1876 which, however, could have no effect upon the property when brought into competition with the registered conveyance of April 1894 in favour of the third defendant. The grantees of H stood in his shoes and could not succeed as against the third defendant where their grantor H could not himself have succeeded. Another argument advanced to the effect that the third defendant had notice of the unregistered conveyance of 1876 through the registered deeds of gift and sale which followed it, was also held to be unsound. The register might be notice of the registered documents which it contains, but it would be pushing the doctrine of constructive notice too far to hold that it could be notice also of the unregistered documents under which the holders of the registered documents derived their title. CHUNI LAL v. RAMCHANDRA, **22 B. 213.** [*F.*, 27 B. 408 ; *R.*, 27 B. 452, 1 N.L.R. 125.]

(571)—*S.* 50—*Registration Act*, XVI *of* 1864, *s.* 68—*Impeachment of registered sale deed—Nature of proof required.*—In order to prevent the operation of s. 68 of Act XVI of 1864, on a

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

deed of sale registered under the Act, it was necessary to show that the registered deed was fraudulently executed, and that the purchaser was wilfully and intentionally a party to the fraud of the vendor, or at least that the deed was executed without consideration. RAM CHUND KOOMAR v. MODHO SOODUN MUZOOMDAR, **7 W.R. 119.** [*F.*, 14 W.R. 318; *R.*, 20 W.R. 287; *D.*, 7 C. 753=10 C.L.R. 129.]

(572)—*S.* 50—*Registration Act*, XX *of* 1866, *ss.* 49, 100.—Where an instrument conferring a right or interest on the parties in whose favour it was made, was executed before 1864 and was valid then, it would not become invalid by reason of the party not getting it registered within 12 months, nor would a person getting a conveyance and registering it under the Act of 1864, have priority over a person who should be holding an instrument not so registered. DOOLAL BIBEE v. NADA SHAHA, **13 W.R. 446.** [*R.*, 6 B. 168]

(573)—*S.* 50 (=*Registration Act*, XX *of* 1866, *s.* 50)—*Prior unregistered deed—Subsequent registered deed —Fraud—Effect.*—A subsequent registered sale deed is not, under s. 50 of Act XX of 1866, entitled to priority over a prior unregistered deed, if the former transaction is not a *bona fide* one, and its holder's conduct in collusion with his vendor is found to be fraudulent. BHIKDAREE SINGH v. KANHYA LALL, **14 W.R. 24.**

(574)—*S.* 50—*Registered and unregistered sale —Fraud—Priority.*—A *bona fide* bill of sale which is not registered will prevail against a bill of sale got up by fraud, even if registered. DHOOKHAI MEER v. SHAIK MASSIR, **20 W.R. 110.**

(575)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Priority of unregistered mortgage over subsequent registered sale—Notice—Fraud.*—It shall only be in cases where notice of a prior conveyance, registration of which is optional, is so clearly proved as to make it fraudulent in a subsequent purchaser to take and register a conveyance in prejudice to the known title of another, that the Courts will suffer the registered deed to be affected. BHALU ROY v. JAKHU ROY, **11 C. 667.** [*Appl.*, 13 C. 70; *R.*, 8 A. 540, 6 C.P.L.R. 112, 16 M. 148, F.B., 27 B. 452.]

(576)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Sale-deed.*—Under s. 50 of the Registration Act—the purchaser under a registered conveyance is entitled to the possession of property as against a prior purchaser under an optionally registrable, but unregistered conveyance, even though the latter was put in possession and enjoyed it for a long time before the execution of the registered conveyance. KONDAYYA v. GURUVAPPA, **5 M. 139.** (2 M. 147, 5 M. 73, *F.*) [*Overruled*, 16 M. 148; *Not F.*, 13 B. 229; *R.*, 10 C. 424.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(577)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Registered and unregistered documents—Priority—Vendee under registered sale-deed competing with auction purchaser at a sale under a decree on a prior unregistered mortgage-deed.*—*Held* that a title resting on a registered sale-deed of the 29th August 1895 could not be defeated by a sale in execution of a decree obtained on the 20th April 1897 in a suit upon an unregistered mortgage of the same property dated the 21st July 1894 to which suit the vendee of 1895 was not a party. BALDEO PRASAD v. BALDEO, **A.W.N. 1901, 112.** (13 A. 288, 28 C. 139, *F.*; 7 A. 888, *Overrueld.*) [*R.*, 30 A. 238=A.W.N. 1908, 99=5 A.L.J. 607.]

(578)—*S.* 50 (=*Registration Act*, 1871, *s.* 50)—*Suit governed by Registration Law at institution—Registered and unregistered sale-deeds —Procedure—Construction of section.*—Under s. 6, Act I of 1868 (General Clauses), a suit is governed by the Registration Law in force at its institution, and not by that in force at its hearing. A compulsorily registrable registered sale-deed has no precedence over a prior optionally registrable unregistered deed of sale of the same property. [*D.*, 4 A. 227; *Cons.*, 7 C. 570 =9 C.L.R. 224; *R.*, 6 B. 168, 13 B. 229] Where the rights of the patries are intended to be taken away by a penal legislation of the kind referred to in s. 50, the language of the law must be construed very strictly against any derogation of right. AGRA SINGH v. ABLAKI KOOER, **4 C. 536=3 C L.R. 436.**

(579)—*S.* 50—*Registration Act*, XIX *of* 1843 —*Deed—Registration—Priority—Sale.*—A deed of sale registered under Act XIX of 1843 has priority over an unregistered deed of an earlier date. MALESHAPPA KARVIRAPPA v. BASSAPPA N. SHETAVNEKAR, **1 B.H C. 10.** [*D.*, 7 B.H.C. O.C. 45, 1 B. 574.]

(580)—*S.* 50—*Registration Act*, XIX *of* 1843 —*Sale of land—Priority.*—By Act XIX of 1843, any unregistered deed of sale is invalidated by a registered deed of sale of the same property, provided that the latter be authentic. And this preference is not confined only to those cases where the earlier and unregistered deed of sale has not been carried into effect. PRABHUDAS HIRACHUND v. DHONDU BHIKAM BHAT, **2 B H C. 222.** [*R.*, 1 B. 574; *D.*, 9 B.H.C. 121.]

(581)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Scope of—Notice—Sale—Compulsorily registrable—Possession—Effect.*—If a prior encumbrancer or vendee was in possession under a compulsorily registrable document, which, owing to his own fault, he omitted to get registered, a subsequent registered purchaser or encumbrancer will be entitled to oust the unregistered vendee or encumbrancer from possession and take the property free from any charge, notwithstanding the fact of his having

Registration Act (XVI of 1908, III of 1877, VIII of 1871, .XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

had notice of the possession of such unregistered purchaser or encumbrancer. HARNAM DAS v. HIRA, **90 P.R. 1885 F.B** (126 P.R. 1884, 14 P.R 1885, *Appr.*; 2 P.R. 1885. *D.*; 18 P.R. 1878, 70 P.R 1880, 37 P.R. 1882, 102 P.R. 1883, 159 P.R. 1883, *R.*) [*D.*, 15 P.R. 1908.] *See, also*, SHANKAR DAS v. DAMODAR DAS, **90 P.R. 1885, note.** [*Cited*, 90 P.R. 1885.]

(582)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) — *Registered and unregistered documents — Priority—Notice — Sale.* — The holder of a registered deed of sale of immoveable property who, at the time of the making of his contract of sale, had notice of a prior unregistered mortgage, which did not require registration, is not entitled to priority by reason of s. 50 of the Indian Registration Act, 1877, over the holder of the unregistered mortgage. DIWAN SINGH v. JADHO SINGH, **20 A. 252=A.W.N. 1898, 82.** [*R.*, 25 A. 366=A.W.N. 1903, 81.]

(583)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Priority—Possession under unregistered document—Sale—Notice.*—Where a registered purchaser has notice that his vendor had previously conveyed away the property to some third person by an unregistered conveyance, it is contrary to equity and good conscience that his title (though under the registered deed) should be allowed to prevail. But although the fact of the unregistered purchaser having taken possession is *not conclusive* evidence of notice, such possession is, in the great majority of cases, very *cogent evidence of notice.* NANI BIBEE v. HAFIZULLAH, **10 C. 1073.** [*Appr.*, 16 M. 148, F.B.; *R.*, 8 A. 540, 27 B. 452, 1 L.B.R. 293]

(584)—*S.* 50—*Registered sale deed — Lien under unregistered deed — Registration Act* (XIX *of* 1843).—Under Act XIX of 1843, a registered sale deed does not give the purchaser any preferential right to avoid an unregistered lien created by the seller to his judgment-creditor. BISSONATH SINGH v. RAJ CHUNDER ROY, **W.R 1864, 141.**

(585) — *S.* 50 (=*Registration Act*, 1866, *s.* 50)—*Priority — Sale.*—A registered sale—though of a subsequent date, is, under s. 50 of Act XX of 1866, entitled to priority over an unregistered mortgage of the same property which is earlier in date. ALI AZIM KHAN v. ISLAM KHAN, **14 W.R. 483.**

(586)—*S.* 50—*Act* XVI *of* 1864, *s.* 68—*Registration—Registered and unregistered sale-deeds —Priority—Possession.* — Under s. 68 of Act XVI of 1864, in the absence of proof of fraud, a later registered deed of sale has priority over an earlier unregistered one, even where the registration is optional and even though the person claiming under the unregistered deed holds possession under it. GOOROO DAS DAN v. KOOSHOOM KOOMAREE DOSSEE, **9 W.R. 547.** [*R.*, 9 B.H.C. 121, 2 B. 299, 5 C. 336=4 C.L.R. 257; *D.*, 7 C. 753=10 C.L.R. 129.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(587)—*S.* 50—*Registered and unregistered deeds of sale, conflict between—Effect of Act* XIX *of* 1843.—A genuine deed of sale under which possession has passed to the purchaser, and which was given by the owner of the estate at a time when registration was not compulsory is not invalidated by a subsequent deed given by that owner's heir and successor, the registration of which is compulsory merely because the last deed was registered and the first was not. The provisions of Act XIX of 1843, do not apply where the vendors are different persons. IMRIL SINGH v. KOYLESHOO KOER, **11 W. R. 559.** [*R.*, 12 W.R. 217, 9 B.H.C. 121, 6 B. 168, F.B.]

(588) — *S.* 50 (=*Registration Act*, 1877, *s.* 50)—*Registered and unregistered conveyances —Priority—Sale-deed.*—Where property (worth less than Rs. 100 and whose conveyance, in consequence, is optionally registrable) was conveyed by the owner twice over, by an unregistered document and a registered instrument, respectively, *held* that the fact of the vendor having given possession to the first and unregistered vendee, though such possession might have continued down to the date of the second registered sale, did not necessarily prevent the operation of the enactment in s. 50 of the Registration Act that "a registered document shall take effect as regards the property therein comprised, against every unregistered document relating to the same property;" and that the only case in which the title of the prior unregistered purchaser can prevail over that of the subsequent registered purchaser for value is when the latter takes with notice of the former—*Prinsep, J., dissenting*; a purchaser under a registered conveyance subsequently executed cannot succeed in a suit to eject one, who holds possession under a prior but unregistered conveyance, the registration of which is optional.—*Per Prinsep, J.* NARAIN CHUNDER CHUCKERBUTTY v. DATARAM RAY, **8 C. 597, F.B.=10 C.L R. 241.** [*R.*, 10 C. 424, 10 C. 1073, 10 C. 1087, 8 A. 540, 13 C. 70, 16 M. 148, F.B., 2 O.C. 74.]

(589) — *S.* 50 (=*Registration Act*, 1866, *s.* 50)—*Unregistered deed of sale—Registered certificate of sale—Priority.*—A subsequent registered certificate of sale of immoveable property by the Court does not take precedence over a prior unregistered deed of sale of the same property where the registration of such unregistered deed is optional under the provisions of the Act. If a creditor cause to be sold property which does not belong to his judgment-debtor at all, the purchaser cannot acquire a title against the real owner by merely registering his certificate. LAKHMICHAND WALCHAND v. KASTUR BECHAR, **9 B.H.C 60.** [*Diss.*, 12 B.H. C. 241; *F.*, 8 B. 489; *Appr.*, 6 B. 193, F.B.; *R.*, 20 B. 158.]

(590)—*S.* 50—*Registration—Priority—Sale-deeds.*—The law requires, if there are two deeds

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

of sale, that effect shall be given to the latter deed, supposing it to be registered, rather than to the earlier one unregistered, notwithstanding knowledge or notice of the unregistered deed on the part of the party to the registered deed. The benefit of priority over an earlier unregistered deed of sale does not extend to a registered document which, although in form a deed of sale, is in truth a fraudulent deed of gift. NETTRO GOPAL CHUNDER v. DWARKANATH MULLICK, **1 W.R. 314.** [*R.*, 4 B. 126, F.B.]

(591)—*S.* 50—*Sale of same property to two persons—Registration—Priority — Registration Act* (XIX *of* 1843).—A registered sale-deed is entitled to priority, under Act XIX of 1843, over an unregistered one (both the sale-deeds being in respect of the same property), even though the former is subsequent in date, and the vendees under both the deeds *bona fide* bought the property. SYUD NUZUR ALI v. SYUD EMDAD ALI, **1 W. R. 206.**

(592) — *S.* 50 (=*Registration Act*, 1877, *s.* 50)—*Scope of—Expression "duly registered," meaning of—Instruments which are not both optionally registrable—Priority—Act* (VIII *of* 1871), *s.* 50—*Vendee not taking possession from vendor—Effect—Fraud.*—S. 50 of the Registration Act (III of 1877) has no application to cases where the contest is between an unregistered instrument whenever executed and a registered instrument executed before the Act came into force. It applies only to cases where the registered instrument is subsequent to the Act. The section has no retrospective effect, and the words "duly registered" in the section mean duly registered under that Act and not under any prior Act. The plaintiff, vendee of the land in dispute under a registered deed of sale dated 1st February, 1872, sued to recover possession from the defendants who claimed the same land by purchase from one X, who had purchased from the plaintiff's vendor by an unregistered deed of sale dated 15th July, 1871. The sale-deed relied on by the plaintiff was compulsorily registrable, and the other relied on by the defendant was optionally registrable. *Held* that, under s. 50 of Act VIII of 1871, which was in force when the instruments in question were executed, the contest can only be between instruments both of which are optionally registrable and that, consequently, by virtue of its being registered, the sale deed of the plaintiff was entitled to no priority over the earlier deed under which the defendant claimed. *Held* also that, by merely omitting to take possession of the land on his purchase, the defendant's vendor was not guilty of any positive fraud or of any concealment or negligence so gross as to amount to fraud that would entitle the plaintiff to relief against him. SHIVRAM v. SAYA, **13 B. 229.** [*R.*, 20 B. 158, 3 Bom. L.R. 679.]

(593)—*S.* 50 (=*Registration Act*, 1877, *s.* 50)—*Purchase of property under prior unregistered sale—Vendor taking lease of property sold from vendee—Decree for rent against vendor—Subsequent sale under registered deed—Priority—Effect of decree for rent.*—Certain property was purchased by A from B in 1876, but the sale-deed was not registered. On the day of purchase, the vendor took a lease of the property from the vendee who, in 1878, sued the vendor for rent due under the lease and obtained a decree. B having sold the property in 1881 under a registered sale to another person the latter brought the present suit against A in 1888 for recovering possession.—*Held* (1) that, under s. 50 of the Registration Act (III of 1877), the plaintiff's registered deed, though subsequent in date, must prevail over the defendant's unregistered earlier deed, and (2) that the decree for rent obtained by the defendant A in the suit for rent in the year 1878 did not give him priority over the plaintiff under s. 50 of the Registration Act (1877). Assuming that the defendant's ownership was not in dispute in the rent suit in which the decree was passed, as appears to have been the case from there being no declaration of his title as owner, the decree merely adjudicated as to the relationship of landlord and tenant between the defendant and his vendor created subsequently to the sale. The title of the defendant as owner was not merged in the decree, but rested exclusively on his deed of sale although his vendor B might not, whilst he was his tenant, be able to dispute it. KESHAV PANDURANG v. VINAYAK HARI, **8 B. 355, F.B.** [*F.*, 28 C. 139; *R.*, 27 B. 452.]

(594)—*S.* 50 (=*Registration Act*, 1877, *s.* 50)—*Notice of earlier unregistered deed, effect of, on priority claimable by holder of subsequent registered deed.*—Though s. 50 of the Registration Act which provides that certain documents shall, if duly registered, take effect, as regards the property comprised therein, against unregistered documents relating to the same property, makes no reference whatever to the holder of the subsequent registered documents having notice of the prior unregistered one, yet, the equitable doctrine of notice has been held to be applicable to such cases so that the registered holder cannot avail himself of the provisions of s. 50 of the Act, if, at the time he registers the deed, either he himself or an agent, whose knowledge is the knowledge of the principal, has notice of an earlier deed, which, though executed, is not registered, and the registration which he has actually effected cannot give him priority over the unregistered deed of which he has such notice. DIWAN SINGH v. JADH SINGH, **19 A. 145=A.W.N. 1897, 19.** (13 C. 70, 10 B. 105, 16 M. 148, *F.*; 8 A. 540, *R.*) [*Affirmed on appeal.*, 20 A. 252; *F.*, 30 A. 238=A.W.N. 1908, 99=5 A.L.J. 607; *R.*, 27 B. 452, 25 A. 366=23 A.W.N. 81, 9 C.W.N. 14.]

(595)—*S.* 50—*Certificate of sale—Registration—Priority—Unregistered lease.*—A certificate

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

of sale is not a document of such a character as to be entitled by law to any priority, by virtue of its being registered, over an unregistered lease. FAKIRCHAND GOVINDRAM v. KAHANDAS, **3 B.H.C. A.C. 367.**

(596)—*S.* 50—*Act* XX *of* 1866—*Priority—Certificate of Court's sale.*—An unregistered deed of sale accompanied by immediate possession ought to be preferred to a subsequent registered certificate of a Court's sale or to a subsequent deed unaccompanied by possession. MANMAL *valad* SURATMAL v. DASHRATH *valad* NARAYAN, **9 B.H.C. 147.** [*Appr.*, 7 C.753=10 C.L.R. 129; *R.*, 1 B. 624, 2 B. 299, 27 B. 452=5 Bom. L.R. 144.]

(597)—*S.* 50 (=*Registration Act*, 1866, *s.* 50) —*Act* XX *of* 1866, *ss.* 18 *&* 50—*Execution sale—Contest between two rival auction-purchasers—Certificate of sale—Act* VIII *of* 1859, *s.* 259.—Of the purchases of the plaintiff and the defendant, two auction purchasers, the plaintiff's purchase was prior, but his certificate of sale was not registered. The defendant was in possession, and his certificate was registered. Registration was optional in both cases. *Held* that, under Act XX of 1866, s. 50, the defendant's title was entitled to priority over that of the plaintiff. PANHA KHUMAJI v. FATTA UPAJI, **12 B.H.C. 179.** [*Appl.*, 5 C. 336; *D.*, 4 C.L.R. 257, 10 C. 250, 7 C. 753.]

(598)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Priority—Auction sale.*—Plaintiff was the purchaser at an auction sale of the properties of one M, judgment-debtor. He held an unregistered mortgage-deed, dated 1869, and obtaining a decree, purchased, in execution of that decree in 1875, his judgment-debtor's interests. The defendants held a possessory mortgage, dated 1873, from the same M of the same properties, and their deed was a registered one. The plaintiff sued to obtain possession of the share of M. *Held* that the defendants' registered mortgage was entitled to priority over the plaintiff's, and that the plaintiff's suit ought to be dismissed as he was not willing to acknowledge and pay off the prior incumbrance; *held*, also, that the fact that the plaintiff was an auction-purchaser on a decree passed in respect of a prior unregistered bond gave him no superior rights over the defendants, and that the priority of the defendants' registered bond conferred by the Registration Act was not affected by the circumstance of a decree having been obtained on the unregistered bond of a prior date. RAGHUBANS KUAR v. GANGA PHUL, **A.W.N. 1886, 133.**

(599)—*S.* 50 (=*Registration Acts*, 1871 *&* 1877, *s.* 50)—*Decrees.*—The omission to register decrees does not make them ineffectual against subsequent registered assignments or decrees, as they are excluded from the operation to s. 50. KOLLURI NAGABHUSHANUM v. AMMANNA, **3 M. 71.** [*D.*, 6 M. 88, 18 B. 355.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(600)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Decrees—Registered and unregistered bond —Priority.*—A decree obtained upon a subsequent registered hypothecation bond had no priority over a prior decree obtained upon an unregistered hypothecation bond. The Court could not go behind either of the decrees, whose priority must be determined according to their respective dates. PARSHADI LAL v. KHUSHAL RAI, **A.W N. 1882, 15.**

(601)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Registered transfer— Unregistered mortgage-deed—Decree—Priority—"Not being a decree or order," Construction of.*—A purchaser under a registered deed of sale will be entitled to priority over a purchaser in execution of the subsequent decree obtained upon an unregistered mortgage prior in date to the registered sale, the registered vendee not being a party to the decree on the unregistered mortgage. (7 A. 888, *Diss.*).—Whenever an unregistered mortgage is merged in a decree, a transferee under a registered-deed subsequent to the mortgage is precluded from claiming priority under s. 50, Registration Act, only when the decree can be used as evidence against the registered transferee. The words "not being a decree or order" in s. 50, construed as "not being a decree or order to which the registered vendees or his vendor (before the sale) was a party." ISHAN CHANDRA DEY v. GONESH CHANDRA PARSI, **28 C. 139=5 C.W.N. 419.** [*F.*, 4 C.L.J. 490.]

(602)—*S.* 50(=*Registration Act*, 1877, *s.* 50)—*Registered and unregistered documents — Priority — Decree on uregistered mortgage.*—Where a mortgagee, under an unregistered hypothecation bond, the registration of which was optional, obtained a decree thereon and attached the hypothecated property in execution he was entitled to priority over the holder of a registered mortgage in respect of the same property which was executed subsequently to the unregistered bond, but prior to the decree. BAIJNATH v. LACHMAN DAS, **7 A. 888=A.W. N.1886, 93.** (A.W.N. 1882, 15, A.W.N. 1884,136, *D.*) [*Not F.*, 6 C.P.L.R. 112, 28 C. 139, A.W. N. 1901, 112.]

(603)—*S.* 50—*Registered deed—Decree on prior registered deed—Priority.*—A decree subsequently obtained on a prior unregistered deed would not give priority on a deed registered before the decree though after the first deed. For, here, the real competition is between the two deeds and not between a registered deed and a decree. RAM DITTA MAL v. AMIR CHAND, **195 P.R. 1889.**

(604)—*S.* 50(=*Registration Act*, 1877, *s.* 50)—*Decree or order founded on unregistered document —Document to be prior to registered document.*—The section implies that the decree or order founded on an unregistered document shall be prior in date to the registered document affecting the same property. RAMDAYAL KASHINATH v. HARNATH SHEOBALAM, **5 C. P.L.R. 109.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(605)—*S.* 50 (= *Registration Act*, 1877, *s.* 50) —*Construction of words "decree or order."*—The "decree or order" contemplated by s. 50 does not mean a decree or order obtained on an unregistered document subsequently to the execution of the registered instrument. MIRAN PINJARA v. RAMASA, **6 C.P.L.R. 112.** (11 C. 667, *R.*) [*R.*, 8 C.P.L.R. 109.]

(606)—*S.* 50 (= *Registration Act*, 1877, *s.* 50)—*Mortgage—Sale of land mortgaged to mortgagee—Lease of land to mortgagor as tenant—Mortgagor, sale of land by—Registration—Priority.*—The suit land was mortgaged with possession by A to B in 1879, but it remained in the possession of the mortgagor as tenant of the mortgagee under an unregistered lease. In 1881, A sold the land to B under a deed which was not registered, and in 1883, he again sold the same under a registered deed to C, who obtained possession and got the land transferred to his name in the revenue records. —B brought the present suit against C for recovering possession. The defendant contended that his subsequent deed of 1883, being registered, had priority over the plaintiff's unregistered deed of 1881. The plaintiff urged that the possession of A as his tenant subsequent to his mortgage and sale amounted to possession by himself which possession was constructive notice of his title to the defendant. —*Held*, (1) that under s. 50 of Act III of 1877, the defendant's subsequent registered deed of 1883 gave him priority over the plaintiff's unregistered deed though prior in date, and (2) that the possession of A was no notice, either actual or constructive, to the defendant, of the plaintiff's title. The defendant having purchased the land from A whom he found to be in possession had no reason to suppose that A was in possession otherwise than as owner. MORESHWAR BALKRISHNA v. DATTA, **12 B. 569.** [*R.*, U.B.R. 1897—1901, Vol. II, 574, 22 B. 213, 27 B. 452.]

(607)—*S.* 50 (= *Registration Act*, 1877, *s.* 50) —*Civ. Pro. Code, s.* 316 - *Registration of certificate of sale—Prior unregistered optionally registrable mortgage—Rights of purchaser.*—A purchaser of land, at a Court-sale, in execution of a decree for money, does not acquire priority by registering his certificate of sale, as against a mortgagee, whose mortgage is optionally registrable and unregistered, but prior in date to the institution of the suit. [*F.*, 9 M. 495; *R.*, 16 M. 148.] *Semble*:—A certificate of sale issued by a Court under s. 316, Civ. Pro. Code if duly registered, takes effect under s. 50 of the Registration Act, 1877, against all unregistered incumbrances. RAMARAJA v. ARUNACHALA, **7 M. 248.**

(608)—*S.* 50 (= *Registration Act*—1877, *s.* 50) *Priority—Mortgagee under registered mortgage—Auction-purchaser under decree on prior unregistered mortgage.*—Under s. 50 of the Act, the decree or order which is not to be affected by a registered document must be a decree or order made prior to the execution and registration of the registered document. In a suit by a registered mortgagee for setting aside an auction-sale held under a decree on an unregistered mortgage, where the registered mortgage had been executed after the unregistered mortgage but before the decree thereon, *held* that the decree on the unregistered mortgage was a perfectly good one, but only that it did not affect the plaintiff's right to have it declared that it was subject to his lien; and hence that the auction-purchaser under the former decree could take only subject to the rights of the registered mortgagee. JAGRUP RAI v. RADHEY SINGH, **13 A. 238. F.B. = A.W.N. 1891, 63.** (8 A. 23, 6 M. 83, *R.*) [*F.*, 28 C. 139, A.W.N. 1901, 112.]

(609)—*S.* 50 (= *Registration Act*, 1877, *s.* 50) —*Registration—Notice—Priority of mortgages.* —S. 50 of the Indian Registration Act, 1877, will not give priority to a mortgagee who with notice of a prior not compulsorily registrable incumbrance over the property mortgaged to him proceeds to register his own subsequent mortgage. GOVIND PRASAD v. NASR ULLA, **A.W.N. 1897, 90.** (A.W.N. 1897, 19, *F.*)

(610)—*S.* 50 (= *Registration Act*, 1877, *s.* 50)—*Possession of over twelve years under prior valid unregistered sale, effect of, on rights under subsequent registered hypothecation.*—Rights created under a registered hypothecation bond might be affected not only by lapse of time as between creditor and debtor, but also by possession of the hypothecated property for the required statutory period, by a third person on a claim inconsistent with the rights of both the creditor and the debtor, as in the case of such possession held by a purchaser under a prior valid unregistered sale of the land; nor does s. 50 of the Registration Act in any way interfere with the operation and effect of the established principle of limitation and prescription governing such cases. NALLAMUTHU PILLAI v. BETHA NAICKAN, **23 M. 37.** [*R.*, 26 M. 72 = 12 M.L.J. 410.]

(611)—*S.* 50 (= *Registration Act*, 1877, *s.* 50) —*Registration Act* (XX *of* 1866) - *Unregistered mortgages optionally registrable, registered mortgage not entitled to priority—Registration Act* (III *of* 1877), *s* 50, *Retrospective effect.*—The unregistered mortgages sought to be enforced by the plaintiff in this case were each for a sum under Rs. 100 and were, under the Registration Acts, 1866 and 1871; optionally, not compulsorily, registrable. The intermediate mortgage of 1870 on which the defendant relied had been registered, but the registration could not bestow any priority over the plaintiff's mortgage. Nor could s. 50 of the Act be taken to operate retrospectively, so as to confer priority on the defendant's mortgage of 1870, in virtue of its registration, over even the plaintiff's earlier mortgage of 1869. Further,

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843) —*continued.*

as the registered purchaser at a Court-sale, defendant had taken only subject to existing liens. RUPCHAND DAGDUSA v. DAVLATRAV VITHALRAV, **6 B 495.** [*F.*, 16 B. 486; *R.*, 7 B. 146, 13 B. 229, 28 B. 153; *Expl. & D.*, 5 C. L.J. 527.]

(612) — *S.* 50 (=*Registration Act*, 1866, *s.* 50) —*Holder of subsequent registered mortgage—Notice of previous mortgage unregistered, effect of, on priority between mortgagees.*—A subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he has notice. The object of the rules of registration is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, and such end and object is accomplished if the person coming to register a deed has, *aliunde*, and not by means of the register, notice of the deed affecting the property, executed before his own. So, if the subsequent mortgagee, at the time of taking his registered mortgage, has had notice of the prior unregistered mortgage, the non-registration of such prior mortgage cannot be availed of by himself or by his assigns under s. 50 of the Registration Act (XX of 1866). SHIVRAM v. GENU AND HANMANTRAV SADASHIV, **6 B. 515.** [*Appl.*, 12 B. 569; *R.*, 7 B. 146, 9 B. 427, 16 M. 148=3 M L.J. 54, F.B., 20 B. 158, 20 B. 390, 27 B. 452, 28 B. 153=5 Bom. L. R. 892, 11 C.W.N. 1078=6 C.L.J. 719; *D.*, 5 C. L.J. 527.]

(613)—*S.* 50—*Mortgage*—Miraspatra—*Registration — Priority.* —A registered *miraspatra* was entitled under Act XIX of 1843, to preference over an unregistered *miraspatra* of a prior date accompanied with possession. HARNAMGIR v. WILLIAM SPIRES, **2 B.H.C. 204.** [*R.*, 8 B H.C. A.C. 50, 9 B.H.C. 121; *D.*, 7 B. H.C.O.C. 45, 1 B. 574.]

(614) —*S.* 50—*Mortgage—Registration—Possession—Act* VIII *of* 1859.—Plaintiffs sued to recover possession of land under a mortgage duly registered. They alleged that they were put in possession under the mortgage, but that they were subsequently dispossessed by the defendants under a decree obtained by them against the mortgagors. Defendants pleaded that they had given the plaintiffs the option of satisfying their claim and retaining the fields or of giving up the fields to them and allowing them to satisfy the plaintiffs' claim. They also stated that the plaintiffs, as mortgagees with prior registered bonds, had no right to possession, but had only to have their claim paid off. The suit was decreed by both the lower Courts. The High Court on appeal modified the decree of the Courts below by awarding possession to plaintiffs, on condition that they satisfied the claim of the defendants as decree-holders; or if plaintiffs declined complying with this condition, the defendants to be entitled to possession of the land on satisfying the amount of the plaintiffs' claim under their mortgage. BHIKAJI v. VALLABHDAS, **2 B.H.C. 209.**

(615)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) — *First unregistered mortgage — Subsequent registered mortgage—Money decree on first mortgage subsequent to second mortgage – Priority.*— On the 7th July 1871; P gave G an unregistered hypothecation bond for Rs. 98. G sued on it and obtained a money-decree on the 14th June 1872. Meanwhile P gave, on the 6th May 1872, a registered usufructuary mortgage of the same property to B. In execution of the decree in favour of G, the property was sold and came into the hands of G himself. In a suit by B, the usufructuary mortgagee, for possession, *held* that, if G pleaded priority of lien under his bond of 7th July 1871, he was estopped by the provisions of s. 50. Act III of 1877, and that, if he pleaded the decree of 14th June 1872, the purchase at the sale in execution of that decree was subject to the respondent's lien, as that decree was a mere money-decree and was subsequent in date to the bond in favour of B. *Held*, further, that the provisions of s. 50, Registration Act, III of 1877, had a retrospective effect. GOKUL v. BASAHU, **A.W. N. 1881, 127.**

(616)—*S.* 50 (=*Registration Act*, 1877, *s.* 50)— *Registration—Registered and unregistered mortgages—Priority—Act* XVI *of* 1864.—A deed of mortgage executed in 1876 and registered under s. 50 of Act III of 1877, cannot claim priority over an unregistered deed of mortgage in respect of the same property executed before Act XVI of 1864 came into force. SHEORAJ SINGH v. LAUNGA KUARI, **A.W.N. 1881, 120.** (4 B. 459, *F.*)

(617)—*S* 50 (=*Registration Act*, 1877, *s.* 50) — *Registered and unregistered mortgages* — This was a suit for possession of a house purchased by the plaintiff at a sale in execution of a hypothecation decree which he had obtained against the owner of such house on two unregistered mortgage bonds. The suit was resisted by the defendant who was in possession of the house as a mortgagee under a registered mortgage-deed later in date than the bonds of the plaintiff but prior to the decree obtained on those bonds. *Held* that the defendant's registered mortgage-deed gave him a title to the possession of the house, superior to that of the plaintiff under his bonds and decree. RAM SAHAI v. GAUNA LAL, **A.W N. 1881, 161.**

(618)—*S.* 50 (=*Registration Act*, 1866, *s.* 50) —*Priority of registered document—Mortgage.*— Under s. 50 of the Registration Act XX of 1866, a duly registered deed of conveyance has priority over a prior unregistered deed of mortgage of the same property, although the registration of the latter is optional. GAYARAM MAZUMDAR v. MADHUSUDAN MAZUMDAR, **4 B.L.R. App. 73.** (9 W.R. 282, 10 W.R. 37, *F.*)

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(619)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Mortgage—Sale of property comprised in an unregistered mortgage—Liability of purchaser—Notice.*—Property was purchased, which was the subject of an unregistered mortgage, the registration of which was not compulsory. The purchaser had no notice of the mortgage at the time of execution of the sale-deed in his favour, but received notice before the sale-deed was registered. *Held* that the mortgage was binding on the purchaser. KHIALI RAM v. HIMMATA, **A.W.N. 1908, 99=30 A. 238=5 A.L.J. 607.** (19 A. 145, 25 A. 366, *Appl.*)

(620)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Prior mortgage not compulsorily registrable—Mortgagee in possession—Subsequent registered mortgage—Priority—Evidence Act, s.* 110.—Where a prior usufructuary mortgagee is in possession under an unregistered instrument, which was not compulsorily registrable, a subsequent mortgagee under a registered instrument must be presumed to have had notice of such possession, and could not claim any priority over the unregistered instrument. BHIKHI RAI v. UDIT NARAIN SINGH, **25 A. 366 =A.W.N. 1903, 81.** (9 Moo. P.C. 18, 16 C. 414, 16 M. 148, 20 A. 252, *R.*) [*Appl.*, 5 A.L.J. 607 =A.W.N. 1908, 99=30 A. 238; *R.*, 9 C.W.N. 14, 11 C.W.N. 1109, P.C.=9 Bom. L.R. 1062= 17 M.L.J. 465=4 A.L.J. 750=6 C.L.J. 674=2 M.L.T. 394=31 B. 566.]

(621)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) — *Unregistered usufructuary mortgage—Long possession thereunder — Invalid sale to same mortgagee—Subsequent mortgage by registered document—Priority of title.*—An unregistered usufructuary mortgage had been executed in respect of certain property. After a long time, the property was transferred to the mortgagee and patta therefor was entered in his name. Subsequently, plaintiff obtained a mortgage of the same property by means of a registered instrument and sued to recover possession of it. *Held* that there was nothing in s. 50 of the Registration Act to affect the operation of the law of limitations in favour of a person who claimed under an unregistered document. Long possession of the usufructuary mortgagee though under an unregistered instrument could not be superseded by a later registered instrument. The fact that the defendant mortgagee latterly claimed under an invalid sale did not make his possession the less adverse to the plaintiff. Consequently plaintiff could not recover possession. BUDANKAYALA BALAKRISHNAMMA SUBUDHI v. VINAYAKA RAVA SINGI BISOYI, **26 M. 72=12 M.L.J. 410.** (23 M. 37, *R.*)

(622)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Retrospective effect—Statutes, Construction of — Unregistered mortgage of* 1861— *Act* XIX *of* 1843, *s.* 2 - *Act* XVI *of* 1864— *Subsequent registered mortgage.*—It is a well-recognised principle of law of the construction of statutes, specially when the rights and liabilities of the parties are altered thereby, that they are not to have retrospective operation unless the language is such as plainly to require such a construction. Hence where an unregistered mortgage was made in 1861, when registration was not compulsory, and a registered mortgage was made in 1900, *held*, that the former had priority over the latter, inasmuch as the effect of giving a retrospective effect to s. 50 of the Indian Registration Act, would be prejudicial to the vested rights which the plaintiff had at the date of the passing of that Act. By the repeal of Act XIX of 1843 she had acquired a privilege which she did not possess before, *viz.*, priority for her mortgage over subsequent instruments, whether registered or not registered. HARGOVIND v. KISHAN KOER, **3 A.L.J. 320=A.W.N. 1906, 113=28 A. 607.** (2 M. 147, 20 B. 390, *F.*)

(623)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Sale of absolute occupancy holding in execution of simple-rent-decree against tenant—Sale certificate not registered—Subsequent sale by purchaser at Court-sale under registered conveyance—Optionally registrable but unregistered mortgage-deeds of date prior to execution sale—Priority between registered sale-deed and mortgage-deeds.*—An absolute occupancy holding was sold in execution of a decree for rent against the original tenant but not free of incumbrances. Nor was the certificate of sale registered. The purchaser at Court sale sold it by a registered sale-deed to the present defendant. The plaintiff sued to enforce upon the holding two optionally registrable but unregistered mortgages in his favour of date anterior to the execution-sale. The question was as to the priority between the plaintiff's mortgages and the defendant's sale-deed. *Held*, a registered conveyance will prevail against an unregistered mortgage none the less because it is itself based upon an unregistered, but optionally registrable, conveyance; for, the object of the Registration Act is unmistakeably to secure subsequent purchasers and mortgagees against prior unknown conveyances and incumbrances. The defendants are entitled to priority, notwithstanding the fact that their vendor held the holding under an unregistered sale-deed. SETH RAMLAL v. BHURIA, **1 N.L.R. 125.**

(624)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Registered and unregistered documents—Mortgagee under registered deed—Holder of decree on prior unregistered deed—Priority.*—The words in s. 50 of the Registration Act —" not being a decree order, whether such unregistered document be of the same nature as the registered document or not "—mean that if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and, under that decree the property has been attached, that decree cannot be ousted by a subsequent

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed. Therefore, a mortgage-deed registered under Act III of 1877 would be entitled to priority over a decree subsequently obtained on a prior unregistered mortgage in respect of the same property. THE HIMALAYA BANK v. THE SIMLA BANK, **8 A. 23 = A.W.N. 1885, 310.** (A.W.N. 1884, 136, A.W.N. 1885, 63, 6 M. 88, *R.*) [*F.*, 28 C. 139 ; *Appr.*, 13 A. 288, F.B.; *R.*, 20 B. 158.]

(625)—*S.* 50 (= *Registration Act*, III *of* 1877, *s.* 50)—*Registered mortgage deed — Notice of previous valid unregistered mortgage, effect of.*—When it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered encumbrance and of possession by such encumbrancer, or of such conveyance without possession, the provisions of s. 50 of the Registration Act should not be strictly construed by the Courts so as to defeat the title of the prior unregistered encumbrancer. KRISHNAMMA v. SURANNA, **16 M. 148, F.B. = 3 M.L.J. 54.** [*F.*, 19 A. 145, 56 P.R. 1900, F.B. = 26 P.L.R. 1900, 31 M. 54 ; *R.*, 8 C.P.L.R. 109, 1 L.B.R. 293, 27 B. 452, 25 A. 366, 9 C.W.N. 14, 29 M. 362, 17 M.L.J. 597.]

(626)—*S.* 50—*Mortgage without possession—Konkan—Registration.*—In Konkan, possession is necessary to complete a mortgage. But the registration of a mortgage without possession cures any defect or imperfection that may have arisen from the non-completion of the transaction by delivery of possession. A deed so registered must be held good against a non-registered mortgage. HARI RAMACHANDRA v. MAHADAJI VISHNU, **8 B.H.C.A.C. 50.** [*F.*, 8 B.H.C. A.C. 55 ; *R.*, 11 B.H.C. 41, 5 B. 2, 5 B. 5, 2 B. 299, 6 B. 168, F.B.]

(627)—*S.* 50—*Act* XIX *of* 1843—*Unregistered mortgage—Sale subject to mortgage - Liability of purchaser to pay off mortgage.*—Where land was sold by a deed of sale, which made mention of a prior unregistered mortgage, and directed the purchaser to pay off the same, the purchaser was bound to redeem the mortgage, inasmuch as what he purchased was only an equity of redemption. KISHORBHAI GALLABHAI v. JORABHAI DAJI, **7 B.H.C. A.C. 56.**

(628)—*S.* 50—*Priority—Unregistered mortgage without possession—Purchase at Court sale.*—Where property sold in Court auction was subject to a Gujarat *san*-mortgage, the rule that an unregistered mortgage without possession was not valid against a purchaser with possession, did not apply, inasmuch as the purchaser at an auction sale in execution of decree buys only the right, title and interest of the debtor, whatever that may be, burdened with all valid liens created by him. The question of registration did not arise in this case, as neither the mortgage nor the instrument of sale was registered. MATHURADAS RANCHODDAS v. KALIA KHUSAL, **7 B.H.C.A.C. 24.** [*F.*, 9 B.H.C. 304 ; *R.*, 11 B.H.C. 41, 1 B. 581, 2 B. 299, 6 B. 168 ; *D.*, 6 B. 193, F.B.]

(629)—*S.* 50—*Registered and unregistered mortgage—Possession—Priority.*—V mortgaged certain property to U under a registered deed, V then mortgaged the same property to H, but the deed was not registered. U brought a suit against the mortgagor and obtained a decree for possession of the property which he took no immediate steps to execute. Then H obtained a similar decree and in execution thereof, he was put in possession of the property. U then applied for execution of his prior decree and in execution H was dispossessed. In a suit by H to recover possession of the property from U, *held* that U's mortgage being prior in point of time and registered, he was entitled to have possession of the mortgaged property till his claim should be satisfied, and in execution of his decree, which was also prior in point of time to the decree of plaintiff, he would be entitled to dispossess the plaintiff H who had obtained possession under an unregistered mortgage, and it was immaterial whether the plaintiff had obtained his possession through a decree of a Civil Court or in any other manner. Registration made the defendant's mortgage complete, though he did not obtain possession of the property mortgaged at the time the deed to him was executed, and any subsequent disposition of the equity of redemption by the mortgagor would be subject to the mortgagee's lien. UMAJI *valad* MANAJI PATIL DUMALE v. HARI RAMCHANDRA KULCARNI, **4 B.H.C. A.C. 143.** [*R.*, 6 B. 168.]

(630)—*S.* 50 — *Registration — Unregistered mortgage without possession—Purchase with possession—Priority.*—An unregistered mortgage without possession is not valid against a purchaser with possession. GANPAT BAJASHET v. KHANDU CHAUGSHET, **4 B.H.C. A.C. 69.** [*R.*, 7 B.H.C. O.C. 45, 9 B.H.C. 121, 2 B. 299, 6 B. 168, 5 Bom. L.R. 148 = 27 B. 452 ; *D.*, 7 B.H.C. 24.]

(631)—*S.* 50—*Registration—Mortgage without possession—Subsequent purchase—Priority.*—A registered mortgagee, although without possession, is entitled to priority over a subsequent purchaser. SUNDAR JAGJIVAN v. GOPAL ESHVANT, **4 B.H.C. A.C. 68.** [*Cons.*, 18 B. 332 ; *R.*, 9 B.H.C. 121, 6 B. 168, F.B.]

(632)—*S.* 50 (= *Registration Act*, III *of* 1877, *s.* 50) —*Conflict between unregistered deeds executed before Registration Acts and those executed after them—Priority.*—The Registration Act, III of 1877, does not operate so as to exclude instruments executed before the Registration Act, XX of 1864, came into operation, on the ground of their non-registration. DESAI LALLUBHAI SETHABHAI v. MUNDAS KUBERDAS, **20 B. 390.** (2 M. 147, 1 B. 574, *R.*) [*Disappr.*, 9 M.L.T. 431, F.B. = 21 M.L.J. 213 ; *F.*, 28 C. 139, 1 N.L.R. 158, 28 A. 607 = 3 A.L.J. 320 = A.W.N. 1906, 113.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843) - *continued.*

(633)—*S.* 50—*Act* XIX *of* 1843, *s.* 2—*Mortgage—Registration—Notice—Priority.*—An unregistered mortgage prior in date cannot take effect against a subsequent registered mortgage. S. 2 of Act XIX of 1843 specially provides that the superior claim of the holder of a registered deed is not to be affected by any other deed in respect of the same property which may not have been registered, whether the holder of the registered deed had or had not notice of the unregistered deed. SUNKUR SAHOY v. SHEO PERSHAD SOOKOOL, **16 W R. 270.**

(634)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Prior unregistered deed and subsequent registered deed—Priority—Notice—Sale—Mortgage.* —A holder of a registered instrument of sale or mortgage has no preference over the holder of an earlier, but unregistered instrument, if he has had notice of the latter at the time the instrument was executed in his favour. HATHISING SOBHAI v. KUVARJI JAVHER, **10 B. 105.** (B.P.J. 1883, p. 83, *F* ; 6 M. 88, 5 M 73, *D.*) [*R.*, 19 A. 145, 9 C.W.N. 14, 27 B. 452]

(635)—*S* 50 (=*Registration Act*, 1877, *s.* 50) —*Conflict between an unregistered hypothecation bond and a subsequent registered conveyance—Notice.*—Land was hypothecated under an unregistered bond, and subsequently sold by a registered conveyance, in which the prior hypothecation was recited, and the sum then due to the encumbrancer left with the purchaser under an express or implied agreement on his part to pay it over to the encumbrancer. Under these circumstances, the purchaser cannot take advantage of s. 50 of the Registration Act, and avoid the prior unregistered encumbrancer. RAMACHANDRA v. KRISHNA, **9 M. 495.** [*R.*, 16 M 148.]

(636)—*S.* 50 — *Unregistered mortgage — Decree—Priority.*—An unregistered mortgage without possession, and a decree obtained on the mortgage, do not deprive of priority a subsequent conveyance duly registered KANU KHANDA v. KRISHNA BHULAJI SHET, **5 B. H C A.C 147.** [*R.*, 7 B.H.C.O.C. 45, 3 B. 30, 6 B. 168, 12 B. 217; *D.*, 22 B 939.]

(637)—*S.* 50—*Subsequent registered mortgage, effect of, on prior unregistered bond.*—Under s. 2, Act XIX of 1843, a subsequent registered mortgage, would invalidate a prior unregistered bond. GOPAL DOSS v. DOONEE CHOWDHRY, **W R. 1864, 226.**

(638)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) — *Registered and unregistered mortgages — Priority* — The priority conferred by s. 50 of the Registration Act on one incumbrance over another in virtue of its being registered, is not in any way affected by the decrees that may be subsequently obtained on them, such decrees merely giving effect to the respective rights under the bonds. SHAHI RAM v. SHIB LAL, **7 A. 378=A.W.N. 1885, 63.** [*F.*, 8 A. 23, *Appr.*, 13 A. 288, F.B.; *D.*, 7 A. 888.]

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(639)—*S.* 50—*Registration—Priority—Mortgage deeds.*—S. 50 of the Registration Act will give priority to a registered mortgage over a previously executed unregistered mortgage, but the claim of the first mortgagee would not be defeated by a sale made in execution of a decree upon the second mortgage when he was not made a party to it. TIMMU v. DEVA RAI, **5 M. 265.**

(640)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Unregistered mortgage—Subsequent registered sale—Vendee having no notice of the mortgage Priority.*—A subsequent registered sale will take effect against a prior unregistered mortgage, if the vendee had no notice of the mortgage, BACHCHA LAL v. HANUMAN, **10 Ind. Cas. 233** (24 C. 825, 1 C.W.N. 665, 31 C. 990, 6 C.L.J. 410, 11 C.W.N. 839, 5 Ind. Cas. 179, 19 A. 145, 25 A. 336, 5 A.L.J. 607, 30 A. 238, A.W.N. 1908, 99, *R.*)

(641)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) —*Earlier unregistered mortgage, priority of later registered mortgage over—Effect of notice of prior mortgage.*—The law gives the holder of a registered mortgage priority over an unregistered mortgage, though the latter may be of earlier date. But, however, in order to check the perpetration of fraud under cover of this provision of law, the Courts do not generally give such priority to the subsequent mortgagee who, at the time of obtaining his mortgage, had notice of the earlier mortgage. The *onus* is upon the party alleging such knowledge or notice to aver the same in his pleadings and to prove it. CHINNAPPA REDDI v. MANICKAVASAGAM CHETTI, **25 M. 1.** [*R.*, 9 C.W.N. 14, 17 M.L.J. 319.]

(642)—*S* 50 (=*Registration Act*, 1877, *s.* 50) —*Prior unregistered mortgage with possession —Subsequent registered mortgage with notice of prior mortgage—Priority of registered over unregistered mortgage.*—Where a subsequent mortgagee under a registered deed of mortgage had actual notice of a prior unregistered mortgage with possession, the registered mortgage could not have any priority over the other. MADHO RAO v. JAGANNATH, **8 C.P L R. 109.** (5 C.P.L.R. 97, 6 C. P.L.R. 112, 16 M. 148, *F.*)

(643)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) San *mortgage optionally registrable but unregistered—Subsequent registered mortgage — Priority—Decree passed on unregistered* san *mortgage—Purchaser at execution sale—Priority of mortgagee under registered mortgage—* San *mortgages — Transfer of possession — Custom of Guzraat.*—Under the earlier Registration Acts, the competition *about priority* was only recognised in regard to documents of like kind, either optional or compulsory. Apart from the doctrine of equitable notice, registration under those acts by itself conferred no priority on a registered document if its registration was compulsory as against a document whose registration was optional. But

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1863, XIX of 1843)—*continued.*

since the Registration Act, III of 1877, however, the competition obtains in a more general form, and confers priority on documents required to be registered and accordingly registered since the Act was passed, over all prior unregistered documents of an antagonistic character. [*R.*, 22 B. 945, 27 B. 452.] A *san* mortgage is not within the exceptions mentioned in s. 50 of the Act. A mortgage under Act III of 1877 is entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered bond. The principle of this rule is that the decree and sale only give effect to the rights under the bond, and cannot confer any higher right. [*F.*, 28 C. 139=5 C. W.N. 419.] In the case of *san* mortgages, the transfer of possession necessary under the general Hindu law is not essential, and such mortgages under the custom of Gujarat, have always been held to be valid charges, as between mortgagor and mortgagee, even when not accompanied by transfer of possession. But this privilege as to possession is liable to be defeated in case of the transfer of interests to third parties under registered instruments. JETHABAI DAYALJI v. GIRDHER, **20 B. 158.**

(644) —*S.* 50 —*Acts* XVI *of* 1864, XX *of* 1866 *and* VIII *of* 1871 —*Reg.* IX *of* 1827, *s.* 6, *cl.* 1 —*Prior unregistered sale with possession—Subsequent registered mortgage without possession.*—On the 15th December 1863, D sold to H for valuable consideration, two fields (Nos. 185 and 186) in the Collectorate of Satara, and executed a deed of that date, whereby he conveyed those fields to H who was then duly put into possession of the same. That deed was unregistered. The provisions of Reg. IX of 1827 and of Act XIV of 1843 applied then to that Collectorate. D, in pursuance of an arrangement with B, executed to him a registered mortgage dated 14th February 1864, for Rs. 300, whereby he purported to secure to B the same two fields. B then knew that H was in possession of the fields as purchaser. *Held* that, according to the true construction of Reg. IX of 1827, s. 6, cl. (i), the title of H having been completed by possession, there was no property in the fields left in D to mortgage to B, and that therefore, H (the purchaser) had a better title to the fields than B, the mortgagee. *Semble.*—The effect would have been the same under the provisions of Act XVI of 1864 or of Act XX of 1866. History of Registration given and the provisions of the various enactments relating thereto discussed. BALARAM NEMCHAND v. APPA *valad* DULU, **9 B. H.C. 121.** [*F.*, 9 B.H.C. 147; *R.*, 1 B. 574, 1 B. 624, 2 B. 299, 4 B 126, F.B., 6 B. 168, F.B., 7 C. 753=10 C.L.R. 129, 12 B. 569, 17 B. 486, 27 B. 452=5 Bom. L.R. 144; *Expl.*, 4 B. 89; *D.*, 18 B. 332.]

(645)—*S.* 50 (=*Registration Act*, 1866, *s.* 50) —*Mortgage*—San *mortgage* - *Mortgage without possession in Gujarat*—*Registration Act*, XX *of* 1866, *s.* 50— *Notice.*—Under s. 50 of the

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

Registration Act XX of 1866, a registered instrument had priority as regards the property comprised therein over every unregistered instrument relating to it, whether or not the grantor of those instruments be the same. As between himself and his mortgagor and also as against any subsequent unregistered assignee of the latter, an unregistered *san* mortgagee in Gujarat has a perfectly valid charge upon the property mortgaged; but if the mortgagor or his heir or such assignee convey it to another by a registered instrument, while the *san* mortgagee's title remains unregistered, the latter might be defeated. *Quære*—Whether notice, to the purchaser, of the existence of a prior unregistered mortgage would in any way affect the provisions of the Registration Act. MAKANDAS KALIDAS v. SHANKARDAS HARIBAI, **12 B H. C. 241.** (9 B.H C 60, *Diss.*) [*Overruled*, 6 B. 193, F.B.; *R.*, 22 B. 213; *F.*, 27 B. 408, 1 N. L.R. 125; *Cited*, 5 N.L.R. 82.]

(646)—*S.* 50—*Mortgage—Possession—Registration—Notice.*—The Hindu Law undoubtedly gives preference to a subsequent mortgagee, who has obtained possession, over a prior mortgagee, who has neglected to obtain it, but it is nowhere said that a mortgage without possession is not binding on the mortgagor. A purchaser with possession at a Court-sale (the sale certificate being registered) purchases only the right, title and interest of the judgment-debtor in the property, subject to all charges with which it may have been previously burdened by him, *e.g.*, the lien of a prior mortgagee without possession, but having a registered mortgage-deed. He acquires nothing by his purchase but what still remains in the judgment debtor, and the question of notice can have no application to him. CHINTAMAN BHASKAR v. SHIVRAM HARI, **9 B.H C. 304** [*F.*, 1 B. 581; *R.*, 11 B.H.C. 41, 6 B. 168, 6 B. 490; *D.*, 6 B. 193, F.B.]

(647)—*S.* 50—*First and second mortgages—Second mortgagee obtaining conveyance of land for consideration and without notice of unregistered prior mortgage — Priority.*—Plaintiff claimed to obtain possession of land his title to which had accrued on his foreclosing a mortgage of those lands obtained by him from the original owners. Defendants alleged purchase by them in execution of a decree obtained on a previous mortgage of the land to them. The lower appellate Court having found that the title of the defendant had priority as his mortgage was prior in date, it was objected on special appeal by the plaintiff that that Court was in error, since the prior mortgagee had no special lien upon the lands; he was entitled only to sell the rights and interests of the judgment-debtor, the mortgagor, under the decree obtained against him which rights and interests had already passed away under the previous foreclosure of the second mortgage. The High Court reversed the above decision and decreed the plaintiff's suit. The liens of

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

the two mortgagees were different in character; that of the first mortgagee was a simple contract without any conveyance of the land and without registration or notice to the public. Nor had the second mortgagee, the plaintiff, any notice, but he obtained transfer of the lands for valuable consideration and, acting upon his mortgage-deed, foreclosed by usual process of law. Plaintiff who was an innocent purchaser for valuable consideration without notice of the contract of the earlier mortgage to the defendant could not be bound by it. NOBO COOMAR DOSS v. GORACHAND MOOKERJEE, **2 W.R. 286.**

(648)—*S.* 50 (=*Registration Act*, 1866, *s.* 50) —*Mortgage perfected prior to passing of Act —Priority of mortgage as against registered sale-deed executed subsequently.*— Where before the Registration Act of 1864 a mortgagee acquired complete title as such, s. 50 of Act XX of 1866 did not operate to invalidate that title. The mortgage, though not registered, was good as against a sale-deed executed subsequent to Act XX of 1866 came into operation and which was registered. SREEMUTTY FYEZOONNISSA v. MOULVIE SADUTOOLLAH, **22 W.R. 3.**

(649)—*S.* 50 (=*Registration Act*, 1877, *s.* 50) — *Priority of mortgage executed subsequent to, over deed of gift executed prior to, passing of Registration Act.*—S. 50 of the Registration Act ought not to be construed with retrospective effect so as to disturb titles acquired at a time when there was no law of registration in force in the Province. It was *held*, therefore, that a mortgage-deed executed and registered in 1892 could not be allowed to prevail against unregistered deed of gift executed in 1865 before the passing of the Registration Act. MUSAMMAT NAZIR SAHIBA v. SITARA KHANAM, **7 O. C. 342.**

(650)—*S.* 50 (=*Registration Act*, III *of* 1877, *s.*50)--*Registered and unregistered deeds--Priority —Notice of previous unregistered encumbrance —Mortgage deeds.*– There were two mortgages of the same land, the first of which was an unregistered mortgage for Rs. 50 to K and other defendants without possession, and the second was a registered mortgage for Rs. 100 to the plaintiffs. In the deed of the latter it was recited that K was a tenant of the land paying rent in kind and it was admitted that K was in possession of the land from two years prior to the mortgage, and under the terms of the mortgage he was to hold as tenant till the date on which they were promised to be given possession. The lower Courts gave the plaintiffs a decree against the mortgagor for the mortgage debt and dismissed the claim against K and others, the alleged prior mortgagees. The plaintiffs in second appeal claimed a decree for possession of the land, their mortgage being registered, and the Chief Court held that the decree for the mortgage-debt was erroneous as

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

the plaintiffs were not suing for money, but for the possession of the land. Also, under s. 50 of the Registration Act, the registered mortgage must take effect against every unregistered document relating to the same property, not being a decree or order. Unless, therefore, the plaintiff had notice of the prior contract, in which case, he would be bound by it (Specific Relief Act, s. 27-*b*), he could claim to be put in possession of the land, and the mortgagor having been in possession at the time of the registered mortgage, he was in a position to give possession to the plaintiffs. ARUR SINGH v. CHUHAR KUSHAL SINGH, **37 P.R. 1882.** [*Overruled*, 115 P.R. 1890; *R.*, 90 P.R. 1885, 56 P.R. 1900.]

(651)—*S.* 50—*Act* XIX *of* 1843—*Registered* kobala, *not entitled to priority over prior unregistered mortgage with enjoyment.*—Plaintiff sued to recover land as purchaser from A under a deed of sale made on 4th September 1863. The defendant claimed to be in possession under a mortgage by conditional sale made by the same A in August, 1862. He also relied on a bond of August 1863 by A purporting to pledge the same properties to the defendant as security for a debt. The lower appellate Court found both the instruments put forward by the defendant to be genuine, and decreed that the plaintiff was only to obtain possession upon discharging the encumbrances created by them. Plaintiff appealed to the High Court on the ground that, as the mortgage in question was never registered, while the *kobala* of the 4th September was so, Act XIX of 1843 gave priority to the latter, and, therefore, the mortgage ought not to have had effect given to it. But the High Court was of opinion that there was ample evidence before the lower appellate Court for the mortgage having been found by it to be genuine; it saw no reason for supposing that it did not consider all the evidence bearing on the point and therefore *held* that the objection was untenable. The High Court was also of opinion that Act XIX of 1843 did not apply to a case where enjoyment had actually taken place under the first deed. SYUD FURZUND ALLY v. SYUD ABDOOL RUHIM, **4 W.R. 30.** [*R.*, 12 W.R 217=3 B.L.R. 312, 9 B.H.C. 121, 7 C. 753=10 C.L.R. 129.]

(652)—*S.* 50 (=*Registration Act*, XX *of* 1866, *s.* 50)—*Purchase not accompanied by possession—Registered and unregistered kobalas—Priority.*— S. 50 of Act XX of 1866 refers to cases where the purchase has not been completed by possession. Before priority should be given to a party's registered *kobala*, the Judge ought to find whether or not the other party's purchase on an unregistered bond had been followed by possession at the time of sale. NARAIN DOSS v. GUNGA RAM DHARAH, **20 W.R. 287.** [*R.*, 4 C.L.R. 257; *D.*, 5 C. 336, 7 C. 753.]

(653)—*S.* 50—*Prior unregistered kobala—Subsequent registered kobala—Act* XIX *of* 1843 *—Fraud of vendor in second sale, effect of.*—Act

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

XIX of 1843 gives the preference, generally to the subsequent registered kobala over a prior unregistered one. In order to avoid the operation of that law, the plaintiff would have to show that the vendor had not only sold and parted with his rights in the property, but had also made over possession to him. It was alleged by the plaintiff in this case that the second sale was really a sham, an illusory sale got up merely for the purpose of defeating the plaintiff's title under his prior purchase, and it was held that if that allegation were established, that would entitle the plaintiff to a decree, because there would be then fraud on the part of the vendor and the subsequent vendees, which would not be allowed to stand in the way of plaintiff's right. MUSSAMUT BUTOOLUN v. MUSSAMUT OZEERUN, **8 W.R. 300**. [*R.*, 4 B. 126, F.B.; *D.*, 22 W.R. 273.]

(654)—*S.* 50—*Act* XVI *of* 1864, *s.* 68—*Priority of lease registered under Act, over earlier unregistered conveyance.*—Suit by a purchaser against his vendor and the vendor's lessee for confirmation of possession and for setting aside the lease. The conveyance was unregistered, but the lease, which was of a later date, was registered under Act XVI of 1864. *Held* that the lease had priority over the conveyance. GOBIND CHUNDER ROY v. POORNO CHUNDER SEIN, **10 W R. 36**. [*Appr.*, 5 C. 336=4 C.L.R. 257; *R.*, 4 B.L.R. App. 73; *D.*, 7 C. 753=10 C.L.R. 129.]

(655)—*S.* 50—*Act* XIX *of* 1843—*Pottahs—Registered and unregistered pottahs—Priority.*—Act XIX of 1843 refers to deeds of sale or gift and to mortgages, and is not applicable to pottahs. Therefore a registered pottah which is subsequent in date cannot prevail over a prior unregistered pottah. ANUND CHUNDER CHOWDHRY v. CHUNDERNATH ROY, **5 W.R. 205**.

(656)—*S.* 50 (=*Registration Act*, 1866, *s.* 50)—*Right to juice of trees if immoveable property.*—S. 50, Act XX of 1866, has no application to the case of a right to take the juice of date trees, which is more a right to, or benefit arising out of, standing trees or timber than a right or benefit to arise out of land coming under the description of immoveable property. JALU NAMDAR v. BEICHA NAMDAR, **3 B.L.R.A.C. 394=12 W.R. 366**. [*Cons.*, 72 P.R. 1884.]

(657)—S. 50—*See* CIV. PRO. CODE, 1908, O. XXII, r. 10, 143 P.R. 1889.

(658)—S. 50—Competition between an unregistered deed of 1865 and a registered deed under the present Registration Act—Failure of the holder of the former deed to enforce his right—Laches—*See* LACHES, 1 N.L.R. 158.

(659)—S. 50—*See* LIS PENDENS, 6 A. 444=A.W.N. 1884, 158, 32 P.R. 1898.

(660)—S. 50—*See* MORTGAGE—REDEMPTION, 2 Ind. Cas. 495.

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(661)—S. 50—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 11 B.H.C. 41, 7 A. 577=A.W.N. 1885, 115.

(662)—S. 50 does not protect a purchaser who purchased with knowledge of an unregistered incumbrance—Pre-emptor no better than an ordinary vendee—*See* PRE-EMPTION—MISCELLANEOUS, 5 A.L.J. 112=A.W.N. 1908, 42=3 M.L.T. 223=30 A. 130.

(663)—S. 50—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 20 M. 250.

(664)—S. 50—Mortgages—Prior unregistered mortgages, subsequent registered mortgagee with notice of, not entitled to the priority under—*See* TRANSFER OF PROPERTY ACT, 1882, s. 53, 8 A. 540=A.W.N. 1886, 174.

(665)—S. 50—*See* Nos. 269, 325 to 327, 333, 334, 367-*a*, 437, 458, 579, 517 to 521, *supra.*

(666)—Ss. 50, 89—*See* CIV. PRO. CODE, 1908, O. XXI, r, 94, A.W.N. 1882, 51.

——S. 51 (=s. 51 of 1877=s. 51 of 1871=s. 56 of 1866=ss. 56 and 59 of 1864).

(667)—S. 51—Relase by co-sharers in a permanent tenure to one among themselves--Registration—Stamp—*See* BEN. ACT VIII OF 1885, ss. 11 and 12, 12 C.W.N. 478.

(668)—S. 51—*See* No. 344, *supra.*

(669)—Ss. 51, 89—Sale certificate granted under s. 316, Civ. Pro. Code—Copy of certificate registered under s. 89, Registration Act—Sale certificate not a registered document, under art. 10, Limitation Act, 1877—*See* LIMITATION ACT, 1908, art. 10, 142 P.R. 1908, F.B.

——S. 52 (=s. 52 of 1877=s. 52 of 1871=s. 57 of 1866=ss. 36, 38 of 1864.)

(670)—*S.* 52—*Bond registered under Act* XVI *of* 1864, *refusal of Deputy Commissioner to enforce—Appeal to Judicial Commissioner—Jurisdiction of High Court.*—The petitioner whose application for the enforcement of a bond specially registered under Act XVI of 1864 had been refused by the Deputy Commissioner was deemed by the High Court to be in the position of a decree-holder whose application to execute his decree had been dismissed or thrown out of Court. The High Court refused to proceed on the present petition complaining of the refusal of the Deputy Commissioner, observing that the petitioner's proper course, if he was dissatisfied with that order, was to appeal to the regular appellate tribunal against the order of the Deputy Commissioner, and if he obtained no relief from that tribunal, *i.e.*, the Judicial Commissioner, he should then come up, in the usual course, by way of special appeal, to the High Court. *In re* JUGTI SAHOO, **6 W.R. Mis., 121**. [*D.*, 17 W.R. 154.]

(670-*a*)—*S.* 52 (1)—*Absence of the signature of executant below presentation endorsement—His signature below execution endorsement—Due "presentation."*—On a document adduced in evidence, there appeared to be an endorsement

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

that it was presented for registration and below it the signature of the registering officer but not that of the executant. Further down there was an endorsement of execution and payment of consideration, below which there was the signature of the registering officer as well as the thumb impression and signature of the executant. *Held* that the provisions of s. 52 (1) of the Registration Act had been sufficiently complied with and the presentation had been duly made. KABUL SINGH v. HARI NARAYAN, **11 A.L.J. 617.**

(670-*b*)—S. 52--*See* No. 376-*a*, *supra*.

(671)—Ss. 52, 58, 59 and 60—Date of registration—Time from which period of limitation begins to run for purposes of art. 10 of the Limitation Act—*See* LIMITATION ACT, 1908, art. 10, 92 P.R. 1906=126 P.L.R. 1906.

(672)—*Ss.* 52, 58, 60—*Registration endorsement—Statement by executant made to the registering officer—Certificate of the registering officer, admissibility of—Evidence Act, ss.* 91 *and* 92.—The endorsement of the registrar on the back of a deed of gift, which purported to be an unconditional one, contained the following statement purporting to have been made to him by the executant, "*agar mahub lahu roti kapra denge to hiba jaiz hai warna najaiz samjha jaega.*" *Held*, that the endorsement could not be said to have been made under s. 52, or s. 58 of the Registration Act, and therefore the certificate of the Registering Officer could not be admitted under s. 60 of the Act. *Held*, further, that the record of the statement could not be admitted in evidence under ss. 91 and 92 of the Evidence Act. MUNNI v. SHYAM BIHARI, **14 O.C. 80.**

—— S. 53 (=s. 53 of 1877=s. 53 of 1871=s. 58 of 1866=s. 57 of 1864).

(673)—*Ss.* 53, 54 *and* 55—*Act* VIII *of* 1859, *s.* 273.—*Act* XX *of* 1866, *s.* 52—*Appeal—Execution—Procedure—Repeal.*—Orders in execution under ss. 53, 54 and 55 of Act XX of 1866 are not appealable. Though this Act has been repealed by Act VIII of 1871, the procedure under it has been saved by ss. 53, 54 and 55 of the latter Act. RAMANAND v. THE BANK OF BENGAL, **1 A. 377.** (7 W.R. 130, 17 W.R. 512, *Cited.*)

—— S 54 (=s. 54 of 1877=s. 54 of 1871=s. 59 of 1866=s. 58 of 1864).

(674)—S. 54—*See* No. 673, *supra*.

—— S 55 (=s. 55 of 1877=s. 55 of 1871=s. 60 of 1866).

(675)—S. 55—*See* Nos. 336, 673, *supra*.

—— S. 57 (=s. 57 of 1877=s. 57 of 1871=s. 65 of 1866=ss. 50, 60 of 1864).

(676)—*S.* 57 (=*Registration Act*, 1877, *s.* 57)--*Registration copy—Admissibility without proof of loss of original.*—S. 57 of the Act expressly provides that copies of registered documents signed and sealed by the registering officer shall be admissible for the purpose of proving the contents of the original documents. Proof of loss of the original is not necessary. PARBAT RAO v. GOPIKA BAI, **2 C.P L.R. 110.** [*R.*, 10 C.P L.R. 59; *Cited*, 11 C.P.L.R. 27.]

(677)—*S* 57 (=*Registration Act*, 1877, *s.* 57)—*Certified copy of registered document, admissibility in evidence of—Public document—Evidence Act, ss.* 65 (*e*) *and* (*f*) *and* 74 (2).—A private document which has been registered does not become a public document uuder s. 74 (2) of the Evidence Act; and a certified copy of it cannot be used to prove the contents of the original either under s. 65 (*e*) or (*f*) of that Act or under s. 57 of the Registration Act. RAJ GOBARDHAN SINGH v. MUSAMMAT NASIBAN, **7 O C. 365.** (7 O.C. 327, 22 W.R. 303, *R.*)

(678)—S. 57—*See* EVIDENCE ACT, 1872, s. 65, cl. (*e*), and s. 74, cl. (2), 7 O.C. 327.

(679)—S. 57 (5)—Registration office, copy of sale-deed when admissible—*See* EVIDENCE ACT, 1872, s. 65 (*f*), 11 Ind. Cas. 50.

(680)—S. 57—*See* No. 424, *supra*.

—— S. 58 (=s. 58 of 1877=s. 58 of 1871=s. 66 of 1866=ss. 30, 36 of 1864).

(681)—S. 58—*See* LIMITATION ACT, 1908, art. 10, 92 P.R. 1906=126 P.L.R. 1906.

(682)—S. 58—*See* Nos. 671, 672, *supra*.

(683)—*Ss.* 58, 59 *and* 60 (=*ss.* 58, 59 *and* 60, *Registration Act*, 1877)—*Document—Secondary evidence—Fact mentioned in endorsement may be proved.*—Ss. 58, 59 and 60 of the Indian Registration Act (III of 1877) provide that the facts mentioned in the endorsement may be proved by those endorsements provided the provisions of s. 60 have been complied with. THAMA v. GOVIND, **9 Bom. L.R. 401.**

(684)—Ss. 58 to 60—*See* CONSIDERATION, 80 P.R. 1868, 8 P.R. 1878.

(685)—*Ss.* 58, 60, 87 (=*Registration Act*, 1877, *ss.* 58, 60, 87)—*Unregistered conveyance—Subsequent bond confirming conveyance—Registration of conveyance after time instead of bond—Registration—"Defect of procedure."*--A sale-deed of immoveable property which ought to have been registered, was not registered owing to the expiry of the time for presenting it for registration. The vendor, however, subsequently gave the vendee a bond confirming the conveyance. On presenting for registration the bond with the conveyance annexed to it, the usual entries and the certificate of registration were either by mistake or for some other reason, entered on the conveyance and not on the bond. *Held* that, even assuming that it was the bond that was registered, it was doubtful whether such an obvious attempt to defeat the provisions of the Registration law would be allowed to succeeed and the document admitted in evidence; that in any case, the provisions of

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ss. 58, 59, 60 of the Registration Act had not been complied with, and that the bond was to all intents and purposes, unregistered; and that such defect was not a "defect of procedure" within the meaning of s 87, and one which could be passed over. MATHURA DAS v. MITCHELL, **4 A. 206 = A.W.N. 1882).**

(686)—*Ss.* 58, 87 (=*Registration Act*, 1871, *ss.* 58, 85)—*Registration—Omission to take signature of person admitting execution of document — Validity of registration.*—When the execution of a document is admitted by the executant or his representative, and the document is registered, the omission of the Sub-Registrar to endorse on it the signature of the person making the admission, cannot affect the validity of the registration. MAN BHARI v. NAUNIDH, **4 A. 40 = A.W.N. 1881, 78.**

——S 59 (=s. 59 of 1877 = s. 59 of 1871 = s. 67 of 1866)

(687)—S. 59—*See* LIMITATION ACT, 1908, art. 10, 92 P.R. 1906 = 126 P.L.R. 1906.

(688)—S. 59—*See* Nos. 336, 671, 683, 684, *supra.*

(689)—Ss. 59, 60--Burden of proof—Mortgage-deed - Evidence —*See* BURDEN OF PROOF—DOCUMENTS RELATING TO LOANS SUITS RELATING TO, 17 A. 428 = A.W.N. 1895, 93.

——S. 60 (=s. 60 of 1877 = s. 60 of 1871 = s. 68 of 1866 = s. 37 of 1864.)

(690)—S. 60 — *See* DEED -- PROOF OF DEEDS, 6 W.R. 105.

(691)—S. 60—*See* LIMITATION ACT, 1908, art. 10, 92 P.R. 1906 = 126 P.L.R. 1906.

(692)—S. 60 — Effect of endorsement by Registering officer — *See* MORTGAGE — REDEMPTION, 3 Ind. Cas. 291.

(693)—S. 60—*See* NOS. 342, 345, 354, 368, 370, 332, 393, 522, 523, 671, 672, 683 to 685, 689, *supra.*

(694)—*Ss.* 60, 87 (=*Registration Act*, 1877, *ss.* 60, 87)—*Registration of deed—Omission to seal deed, effect of.*—The sealing of a deed is not an essential part of the act of registration. The omission of the registering officer to seal a deed is a mere defect of procedure which is cured by the provisions of s. 87 of the Registration Act. SITA NATH BANDOPADHYA v BISSESSUR ROY BHAUDHURI, **9 C.W.N. 528.**

(695)—*Ss.* 60, 87—*Registration Act*, XX *of* 1866 — *Document not received at Registrar's public office—Error not vitiating registration.*—The bond in this case hypothecated immoveable property. It was presented for registration to the Sub-Registrar of K when he was absent from K on duty as revenue officer at G within his District. He, nevertheless, received the bond and registered it. No one having been actually appointed to act for the Sub-Registrar on the occasion of his absence, it did not appear that he acted in any manner otherwise than in good faith. The High Court *held* that, though he should have received the bond for registration only at his public office at K, yet, his procedure although erroneous, did not invalidate the registration of the bond. KALIAN MAL v. MUSAMMAT BHAGWATI, **7 N.W. P. 119.**

——S. 64 (=s. 64 of 1877 = s. 64 of 1871 = s. 72 of 1866 = s. 23 of 1864).

(696)—S. 64—*See* NOS. 371, 372, *supra.*

——S. 65 (=s. 65 of 1877 = s. 65 of 1871 = s. 73 of 1866 = s. 25 of 1864).

(697)—S. 65—*See* NOS. 371, 372, *supra.*

——S 66 (=s. 66 of 1877 = s. 66 of 1871 = s. 74 of 1866).

(698)—S. 66—*See* NOS. 371, 523, *supra.*

——S. 67 (=s. 67 of 1877 = s. 67 of 1871 = s. 78 of 1866 = s 27 of 1864).

(699)—S. 67—*See* NO. 523, *supra.*

——S. 68 (=s. 68 of 1877 = s. 68 of 1871 = s. 79 of 1866 = s. 61 of 1864).

(700)—S. 68—*See* NO. 523, *supra.*

——S. 69 (=s. 69 of 1877 = s. 69 of 1871 = s. 80 of 1866 = s. 64 of 1864).

(701)—*S.* 69—*Registration Act* (XX *of* 1866), *ss.* 36, 80—*Powers and duties of Registrar—Evidence—"Representative, assign or agent," meaning of.*—S. 80 of the Registration Act in no way empowered the Registrar-General to pass any rule directing by what particular description of evidence a person, producing a deed to be registered, shall prove his right to have it registered. It cannot empower the Registrar-General to frame a special law different from the oridinary law of evidence in force in all the Civil Courts of the country as to what particular fact shall be proved by oral, and what by documentary evidence. What the Registrar is required by law to inquire is, whether the deed is executed by a certain person or not. He has no business to inquire, what actually passes or should pass under such a document or whether the interest of any third person is affected by it. He cannot assume the functions of a Civil Court and inquire into the possible effect or operation of such a document. The representative, assign, or agent mentioned in s. 36 means the representative, assign, or agent of one of the executants of the deed. *In the matter of* RAM CHUNDER BISWAS, **16 W.R. 180.** [*Appl.*, 21 A. 281 = A.W.N. 1899, 59.]

——S. 71 (=s. 71 of 1877 = s. 71 of 1871 = s. 82 of 1866 = s. 66 of 1864.)

(702)—S. 71—*See* NOS. 353, 375, 400, 524, *supra.*

(702-*a*)—*Ss.* 71, 72, 73, 76, 77—*Failure of executant to appear and admit execution—Refusal by Sub-Registrar to register document—Establishing right to have document registered—Application to Registrar—Mention of wrong*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

section—Dismissal of application—Suit for registration of document whether lies.—The executant of a document did not appear before the Sub-Registrar, who refused to register the document. The person, in whose favour the document was executed (the plaintiff), then moved the Registrar. But the application was described as one under ss. 71 and 72 of the Registration Act, although it was one under s. 73, and was accompanied by a copy of the reasons recorded by the Sub-Registrar under s. 71 for refusing to register and was verified as required by s. 73. The facts were all stated in the application. The application was dismissed by the Registrar, so the present suit was brought under s. 77 for having the document registered: *Held*, that the suit was maintainable. A Court, in the administration of justice, should not refuse an application, which, on the merits, it ought to grant and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section. Regard should be had to the substance rather than to the form of the proceedings. The scope of a suit under s. 77 of the Registration Act depends upon the proved or admitted facts and circumstances, and not upon the erroneous mention of a section of the statute in an application to the Registrar. Failure on the part of the executant to appear and admit execution of a document is equivalent to denial of execution. BECHUN SAHU v. SYED ALI RASUL, **16 Ind. Cas. 614.**

(703)—*Ss.* 71, 77—*Right of suit—Refusal to register — Absence of agreement to register.*—Where there was no agreement in a mortgage bond, that the executant should register the bond, a suit did not lie for damages for failure to register the same. GIRDHAR DALPAT v. HARIBHAI NARAYAN, **7 B H C. A C. 3.**

——S. 72 (=s. 72 of 1877=s. 72 of 1871=s. 83 of 1866=s. 62 of 1864.)

(704)—*S.* 72 (=*Registration Act*, 1877, s.72)——*Registration Moharir not proper officer to receive appeals.*—S. 72 does not contemplate the presentation of an appeal to a Registration Moharir as a legal presentation. DRIGPAL SINGH v. GOVIND PANDA, **9 C.P.L.R. 45.**

(705)—S. 72—*See* NOS. 337, 375, 376, 524, 702-*a*, *supra*.

(706)—*Ss.* 72, 73 (=*Registration Act*, 1866, ss. 83, 84)—'*Appealed against,' meaning of—Execution denied— Registration refused—Petition to District Judge—Power of Judge to examine witnesses as to execution—Remand.*—A person claiming under a document presented it for registration. The alleged executant appeared and falsely denied the execution of the said instrument; thereupon the Sub-Registrar refused to register the deed, although the person claiming under the document was ready to give proofs of the execution of the deed. The District Registrar affirmed the order of the Sub-Registrar. An application to the District Court under s. 84 (2) of Act XX of 1866 was also dismissed, the Judge holding that "he had no authority to examine witnesses in this matter or to determine whether the deed of sale was executed or not" *Held* that the Judge was wrong in declining jurisdiction, that the petition made to him was not an appeal from the decision of the Sub-Registrar or Registrar-General, but was a mode of bringing the question before the Judge as a Court of Original jurisdiction, in order to determine whether an order ought to be made for the registration of the document, and that the Judge had power to examine witnesses and to determine whether there has been a false denial of the execution of the document, but he had no power to remand the case to the Sub-Registrar for the purpose of examining witnesses. The words "appealed against" in s. 84 of the Act only mean "complained of" or "objected to." *In the matter of the petition of* SANKAR DOBAY, **4 B.L.R. A.C. 65=12 W.R. 385.** [*Affirm.*, 12 W.R. 500; *Expl*, 15 W.R. 487.]

(707)—*Ss.* 72, 73, 74 (=*Registration Act*, 1877, *ss.* 72, 73 *and* 74)—*Appeal—Order refusing registration.*—The plaintiff presented a receipt purporting to be executed by the defendant in his favour to the Sub-Registrar. The defendant having denied execution, registration was refused. The plaintiff appealed from the order of the Sub-Registrar to the District Registrar, but his appeal was dismissed on the ground that no appeal lay. The plaintiff then brought a suit in the Civil Court for a decree directing the document to be registered. *Held* that under s. 72 (Registration Act) no appeal lay to the Registrar and the plaintiff should have proceeded under s. 73. *Held* further, that by virtue of the provisions of s. 77 of the Registration Act, the Court was not competent to order registration. GANGA DIN v MATA DIN, **2 O.C. 77.**

(708)—*Ss.* 72 *to* 75 (=*Registration Act*, III *of* 1877, *ss.* 72 *to* 75)—*Registrar a Court for purposes of s.* 195, *Crim. Pro. Code.*—A Registrar acting under s. 72 to 75 of the Registration Act, III of 1877, was a Court for the purposes of s. 195, Crim. Pro. Code, and his sanction was therefore necessary for a prosecution. ATCHAYYA v. GANGAYYA, **2 M L.J. 64=15 M. 138, F.B.**

——S. 73 (=s. 73 of 1877=ss. 73, 74, 75 of 1871 =s 84 of 1866.)

(709)—*S.* 73 (=*Registration Act*, 1871, *s.* 73)—*Registration—Person "claiming under document"—Petition to have document registered.*—Where is appears, on the face of a document, that the person applying for its registration is not a person "claiming" under it, his petition for its registration cannot be entertained. *Per Stuart, C. J.*—The mere fact that it so appeared on the face of the document could not preclude the petitioner from applying to have the document registered. *Per Oldfield, J.*—When the document is duly executed and the requirements of the law are fulfilled, it is the duty of

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

the Court to order registration without going into the question whether or not the petitioner could claim under it. BISH NATH, *In re*, **1 A. 318, F.B.**

(710)—*S.* 73 (=*Registration Act*, 1877, *s.* 73) —*Refusal to register document—Denial of execution—Suit for registration.*—Where the registration of a document is refused by the Sub-Registrar on the ground of denial of execution, a suit for the registration of the document is not maintainable unless an application under s. 73 of the Registration Act has been previously made to the Registrar. BHAGWAN SINGH v. KHUDA BAKHSH, **3 A. 397, F B.** (2 A. 46, *Observed upon.*) [*F.*, 9 C. 150, 7 M. 535, 16 M. 341, 24 A. 402; *Appr.*, 11 C. 750; *R.*, 1 A.W.N. 98, 4 L.B.R. 88, 14 Bur. L.R. 161; *D.*, 5 A.W.N. 329, 16 A. 303.]

(711)—S. 73—*See* Nos. 268, 336, 343, 353, 375, 376, 386, 416, 417, 420, 421, 524, 702-A, 706 to 708, *supra* and No. 788, *infra.*

(712)—*Ss.* 73, 74, 75 (*Registration Act*, XX *of* 1866, *s.* 84)—*Appeal.*—There is no appeal to the High Court against an order of the District Judge passed under s. 84 of Act XX of 1866. The High Court cannot interfere even under Reg. 11 of 1827, s. V, cl. 2. *Ex parte* DHARAMDAS BHAVANIDAS, **3 B.H.C. A.C. 104.**

(713) *Ss.* 73, 74, 75 (= *Registration Act*, 1866, *s.* 84)—*Res judicata.*—A suit to have a registered kobala declared fictitious and void as against plaintiff was held to disclose no good cause of action, seeing that, on a petition preferred according to the provisions of s. 84, Act XX of 1866, a competent Court had already decided that the defendant was entitled to obtain registration of the deed. RAM CHANDRA PAUL v. BECHARAM DEY, **8 B.L.R. App. 28, note=10 W.R. 329.** [*Not F.*, 7 C. 736=9 C.L.R. 471; *Expl.*, 8 B.L.R. App. 26= 15 W.R. 487.]

(714)—*Ss.* 73,74, 75 (=*Registration Act*, 1866, *s.* 84)—*Registration—Evidence.*—In a case in which, on an application made under s. 84, Act XX of 1866, the party alleged to have executed the document presented for registration did not deny execution, but said that he had been compelled to execute it, and the Judge, not thinking the objection sufficient, directed that the deed should be registered; *held* that it was not necessary for the Judge to take evidence before directing registration. PRASANNA KUMAR SANDYAL v. MUTHURANATH BANERJEE, **8 B.L R. App. 26=15 W.R. 487.**

(715)—*Ss.* 73,74, 75 (=*Registration Act*, 1866, *s.* 84), *appeal under—Procedure—Notice—Language—Deputy Registrar, Powers of.*—A petition of appeal to the High Court under s. 84 of Act XX of 1866, should be in English, only when the party understands that language sufficiently for the purposes of verification, and when this is not the case, a translation accompanying the vernacular petition will be proper

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

and sufficient. A notice in accordance with the provisions of cl. 4, s. 84, of the Act, ought to be issued on both the registering officer, and on the other persons interested in the matter. The Deputy Registrar of the High Court is competent to fix the time for the hearing of the case, and to require the appellant to insert, at the head of the petition of appeal, the names of such persons as are interested in the matter as also to serve them with notice. The document the registration of which has been refused should always be put in with the petition of appeal, and the presentation of the latter should be in the *office* in the same way as in the case of miscellaneous appeals. *In the matter of* JUGUN PATNEE, **12 W.R. 2.**

(716)—Ss. 73, 74, 75—*See* LEGAL PRACTITIONERS—PLEADERS—REMUNERATION, 7 B.H.C A.C. 132.

(717)—Ss. 73, 74, 75—*See* PRACTICE AND PROCEDURE, 12 W.R. 2.

(718) Ss. 73, 74, 75—*See* SPECIFIC PERFORMANCE, 2 B.L.R.A.C. 105=10 W.R. 483, 9 B.L.R. 433=14 M.I.A. 129=16 W.R. P.C. 26.

(719)—*Ss.* 73 *to* 77 (=*Registration Act*, 1877, *ss.* 73 *to* 77)—*Jurisdiction of Civil Court to order registration, when arises—"In such case," meaning of.*—A Civil Court is competent, under s. 77 of the Registration Act, to order the registration of a document which the Sub-Registrar has refused to register because its execution was denied, only when an appeal has been preferred before the Registrar *within the time prescribed* therefor in s. 73 of the Act, and after inquiry, registration has been again refused. Where, therefore, a Sub Registrar refused to register a document on the ground of denial of execution, and an appeal was made to the Registrar *after* the time prescribed therefor, who therefore dismissed it without inquiry as being beyond time, *held* that a Civil Court would not interfere to compel the registration of the document. [*R.*, 11 O.C. 353.] The words 'in such case' with which s. 74 of the Act opens, are equivalent to saying, "when, under the last preceding s. 73, an application has been presented to the Registrar within thirty days after the making of the order of refusal by the Sub-Registrar" UDIT UPADHIA v. IMAM BANDI BIBI, **24 A. 402=A.W.N. 1902, 99.**

(720)—*Ss.* 73, 74, 77—*Refusal of Registrar to register document because no evidence produced—Suit for registration maintainable.*—Where the District Registrar, on an application duly presented within time under s. 73 of the Registration Act, has fixed a date for the purpose of an enquiry under s. 74, and has then refused to register the document because no evidence has been adduced before him, the refusal comes within the purview of s. 77, and

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a civil suit is maintainable for the purpose of enforcing the registration of the document. (13 C. 264, *F.*; 24 A. 402, *D.*) Observations at pp. 406, and 407 of the report of I.L.R. 24 All., *held obiter.* ABDUL HAKIM KHAN v. CHANDNA, **9 A.L.J. 4=13 Ind. Cas. 83=34 A. 165.**

(721)—*Ss.* 73, 77 (=*Registration Act*, 1877, *ss.* 73, 77)—*Registration of document presented after time—Registration Act*, 1871, s. 24—*Discretion.*—Where an application for the registration of a document, presented after the expiration of the period allowed by law, is dealt with under s. 24 of the Registration Act, and registration ordered by the Registrar on compliance with the requirements of law, such exercise of discretion cannot be questioned either by a succeeding Registrar, or by a Civil Court in a suit instituted under s. 77 of the Act. DURGA SINGH v. MATHURADAS, **6 A. 460=A.W.N. 1884. 173.** [*F.*, 21 B. 69, 21 B. 724; *R.*, 30 B. 304=7 Bom. L.R. 742.]

(722)—*Ss.* 73, 77 (=*Registration Act*, 1877, *ss.* 73, 77).—A Civil Court is competent, under s. 77, to order registration of a document, which the Sub-Registrar has refused to register because its execution was denied, only when an appeal has been preferred before the Registrar in the time prescribed therefor, and, after inquiry, registration has been again refused. KUNHIMMU v. VIYYATHAMMA, **7 M. 535.** [*F.*, 16 M. 341; *Appr.*, 24 A. 402; *R.*, 2 O.C. 77.]

(723)—*Ss.* 73, 77 (=*Registration Act*, 1877, *ss.* 73, 77)—*Suit to compel registration.*—Under the Registration Act of 1877, a suit to compel registration is maintainable only when the provisions of s. 77 of the Act have been strictly complied with, including the presentation of the application to the Registrar under s. 73 within the proper time. Independently of s. 77, no suit will lie. (3 A. 397, *F.*; 2 A. 46, *Diss.*) One of the objections to the maintenance of a suit of this nature lies in the circumstance that, under the Registration Act, the document cannot be received in evidence, because it has not been duly registered, under its provisions. EDUN v. MAHOMED SIDDIK, **9 C. 150=11 C.L.R. 440.** [*F.*, 4 L.B.R. 88, 9 C. 851; *Expl.*, 16 A. 303=14 A.W.N. 94; *Appr.*, 7 M. 535, 16 M. 341, 2 O.C. 77; *R.*, 11 C. 750, 24 A. 402=22 A.W.N. 99, 9 B. 63.]

——S. 74 (=s. 74 of 1877=s. 76 of 1871=s. 84 of 1866.)

(724)—S. 74—*See* Nos. 268, 341, 386, 416, 524, 707, 708, 712, 713, 714, 715, 716, 717, 718, 719, 720, *supra* and No. 788, *infra.*

(725)—*Ss.* 74, 77 (=*Registration Act*, 1877, *ss.* 74, 77)—*Suit to compel registration, when not maintainable.*—If non-registration of a document has resulted from the refusal of one of the parties to it to execute it, that matter must be nquired into by the Registrar as directed by s. 74, before any right to sue under s. 77 of the Registration Act would arise. LAKHIMONI CHOWDHRAIN v. AKROOMONI CHOWDHRAIN, **9 C. 851=12 C.L.R. 527.** [*R.*, 11 C. 750, 24 A. 402=22 A.W.N. 99.]

(726)—*Ss.* 74, 82 (=*Registration Act*, 1877, *ss.* 74 *and* 82)—*District Registrar's power to delegate to Sub-Registrar, functions prescribed by s.* 74.—The functions prescribed by s. 74 are entirely in the Registrar himself. He cannot delegate them to the Sub-Registrar. The delegation, by the Registrar, of his functions of inquiry under this section is illegal. Therefore, a Sub-Registrar, holding an inquiry under s. 74, acting under the orders of the Registrar cannot be said to be acting within the meaning of s. 82 of the Act. Where a witness makes a false statement before the Sub-Registrar in such a case, he cannot be prosecuted under s. 82 of the Act. MATA DAYAL v. QUEEN-EMPRESS, **24 C. 755.**

——S 75 (=s. 75 of 1877=s. 76 of 1871=s. 84 of 1866.)

(727)—*S.* 75—*Registration—Remedy for refusal—Act* XX *of* 1866, *s.* 84.—The remedy for refusal to register an instrument is by a petition to the Judge under s. 84, Act XX of 1866. A regular suit to enforce registration does not lie. TULSI SAHU v. MAHADEO DAS, **2 B.L.R. A.C. 105=10 W.R. 483.** (10 W.R.F.B, 51, *Rel. on.*) [*F.*, 12 W.R. 335=4 B.L.R. A.C. 65.]

(728)—*S.* 75 (=*Registration Act*, XX *of* 1866, *s.* 84)—*Refusal of registration—S.* 84, *Act* XX *of* 1866—*Petition to District Judge—Trial by Judge—No remand.*—Where registration of a document has been refused, because the execution of it is denied by one of those said to have executed it, and a petition under s. 84, Act XX of 1866, is presented to the District Court by the party claiming under the document, to establish his right to have the document registered, the Judge must himself decide the question whether the document was executed or not and not remand the case to the Sub-Registrar for the examination of witnesses; the petition above referred to not being an appeal but a step intended to bring the question before the Court. OBHOY CHURN MOHAPATTUR v. SHUNKER DOBEY, **12 W.R. 500.**

(729)—*S.* 75—*Registration Act* (XX *of* 1866), *s.* 84—*Refusal to register—Power of District Court.*—*Held* (by *Kemp, J.*) that when a person executing a document refuses to admit the fact of its execution, and the Sub-registrar, without taking any step to satisfy himself of the fact of execution, refuses to register it and the order of refusal is confirmed by the District Registrar, the aggrieved party cannot enforce registration of the document by a regular suit; but that the District Court has power, under s. 84 of Act XX of 1866, to examine witnesses, to make some enquiry into the fact of execution of the deed, and to order the Registrar to

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register it; the Court may also remand the case to the Sub-Registrar to examine witnesses, &c. *Held* by *Markby, J. contra.* Unless a special power were given for the purpose, the Civil Court cannot direct the Registering Officer to register a document which he had refused to register. *In the matter of* SUNKUR DOBEY v. OBHOY CHURN MOHAPATTUR, **12 W.R. 385.** [*Affirmed*, 12 W.R. 500=4 B L.R.A.C. 65.]

(730)—*S.* 75—*Act* XX *of* 1866, *s.* 84—*Registration—Appeal.*—No appeal lies to the High Court against an order made by a District Court on a petition under s. 84 of the Registration Act XX of 1866. SALIGRAM MISSER v. MUSSAMUT JANKEE KOER, **9 W.R. 122.**

(731)—*S.* 75—*Act* XX *of* 1866, *s.* 84—*Application for declaration of right to get document registered—Summary determination of fact of execution—Court not bound to determine any issue respecting consideration.*—The question for determination in this case related to the functions of the Court when an application has been made to it under s. 84 of Act XX of 1866 providing that, where the registration of a document shall have been refused, any person claiming thereunder may apply by petition to the Court for establishing his right to have the document registered. The High Court *held* that the Legislature has intended that the Civil Court should summarily determine the fact of execution in cases in which it has not been admitted, and also that, on such proof of the fact of execution and of compliance with the requirements of the Act, it is the duty of the Civil Court to order registration without concerning itself to enquire whether or not consideration has been received or if the petitioner is for any other reasons disentitled to claim to enforce the deed. In such cases, therefore, the Court is not bound to determine any issue respecting payment of consideration. SHEO NEWAZ v. AJOODHYA KOONBEE, **2 N.W.P. 254.**

(732)—S. 75—*See* NOS. 38, 268, 416, 418, 524, 708, 712 to 719, *supra*, and NO. 788, *infra.*

——S. 76 (=s. 76 of 1877=ss. 71, 72, 76 of 1871).

(733)—*S.* 76 (=*Registration Act*, 1871, *s.* 76) —*Civ. Pro. Code* (VIII *of* 1859), *applicability of, to proceedings under Registration Act—Appeal from orders directing or refusing registration—Review—Ground other than error of law discovery of new evidence—Order under Registration Act*, 1871—*Suit to contest order of registering officer.*—The procedure prescribed in Act VIII of 1859 (old Civ. Pro. Code) is applicable to proceedings under the Registration Act (VIII of 1871=III of 1877), including the power to admit a review. [*R.*, 29 B. 698, 14 M.L.J. 471, F.B.] The words 'no appeal lies from any order under this section' in s. 76 of Act VIII of 1871 (=III of 1877) exclude an appeal not only from an order directing registration but also from one refusing registration. [*Appl.*, 6 C. 168, 10 M. 179. F.B; *R.*, 12 A. 510, 33 C. 1323=10 C.W.N. 986=3 C.L.J. 545.] Under the Civ. Pro Code of 1859, it was competent for a Judge to entertain an application for review on grounds other than error of law or of discovery of new evidence. *N.B.*—In this case the Officer admitting the review was different from the one who passed the order sought to be reviewed. [*Diss.*, 6 C. 236=6 C.L.R. 549, 2 M. 10; *Appl.*, 10 M. L J. 134; *Dist.*, 15 C. 166; *R.*, 9 A. 36] An order rejecting an application for registration, under s. 76 of Act VIII of 1871, was one in the nature of a 'decree' so as to admit of a review. *Quære.*—Whether, after the rejection of an application for registration of a document, the defeated party can have recourse to a regular suit for obtaining registration? *In the matter of the petition of* HADGEE ABDOOLLAH, **2 C. 131=3 I.A. 221=26 W.R. 50, P.C.=3 Sar. 221.** (14 M.I.A. 129=9 B.L R. 436, *D.*)

(734)—S. 76—*See* Nos. 340, 353, 386, 417, 419, 702 (*a*), *supra.*

(735)—*Ss.* 76, 77 (=*Registration Act*, 1877, *ss* 76, 77)—*Suit for registration of document.*—The mere fact of an applicant not having adduced any evidence before the Registrar, in respect of the execution of a deed, would not make his order one not refusing registration within the meaning of s. 76 of the Registration Act, so as to preclude the applicant on that ground alone from pursuing his remedy by civil suit under s. 77 of the Act. SAJBULLAH SIRKAR v. HAZI KHOSH MOHOMED SIRKAR, **13 C. 264.**

(736)—*Ss.* 76, 77 (=*Registration Act*, 1877, *ss* 76 *and* 77)—*Registration—Suit to compel registration—Grounds of such suit.*—Where, a Registrar refused to register a document presented to him, upon the grounds that there was not sufficient proof that the document was executed by the authority of the alleged executant, and that there was undue and unexplained delay, in presenting the document for registration, it was *held*, that a suit would lie under s. 77 of the Indian Registration Act, 1877, to compel registration. *Held* also that, in a suit under s. 77 of the Registration Act, the Court is only concerned with the genuineness of the document sought to be registered, and not with its validity. KANHAYA LAL v. SARDAR SINGH, **A.W.N. 1907, 46=4 A.L.J. 171=29 A. 284.** (25 C. 93, 24 C. 668, *R.*)

(737)—*Ss.* 76, 77 (=*Registration Act*, 1877, *ss.* 76, 77)—"*Refusal to accept*" *and* "*Refusal to register*," *difference between—Suit to compel registration.*—S. 76 (*a*) of the Registration Act shows that cases of "refusal to accept" were within the meaning of the words "refusing to register" s. 77 of the Act applies to the refusal to register a document as well as to refusal to accept the same for registration. NARASIMHA NAYANEVARU v. RAMALINGAMA RAO, **10 M.L.J. 104.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

——**S. 77 (= s. 77 of 1877 = s. 15 of 1864).**

(738)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Document not compulsorily registrable--Suit to compel registration.*—Under the Registration Act a suit will lie on the part of a purchaser to compel registration of his *kobala* in a case in which the value of the property conveyed is under Rs. 100 and registration is therefore not made compulsory by the Act. TOPA BIBI v. ASHANULLA SARDAR, **16 C. 509.** (6 M.H.C. App., 9, 10 W.R. 360, *Cited.*)

(739)—*S.* 77 (= *Registration Act*, 1877, *s.* 77)—*Suit to register document—Scope of enquiry.*—*Held*, that in a suit filed under s. 77 of the Registration Act the Court should enquire into nothing more than whether the defendant ostensible executant signed and delivered to the plaintiff the document in question in the suit. NAWAB v. ARJAN DAS, **78 P.L.R. 1904 = 13 P.R. 1904.** (24 C. 668, 11 P.R. 1903, 84 P.L.R. 1903, 18 M. 255, *R.*)

(740)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Suit for direction to register documents—Scope of enquiry—Issues—Execution—Compliance with requirements of law—Effect and binding nature of the documents.*—In a suit for a decree directing the registration of certain documents, the enquiry in Court is to be directed to two points only, namely, (1) whether the documents had been executed; and (2) whether certain requirements of the law as to presentation for registration in due time to the proper office, and in the manner generally prescribed by the Registration Act, had been complied with by the person presenting the documents for registration. The defendant in such a suit may possibly have good reasons why he should not be bound by the documents, but the law does not allow him to advance such reasons in a suit under s. 77 of the Indian Registration Act W. W. BROUCKE v. RAJAH SHAHEB MOHAN BIKRAM SHAH, **14 C W.N. 12 = 5 Ind. Cas. 20.** (24 C. 668, 18 M. 255, 29 A. 284, *R.*)

(741)—*S.* 77 — *Time for presentation of a document.*—The document must be presented for registration within 30 days of the decree; otherwise it will become inoperative. DUDA MAL v. FAQIR MUHAMMAD, **120 P R. 1888** *and* ABDUL HALIM v. GHULAM MIAN, **70 P. R. 1887.**

(741-*a*)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Suit for registration of document — Limitation—Last day a holiday—Suit filed on reopening of Court* — Stare decisis — *General Clauses Act* (X *of* 1887), *s.* 7--*General Clauses Act* (I *of* 1897), *s.* 10—*Limitation Act* (XV *of* 1877), *s.* 5.—Where a Registrar having refused to order the registration of a document on the 29th November, the plaintiff instituted a suit for the registration of the document under s. 77, Registration Act of 1877, on the 2nd January following, the Court being closed on the 29th of December and the following days until it reopend on the 2nd January: *Held*—That, in view of previous decisions of the Court and of the legislative sanction impliedly accorded to the rule there laid down by the General Clauses Acts of 1887 and 1897, the suit should be held to have been properly instituted. (5 C. 906, 18 C. 231, 631, *Commented on*) *Per D. Chatterjee, J.*—S 5 of the Limitation Act has no application to suits under s. 77 of the Registration Act. AHAD BAKSH v. SHEIKH BAHAR ALI, **16 C.W.N 721 = 14 Ind Cas. 173.**

(741-*b*)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Suit for registration of a document—Limitation—Order striking off a case for compulsory registration of a document — Review—Final order refusing to register—Period of thirty days when to run from.*—Where the plaintiff applied to the Registrar for compulsory registration of a deed of sale and the case was struck off, but on the plaintiff's application for review the case was restored and the Registrar, after taking evidence on both sides, made his final order refusing to register the deed and the plaintiff instituted a suit in the Civil Court under s. 77 of the Registration Act within 30 days from the date of this order:—*Held*, that the final order of the Registrar made after the restoration of the case was the order of refusal in respect of which the plaintiff was entitled to institute a suit in the Civil Court, and the plaintiff's suit was not barred by limitation. SHEIK SAJED v SARODA PROSAD CHAUDHURY, **17 C.W.N. 585 = 18 Ind. Cas. 450 = 18 C L.J. 45.**

(742) - *S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Suit to compel registration of document —Execution admitted — Plea of cancellation of document no bar.*—In a suit under s. 77 of the Registration Act to compel registration of a document, the only question to be considered is the *factum* of execution, and when this is admitted, the plaintiff is entitled to claim registration. That the contract embodied in the document was cancelled after its execution is no defence to the suit. And where the instrument has been presented for registration in time and accepted, it is no defence to say that the document was not registered within a certain time, for the law fixes no time within which the registration of such a document must be completed. BALAMBAL AMMAL v. ARUNACHELA CHETTI, **18 M. 255.** [*Appr.*, 24 C. 668 = 1 C.W.N. 444, 11 P. R. 1903 = 84 P.L R. 1903, 13 P.R. 1904 = 78 P.L R 1904; *R.*, 14 C.W.N 12.]

(743)—*S.* 77 (= *Registration Act*, 1864, *s.* 15) —*Suit brought under—Execution admitted but collateral agreement invalidating original document set up—Document to be registered.* —In a suit under s. 15 of the Registration Act against a person to compel him to join in the registration of certain documents, where the defendant admits the execution of the documents but sets up a collateral agreement which would render the documents of no legal

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

force, the document ought to be registered, execution having been admitted, even although the agreement relied on is found by the Court to be genuine. RAMANADAN CHETTY v. VIJIASAMY, **4 M.H.C. 425.** [*D.*, 1 C.L.J. 126.]

(744)—*S.* 77 (=*Registration Act*, 1877, *s.* 77) —*Suit to enforce registration of document—Execution admitted—Question of validity of document.*—In a suit to enforce the registration of a document under s. 77 of the Registration Act, a Court cannot go into any matter affecting the validity of a document apart from its genuineness. HAZURI MAL v. KUTAB UD-DIN, **84 P.L R. 1903=11 P.R. 1903.** (18 M. 255, 24 C. 668, *F.*) [*R.*, 13 P.R. 1904=78 P. L.R. 1904]

(745)—*S.* 77 (=*Registration Act*, 1864, *s.* 29)— *Sale-deed — Execution not admitted.* —A Registrar is justified in refusing to register a sale deed under Act XVI of 1864, when all the requirements of s. 29 had not been carried out before him. BHAGVAN JAYARAM v. VITHOBA GOVIND, **4 B.H.C.A.C. 140.**

(746)—*S.* 77 (=*Registration Act*, 1867, *s.* 77) —*Limitation Act*, 1877, *s.* 7—*Minor's suit to enforce registration after time.*—The Registration Act being a special Act, complete in itself, s. 7 of the Limitation Act would not apply to a suit by a minor under s. 77 of the Registration Act for a decree directing a document to be registered. Such a suit brought more than thirty days after refusal of the Registrar to register would be barred by limitation. VEERAMMA v. ABBIAH, **18 M 99. F.B.** [*Not F.*, 30 B. 275=7 Bom. L.R. 697; *F*, 20 M. 249, 8 M. L.J. 265=22 M. 179, 24 A. 402, 30 C 532; *R.*, 18 M 484, 20 B. 543, 20 M. 476=23 M. 389, 4 O.C. 182.]

(747)—*S.* 77 (=*Registration Act*, 1877, *s.* 77) —*Suit to compel registration not maintainable independently of.*—Independently of the provisions of s. 77 of the Registration Act, no suit can be maintained for compelling the registration of an executed document, or for getting a fresh document executed and registered by the defendant. The document sought to be registered by means of such a suit cannot, except under the special provisions of s. 77, be received in evidence so as to enable the Court to ascertain the existence of a document requiring registration. Moreover, such a suit will not lie upon the general principle that, when a statute creates a right or an obligation and provides a method of enforcing it, that method, and not the remedy at the common law, must be followed. Where, as in this case, plaintiff had possession of the document within the time allowed for its registration, he could have himself presented it for registration and proceeded under the provisions of the Act. He had a complete remedy under the Act, and having neglected to take the possible and proper steps thereunder he has only himself to blame, nor can a decree be given for execution and registration of a similar document, since the defendant has in fact already executed one. VENKATASAMI v. KRISTAYYA, **16 M. 341=3 M.L J. 169.** [*F.*, 6 M.L.J. 263; *D.*, 20 M. 19, 20 M. 250.]

(748) — *S.* 77 (= *Registration Act*, 1877, *s.* 77)—*Suit to enforce registration maintainable independently of.*—Plaintiffs alleged that, after the execution of a lease-deed by the lessor's agent, the lessor refused to be a party to the registration of the deed, and instituted the present suit praying that the defendants be ordered to cause the registration of it. Reversing the decision of the lower appellate Court to the effect that the plaintiff's suit was barred by s. 77 of the Registration Act, the High Court *held* that that section, being an enabling one, contained nothing which could bar a suit of any description, that the refusal by a party to a deed to register it gives a cause of action outside the provisions of the Registration Act for a suit like the present one. ABDULLAH KHAN v. JANKI, **16 A. 303=A.W. N. 1894, 94.** (2 A. 46, *F.*; 3 A. 39, 3 A. 397, 9 C. 151, *D.*) [*R.*, 4 L.B.R. 88=14 Bur. L. R. 161.]

(749)—*S.* 77 (=*Registration Act*, 1864, *s.* 15) — *Suit under -- Suit to be limited to object specified in section—Power of Court.*—Where it is necessary to institute a suit under s. 15 of the Registration Act to enforce registration, the suit should be limited to that object. It would be improper for the Court, after making the order to compel the registration, to suspend the further hearing of the case until registration had been effected, and then proceed to consider and decide upon the rights of the parties. HAKIM KHADAR SAIB v KHADAR BHIBI, **3 M H.C. 149.** [*R.*, 4 M H.C. 425.]

(750)—*S.* 77 (=*Registration Act*, 1877, *s.* 77) —*New bond in cancellation of old bonds—Registration refused—Suit on original bonds—Novation.*—Where in consolidation of some old bonds, and in consideration of a further advance, a new bond was executed, and the obligor subsequently refused to register the new bond, denying execution, and the plaintiff's proceedings under the Registration Act proved a failure, and thereupon the plaintiff sued on the old bonds and to recover the advance made in cash, *held* that, under the circumstances, there had been no novation, nor, as the suit was not on the new bond, had the principle laid down in 3 A. 397 any reference. MAHABIR RAI v. DEBI DAYAL, **A.W.N. 1881, 98.**

(751)—*S.* 77 (=*Registration Act*, 1877, *s.* 77) —*Order—Registrar—Suit to set aside the order.* —A suit to set aside an order, brought under s. 77 of the Registration Act must be instituted within 30 days from the making of it: the making of the order means not merely recording it in writing but communicating it to the party

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

concerned so as to bind him by it. ABDUL ALI v. MIRJA KHAN, **5 Bom. L.R. 622=28 B. 8.**

(752)—*S.* 77 (=*Registration Act*, 1877, *s.* 77)—*Suit under—Power of Court—S.* 30, *Guardian and Wards Act*, 1890—*Guardian acting without permission or in contravention of permission.*—In a suit under s. 77, Registration Act, it is not competent for the Court to go into any matter affecting the validity of a document apart from its genuineness. S. 77 does not contemplate a suit for a decree declaring the validity or the binding character of the document. The question of validity of the document is left to be determined in a proper suit, (18 M. 255, *Appr.*) [*F.*, 54 P.L.R.1903=11 P.R. 1903, 78 P.L.R. 1904=13 P.R. 1904, 29 A. 284, A.W.N. 1907, 46=4 A.L.J. 171; *R.*, 14 C.W.N. 12.] If a guardian executes a deed in contravention of the terms of the permission, his act will not be void, but voidable. He or his successor may be compelled to register it, if it was proved to be genuine, even though such deed be voidable at the option of the minor. The infant will be entitled to avoid the deed, but only on condition he restores any benefit received thereunder to the person from whom it was received; but the Court cannot grant such relief to the latter unless he brings another suit. RAJ LAKHI GHOSE v. DEBENDRA CHANDRA MOJUMDAR, **24 C. 668=1 C.W.N. 444.** [*R.*, 22 M. 289, 3 C.L.J. 260, 14 C.W.N. 12.]

(753)—*S.*77 (=*Registration Act*, 1877, *s.*77)—*Decree in a suit under, directing, but not fixing period for, registration of document—Omission to present document within thirty days of decree, whether could vitiate subsequent registration.*—The defendant, in this case, had obtained a decree, against the present plaintiff, which directed a certain document to be registered by the latter but said nothing about its presentation for registration within thirty days from the passing of the decree. The said defendant did not present the document, for registration, within thirty days, after the passing of the first Court's decree, but did so present it within such period after the passing of the decree on an unsuccessful appeal by the present plaintiff and plaintiff, in the present suit, asked for a declaration that the registration was bad. *Held*, there is no positive enactment in s. 77 of the Act that a document directed to be registered, by a decree thereunder, ought to be presented for registration within thirty days after the passing of the decree and though, to give effect to the intention of the section, the decree made under it could have provided that the document should be presented for registration within such period, yet, it was not competent for the Court in the present suit, to go behind the express decree and incorporative into it a condition not imposed by the Court, which passed the same. GOPINATH ADHICARY v. GADADHAR DAS, **33 C. 1020.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(754)—*S.* 77 (=*Registration Act*, 1877, *s.* 77)—*Transfer of right of management of temple endowment—Sufficiency of description—Refusal to register where description regarding some of the properties is insufficient.*—The right of the manager of a Hindu temple, even though such management involves the holding of immoveable property forming part of the endowment of the temple, is not immoveable property within the meaning of the Act. The incident of reference, in an instrument of transfer of such right, to the endowment cannot alter the character of transfer. Where a document covering more properties than one is presented for registration and the description of one of the properties is sufficient to satisfy the requirements of the Act, while those with regard to the rest are not sufficient, the registering officer ought not to refuse registration in regard to the document as a whole. He ought to register the document as regards the property whose description is correct. Where the right to manage a temple and its endowments is transferred, the description would be sufficient if the deed mentions the name and situation of the temple, extent of the lands and the registry. KESAVA PILLAI v. KUNNUSAMI PILLAI, **15 M.L.J. 30.**

(755) — *S.* 77 (=*Registration Act*, 1866, *s.* 82)—*Sale deed—Refusal to register—Suit to recover deed*—A sale-deed to the plaintiff was duly executed by the vendor and the purchase money was paid, and when the deed was presented for registration, the defendant instigated the vendor to deny the receipt of the purchase-money, whereupon the Sub-Registrar refused to register. The plaintiff sued the vendor and the defendant for the recovery of the deed of which the latter had obtained possession. *Held* that the plaintiff was entitled to sue for the document itself, as the defendant had no right to it after it had been received back from the Sub-Registrar, and that the plaintiff was also entitled to ask, as against the defendant, for such aid as the Court could afford towards procuring the due registration of the document according to law. MITTER SEIN v. NARAIN SINGH, **1 N.W.P. 289.**

(756)—*S.* 77 (=*Registration Act*, 1864, *s.* 15)—*Registrar's improper refusal to register.*—This was a suit under s. 15 of Act XVI of 1864 to establish the right to have a certain instrument registered. The lower Court held that the section did not apply to the present case and that the Registrar was right in refusing to register when the parties would not attend and did not assent to the registration. The High Court was also of opinion that s. 15 of the above Act applies only to cases in which the Registrar has refused when, under the circumstances, he ought not to have refused to register. GOOROO DOSS DUTT v. DWARKANATH MANNA, **6 W.R. Mis. 61.**

(757)—*S.* 77—*Lease not requiring registration—Suit to compel registration—Express covenant*

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

to register.—Where in a lease there has been no express covenant to register it, nor, at the time of its execution, was there any provision of law in force, rendering the registration of the lease compulsory in order that the lease may be operative, from which an implied agreement to register might be inferred, no suit can be maintained simply to compel the registration of the deed embodying the lease. AHSUNA BEGUM v. KHEERUN SINGH, **10 W.R. 360.** [*D.*, 16 C. 509.]

(758)—*S.* 77—*Claim arising from unregistered document—Existence of document proved—Claim sought to be proved* debors *the document.*—In a case where it is made to appear that the cause of suit arises from a document which by law requires registration, but has not in fact been registered, the plaintiff cannot be permitted to establish a claim independently of the document whose existence is shown. To permit this, would be to enable parties to escape from the consequences which the law has attached to non-registration. RAMPERSHAD v. MUSUMUT RANEE MEWA KOER, **2 N.W.P. 12.**

(759)—*S.* 77 (=*Registration Act*, 1864, *s.* 15)—*Deed presented for registration, return of, without registration—Suit to enforce contract against resiling vendor—Act* XX *of* 1876, *s.* 84.—Plaintiff alleged that defendant had agreed to sell certain property to him; that when the deed was executed and taken to the Registrar's office, the defendant objected to the registration on the ground that the full price had not been paid, on which the Registrar returned the deed to the defendant. The defendant then having sold the same property to the other defendants, this suit was brought to set aside the subsequent sale and to enforce the contract entered into by the principal defendant with the plaintiff and to have his purchase registered under a decree of Court. Both the lower Courts rejected the claim and dismised the suit, the Judge of the Lower Appellate Court holding that the only course for plaintiff to adopt was to come in under s. 84 of Act XX of 1866, and that, having failed to follow the course prescribed by law, the plaintiff cannot be allowed to sue for the specific performance of the contract owing to the defective nature of the plaint. The High Court, however, *held* that, as the plaintiff's case had arisen from acts done under s. 15 of Act XVI of 1864, which was the law in force when the Registrar refused to register the deed, the provisions of the subsequent law could not deprive the plaintiff of his right to bring an action. It was further held that the present case was not one coming either under the provisions of s. 15 of Act XVI of 1864, or of s. 84, Act XX of 1866, though the plaintiff asked for registration. It was a suit to enforce a contract from which the vendor had resiled, and the prayer for registration did not alter the nature of the suit, and consequently, notwithstanding the subsequent sale to a third party

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

and registration of such subsequent deed, nothing in the Registration Act could prevent the plaintiff from enforcing his contract. BHEEMUL MAHTOON v. MUSSAMUT OLIMUSSA, **8 W.R. 423.**

(760)—*S.* 77—*Registration of fraudulent deed, effect of—Suit by purchaser to compel vendor to complete sale by registration, maintainability of.*—Registration can give no efficacy to a fraudulent and collusive deed. The remedy given by the Registration Act by appeal when a registry officer refuses to register, does not affect a purchaser's remedy by suit to compel the vendor to do all that is legally requisite to complete the sale, including the registration of the deed. RAMPHUL LALL v. CHUNDY PURSHAD, **1 N.W.P. 287.**

(761)—*S.* 77—*Suit for cancelment of mortgage deed—Registration Act—Process of execution—Right to suit.*—The powers conferred on the Court under the sections of the Registration Act for enforcement by process of execution of the payment of a bond including the power to set aside a decree made thereunder, to stay execution and to cause the bond to be kept in safe custody, are by no means inconsistent with the right to maintain a suit for the cancelment and annulment of a deed of mortgage alleged to be false and fraudulent, the mortgagors denying execution thereof and all knowledge of its execution and registration. SREE RAM v. HOKOON SINGH, **2 N.W.P. 467.**

(762)—*S.* 77 (=*Registration Act*, 1877, *s.* 77)—*Suit to compel registration — Limitation—Act No.* XV *of* 1877 (*Indian Limitation Act*), *ss.* 5 *and* 6.—*Held*, that s. 5 of the Indian Limitation Act, 1877, applies to a suit brought under s. 77 of the Indian Registration Act, 1877, to compel registration of a document. SURAJ BALI PRASAD v. THOMAS, **A.W.N. 1905, 175=2 A.L.J. 714=28 A. 48.** (23 A. 277, *F.*)

(763)—*S.* 77 (=*Registration Act*, 1877, *s.* 77)—*Suit for registration of document—Limitation—Limitation Act* (XV *of* 1877), *s.* 5, *whether applicable.*—The provisions of s. 5 of the Limitation Act, 1877, control the special rule of limitation in s. 77 of the Registration Act, 1877. Therefore, where the Court was closed on the 30th day after the making of an order of refusal to register a document by the Registrar, and a suit under s. 77 of the Registration Act was brought on the next open day: *Held*, that the suit was within time. AHAD BAKSH MOLLA v. SHEIKH BABAR ALI, **5 Ind. Cas. 416.** (8 C. 910, 10 C.L.R. 333, *F.*)

(764)—*S.* 77—*Suit for order directing registration of document—Limitation Act* (XV *of* 1877), *ss.* 5, 6—30 *days expiring during a Court holiday—Suit instituted on reopening day if barred.*—The provisions of s. 5 of the Limitation Act apply to suits under s. 77 of the Registration Act (III of 1877). When therefore the

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

period of limitation provided in that section for a suit for an order directing the registration of a document expired during the X'mas holidays. *Held*—That the suit, if instituted on the day the Court re-opened, would not be barred by limitation. MATABBAR MOLLAH v. SASI BHUSAN GHATAK, **16 C.W.N. 20.** (8 C. 910, *F.*)

(765)—*S* 77 (= *Registration Act*, 1877, *s.* 77) —*Limitation Act*, 1877, *s.* 14—*Applicability to suits under Registration Act, s.* 77,—S. 14 of the Limitation Act, which provides for cases in which a plaintiff, in perfect good faith, but under a mistake, institutes proceedings in a wrong Court, is applicable not only to the provisions of the Limitation Act itself, but also to those of all Acts providing a special time for the limitation of suits such as that in s. 77 of the Registration Act. KHETTER MOHUN CHUCKERBUTTY v. DINABASHY SHAH, **10 C. 265** [*F.*, 8 B. 529; *R.*, 12 M 467, 18 M. 99, F.B., 20 B 543, 4 O.C. 182; *D.*, 17 C. 263; *Doubt.*, 30 C. 532, F.B.]

(766)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Suit under s.* 77, *Registration Act*, 1877—*Limitation.*—S. 5, Limitation Act, 1877, applies to suits to compel registration instituted under s. 77 of the Registration Act. NIJABUTOOLLA v. WAZIR ALI, **8 C. 910 = 10 C.L.R. 233.** [*R.*, 18 M. 99.]

(767)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Limitation—Joinder of claims.*—In calculating the 30 days under s. 77 of the Registration Act, the day on which the order was passed ought to be excluded. No other claims can be joined in a suit brought under s. 77, Registration Act. But, if such a claim is joined, the Court should direct the plaint to be amended, and should not dismiss the suit. VENKATARAMACHENDRA RAO v. VEERAMMA, **9 M. L. J. 107.**

(768)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Presentation of document in time—Withdrawal by party presenting—Subsequent presentation for registration after expiry of time limited —First presentation not rendered void by subsequent withdrawal.*—A document was presented for registration within the time allowed by law. It was however impounded on the ground that the proper stamp duty had not been paid. On its being returned by the Collector to the Registrar the party who presented it applied for its return to the Registrar and was given back to him by the Registrar. Sometime after, the party again presented it for registration and registration was refused on the ground that the document had been presented after the expiration of 8 months from the date of execution Hence a suit under s. 77 of the Registration Act for a decree directing the registration of the document. *Held* that the withdrawal of the document was a mere irregularity and as there is no enactment, which provides that if a party presenting a document subsequently withdraws it before Registration, it shall be deemed not to have been presented, it could not be held that the first presentation was rendered void and of no effect by the subsequent removal of the document from the Registrar's office. ADKU PATEL v RAMCHANDRA, **3 C.P.L.R. 67.**

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

(769)—*S.* 77 (= *Registration Act*, 1877, *s.* 77) —*Suit under s* 77 *of Act* III *of* 1877 —*Appeals to the High Court—Amount of Court-fee.*—The Court fee payable on appeals to the High Court in suits under s. 77 of the Registration Act, is ten rupees, irrespective of the value of the suit. JANTOO v. RADHA CANTO DOSS, **8 C. 515** [*F.*, 12 M.L.J 83, 31 M. 89 = 3 M.L.T 73 = 17 M L.J. 573.]

(770)—S. 77—*See* APPEAL—GENERAL, **43** P.R. 1896.

(771)—S. 77—*See* COURT FEES ACT, 1870, sch. II, art. 17 (3), 21 P.R. 1895.

(772)—S. 77—*See* JURISDICTION OF CIVIL COURTS, 9 W R. 576.

(773)—S. 77—Suit to direct registration of will disposing of property worth more than Rs. 2,500—Jurisdiction of Munsiff's Court—*See* JURISDICTION OF MUNSIFF'S COURTS, 17 M L.J. 572, F.B = 3 M.L T. 73 = 31 M. 89.

(774)—S. 77—Suit to compel registration of document—Limitation expiring on holiday—Filing of suit on re-opening of Court—*See* LIMITATION ACT, 1908, ss. 4 & 5, **20 M. 249** = 7 M.L J. 94.

(775)—S. 77—*See* LIMITATION ACT, 1908, s 5, 74 P.R. 1890.

(776)—S. 77—*See* LIMITATION ACT, 1908, s. 14, 30 C. 532 = 7 C.W N. 550.

(777)—S. 77—*See* Nos. 267, 273, 341, 359, 386, 401, 402, 417, 418, 420, 702 *a*, 703, 719, 720, 721, 722, 723, 725, 735, 736, 737, *supra.*

(777-*a*)—*Ss.* 77, 36—*Maintainability of suit—Refusal to register for not summoning witnesses under s* 36 *of the Act.*—Where a document was presented for registration to the Sub Registrar after the death of the executant, and the registration was refused on the ground that heirs of the deceased executant were not summoned under s 36 of the Registration Act, and the order of refusal was upheld by the Registrar on appeal, *held* that a suit to have the document, registered was maintainable under s. 77 of the Registration Act. HAYAT ALI v. MUHAMMAD SADIQ, **9 A.L.J. 756 = 16 Ind. Cas. 97.**

——S. 82 (= s. 82 of 1877 = s. 80 of 1871 = ss. 91, 92, 93, 94 of 1866 = s 70 of 1864).

(778)—*S.* 82 (= *Registration Act*, 1877, *s.* 82) —*Execution, Denial of—Prosecution—Stay of proceeding pending civil suit.*—Where the special Sub-Registrar sanctioned the prosecution of the petitioner under s. 82 of the

Registration Act (XVI of 1908, III of 1877, VIII of 1871, XX of 1866, XVI of 1864, XIX of 1843)—*continued.*

Registration Act for having denied the execution of a mortgage deed which was found by him to be genuine, and the petitioner applied to the Magistrate to defer the criminal proceedings until the decision in a civil suit brought by him for a declaration that the mortgage-bond was a forgery and that it was not binding on him, *held* that the application should have been granted. GOBERDHONE PRAMANICK v. ISWAR CHUNDER PRAMANICK, **5 C.W.N. 44.** [*R. & D.*, 31 C. 858]

(779)—*S.* 82 (= *Registration Act*, 1877, *s.* 82)—*Misjoinder.*—Where an accused person was tried in one trial for offences under s. 82, Act III of 1877, and ss. 467 and 471, I.P.C., the trial was held bad for misjoinder. BIRENDRA LAL BHADURI v. EMPEROR, **30 C. 822=7 C.W N. 639.** [*R.*, 11 C.W N. 715.]

(780)—*S* 82 (=*Registration Act*, 1877, *s.* 82) —*Sanction to prosecute.*—No sanction is necessary before instituting a charge under s. 82 of the Act. GOPEENATH v. KULDIP SINGH, **11 C. 566, F.B.** [*R.*, 11 M. 500]

(781)—*S.* 82 (*a*) (=*Registration Act*, 1877, *s.* 82 (*a*))—*Acting in execution of the Act—Questions to parties about the circumstances under which the deed was executed—Parties making false statements.*—A district Registrar cannot be considered to be "acting in execution of the Act" III of 1877 (The Indian Registration Act), in questioning the parties who signed the document as to the circumstances under which they signed. If, therefore, such persons make false statements to the officer, they cannot be guilty of an offence under s. 82 (*a*) of the Registration Act, 1877. QUEEN-EMPRESS v. BABAJI, **1 Bom. L R. 686.**

(782)—*S.* 82 (*c*) (=*Registration Act*, 1877, *s.* 82) (*c*)—*False personation—Interpretation.*—To complete the offence of false personation, under s. 82 (*c*) of the Registration Act, 1877, fraudulent intent is not necessary; hence, where a person at the instance of another goes to the Registrar and demands the return of document which had been presented for registration representing that he is that other person, he commits the offence of false personation, within the meaning of s. 82 (*c*) of the Registration Act, 1877. EMPEROR v. KALYA, **5 Bom. L.R. 138.**

(783)—S. 82—*See* No. 726, *supra.*

——S. 85 (=s. 85 of 1877=s. 83 of 1871).

(784)—S. 85—*See* No. 372, *supra.*

——S 87 (=s 87 of 1877=s. 85 of 1871=s. 88 of 1866).

(785)—*S.* 87 (=*Registration Act*, 1871, *s.* 85) —*Presentation of document for registration by agent—Registration of document by registering officer—Saving of irregularity.*—Where a document executed by the agent for his principal was presented for registration by the agent and was registered, the registering officer holding that the power of attorney produced by the agent authorised him to act for principal in such matters, the registration was not invalid and the irregularity, if any, was saved by the provisions of s. 85 of the Act. HAZARI LAL v. DEBI PERSAD, **1 C.P L.R. 87.** (24 W.R. 75, 1 A. 465, *F.*)

(786)—*S* 87 (=*Registration Act*, 1877, *s.* 87) —*Omission of registering officer to sign certificate of registration fatal to validity of registration.*—The certificate must be signed by the registering officer to make the registration of a document valid and binding according to law. The omission to sign is not a defect of procedure within the meaning of s. 87 of the Act. DAUJI ALASPURI v. PUNJAJI, **6 C.P L R. 125.** (1 A. 473, *D.*)

(787)—S. 87—*See* Nos. 41, 354, 367-*a*, 370, 373, 376-*a*, 377, 382, 383, 384, 385, 393, 403, 416, 525, 526, 685, 686, 694, 695, *supra.*

(788)—*Ss.* 87, 23, 24, 25, 73, 74, 75, 19, 21, 35, 49 (=*Registration Act*, 1866, *ss* 88, 22, 24, 84, 19, 21, 36, 49)—*Registration—Limitations—Effect to be given to s. 49—"District Court"—Jurisdiction of High Court, N.W.P.*—For the purpose of Act XX of 1866, "District Court" means the principal Court of original Civil jurisdiction in a District and includes the High Court in its ordinary original civil jurisdiction. The N.W.P. High Court having no ordinary original civil jurisdiction is not competent under Act XX of 1866, s 88, to direct the registration of an instrument, the registration of which has been refused by the Registrar and the Registrar General. Ss. 22 and 24, Act XX of 1866, make it imperative that the instruments therein referred to shall be presented for registration within four or at most eight months from the date of their execution, but the Act fixes no time within which the registration must be completed. Where a deed of sale is presented for registration within the period required by s. 22, and is accepted by the Registering Officer who, without the vendors appearing, registers it by mistake, and the registration is declared by a competent Court to be invalid, the registering officer may, although the period of 4 months has expired, proceed to compel the appearance of the vendors, and, on their admission, register the deed. Such registration may be effected by the Registering officer voluntarily, and without an order from the District Court under s. 84, notwithstanding that an application by the parties concerned to have it registered has been refused by the Registrar, and that the Registrar-General has deemed the first (invalid) registration to be due registration. [*Appr.*, 5 M.L J. 29; *R.*, 11 C. 750, 15 C 548, 16 C. 189, 18 M. 255.] It is not clear that the words "unless it shall have been registered in accordance with the provisions of this Act" in s. 49, are not, especially

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as regards strangers to the deed confined to the procedure on "admitting to registration" without reference to any matter of procedure prior to registration or to the provisions of ss. 19, 21, or 36 of the Act, or other provisions of a similar nature. In considering the effect to be given to s. 49, that section must be read in conjunction with s. 88, and with the words of the heading of part X "Of the effects of Registration and non-registration." It is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21, or 36 or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general heads "defects in procedure" in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property, through any error or inadvertence of a public officer on whom they would naturally place reliance. SAH MUKHUN LALL PANDAY v. SAH KOONDUN LAL, **15 B.L R. 228 = 24 W.R. 75 = 2 I.A. 210 = 3 Sar. 509.** [*F.*, 11 A. 319; *Appl.*, 1 A. 465 = 4 I.A. 166, 23 M. 580; *R.*, 7 C.L.R. 223, 4 A. 384, 7 A. 590, 17 B. 94, 23 A. 233; *D.*, 14 C. 449, 5 C.L.J. 188.]

—— S. 88 (= s. 88 of 1877 = s. 86 of 1871 = s. 89 of 1866 = s. 69 of 1864).

(789)—S. 88. *See* Nos. 345, 370, *supra.*

—— S. 89 (= s. 89 of 1877).

(790)—*S.* 89 (= *Registration Act*, 1877, *s.* 89) —*Sale certificate—Registration.*—A sale certificate must be regarded as a registered document, when a copy of it has been transmitted by the Court, and filed by the Registrar under s. 89 of the Indian Registration Act. TINNAPA v. MURUGAPPA, **7 M. 107.**

(791)—S. 89—*See* Nos. 354, 666, 669, *supra.*

Registration and Limitation Act Amendment Act.

See ACT XII OF 1879.

Registration of Land Act.

See BEN. ACT VII OF 1876.

Registration of Assurances Act.

See ACT XVI OF 1864.

Registration of Books, Press.

See ACT XXV OF 1867.

Registration of Certain Deeds Act.

See ACT XIX OF 1843.

Registration of Mahomedan Marriages and Divorces, Bengal Act.

See BEN. ACT I OF 1876.

Registration of Ships Act.

See ACT X OF 1841.

Registration, Societies Act.

See ACT XXI OF 1860.

Registration Manual.

This circular directs Judges to furnish information as to Moonsiffees to the Registrar-General of Assurances for his Registration Manual, Civ. Cir. No. 10, dated 22nd September, 1869, **12 W.R. Civ. Cir. 7.**

Registration Memoranda.

This circular deals with indents to be made forms A and B for the preparation of Registration Memoranda. Cir. No. 8, dated the 26th February, 1867, **7 W.R. Civ. Cir. Orders, p. 4.**

Re-grant.

See GRANT.

(1)—*Confiscation by Government and re-grant —Leases created meanwhile - How far valid.*— Plaintiff sued to eject defendant from a plot of ground leased out to him by Government. On the land so leased out the defendant had erected a building, and he contended that one of the conditions of the re-grant by Government of the plot of ground to the plaintiff was that he should ratify this lease; but that was found against. The only other ground on which the defendant's right under the lease could be maintained was that Government were rightful owners on the date they created the lease. That depended upon the question whether there was a confiscation at first and a re-grant, in which case Government should be deemed to be rightful owners, or a mere abandonment and occupation by Government. As there was no evidence on this point, the case was remanded for a finding as to whether there was a confiscation. In absence of evidence on this point, the defendant must be ejected from the land, but must be paid the cost of the materials of the building. KURREEM BUX v. SHADEE RAM, **19 P.R. 1866.**

Regrating.

(1)—*Offence of—Applicability.*—The common law of offence of engrossing or regrating, applies only with respect to the necessaries of life. DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS, **5 M.I.A. 109 = 7 Moo. P. C. 239 = Perry O.C. 232 = 1 Sar. 403.**

Regular Appeals, Bengal.

See BEN. ACT XV OF 1853.

Regulations.

1.—IMPERIAL REGULATIONS.
2.—BENGAL REGULATIONS.
3.—BOMBAY REGULATIONS.
4.—BURMA REGULATIONS.
5.—MADRAS REGULATIONS.
6.—PUNJAB REGULATIONS.

Regulations—continued.

——1.—Imperial Regulations.

———Reg. I of 1877 (The Ajmere Courts).

[REP. IN PT. ACT IX OF 1887 ; ACT VI OF 1888, S. IX, REP. IN PT. AND AMDED. REG. IX OF 1893 ; AM., REG. IX OF 1890 SEC. 4 A. INS., REG. VII OF 1907.]

(1)—S. 17—*See* No. 4, *infra.*

(2)—*S.* 18, *powers of High Court on reference made under.*—When, under the provisions of s. 18 of Reg. No. 1 of 1877, the Commissioner and District Judge of Ajmere makes a reference to the High Court asking for a ruling upon a question of law, or, amongst other things, upon the construction of any document, arising out of an appeal which has been heard by him, and upon which he has expressed his own opinion, the power of the High Court is limited to expressing its opinion on the specific point referred to it, and it is not competent to the High Court to go into the question whether such point has really arisen in the case or to enter upon the merits of the case in any other respect. KALIAN MAL v. RAM KISHEN, **21 A. 163=A.W.N. 1899, 4.**

(3)—*S.* 21—*Jurisdiction—Civ. Pro. Code,* s. 57.—In a suit for partition filed in the Court of a Subordinate Judge of the first class in Ajmere, the Court, acting under s. 57 of the Code of Civil Procedure, returned the plaint on the ground that the subject-matter of the suit was beyond its jurisdiction. There was an appeal against that order to the Court of the Commissioner of Ajmere-Mairwara, which rejected it, holding the same view as the Subordinate Judge. *Held* that, under these circumstances, the chief Commissioner of Ajmere Mairwara had no power to refer the question of jurisdiction under s. 21 of the Ajmere Court's Regulation, 1877, to the High Court for its opinion. RAJ MAL v. PANNA LAL, **A.W.N. 1902, 215.**

(4)—Ss. 21, 17—*See* ATTACHMENT—MISCELLANEOUS, A.W.N. 1885, 57.

(5)—*Ss.* 21, 36—*Reference to High Court by the Chief Commissioner of Ajmere and Mairwara—Reference to Chief Commissoner by Commissoner of Ajmere—Appeal from Commissioner's decree passed in accordance with Chief Commissioner's judgment.*—A question, arising before the admission of a civil appeal in the Court of the Chief Commissioner of Ajmere and Mairwara, as to whether the appeal lies to him or to the Privy Council, is a question arising "in the trial of an appeal" within the meaning of s. 21 of Reg. I of 1877, and could be referred by him to the High Court. *Per Spankie, J. contra.* Where the Commissioner of Ajmere refers under s. 36, Reg. 1 of 1877, to the Chief Commissioner a question of the nature mentioned in s. 17, and, on receipt of his opinion, passes a decision in accordance with it, the appeal from such decision lies to the Privy Council

Regulations—continued.

—— 1.—Imperial Regulations—*continued.*

and not to the Chief Commissioner. THAKUR OF MASUDA v. THE WIDOWS OF THE THAKUR OF NANDWARA, **2 A. 819, F.B.** [*R.*, 8 P.R. 1903, Rev., 30 A. 290=5 A.L.J. 584=A.W.N. 1908, 109.]

(6)—S. 36—*See* No. 5, *supra.*

———Reg. II of 1877 (The Ajmere Land and Revenue Regulation).

[REP. IN PT., REG. I OF 1888. REP. IN PT., LOCALLY, REG. III OF 1895. S. 6. AM., REG. IX OF 1893, S. 3 AM., REG. V OF 1907.]

(1)—*S.* 41—*Usufructuary mortgage—Proprietary rights, losing or parting with—Expropriatary tenant.—Per Richards, J.*—A usufructuary mortgagor, by placing the usufructuary mortgagee in possession temporarily, loses his proprietary rights within the maaning of s. 41 of Reg. II of 1877 of the Ajmere Code. The mortgagor, who before the mortgage was and since the mortgage remains, in cultivation of lands, is an occupancy tenant in respect to these lands. *Per Karamat Husain, J.*—An owner of a holding, who makes a usufuctuary mortgage of his holding, does not lose or part with his proprietary rights, either temporarily or permanently, within the meaning of Reg. II of 1877, of the Ajmere Code, and does not become an expropriatary tenant of his khudkasht in that land. *Held*, further, that, where a mortgagor in the mortgage-deed promises to make over possession of the mortgaged property, which is his khudkasht to the mortgagee, s. 41 of the Ajmere Land and Revenue Regulations does not apply. Rules of interpretation of statutes discussed. NEMI CHAND v. GANESH, **7 A.L.J. 370=5 Ind. Cas. 503.**

———Reg. III of 1877 (The Ajmere Laws).

[REP. IN PT , ACT III OF 1879 ; ACT X OF 1882; ACT XII OF 1882 ; ACT XIII OF 1889 ; REG. IX OF 1893.]

(1)—*S.* 33—*Rule of* damdupat—*Applicability to suit for redemption.*—The language used in s. 33, Reg. III of 1877, has reference only to cases in which money is payable by the defendant to the plaintiff, and not to a suit for redemption of mortgage. NEMI CHAND v. RADHA BALLABH, **26 A. 354.** (13 M.I.A. 404, *F.*)

(2)—Ch. 2—*See* MAHOMEDAN LAW—PREEMPTION, 11 Ind. Cas. 670.

———Reg. XIII of 1887 (The Hazara Tenancy).

See PUN. ACT XVI OF 1887, s. 5, (1) (*c*) and (*e*), 109 P.L.R. 1901=1 P.R. 1902.

———Reg. III of 1891 (Sylhet Jhum).

(1)—Jhum *cultivation—Legislation to extinguish right to carry on such cultivation outside settled estate—Compensation*—Onus *to prove that statute applies—Statement of facts in preamble of statute—Value—Question of fact or*

Regulations—continued.

——1.—Imperial Regulations—*continued.*

law—Concurrent findings—Evidence Act (I *of* 1872), *s.* 13—*Transactions* inter alia.—Reg. III of 1891 when applied to any lands would have the effect of confiscating proprietary rights and giving compensation in exchange. The *onus* therefore lies on Government to show, that the facts of any case are such as to bring it within its operation. The Government must prove that at the Permanent Settlement, the officers of the Government, included among the assets of the estate, income derived by its owners from *jhum* cultivation carried on beyond the limits of the estate. The argument, that under the Regulations then in force no assets not arising out of the estate could be lawfully taken into account, and that a strong presumption was thus raised that the course which was in accordance with law was followed in a particular case, was not entertained in the face of the preamble to the Regulation which shows that in a number of cases the income of *jhum* cultivation carried on beyond the estate was rightly or wrongly taken into account. It was proved that as early as 1837, the owners of the estate received *kabuliyats* from tenants carrying on *jhum* cultivation on the disputed land, that in 1842 and 1843 they succeeded in defeating an attempt on the part of persons interested in the adjoining *mouzah* to exercise rights over the land, and that on several occasions they successfully resisted proposals on the part of the Revenue authorities to settle portions of the land as *ilam* land, open for settlement. *Held*, that from this and other evidence of continuous possession and enjoyment, it should be inferred that the land was included within the permanently settled estate of the owners, and the Regulation had no application to it. The question here was in one sense a question of fact, but every point in the process of the reasoning involved considerations of law, and thus although the findings of the Courts in India were concurrent, the Judicial Committee could review such findings in appeal. MAHOMED ALI HAIDAR KHAN v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **12 C W N. 1095. P.C.=4 M L T. 234=10 Bom. L R. 1102 =8 C L J. 436=18 M.L.J. 549=36 C. 1=P.L R. 1908, Journal p. 110=1 Ind. Cas. 182=35 I.A. 195.**

——Reg. II of 1900 (The Hazara Upper Tanawal Reg.)

(1)—*Operation of.*—Regulation II of 1900 is not applicable to a suit pending at the time when it came into force, for there is nothing in the Regulation which is retrospective in effect. Before Regulation II of 1900 came into force the District Court of Hazara had jurisdiction over the Tanawal and Phulera tracts of the Hazara District. The Nawab of Amb and the Khan of Phulera occupied a somewhat anamalous position before Regulation II of 1900 was passed with respect to Tanawal and Phulera tracts. There was no difficulty in

Regulations—continued.

——1.—Imperial Regulations—*concluded.*

suing them in the Civil Courts in the ordinary way and in getting decree executed against them within those tracts. SAMUNDAR KHAN v. ATA MUHAMMAD, **104 P.L R. 1904=73 P. R. 1904.**

——Reg. VII of 1901 (The North-West Frontier Province Law and Justice Regulation.)

[SCH I REP. IN PT., ACT I OF 1903 SS. 89 TO 92 REP., REG. V OF 1904, S 3. S. 87-A ADDED. REG I OF 1906, SS. 34 TO 41 : REP., REG. II OF 1906, S. 3.]

Jurisdiction of Chief Court, Punjab, to hear appeal from North-West Frontier Province—*See* CHIEF COURT, JURISDICTION OF, 50 P. R. 1907, F.R.=63 P.W.R. 1907.

——2.—Bengal Regulations.

——Reg. I of 1793 (Bengal Permanent Settlement.)

[SHORT TITLE GIVEN, ACT V OF 1897. SS. 10, 11, REP. IN PT., ACT IV OF 1846. S 10 SUPPLEMENTED IN BENGAL AND EASTERN BENGAL, BEN REG. I OF 1801, S. 8. DECLARED IN FORCE—THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS ACT XV OF 1874, S 6; IN THE SONTHAL PARGANAS, REG. III OF 1872, S 3, AS AMENDED BY REG III OF 1899, S. 3.]

(1)—*See* PERMANENT SETTLEMENT, 6 W.R 311.

(2)—*See* PRESUMPTION, RIGHT OF—PRACTICE AND PROCEDURE, 3 W.R. 45, P.C.=7 M.I.A 283.

(3)—S. 8 (1)—Applicablity—*See* BEN. ACT VI OF 1870, s. 1, 15 C.W.N. 300=9 Ind. Cas. 688.

(4)—S. 8, cl. 4—*See* GHATWALI TENURE, 4 W.R. P.C. 77=6 M I.A. 101.

(5)—S. 8, cl. 4—*See* SERVICE TENURE, 1 W.R. 26, P.C.=10 M.I.A. 16.

——Reg. III of 1793 (Zila Courts.)

[REP., ACT VI OF 1871.]

(1)—*Lease of ferry by Government—Infringement by Government of rights of lessee—Suit by lessee—Jurisdiction—Regs.* III *of* 1793 *and* III *of* 1803—*Act* IV *of* 1872.—Ferry tolls form one of the State rights which, in 1849, were substituted in the Punjab for that part of the revenue raised by former rulers by means of custom and transit duties. A suit for an alleged infringement by the Government of the Punjab, of a right of ferry granted to the plaintiff by the Goverment, can be brought in the Courts of the province under Regs. III of 1793 and III of 1803, according to which the Courts established by the East India Company have jurisdiction in regard to the acts of the Government "in superintending the collection of revenue, &c." The

Regulations—continued.

——2.—Bengal Regulations—*continued.*

Government having once formally submitted to the jurisdiction of its own Courts, in certain matters connected with the collection of revenue, by means of Regulations III of 1793, and III of 1803, and such submission having been acted on for a long space of time, it can hardly be said that the submission rests so completely on the formal words of the Regulations that, if those words are taken away by the repealing Act IV of 1872 without express reservation of the submission in the same Act that takes them away, the submission is abrogated and abolished. This was a suit by the lessee of a ferry against Government for damages for infringement of his rights. The allegation against Government was that they, by their Railway servants, carried materials and workmen for the construction of a bridge across the river in their own boats, not far from the plaintiff's ferry. It was *held* on the evidence that there was no infringement of the plaintiff's rights and that his suit was therefore liable to be dismissed. SUJAN SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **56 P.R. 1876.** [*On appeal*, 30 P.R. 1877.]

(2)—*Party obtaining possession—Limitation — Pendency of collusive suit.*—A sued the widow and heir of B for half of a certain mehal. It appeared that B obtained a decree against three ladies (the daughters-in-law and widow of H), and that under that decree half of the mehal in question was sold to B. B, however, succeeded in getting the whole Mehal into his possession in 1845. A the heir of the three ladies above-named, sued to recover half, and was met by the plea of limitation. *Held*, that this defence must prevail unless A could take the case out of the operation of Regulation III of 1793 by alleging violence, or frauds, or some other good and sufficient excuse. In this case there was but a faint and improved allegation of violence and none of fraud, and the principal point relied on, *viz.*, the pendency of a suit, would not interfere with the running of the period of limitation as it was evidently a collusive one. MUSSUMAT JUSWUNT KOONWUR v. MUSSUMUT PARBUTTY KOONWUR, **7 M.J. 258.**

(3)—A suit instituted in 1817, to recover Altumgha lands in right of an ancestor who died out of possession of them in 1798, *held* to be barred by the Bengal Statutes of Limitations, Reg. III of 1793 and II of 1805. GEORGE JAMES GORDON v. KHAUJEH ABU MOOHUMMUD KHAN, **2 Knapp. 225.**

(4)—*See* ACT OF STATE, 6 P.R. 1867.

(5)—*See* LIMITATION—LAW OF LIMITATION, W.R. 1864, 2.

(6)—*See* LIMITATION—MISCELLANEOUS, 6 W.R. P.C. 24=3 M.I.A. 1.

(7)—*See* LIMITATION ACT, 1908, art. 144, 3 W.R. P.C. 5=10 M.I.A. 165.

Regulations—continued.

——2.—Bengal Regulations—*continued.*

(8)—S. 13—*See* RAJ—SUCCESSION TO, 6 W.R. P.C. 1=2 M.I.A. 344.

(9)—*S.* 14—*Act* XIV *of* 1859, *s.* 1, *cl.* 16—*Suit for possession—Subsequent suit for mesne profits.*—The plaintiff had instituted a suit for recovery of possession of land and obtained a decree for possession. He subsequently brought a suit for recovery of *wasilat* of the land. *Held per Peacok, C J., Norman and Seton-Karr, JJ.* (*Stear and Kemp, JJ., dissentiente*), that under Reg. III of 1793, s. 94, plaintiff was entitled to recover *wasilat* for 12 years prior to suit, excluding from such computation the period of the pendency of the suit for possession, from the date of the plaint till the final decree. ANNADA GBRIND CHOWDHRY v. RANI SWARNAMAYI, **B.L.R. Sup. Vol. 7.**

(10)—S. 14—*See* EVIDENCE—MISCELLANEOUS, 2 W.R. 221.

(11)—S. 14—*See* HINDU LAW—REVERSIONERS, 2 C.L.J. 16.

(12)—S 14—*See* LIMITATION—GENERAL, 4 W.R. P C. 103=6 M.I.A. 494, 2 B.L.R. P.C. 75=12 M.I.A. 366=11 W.R. P.C. 29.

(13)—S. 14—*See* LIMITATION — LAW OF LIMITATION, 2 W.R. 65.

(14)—S. 14—*See* LIMITATION— MISCELLANEOUS, 3 W.R. P.C. 31=8 M I.A. 225, 5 W. R. P.C. 68=10 M.I.A. 476, 7 M.I.A. 238, 4 W. R. P.C. 63=8 M.I.A. 308.

(15)—S. 14—*See* LIMITATION ACT, 1908, s. 12, 6 W.R. 57, 1 W.R. 35.

(16)— S. 14—*See* LIMITATION ACT, 1908, s. 14, 2 W.R. 45.

(17)—S. 14—*See* LIMITATION ACT, 1908, s. 19, 3 B.L.R. P.C. 37=12 W.R. P.C. 36=13 M.I.A. 37.

(18)—S. 14—*See* LIMITATION ACT, 1908, arts. 132 and 144, 16 W.R. P.C. 19=8 B.L.R. 122=14 M.I.A. 101.

(19)—S. 14—*See* LIMITATION ACT, 1908, art. 144, 2 B.L.R. P.C. 75=12 M.I.A. 366=11 W.R. P.C. 29.

(20)—S. 14—*See* LIMITATION ACT, 1908, art. 149, 7 W.R. P.C. 21=11 M.I.A. 345.

(21)—S. 14 — *See* MAHOMEDAN LAW — DOWER, 6 M.I.A. 211.

(22)—S. 14—*See* MORTGAGE—FORECLOSURE, 5 W.R. P.C 83=10 M.I.A. 540, 7 M.I. A. 323.

(23)—S. 15—*See* POSSESSION — ADVERSE POSSESSION, 1 M.I.A. 482.

(24)— S. 16—*See* BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION, 1 W. R. P.C. 51=8 M.I.A. 199.

(25)—S. 16— *See* MONEY PAID UNDER DECREE, 3 W.R. P.C. 11=10 M.I.A. 203.

Regulations—continued.

——2—**Bengal Regulations**—*continued.*

(26)—S. 21—*See* INTEREST—STIPULATION IN THE NATURE OF PENALTY, 12 B.L.R. 451 =21 W.R. 352.

——**Reg. IV of 1793 (Civil Procedure).**

[REP., ACT XVI OF 1874.]

(1)—*Reg.* IV *of* 1793—*Reg.* X *of* 1800—*Zamindari—Partition.*—By Reg. IV of 1793, it is provided that, in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, Mahomedan laws with respect to Mahomedans, and Hindu laws with respect to Hindus, are to be considered as the general rules by which Judges are to form their decision; according to the true construction of which the Mahomedan law of each sect ought to prevail as to the litigants of that sect, and not the general or *Soonee* Mahomedan law. In a suit, therefore, by a party in possession of one moiety of a *Zamindary*, for recovery of the other, on the ground that the estate was, according to the family rule indivisible, it was held by the Judicial Committee, that the property not being a *Jungle Mahal*, within the provisions of Reg. X 1800, the family rule, if proved, was abrogated by Reg. XI of 1793, and (the title-deeds set up in the pleadings not being satisfactorily proved) that the descent must be governed, according to Reg. IV of 1793, by the laws of the religious sect to which the litigant parties belonged. The Judicial Committee, in affirming the judgment of the Court below, *held* the *Zemindary* divisible among the co-heirs of the deceased *Zemindar*, according to the laws of the *Sheeah* or *Imameean* sect of Mahomedans to which they belonged, according to which law, property descends to the daughters of a deceased brother, in preference to the surviving brother. RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-OON-NISSA, **2 M.I.A. 441=2 Suther. App. 5=1 Sar. 217.**

(2)—*Practice—Supplemental answer—Fresh issue—Ben. Reg.* XXVI *of* 1814.—The permission under s. 5 of Bengal Reg. IV of 1793, to a defendant to file a supplemental answer, does not entitle him to make a new case, or raise a fresh issue, in contradiction of his former defence. By s. 10 of *Bengal* Regulation XXVI of 1814, the *Sudder Amin* is bound to record a proceeding specifying the points at issue, and to call for evidence for and against the claim. DOUGLAS v. THE COLLECTOR OF BENARES, **5 M.I.A. 271=1 Sar. 434.**

(3) — *See* LIMITATION ACT, 1908, s. 19, 1 C.W.N. 513.

(4)—*See* BEN. REG. X OF 1800, 2 M.I.A. 441.

(5)—S. 15—*See* RESTITUTION OF CONJUGAL RIGHTS, 8 W.R. P.C. 3.

(6)—S. 25, *applicability of, to landed proprietors.*—The objection was taken in this case that the law under which the Judge had acted, namely, s. 25, Reg. IV of 1793, was not applicable to the defendants who were landed proprietors, but it was held that s. 3 of Reg. IX of 1799 had extended the provisions of that section to all classes, and neither of the regulations had been rescinded by Act X of 1861. SHAIKH KUDRUTOOLLAH v. RAGHOOBUR DUTT CHOWDHRY, **6 W.R. Mis. Rul. 50.**

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

——**Reg. VI of 1793 (Sadar Diwani Adalat).**

[REP., ACT XXIX OF 1871.]

S. 9—*See* BEN. REG. XLVIII OF 1793. s. 24, 4 B.L.R. App. 44=13 W.R. 162.

——**Reg. VII of 1793 (Bengal Decennial Settlement).**

[SHORT TITLE GIVEN, ACT V OF 1897. S. 20, REP., IN PT., BEN. REG. VII OF 1796 EXPLD., REG I OF 1801. S. 14, SS. 23 TO 25 REP., BEN. REG XVII OF 1805, S. 58. REP., S. 55. REP. IN PT., BEN. REG. V OF 1812, S. 3. S 62 REP. BEN. REG. XII OF 1817, AS EXT. BY BEN. REG. I OF 1819, S. 4 (2). SS. 1 TO 3, 5 TO 12, 42, 44 TO 47, 61, 63, 68 TO 101. REP., SS. 21. 35 REP., IN PT., ACT XVI OF 1874. SS. 16 TO 18, 28, 29, 48, 56, 57, 59, 60, REP. S. 67 REP. IN PT., ACT XII OF 1876. SS. 51 TO 55, 64, 65 REP., IN EASTERN BENGAL AND LOCALLY IN BENGAL ACT VIII OF 1885. SS. 19, 66, REP. IN PT., SS. 20, 21, AM., S 33 REP., ACT I OF 1903. DECLARED IN FORCE— THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S 6, IN THE SONTHAL PARGANNAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3].

(1) — *See* ENHANCEMENT OF RENT — ENHANCEMENT, EXEMPTION FROM, **Marsh 424.**

(2) — *See* ENHANCEMENT OF RENT — ENHANCEMENT, LIABILITY TO, 4 B.L.R.P.C. 8=13 W.R. P.C. 11=13 M.I.A. 248.

(3)—*See* LANDLORD AND TENANT—MISCELLANEOUS, 15 W.R. 474.

(4)—*See* SAYER, 5 M.I.A. 467.

(5 & 6)—S. 5 — *See* ENHANCEMENT OF RENT—MISCELLANEOUS, 22 C. 214, P.C.=22 I.A. 131.

(7)—S. 41—Applicability—*See* BEN. ACT VI OF 1870, s. 1, 15 C.W.N. 300=9 Ind. Cas. 688.

(8)—S. 41—*See* BEN. ACT VI OF 1870, s. 48, 10 C.W.N. 637=3 C.L.J. 530=33 C. 390.

(9)—S. 41—*See* BEN. ACT VI OF 1870, ss. 50, 55, 10 C.W.N. 598=33 C. 596=5 C.L.J. 299.

(10)—S. 41—*See* GHATWALI TENURE, 14 W.R. P. C. 28=5 B.L.R. 529=13 M.I.A. 438.

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Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(11)—S. 41—*See* SERVICE TENURE, 5 B.L.R. 529, P.C.=14 W.R. P.C. 28=13 M.I.A. 438, 10 M.I.A. 123, 1 W.R. P.C. 26=10 M.I.A. 16.

(12)—*S.* 46—*Suit for malikana —Quære.*—Whether, under s. 46, Reg. VIII of 1793 a suit for the recovery of malikana would lie at all? BHULI SINGH v. MUSSAMAT NIMU BEHU, **4 B.L.R.A.C. 29=12 W.R. 498.**

(13)—S. 46—*See* LIMITATION ACT, 1908, art. 132, 4 B.L.R.A.C. 29=12 W.R. 498.

(14)—S. 48—*See* ENHANCEMENT OF RENT — ENHANCEMENT, LIABILITY TO, 14 C. 133.

(15)—Ss. 48, 51—*See* ENHANCEMENT OF RENT—ENHANCEMENT, NOTICE OF, 21 W.R. 439.

(16)—Ss. 49, 51 — *See* ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 1 W. R. 367.

(17)—*S.* 51—*Valid notice, contents of—Undivided taluk—Joint settlement—Separate collection—Assessment—Measurement—Separate tenancy—Declaratory decree—Liability of taluk to enhancement, not in issue.*—A talukdar is entitled to a notice of demand for enhancement of rent under s. 51 of the Bengal Decennial Settlement Regulation (VIII of 1793). The notice should contain one of the grounds mentioned in the said section; a notice not containing any such ground is bad in law. A declaratory decree declaring a talukdar's tenure liable to enhancement should not be passed, where the question of the liability to enhancement of the taluk as a dependent taluk under the provisions of s. 51 of the Bengal Decennial Settlement Regulation was not put in issue. A taluk was situated within three zamindaries. The settlement of it was a joint one, but the collection was separate. The proprietor of two of the zemindaries caused the entire taluk to be measured, assessed with rent upon the area found therein, granted a *dowl* to the holders of the taluk, who agreed to pay their share of rent thus assessed. *Held per Mitter, J.*—That the effect of the *dowl*, was to constitute the fractional share of the undivided taluk a separate and distinct tenure with which the proprietor of the remaining zemindary had no concern. Hence in a suit for enhancement of rent of a taluk by the zemindar, the proprietor of the remaining zemindary was not a necessary party. THE BANK OF HINDUSTAN, CHINA AND JAPAN, LD. v. BABU SHIB DOYAL TEWARY, **8 C.L.J. 329.**

(18)—S. 51—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 4 B.L.R.P.C. 8=13 W.R. P.C. 11=13 M.I.A. 248.

(19)—S. 51—*See* ENHANCEMENT OF RENT—ENHANCEMENT, EXEMPTION FROM, 1 W. R. 339.

(20)—S. 51—*See* ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 20 W.R. 459.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(21)—S. 51 - *See* ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 1 W.R. 37, 3 W.R. 172, 8 W.R. 496, 12 W.R. 112, 12 W.R. 320, 13 W.R. P.C. 11=13 M.I.A. 248, 22 W.R. 383, 24 W.R. 146, 2 Hay 220, 3 W.R. Act X, Rul. 26.

(22)—S. 51—*See* ENHANCEMENT OF RENT—ENHANCEMENT, NOTICE OF, 19 W.R. 338.

(23)—S. 51—*See* ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT OF, 14 W.R. 251.

(24)—S. 51—*See* ENHANCEMENT OF RENT—MISCELLANEOUS, 6 W.R. Act X, Rul. 42.

(25)—S. 51—*See* LANDLORD AND TENANT—ACCRETION TO TENURE, 9 W.R. 379.

(26)—S. 51, cl. 4—*See* GHATWALI TENURE, 3 C. 251.

(27)—S. 51—*See* NOS. 15, 16, *supra.*

(28)—Ss. 54, 55, 61—Abwabs suit by landlord to recover—Long period of payment of abwabs—Effect—*See* ABWABS, 17 C. 131=16 I.A. 152, P.C.

(29)—S. 55 — *See* CONTRACT — ILLEGAL CONTRACTS, 3 B.L.R. A.C. 44=11 W.R. 395.

(30)—S. 55—*See* NO. 28, *supra.*

(31)—S. 61—*See* NO. 28, *supra.*

——**Reg. X of 1793 (Court of Wards).**

[REP., ACT XVI OF 1874.]

(1)—*Bengal Reg.* X *of* 1793 — *Scope of Regulation.* — The prohibition contained in Bengal Reg. X of 1793 is confined only to a person actually under the guardianship of the Court of Wards. JUMOONA DASSYA v. BAMASOONDARI DASSYA, **1 C. 289, P.C.=3 I.A. 72 =25 W.R. 235=3 Sar. 602.**

(2 & 3)—*See* COURT OF WARDS, 8 C. 620=11 C.L.R. 285, 9 W.R.P.C. 9=11 M.I.A. 468.

(4)—*See* LUNATIC, 10 B.L.R. 364=19 W.R. 163.

(5)—*See* MAJORITY, 1 B.L.R. F.B. 49=10 W.R.F.B. 36.

(6)—*See* MINOR—SUITS BY AND AGAINST MINORS, 16 W.R. 231.

(7)—S. 21—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 10 C. 15.

(8)—S. 33—*See* HINDU LAW—ADOPTION, 2 W.R. P.C. 19=9 M.I.A. 287.

——**Reg. XI of 1793 (Bengal Inheritance).**

[SHORT TITLE GIVEN, ACT V OF 1897. APPLICATION RESTRICTED — (IN BENGAL, EASTERN BENGAL AND ASSAM), BEN. REG. X OF 1800; (IN BENGAL), BEN. REG. XII OF 1805, S. 36. SS. 2 TO 6 REP. IN PT., ACT XVI OF 1874. S. 3 AM., ACT XII OF 1891, DECLARED IN FORCE THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6.]

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

(1)—*Zamindari—Family usage — Partition —Reg.* X *of* 1800.—The family usage, that a *Zamindary* has never been separated, but devolved entire on every succession, though proved to have existed as the custom for many generations, will not exempt the *Zamindary* from the operation of Reg. XI of 1793, which provides, in case of intestacy, for the division of landed estate among the heirs of the deceased, according, to the Mahomedan or Hindu Law. Regulation X of 1800 does not apply to undivided *Zamindaries*, in which a custom prevails, that the inheritance should be indivisible, but only to *Jungle Mahals*, and other entire districts, where local customs prevail; and therefore, only partially and, to that extent, repeals Reg. XI of 1793. RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-OON NISSA, **2 M I.A. 441=2 Suther. App. 5=1 Sar. 217.**

(2)—*Applicability of—To a Raj—Quære.*—Whether Ben. Regs. XI of 1793, and X of 1800 being confined to cases in which there is no deed or Will executed, apply to the case of a *Raj*? BABOO GUNESH DUTT SINGH v. MAHARAJA MOHESUR SINGH, **6 M.I.A. 164=1 Sar. 521.**

(3)—*See* HINDU LAW—IMPARTIBLE ESTATE, 9 W.R. P.C. 15=12 M.I.A. 1.

(4)—*See* HINDU LAW — INHERITANCE, 32 C. 6.

(5)—*See* BEN. REG. IV OF 1793, 2 M.I.A. 441.

(6)—*See* BEN. REG. X OF 1800, 2 M.I.A. 441.

(7)—*S.* 5—*Primogeniture—Preamble and s.* 5 —*Family custom—Bhuiya—Raj.*—Reg. XI of 1793 was not aimed at abolition of all customs of primogeniture, but customs which had originated in "considerations of financial convenience" and which were "repugnant both to the Hindu and Mahomedan laws." S. 5 of the said Regulation merely gives effect to the general intention expressed in the preamble. A custom of descent according to the law of primogeniture may exist by *kulachar* or family custom, although the estate may not be what is technically known as Raj; such a *kulachar* is in nowise taken away or rescinded by the application of Reg. XI of 1793. BHUIYA SARAT KUMAR DAS MAHAPATRA v. AKSHOY NARAIN DAS, **13 C.L.J. 305.**

——**Reg XV of 1793 (Interest).**

[REP. ACT VIII OF 1868.]

(1)—*Suit for arrears of rent—Interest.*—In an action for recovery of arrears of rent due to the plaintiff, under a sub-lease of a *pergunna*, the defendant pleaded, that the sub-lease was part of a loan transaction, for the purpose of securing to the plaintiff an illegal interest upon the loan, and was void under Reg. XV of 1793. The Courts in India, held, that it was an usurious transaction, and dismissed the action. Upon appeal, this decision was confirmed by the Judicial Committee of the Privy Council. WISE v. KISHENKOOMAR BOUS, **4 M.I.A. 201.**

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

(2)—*Interest—Reg.* XV *of* 1793 —*Bond-debt—Payment — Interest.* — Where payments are made upon a bond, the payments, if less than the interest due on the bond, will be applied to the interest, and a decree for the principal sums and the balance of interest up to the date of the decree will be awarded. LUCHMESWAR SING BAHADUR v. SYUD LUTF ALI KHAN, **8 B L R. 110, P C.=2 Sar. 700=2 Suther. 461.** [*F.*, 28 A. 25=2 A.L.J. 585=A. W.N. 1905, 167.]

(3)—*Interest— Reg.* XV *of* 1793 *and Reg.* XVII *of* 1806.—Reg. XVII of 1806 is not inconsistent with Reg. XV of 1793, as the former refers to *accumulations* of interest, whatever the *rate* may be, and the latter to rates of interest. RAJA BARDA KANT RAI v. BHAGWAN DAS, **1 A. 344.**

(4)—*See* APPEAL—ACTS AND REGULATIONS, 24 W.R. 17.

(5)—*See* INTEREST—MISCELLANEOUS, 5 W.R. Mis. 22.

(6)—*See* MORTGAGE — ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 2 Hay 17.

(7)—*See* MORTGAGE—REDEMPTION, B.L. R. Sup. Vol. 613=6 W.R. 240.

(8)—*See* MORTGAGE — MISCELLANEOUS, 10 B.L.R. 386, P.C.=17 W.R. 262=14 M.I.A. 443.

(9)—*See* VENDOR AND PURCHASER—MISCELLANEOUS, Marsh 632.

(10)—*Bengal Reg.* XV *of* 1793 — *Construction—Interest—Mortgage — Redemption—Accounts - Construction of Bengal Regulation* XV *of* 1793 *as to usurious interest.*—A mortgage, lease, and agreement, held to constitute one mortgage security, the three instruments being entered into as a devise to avoid the usury laws within the meaning of s. 9, Bengal Reg. XV of 1793. Interference with the rate of interest was a thing of positive law and cannot be extended beyond the provisions of Reg. XV of 1793. [*R.*, 5 A. 419.] The mortgagors in this case were entitled to redeem at any time before the expiration of the term created by the lease on payment of what might be due on the mortgage security for principal and interest at 12 per cent. per annum. In a suit by mortgagors under a usufructuary mortgage to establish their right to cancellation of the mortgage-deed, to the possession of the lands, and to payment of the surplus, *held*, that the *onus* lay on the plaintiffs to show that the mortgagees in possession were paid in full by receipt of the profits. Bengal Reg. XV of 1793, s. 2, *re* non-production of accounts of

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

receipts by the mortgagees in possession is still in force and unrepealed by Act XVIII of 1855. A mortgagee is not an assurer of the continuation of the same rate of profit which his mortgagor was able to raise; therefore an estimate of a proceeding rental does not suffice to show actual receipt. The duty to which the mortgagees are bound by s. 11, Reg. XV of 1793, is to keep accounts of gross receipts from the property mortgaged, and also the expenses of management and preservation. The gross receipts must be such as the mortgagor himself, would have been entitled to; and if he could not, by reason of an intervening lease, call for an account of the collections, neither can his mortgagee; and if a valid engagement is made, qualifying the usufructuary possession, the account of the receipt must be subject to that modification. The mortgagee need not personally attest the accounts if he has no personal knowledge of them. The Legislature never intended that a man should swear positively to knowledge of that of which he can have no personal knowledge. Presumptions against mortgagees for non-production of accounts must have reasonable limits, and not be mere conjuctures based on in exact data. SHAH MAKHANLAL v. SRIKRISHNA SINGH, **2 B.L.R. P.C. 44=11 W.R. P.C. 19=12 M.I.A. 157=2 Suther. 190 =2 Sar. 403.** [*R.*, 14 W.R. 66, 4 M. 113, 26 B. 363; *D.*, 16 W.R. 251.]

(11)—Ss. 3, 4, 10 and 11—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 5 A. 419=A.W.N. 1883, 43.

(12)—S. 4—*See* No. 11, *supra.*

(13)—S. 6—*See* LIMITATION ACT, 1908, s. 12, 5 W.R. 51.

(14, 15, 16)—*Ss.* 8 *and* 9—*Usury—Ss.* 8 *and* 9, *Reg.* XV *of* 1793 *forbid the maintenance of any suit arising out of an usurious transaction.*—A granted a bond to B to secure an advance of money. C acted as B's agent. A lease was afterwards granted by A to D, a servant of C, at colourable rent, and subsequently, an under-lease was made by D to E, a relative of A, the consideration for which was also colourable and made with a view to elude the usury laws. *Held* that the bond, lease and the under-lease formed one entire transaction, which was tainted with usury, and therefore, void under Beng. Reg XV of 1793, ss. 8 and 9. THOMAS ALEXANDER WISE v. JAGABANDHU BOSE, **2 B.L.R. P.C. 69=12 M.I.A. 477=2 Sar. 469.**

(17 & 18)—S. 9—*See* No. 14, *supra.*

(19)—*Ss.* 9 *and* 10—*Rate of interest—Usufructuary mortgagee.*—In a suit on a bond executed together with an assignment to the plaintiff of the rent of certain mehals framed out to other parties, the Judge dismissed the suit under s. 9, Reg. XV of 1793, holding that a deduction of a certain sum from the jumma of the assignment was a device to obtain more interest than the legal rate. *Held* that, under the decision of the Privy Council in

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

Anundo Mohun Pal Chowdhry v. *Kishen Chunder Banerjee*, 8 Moore's I. A. 358, that section does not apply where the transaction of the bond and the assignment are one and the same, and where the plaintiff has a claim to be treated as a usufructuary mortgagee under s. 10 of the same law. RASSMONEE DOSSEE v. MONSHAR ALLY, **1 Hay 483.**

(20)—*S.* 10—*Redeemed, meaning of—Jurisdiction of Court—Suit for redemption of mortgage and profits valued at less than Rs.* 1,000—*Munsiff passing a decree for over a thousand rupees—Bengal, N.W.P. & Assam Civil Courts Act* (XII *of* 1877), *s.* 19—S. 10 of Reg. XV of 1793 means that, once a mortgage debt has been satisfied by receipt of rents and profits, the mortgage is to be considered as satisfied and discharged. The word "redeemed" as used in the section was not used in the sense that the mortgage had been redeemed in the full sense of that word, that is, satisfied and possession given to the mortgagor. So long, therefore, as the property remains in the hands of the mortgagee, the mortgagor can bring a suit for redemption, even if the mortgage had been satisfied over twelve years before suit. The pecuniary jurisdiction of a Court is, ordinarily speaking, determined by the value stated by the plaintiff in his plaint, and such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff. Where a suit for redemption of a mortgage and recovery of rents and profits valued at less than a thousand rupees was brought in the Munsif's Court, *held* that the Munsif could pass a decree awarding more than a thousand rupees to the plaintiff. SUDARSHAN DAS SHASHTRI v. RAM PRASAD, **7 A.L.J. 963=7 Ind. Cas. 385.** (16 A. 286, *F.*; 13 C.W.N. 493, *Diss.*)

(21)—S. 10—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, W.R. 1864, 109.

(22)—S. 10—Mortgage made while Regulation in force—Redemption—Accounts—*See* MORTGAGE—REDEMPTION, 9 A.L.J. 131.

(23)—S. 10—*See* NOS. 11 and 19, *supra.*

(24)—Ss. 10 and 11—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 13 C.L.R. 128.

(25)—S. 11—*See* BURDEN OF PROOF—MORTGAGE, A.W.N. 1883, 90.

(26)—S. 11—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 5 W.R. 53, 1 Hay 182, 14 W.R. 66.

(27)—S. 11—*See* MORTGAGE—FORECLOSURE, 5 W.R. P.C. 47=10 M.I.A. 340.

(28)—S. 11—*See* MORTGAGE—REDEMPTION, 1 W.R. P.C. 19=10 M.I.A. 1, 2 B.L.R. P.C. 44 = 11 W.R. P.C. 19=12 M.I.A. 157.

(29)—S. 11—*See* NOS. 11 and 24, *supra.*

Regulations—continued.

—2.—**Bengal Regulations**—*continued.*

——**Reg. XIX of 1793 (Bengal Revenue Free Lands) (Non-Badshahi Grants.)**

[SHORT TITLE GIVEN ACT I OF 1903. SS. 12 TO 14. 16. 19 REP., BEN. REG. II OF 1819 AM., REG. XIV OF 1825. S. 10 REP. IN PT., ACT X OF 1859, S. 28 S 23 REP., ACT VIII OF 1868, S. 2 (2). REP. IN PT.. S. 18, REP. ACT XVI OF 1874. SS. 21, 22, 29 TO 34. 36 TO 46, REP., BEN. ACT VII OF 1876. S. 4 REP. IN PT., ACT XII OF 1891, SS. 2, 3, 8, 10, 15 AM., SS. 25, 35 REP., ACT I OF 1903. REP., IN ASSAM (EXCEPT THE LUSHAI HILLS), REG. I OF 1886. DECLARED IN FORCE—(WITH MODIFICATIONS) IN CUTTACK, BEN. REG. XII OF 1805, SS. 17, 24 ; THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6 ; IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 4 M.I.A. 466.

(2)—Grant—Sale under Act XI of 1859—Suit by purchaser for recovery of possession or for assessment of rent and mesne profits — *See* GRANT — GENERAL, 35 C. 931=9 C.L.J. 119=3 Ind. Cas. 301.

(3)—*See* GRANT—CONSTRUCTION, 12 W.R. 251.

(4)—*See* RESUMPTION, RIGHT OF—GENERAL, W.R. 1864, 217.

(5)—*See* RESUMPTION, RIGHT OF—PRACTICE AND PROCEDURE, 15 W.R, 483.

(6)—*See* SETTLEMENT—EFFECT OF SETTLEMENT, 8 B.L.R. 197=16 W.R. 35.

(7)—S. 1—*See* GRANT—MISCELLANEOUS, 2 A. 732.

(8)—S. 6—*See* LANDLORD and TENANT — FORFEITURE, 21 W.R. 26.

(9)—Ss. 6, 9, 10--*See* BENGAL ACT VIII OF 1869, s. 28, 6 C.L.R. 301.

(10)—*S.* 9—*Resumption—Rent suit.*—A decree for resumption under s. 39, Reg. II of 1819, does not entitle the proprietor of *lakhiraj* land to bring a suit for a kabuliat in a revenue Court before the revenue has been fixed, and the lakhirajdar has agreed to pay the same. Until this has been done, the relation of landlord and tenant cannot come into existence. MADHAB CHANDRA BHADORY v. MAHIMA CHANDRA MAZUMDAR, **8 B.L.R. App. 83, Note =12 W.R. 442.** [*R.*, 15 W.R. 474 ; *D.*, 15 W. R. 345.]

(11)—S. 9—*See* NO. 9, *supra.*

(12 & 13)—*S.* 10—*Ben. Reg.* II *of* 1805, *s.* 3, *cl.* 3—*Land held without payment of rent for* 60 *years—Suit for rent—Limitation—Effect of cl.* 3—*Possession under grant—Suit for assessment—Demand for arrears.*—By a *pottah* in the nature of lease in perpetuity, granted by the ancestor of A in the year 1796, to the ancestor of B of a piece of land, B and his heirs were to enjoy a house built thereon, in consideration of setting up an idol in the house, without payment of rent. Upwards of sixty years after the date of this grant, during which period the idol remained and its worship uninterruptedly continued, no rent having been paid by the grantee or his heirs, A, without any demand for rent, or bringing a suit for assessment of the property, brought a suit against B to recover six years' arrears of rent for the house, at the rate fixed by s. 10, Ben. Reg. XIX of 1793. *Held* reversing the decree of the *Sudder Court* that, B and those under whom she claimed having been in undisturbed possession and the cause of action having arisen sixty years before the institution of the suit, the suit was barred by cl. 3 of Ben. Reg. II of 1805. *Quære* :—Whether the twelve years' limitation provided by s. 3, cl. 1 of Ben. Reg. II of 1805, can be held applicable to such a suit. [*F.*, 1 Agra 167, 8 W.R. 232; *Expl.*, 9 W.R. F.B. 1=B.L.R. F. B. 774; *Rel. on*, 12 W.R. 440; *D.*, 5 W.R. 191.] Cl. 3, s. 3 of Ben. Reg. II of 1805 takes away from the Courts all authority to take cognizance of any suit whatever if the cause of action shall have arisen sixty years before the institution of the suit; it distinguishes between the effect of the twelve years' limitation and that of sixty, by precluding all enquiry into any original defect in the title under which the possession for the latter period commenced; it makes it in effect, in cases in which the section applies, unavailing to show that the possession commenced under a grant made null and void by Reg. XIX of 1793. A demand for arrears of rent should be proceeded by a suit for assessment of rent under s 10, Ben. Reg. XIX of 1793. CHUNDRABULLEE DEBIA v. LUCKHEE DEBIA CHOWDRAIN, **5 W R.P.C. 1=10 M.I. A. 214=1 Ind. Jur. N S. 25=1 Suther. 602= 2 Sar. 119.**

(14)—*S.* 10—*Landlord and tenant*—Lakhiraj *grants—Resumption.*—Where grants for holding lands exempt from payment of revenue have been made since 1st December, 1790, and the person who succeeds to the proprietary right in the estate takes possession under s. 10, Reg. XIX of 1793, and dispossesses the grantee of the *proprietary right*, he is authorised and required to collect the rents from such lands at the rates of the pergunnah. A decree, therefore, declaring the zamindar's right to assess rent on lands held under such grants, establishes, as between him and the person in possession the relation of landlord and tenant. RANI SHAMA SUNDARI DEBI v. SITAL KHAN, **8 B. L.R. App. 85, Note=15 W.R. 474.** [*Appr.*, 3 C. 501, 1 C.L.R. 596 ; *R.*, 24 W.R. 447, 16 C. 449.]

(15)—*S.* 10—*Act* X *of* 1859 (*B.C.*), *s.* 28—*Construction*—Lakhiraj *tenures.*—Construction of Act No. X of 1859, s. 28, in respect to the operation of the law of Limitation in suits brought under Ben. Reg. XIX of 1793, s. 10, and II of 1819. S. 30, for resumption and

Regulations—continued.

——2.—Bengal Regulations—*continued.*

assessment of lands as *mal*, or rent paying lands held as *lakhiraj*. Review of Bengal Regulations relating to *lakhiraj* tenures within the provinces included in the perpetual settlement. HURIHAR MUKHOPADYA v. MADAB CHANDRA BABU, NABA KRISHNA MOOKERJEE v. KAILAS CHANDRA BATTACHARJEE, **8 B.L.R. 566, P.C.=14 M.I.A. 152=20 W.R. 459=2 Suther. 454=2 Sar. 713.** [*R.*, 21 C. 38, F.B.; *F.*, 20 W.R. 465.]

(16)—*S.* 10—*Act* X *of* 1859, *s.* 23, *cl.* 1—*Resumption—Assessment.*—Where a zemindar had obtained an *ex parte* decree declaring certain lands to be his *mal* lands, it was held that his only remedy was to have the rates at which he was authorised under s. 10, Reg. XIX of 1793, to collect the rents determined and to obtain a *kabuliat*, and his only course was to sue in the Collector's Court under cl. 1, s. 231, Act X of 1859. ROHINI NANDAN GOSAIN v. RATNESWAR KUNDU, **8 B.L.R. App. 89, Note =15 W.R. 345.** [*F.*, 8 B.L.R. App. 82=17 W.R. 363.]

(17)—*S.* 10—*Reg.* XLIV *of* 1793, *s.* 8—*Land granted by Zemindar "rent free" for public purpose—Rent—Revenue.*—A zemindar by a sunnud in 1850 (after reciting that there was no water in talook A, and that, the river being at a distance, great inconvenience was felt for want of water, in consequence of which desertions took place in the village) granted to B, 22 bigas of land rent-free, stipulating that B should dig a tank on the land, and continue to distribute water. In a suit to annul the grant, on the ground that it was void under s. 10, Reg. XIX of 1793, *held* by the majority of the Court (*dissentiente Levinge, J.*), that grants of land made by zemindars free of rent are void under the provisions of that enactment. But further held by the majority of the Court (*dissentientibus Trevor, J., and Loch, J.*) that the grant in question was valid, the reservation of a right to the use of the water by the tenants of the zemindaree being a benefit of service in the nature of rent reserved to the zemindar; and that the grant was therefore either not one of those intended to be dealt with by s. 10, Reg. XIX of 1793, or was one which the zemindar was empowered to make by Reg. XLIV of 1793. PIZIRUDDIN v. MADHUSUDAN PAL CHOWDHRY, **B.L.R. Sup. Vol. 75=2 W. R. F.B. 15.** [*Appl.*, 25 W.R. 245; *Expl.*, B. L.R. Sup. Vol. 774=9 W.R. 1; *D.*, 3 W.R. 177.]

(18)—*S.* 10—*Reg.* II *of* 1819, *s.* 30—*Resumption*, Lakhiraj.—A suit brought under s. 30. Reg. II of 1819, must be assumed to relate only to *lakhiraj* created prior to 1st December 1790, and is therefore not exempt from limitation under s. 10, Reg. XIX of 1793. HEERA MONEE DABEE v. KOONJ BEHARY HOLDAR, **B.L.R. Sup. Vol. App. 8=2 W.R. 207.** [*F.*, W.R. 1864, 212; *R.*, 8 B.L.R. 566, P.C.=14 M.I.A. 152=20 W.R. 459.]

Regulations—continued.

——2.—Bengal Regulations—*continued.*

(19)—*S.* 10—*Rent-free grant—Resumption—Zemindar.—Held* by *Peacock, C.J.*, and *Jackson*, and *Macpherson, JJ.*, that the grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent is valid as against the heir of grantor or a purchaser from him by private sale of the Zemindari; and that, under s. 10, Reg. XIX of 1793, such heir or purchaser is *not* entitled to resume the land. *Bayley, Norman and Seton Karr, JJ., Contra.* MAHOMED AKIL v. ASADUNNISSA BEBEE, **B.L.R. Sup. Vol. 774, F.B.= 9 W.R. F.B. 1.** [*F.*, 12 W.R. 361; *Appl.*, 8 A. 552= A.W.N. 1886, 221; *R.*, 6 N.W.P. 373, 2 A. 545.]

(20)—*S.* 10—*Reg.* II *of* 1819, *s.* 30—*Act* X *of* 1859, *s.* 25—*Act* XIV *of* 1859—*Rent—Enhancement*—Onus.—A suit was instituted in the Civil Court prior to the coming into operation of Act XIV of 1859, to enforce a right under s. 10, Reg. XIX of 1793. *Held* that the suit was not barred by s. 28, Act X of 1859. The *onus* was on the plaintiff to prove that the case fell within s. 10, Reg. XIX of 1793. PARBATI CHARAN MOOKERJEE v. RAJKRISHNA MOOKERJEE, **B L.R. Sup. Vol. 162.** [*F.*, 1 C. 378=25 W.R. 209; *R.*, 8 B.L.R. 566, P.C.=14 M.I.A. 152=20 W.R. 459, 8 C. 230.]

(21)—S. 10—*See* BEN. ACT XI OF 1859, ss. 11, 13, 54, 3 B.L.R.A.C. 446=12 W.R. 440.

(22)—S. 10—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 2 W.R. 303, W.R., F.B. 174.

(23)—S. 10—*See* GRANT—MISCELLANEOUS, 2 A. 545, F.B., 2 W.R. 15.

(24)—S.10—*See* LAKHIRAJ TENURE, B.L.R. Sup. Vol. App. 8=2 W.R. 207, 2 W.R. 205.

(25)—S. 10—*See* LIMITATION ACT, 1908, art. 130, 4 W.R. 53.

(26)—S. 10—*See* RESUMPTION, RIGHT OF —GENERAL, 2 W.R. 15, 12 W.R. 440.

(27)—S. 10—*See* NO. 9, *supra.*

——Reg. XXVI of 1793 (Minority of Native Landholders).

[REP., ACT XXIX OF 1871.]

(1)—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIAN, W.R. 1864, 83.

(2)—*See* MAHOMEDAN LAW — GIFT, 5 W.R. 4.

(3)—*See* MAJORITY, 1 B.L.R.F.B. 49=10 W.R. F.B. 36.

(4)—S. 2—*See* MINOR — CONTRACTS BY MINORS, 5 W.R. 2.

——Reg. XXVII of 1793 (Sair).

[REP., ACT XXIX OF 1871.]

(1)—*See* BAZAARS, 16 W.R. 268.

(2)—*See* CONTRACT—ILLEGAL CONTRACTS, 21 W.R. 383.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(3)—Right of zemindar to establish market on his own land—Reg. VI of 1882, s. 9—*See* MARKET, A.W.N. 1907. 248=4 A.L.J. 728=29 A. 740.

(4)—*See* RESUMPTION, RIGHT OF—GENERAL, 5 M.I.A. 467.

(5)—*S. 5—Illegal cesses.*—S. 5, Reg. XXVII of 1793, is inapplicable to bazaars not existing in 1793. MOONSHEE AFTABOODDEEN AHMED v. MOHINEE MOHUN DOSS, **15 W.R. 48.**

———**Reg. XXXVI of 1793 (Registry of Wills and Deeds).**

[REP., ACT XVI OF 1864.]

(1)—S. 17—*See* EVIDENCE — SECONDARY EVIDENCE, 8 W.R. 438.

———**Reg. XXXVII of 1793 [Bengal Revenue-free lands (Badshahi Grants)].**

[SHORT TITLE GIVEN, ACT I OF 1903. SS. 7 TO 9, 11, 14 REP., BEN. REG. II OF 1819. AM., BEN. REG. XIII OF 1825, S 5. AM BEN. REG. XIV OF 1825. S. 10, REP. IN PT., SS. 13, 25, 34 REP., ACT XVI OF 1874. SS. 16 TO 18, 24, 26 TO 29, 31 TO 33, 35 TO 41 REP., BEN. ACT VII OF 1876. SS. 2, 3, 5, 10 AM., S. 2 (2), REP. IN PT., SS. 20, 30 REP., ACT I OF 1903. REP. (IN ASSAM, EXCEPT THE LUSHAI HILLS), REG. I OF 1886. DECLARED IN FORCE — (WITH MODIFICATIONS) IN CUTTACK, BEN. REG. XII OF 1805, S. 25; THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS. ACT XV OF 1874, S. 6; IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—Capability of land to be resumed by Government under, whether sufficient to make it revenue-free within s. 78, Land Registration Act—*See* BEN. ACT VII OF 1876, ss. 3 (10), 78, 8 C.L.J. 523.

(2)—*See* GRANT—CONSTRUCTION, 2 Agra 284.

———**Reg. XLIV of 1793 (Grant of Leases).**

[REP., ACT XXIX OF 1871.]

(1)—*See* ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 14 C. 133.

(2)—*See* GHATWALI TENURE, 13 B.L.R. 124, P.C.=I.A. Sup. Vol. 181.

(3)—*See* RESUMPTION, RIGHT OF—GENERAL, 2 W.R. 15.

(4)—S. 5—*See* ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT OF, 11 W.R.P.C. 10 =12 M.I.A. 263.

(5)—S. 5—*See* ENHANCEMENT OF RENT—MISCELLANEOUS, 4 C. 612.

(6)—S. 5—*See* SERVICE TENURE, 10 M.I.A. 123.

(7)—*S. 5, power under, to avoid subsisting engagements, extending only to purchaser at revenue sale and his heirs—Enhancement of rent.*—In this case, their Lordships, with regard to the construction of s. 5 of Reg. XLIV of 1793, decided that, in terms, power was given only to the purchaser himself and his heirs, and not a power attaching to the Zamindari so as to pass to subsequent purchasers. Read with the language of the exception in s. 7, it is clear that what was aimed at by s. 5 was not the destruction of the tenure but the increase of rent under certain specified and equitable limitations. Their Lordships arrived at the conclusion that, by s. 5, a power was given to a purchaser at a Revenue sale to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the pergunnah or district, it would have stood had the cancelled engagement so avoided never existed. RANEE SURNOMOYEE v. MAHARAJAH SUTTESCHUNDER ROY BAHADUR, **2 W.R.P C. 13=10 M.I A. 123=2 Sar. 60.** [*F.*, 4 C. 612; *Appl.*, 5 W.R Act X, Rul. 63; *Diss.*, 4 C.L.R. 422; *R.*, 3 W.R. 178, 9 W.R. 1, F.B.=B.L.R. Sup. Vol. 774, 9 W.R. P.C. 3, 11 W.R. P.C. 10, 12 W.R. 154, 12 W.R. 383, 13 W.R. P.C. 24, 14 W.R. 107, 13 B.L.R. 124, 22 W.R. 29, 6 N.W.P. 373, 24 C. 334, 1 C.L.J. 579.]

(8)—S. 8—*See* BEN. REG. XIX OF 1793, s. 10, B.L.R. Sup. Vol. 75=2 W.R. F.B. 15.

———**Reg. XLV of 1793 (Execution-sales of Malguzari and Lakhiraj lands.)**

[REP., ACT IV OF 1846.]

(1)—S. 12 — *See* LIMITATION ACT, 1908, arts. 11 A. 12, s. 18, 11 W.R. 261.

(2)—S. 12—*See* NOTICE, 8 M.I.A. 427.

(3)—S. 12—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 8 M.I.A. 427.

———**Reg. XLVIII of 1793 (Quinquennial Register).**

[REP., (IN BENGAL AND EASTERN BENGAL) BEN ACT VII OF 1876, (IN ASSAM) REG. I OF 1886.]

(1)—S. 14—*See* CAUSE OF ACTION, 17 W.R. 400.

(2)—S. 24—*Reg. VI of 1793, s. 9—Transmission of decree to Collector—Entry in books.*—Reg. XLVIII of 1793, s. 24, and Reg. VI of 1793, s. 9, positively direct the Zilla and City Courts to transmit their decrees to the Collector, but give no power whatever to those Courts to make any orders on the Collector as to how he is to enter the result of those decrees in his books. NIMDHARI SING v. KANCHAN SING, **4 B.L.R. App. 44=13 W.R. 162.**

(3)—S. 24, cl. (2)—*See* LIMITATION ACT, 1908, ART. 182, STEP-IN-AID OF EXECUTION, 4 B.L.R. A.C. 158=13 W.R. 141.

(4)—S. 24, cl. 2—*See* MUTATION PROCEEDINGS, 13 W.R. 141.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

——**Reg. XIII of 1795 (Extending Ben. Reg. VII of 1793 to Benares.)**

[REP., BEN. REG. XXVII OF 1814.]

See GRANT—CONSTRUCTION, 2 Agra 284.

——**Reg. XX of 1795 (Execution-Sales of Malguzari lands).**

[REP., ACT IV OF 1846.]

(1)—*See* SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, Marsh 592=2 Ind. Jur. O.S. 1=9 M.I.A. 324 =5 W.R. P.C. 7.

(2)—S. 12—*See* BURDEN OF PROOF—SALE IN EXECUTION OF DECREE, Marsh 592=2 Ind.Jur.O.S. 1=5 W.R.P.C. 7=9 M.I.A. 324.

——**Reg XLI of 1795 (Non-Badshahi Lakhiraj, Benares.)**

[REP., (EXCEPT IN CERTAIN AREAS), ACT XIX OF 1873.]

(1)—S. 10—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 1 Agra 167.

(2)—S 10—*See* GRANT—MISCELLANEOUS, 2 A. 545, F.B.

——**Reg. LVIII of 1795 (Commission on Jama; Copies of decrees)**

[REP., ACT XII OF 1876.]

This circular enquires whether the provisions of ss. 3 and 4, Reg LVIII of 1795, are observed in each district. Civil Cir. Memo. No. 1, **23 W.R. Rules and Orders of the H C , p. 3.**

——**Reg. XI of 1796 (Resisting Process).**

[REP., ACT XVII OF 1862.]

(1)—*See* CONFISCATION, 7 W.R. P.C. 47=4 M I.A. 246.

(2)—*See* FORFEITURE OF PROPERTY, 7 W.R. P.C. 47=4 M I.A. 246.

(3)—S. 4—*See* FORFEITURE OF PROPERTY, 7 W.R P.C. 18=11 M.I.A. 223.

——**Reg. XVI of 1797 (Appeals to Privy Council).**

[REP., ACT VI OF 1874.]

(1)—*See* APPEAL TO PRIVY COUNCIL—STAY OF EXECUTION PENDING APPEAL, 14 W.R. 361.

(2)—*S.* 4—*Act* VIII *of* 1859, *ss.* 221, 338, 362—*Act* XXIII *of* 1861, *s.* 36—*Appeal to Privy Council—Execution of decree—Jurisdiction—Security.*—In a suit in which an appeal to the Privy Council from a decree of the High Court has been admitted and is still pending, the Court of original jurisdiction which made the decree first appealed from has power to issue execution. But such Court, if it has notice of the appeal to the Privy Council, should stay its hand until the parties have had an opportunity of applying to the High Court under s. 41, Reg. XVI of 1797. Although, as a general rule, the High Court will take security under s. 4, Reg. XVI of 1797, before allowing execution of a decree while there is an appeal to the Privy Council pending, yet the Court may, under certain circumstances, allow execution without taking security. J. P. WISE v. RAJKRISHNA ROY, **B.L.R. Sup. Vol. 541= 6 W.R. Mis. 84.** [*R.*, 7 W.R. 136, 12 W.R. 296, 14 W.R. 205, 33 C. 927=3 C.L.J. 67.]

(3)—*S.* 4—*Security for execution of decree—Appeal to Privy Council.*—After execution has once gone out under a decree of the High Court, subsequently appealed to Her Majesty in Council, it is beyond the power of the High Court, and not within the scope of s 4, Reg. XVI, 1797, to set aside the execution. JOYNARAIN PATTER v. RUSSICK MOHAN BANARJEE, **B. L.R. Sup. Vol. 744, F.B.=8 W.R. 144.** [*R.*, 12 W.R. 296; *Expl.*, 33 C. 927=3 C.L.J. 67.]

(4)—*S.* 4—*Appeal to Privy Council—Execution—Security.*—Plaintiff obtained a decree for possession which was reversed by the High Court on appeal, and restitution of the property was ordered. Plaintiff, having appealed to the Privy Council, applied to be allowed to remain in possession of the property upon the security which he has already given. *Held* that the High Court had no jurisdiction, under s. 4, Reg. XVI, 1797, to suspend the restitution, and that the defendant was entitled to enforce restitution without giving security. *In the matter of the petition of* RAJKISSEN SINGH, **B.L.R. Sup. Vol. 605=6 W.R. Mis. 111.** [*F.*, 9 W.R. 402, F.B.=B.L.R. Sup. 985, 1 B.L.R. A.C. 146=10 W.R. 131, 16 W.R. 289; *R.*, 3 C. 720=2 C L.R. 75.]

(5)—S. 4—*See* APPEAL TO PRIVY COUNCIL—STAY OF EXECUTION PENDING APPEAL, 6 W.R. Mis. 17, 45, 5 W.R. Mis. 37, 10 M.I.A. 196, 8 W.R. 275.

(6)—S. 4—*See* SURETY—MISCELLANEOUS, 6 B.L.R. App. 126=14 W.R. 410.

——**Reg. I of 1798 (Bengal Land Conditional Sales).**

[SHORT TITLE GIVEN, ACT I OF 1903. REP. (EXCEPT IN THE PUNJAB, THE N.W. FRONTIER PROVINCE AND THE SONTHAL PARGANAS), ACT IV OF 1882. DECLARED IN FORCE—IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3; IN THE PUNJAB (EXCEPT SUCH PARTS AS RELATE TO INTEREST), ACT IV OF 1872, S. 3; IN THE N.W. FRONTIER PROVINCE (EXCEPT SUCH PARTS AS RELATE TO INTEREST), REG. VII OF 1901, S. 4.]

(1)—*Reg.* I *of* 1798—*Reg.* XVII *of* 1806, *s.* 7—*Mortgage—Tender.*—If a mortgagor deposits money in Court without placing any actual restriction on its being paid over to the mortgagee, but with express notice that the mortgagor denies the existence of any mortgage, and intends to sue to recover back the money so deposited, this would not be such a deposit, within the meaning of Regs. I of 1798 and

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

XVII of 1806, as would save the right of redemption. ABDOOR RUHMAN v. KISTO LALL GHOSE, **B.L.R. Sup. Vol. 598=6 W.R. 225.** [*F.*, 6 A. 398=A.W.N. 1884, 137 ; *D.*, 25 W.R. 259.]

(2)—*See* APPEAL — ACTS AND REGULATIONS, 19 W.R. 122.

(3)—*See* MORTGAGE — GENERAL, W.R. 1864, 219.

(4)—*See* MORTGAGE — ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 2 Hay 17.

(5)—*See* MORTGAGE — REDEMPTION, B. L.R. Sup. 613, F.B.=6 W.R. 240, W.R. 1864, 183.

(6)—*See* REVISION—GENERAL, 107 P.R. 1890.

(7)—S. 2—*See* MORTGAGE—FORECLOSURE, 5 B.L.R. 389=13 W.R. 364.

(8)—S. 2—*See* MORTGAGE—REDEMPTION, 5 W.R. P.C. 47=10 M.I.A. 340, W.R. 1864, 219, 3 B.L.R.A.C. 141, 6 B.L.R. App. 53=14 W.R. 278.

(9)—S. 3—*See* MORTGAGE—REDEMPTION, 1 W.R. P.C. 19=10 M.I.A. 1.

——**Reg. V of 1799 (Bengal Wills and Intestacy).**

[SHORT TITLE GIVEN, ACT V OF 1897. SS. 5, 6, AM., BEN. REG. V OF 1827. SS. 2, 3, REP. IN PT., ACT XL OF 1858. SS. 1,2,3,7,8 REP. IN PT., ACT XVI OF 1874. TITLE REP. IN PT., ACT XII OF 1891. SS. 2,3, REP. IN PT., S. 7 REP IN PT. AND AM., ACT I OF 1903. S. 2 REP. IN PT. [IN BENGAL (EXCEPT THE SAMBALPUR DISTRICT), EASTERN BENGAL AND ASSAM], ACT XXI OF 1870, AM. (IN AGRA); ACT XIX OF 1886, REP. (IN BURMA), ACT XIII OF 1898, S. 18. DECLARED IN FORCE—THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT), EASTERN BENGAL AND ASSAM, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, SS. 6, 7; IN THE CENTRAL PROVINCES AND THE SAMBALPURE DISTRICT (SS. 4,5,6, WITH A MODIFICATION, ACT XX OF 1875. S 3 : THE MODIFICATION REP. IN THE SAMBALPURE DISTRICT, ACT VII OF 1905 ; IN AJMERE (SS. 4, 5, 6, WITH A MODIFICATION), REG. III OF 1877, S. 3.]

(1)—*See* LUNATIC, 10 B.L.R. 364=19 W.R. 163.

(2)—*S. 4—Order under Regulation, if a decree—Appeal if lies against order—Administration of estates of persons dying intestate—Order deciding claims of rival claimants for possession of properties—Order for security—Regular suit, if necessary to be brought—Jurisdiction of Judge to make order, when arises.*—The proceeding for the administration of the estate of a person dying intestate under Regulation V of 1799 is not a suit, and the order by the District Judge selecting one of several persons as the claimant, into whose possession the properties should go, and calling upon him to furnish security, is not a decree, as it does not adjudicate or conclusively determine the rights of the parties with regard to all or any of the matters in controversy, and is not appealable as a decree. It is not appealable as an order, as it does not fall within the description of appealable orders under the Civil Procedure Code, nor is any provision made for appeal in the Regulation itself. But the memorandum of appeal may be treated as an application for revision. (25 C. 757, 13 C.L.J. 467, *R.*) A District Judge has no jurisdiction to make any order under s. 4 of Reg. V of 1799, unless a claimant has taken possession and a regular suit has been preferred by the party out of possession. It is only during the pendency of such regular suit for adjudication of the dispute between the rival claimants, one of whom is in possession, that the Judge is authorized to take security from one of the parties and to place him in possession of the disputed property. SETARA BEGUM v. SYED FAIZ ALI KHAN, **13 C.L.J. 677.**

(3)—S. 5—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 4 B.L.R. App. 80=13 W.R. 194.

(4)—*Ss. 5, 7—Rejection of application to be put in possession of the estate of the deceased—Appeal.*—During the course of a proceeding under Regulation V of 1799, the appellant applied under ss. 5 and 7 of the Regulation that the property of the deceased intestate might be handed over to him on the ground that he was the heir. The Court dismissed the application; *held*, that the order rejecting the application was not appealable. BHURE LAL BRAHMAN v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **10 Ind. Cas. 414.**

(5)—*S. 7—Suit against Secretary of State before the property of a deceased vested in him—Premature.*—A District Judge, purporting to act under s. 7 of Regulation V of 1799, took possession of the property of a deceased person, whose property was not claimed by any person. A creditor of the deceased brought a suit for recovery of his dues against the Secretary of State. *Held*, that the liability of Secretary of the State does not arise, unless property vests in him under the Regulation. RAM NARAIN DUBE v. THE SECRETARY OF STATE FOR INDIA, **4 A.L J. 144=A.W.N. 1907, 66=29 A. 277.**

(6)—*S. 7, applicability of, only to moveable property—Claim to immoveable property, not subject to one year's limitation.*—In this case the High Court *held* that the decision of the Principal Sudder Ameen on several of the issues was manifestly erroneous. He should not have held that the suit was barred because it was not brought within one year of the proclamation issued under s. 7 of Reg. V of 1799. The section of the law applies only to moveable property and not to landed estate which was the subject of the present suit. Also the section of the Limitation law, *viz.*, cl. 5, s. 1.

Regulations—continued.

—— 2.—**Bengal Regulations**—*continued.*

Act XIV of 1859, which the Principal Sudder Ameen had applied, referred to summary decisions and orders, and in the present case there had been no summary decision or order passed against the plaintiffs in any Court. SHIB RAM LAL v. RAJ COOMAR MITTER, **6 W.R. 48.**

(7)—S. 7—*See* PROPERTY, 15 W.R. 302.

(8)—S. 7—*See* No. 4, *supra.*

——— **Reg. VII of 1799 (Recovery of arrears of Rent and Revenue.)**

[REP. ACT XVI OF 1874.]

(1)—*Summary suit for rent under Ben. Reg.* VII *of* 1799—*Act* X *of* 1859—*Reg.* VIII *of* 1841, s. 4.—Where a summary suit for rent under Reg. VII of 1799, was commenced before the passing of Act X of 1859, it was held that the unsuccessful party was not, by reason of the decision in that suit having been given after that Act came into operation, deprived of his right, under s. 4, Reg. VIII of 1841, the contest the justice of the summary decision by a regular suit. GOBIND CHUNDER MOOKERJEE v. KALLA GAJEE, **B.L.R. Sup. Vol. 626=2 Ind. Jur. N.S. 119=7 W.R. 185.**

(2)—*See* CIV. PRO. CODE, 1908. O. XXI, r. 2, 1 B.L.R. A.C. 76=10 W.R. 104.

(3)—*See* LANDLORD AND TENANT—PAYMENT OF RENT BY TENANT, 2 W.R. 57.

(4)—*See* LIMITATION ACT, 1908, s. 12, 5 W. R. 100.

(5)—*See* LIMITATION ACT, 1908, art. 181, 17 W.R. 471.

(6)—*See* BEN. REG. VIII OF 1819, s. 18, cl. 4, B.L.R. Sup. App. 10=5 W.R. 100.

(7)—Suit for balance after execution of decree for rent—Suit under Rent Act to recover sum due after sale in execution of decree under — *See* RIGHT OF SUIT—DECREES, Marsh 340=2 Hay 445.

(8)—S. 15, cl. 7—*See* LANDLORD AND TENANT—EJECTMENT, 2 W.R. 154.

(9)—S. 25—*See* SALE—SALE FOR ARREARS OF RENT—DEFAULTERS, 13 W.R. 302.

——— **Reg. I of 1800 (Guardians and Minors not subject to Court of Wards).**

[REP., ACT XL OF 1858.]

See LUNATIC, 10 B.L.R. 364=19 W. R. 163.

——— **Reg. VIII of 1800 (Bengal Revenue-free lands.)**

[SHORT TITLE GIVEN, ACT I OF 1903, S. 19, REP. IN PT., ACT XVI OF 1874. REP. EXCEPT S. 19. BEN. ACT VII OF 1876. TITLE REP. IN PT., ACT XII OF 1891. REP. (IN AGRA, EXCEPT CERTAIN AREAS), ACT XIX OF 1873, IN ASSAM (EXCEPT THE LUSHAI HILLS), REG. I OF 1886. DECLARED IN FORCE — THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6; IN THE SONTHAL PARGANNAS (S. 19), REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

Regulations—continued.

—— 2.—**Bengal Regulations**—*continued.*

(1)—*See* EVIDENCE — MISCELLANEOUS DOCUMENTS, 9 W.R. 105.

(2)—Entries in registers kept under—Evidentiary value—*See* TITLE, 16 C.W.N. 683.

(3)—S. 21—*See* HINDU LAW—ALIENATION, 9 M.I.A. 39.

——— **Reg. X of 1800 (Bengal Inheritance).**

[SHORT TITLE GIVEN, ACT V OF 1907. EXT. TO CUTTACK, BEN. REG. XII OF 1805, S. 36.]

(1)—*Application of the Regulation to undivided Zamindari.*—Reg. X of 1800 does not apply to undivided *Zemindaries* in which a custom prevails that the inheritance should be indivisible, but only to *Jungle Mahals*, and other entire districts where local customs prevail; and therefore, only partially, and to that extent, repeals Reg. XI of 1793. By Reg. IV of 1793, it is provided, that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, Mahomedan laws with respect to Mahomedans and Hindu Laws with respect to Hindus, are to be considered as the general rules by which Judges are to form their decision; according to the true construction of which the Mahomedan law of each sect ought to prevail as to the litigants of that sect, and not the general or *Soonee* Mahomedan law. RAJAH DEEDAR HOSSEIN v. RANEE ZUHOOR-OON-NISSA, **2 M.I.A. 441=2 Suther. App. 5=1 Sar. 217.**

(2)—*See* HINDU LAW—INHERITANCE, 32 C. 6.

——— **Reg. II of 1803 (Zilla Courts, Ceded Provinces.)**

[REP., ACT VI OF 1871.]

(1)—Putni *lease granted when—was in force—Lease void—Suit to recover possession of* mouzahs *leased —Limitation, starting point of.* — Where, when Reg. II of 1803, as amended by Reg. II of 1805, was in force, a *putni* lease of certain *mouzahs* was granted and the lease was void, the period of limitation for a suit by the rightful owner to recover possession of the *mouzahs* ran from the date on which the cause of action arose (*i.e.*,) when the lease was granted. RAI BANOMALI ROY BAHADUR v. JAGAT CHANDRA BOWMICK, **1 C.L.J. 319=9 C.W.N. 673=15 M.L.J. 267=32 C. 669, P.C.=2 A.L.J. 794=32 I.A. 80=8 Sar. 784.**

(2)—*See* ACT OF STATE, 6 P.R. 1867.

(3)—*See* JURISDICTION—CAUSES OF JURISDICTION, 1 W.R.P.C. 35=8 M.I.A. 291.

(4)—S. 3—*See* MORTGAGE — FORECLOSURE, 7 M.I.A. 323.

(5)—S. 18—*See* LIMITATION—MISCELLANEOUS, 5 W.R. P.C. 95.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(6)—S. 18, cl. 3—*See* LIMITATION—MISCELLANEOUS, 4 W.R.P.C. 111=7 M.I.A. 104.

——**Reg. III of 1803 (Civil Suits, Ceded Provinces)**

[REP., (EXCEPT IN CERTAIN AREAS) ACT, XIX OF 1873]

See BEN. REG. III OF 1793, 56 P.R. 1876.

——**Reg XXXI of 1803 (Non-Badshahi grants, Ceded Provinces).**

[REP., (EXCEPT IN CERTAIN AREAS ACT XIX OF 1873]

S. 6—Settlement of land by proprietor renenue free — Condition rendering other lands of grantor liable for the revenue of the lands granted, whether enforceable — *See* GRANT—CONSTURCTION, 21 A. 12=A.W.N. 1898, 149.

——**Reg. XXXIV of 1803 (Interest, Ceded Provinces.)**

[REP. ACT XV OF 1874.]

(1)—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 2 A. 593, P.C.=7 I.A. 51.

(2)—*Ss.* 9, 10, *provisions as to interest under, not affected by subsequent enactments* (*Acts* XXVIII *of* 1855, XIV *of* 1870)—*Transfer of Property Act* (IV *of* 1882), *s.* 2, *saving of previous legal relations by.*—In this suit for redemption, the plaintiff alleged that both upon the construction of the mortgage-deed and under the provisions of ss. 9, 10 of Regulation XXXIV of 1803, which governed and regulated the operation of that deed, the amount of money which the defendant derived by way of profits from the mortgaged property was sufficient to pay off the mortgage-money with interest at the above Regulation rate of 12 per cent., per annum. The said Regulation provided that the rate of interest allowable to the mortgagee was not to exceed 12 per cent., per annum, any contract for higher rate notwithstanding. The mortgage, in the present case, was of the year 1846, and the provisions of the above Regulation relating to interest attached as incidents to the mortgagor's right, such provisions not having been disturbed by any of the subsequent enactments (Acts XXVIII of 1855 and XIV of 1870) of the Transfer of Property Act (IV of 1882), s. 2. SAMAR ALI v. KARIM-UL-LAH, **8 A. 402=A.W.N. 1886, 139.**

(3)—*Ss.* 9, 10 — *Mortgage — Liability to account—Validity of agreement.*—When a mortgagor contracted that he should not have any right or claim to an account of mesne profits during the time of the mortgagee's possession, such a stipulation is valid in law and binding on the mortgagor even though it is opposed to ss. 9 and 10 of Reg. XXXIV of 1803. BUDRI PRASAD v. MURLIDHAR, **6 C.L.R. 257, P.C. =2 A. 593=7 I.A. 51=4 Sar. 100.**

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(4)—S. 10—*See* Nos. 2 and 3, *supra.*

(5)—S. 12—*See* MORTGAGE — FORECLOSURE, 5 B.L.R. 389=13 W.R. 364.

——**Reg. LII of 1803 (Court of Wards, Ceded Provinces.)**

[REP., (IN AGRA, EXCEPT IN CERTAIN AREAS), ACT XIX OF 1873. REP. (IN THE CENTRAL PROVINCES AND THE SAMBALPUR DISTRICT), ACT XVII OF 1885. EXERCISE OF FUNCTIONS BY LIEUTENANT-GOVERNOR IN AGRA VALIDATED, ACT XIX OF 1886, S. 2.]

(1)—*See* COURT OF WARDS, 9 W.R.P.C. 9 =11 M.I.A. 468.

(2)—S. 7—*See* COURT OF WARDS, 5 A. 142, P.C.=9 I.A. 182=13 C.L R. 232.

(3)—*S.* 37—*Disqualified proprietor—Procedure preliminary to taking estate under Court of Wards—Procedure to be followed strictly.*—The provisions of the regulation should be strictly followed in order to effect the disqualification of any particular person; and it must not be assumed that a female proprietor was necessarily a disqualified person from the estate being in fact under the charge of the Court of Wards. (11 M I.A. 468, *R.*) It follows, therefore, that it rests upon one seeking to invalidate an adoption by reason of the provisions of s. 37 of the Regulation (*i.e.*, on the ground that the person making it was a disqualified proprietor), to give strict proof, not only that the estate was in the actual possession of the Court of Wards, but that the necessary legal preliminaries to the disqualification of the female proprietor had regularly taken place. ISHRI PRASAD SINGH v. LALL JAS KUNWAR, **22 A. 294=A.W.N. 1900, 82.**

——**Reg. V of 1804 (Native Officers).**

[REP., ACT XVI OF 1874.]

S. 15—*See* APPEAL—ORDERS, 3 B.L.R.A.C. 370=12 W.R. 323.

——**Reg. II of 1805 (Limitation).**

[REP., ACT VIII OF 1868.]

(1)—*See* BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION, 5 W.R. 136.

(2)—*See* LIMITATION — MISCELLANEOUS, 5 W.R. P.C. 95, 1 M.I.A. 446.

(3)—*See* POSSESSION—ADVERSE POSSESSION, 1 M.I.A. 482.

(4)—*See* BEN. REG. III OF 1793, 2 Knapp. 225.

(5)—*See* BEN. REG. II OF 1803, 1 C.L.J. 319=9 C.W.N. 673, P.C.=15 M.L.J. 267=32 C. 669=2 A.L.J. 794=32 I.A. 80.

(6)—S. 2—*See* LIMITATION—GENERAL, 6 W.R. P.C. 3=2 M.I.A. 390.

(7)—S. 2—*See* LIMITATION ACT, 1908, art. 149, 5 W.R. 115.

(8)—S. 2, cl. 2—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 4 M.I.A. 466.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(9)—S. 2, cl. 2—*See* LIMITATION—MISCELLANEOUS, 3 W.R. P.C. 31=8 M.I.A. 225.

(10)—S. 3—*See* BEN. ACT XI OF 1859, ss. 11, 13, 54, 3 B.L.R.A.C. 446=12 W.R. 440.

(10)—S. 3—*See* LIMITATION — MISCELLANEOUS, 6 W.R. P.C, 24=3 M.I.A. 1, 5 W. R. P.C. 68=7 M.I.A. 238.

(11)—S. 3—*See* POSSESSION—SUITS FOR POSSESSION, 22 W.R. 165.

(12)—S. 3, cl. 1 — *See* LIMITATION — GENERAL, 4 W.R. P.C. 103=6 M.I.A. 494.

(13)—S. 3. cl. 2—*See* LIMITATION—QUESTION OF LIMITATION, 1 Ind. Jur. O.S. 23, Marsh 22=1 Hay 55.

(14)—S. 3, cls. 2 and 3—*See* LIMITATION ACT, 1908, arts. 132 and 144, 16 W.R.P.C. 19=8 B.L.R. 122=14 M.I.A. 101.

(15)—S. 3, cl. 3—*See* LIMITATION—LAW OF LIMITATION, 9 W.R. 158.

(16)—S. 3, cl. 3—*See* POSSESSION — ADVERSE POSSESSION, 8 W.R. 232.

———**Reg. XII of 1805 (Cuttack Land-revenue.)**

[SHORT TITLE GIVEN, ACT I OF 1903. AM., BEN. REG. XIV OF 1825. S. 31 REP. IN PT., ACT X OF 1840. S. 24, REP. IN PT., ACT X OF 1859, S. 28, S. 32 REP., ACT XVI OF 1864. SS. 12 TO 16 REP., ACT XVI OF 1874. S. 30 REP. IN PT., ACT XII OF 1891. S. 36 REP. IN. PT., S. 37 REP., ACT XI OF 1893, SS. 1, 31 REP. IN PT., SS. 2 TO 11 REP., SS. 18, 20, 22, 26, 28, 30 AM. ACT I OF 1903.]

(1)—*See* HINDU LAW—INHERITANCE, 32 C. 6.

(2)—S. 33—Applicability—*See* BEN. ACT VI OF 1870, s. 1, 15 C.W.N. 300=9 Ind. Cas. 688.

———**Reg. XVII of 1805 (Joint Undivided Estates.)**

[REP., ACT XXIX OF 1871.]

See LUNATIC, 10 B.L.R. 364=19 W.R. 163.

———**Reg. II of 1806 (Civil Procedure.)**

[REP., ACT X OF 1861.]

(1)—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 12 W.R. 391.

(2)—*See* LEASE—MISCELLANEOUS, 1 W.R. 63.

(3)—*See* MESNE PROFITS — MISCELLANEOUS, 9 W.R. 450.

(4)—*See* SALE—SALE IN EXECUTION OF DECREE—PROCEEDS OF SALE, RIGHT TO, 12 W.R. 48.

———**Reg. XVII of 1806 [Bengal Land (Redemption and Foreclosure.)]**

[SHORT TITLE GIVEN, ACT I OF 1903. REP. (EXCEPT IN THE PUNJAB, THE N. W. FRONTIER PROVINCE AND THE SONTHAL PARGANAS), ACT IV OF 1882. SS. 7 AND 8 DECLARED IN FORCE—IN THE SONTHAL PARGANAS REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3, IN THE PUNJAB, ACT IV OF 1872, S. 3; IN THE N.W. FRONTIER PROVINCE, REG. VII OF 1901, S. 4.]

(1)—*Conditional sale—Year of grace, when commences—Date of order of first Court—Punjab Civil Code, part* II, *s.* 6, *cl.* 7.—A conditional vendee obtained a decree on 28-9-1865 to the effect that, if the vendor did not pay within the year of grace the sum found due to the vendee, the conditional sale would merge into an absolute sale. On appeal by the vendor, the appellate Court on 3-5-1867 confirmed the order of the first Court except in the matter of interest. *Held* that the year of grace ran from the date of the order of the first Court (*i e.*, 28-9-1865). Reading s. 6, cl. 7 of the Punjab Civil Code, Part II, by the light of Reg. XVII of 1806, it would appear that a conditional vendor probably lost his right to have his appeal heard if he did not lodge the sum decreed within the year of grace, for, by his omitting to do so, the sale becomes an absolute one, and the fact of an appeal having been lodged could not extend the year of grace within which it was absolutely necessary to pay the money, if the conditional vendor wished to obviate the operation of the law. JEHANGEER v. SAIN DASS, **42 P.R. 1870.**

(2)—*Mortgage—Notice of foreclosure—Regulation* XVII *of* 1806.—The words "legal representative" in Regulation XVII of 1806 are not used in the sense of a *universal* legal representative, such as an heir; a purchaser of mortgaged property is included within the meaning of the term, and, as such, is entitled to notice of foreclosure whether he be a purchaser of the whole property or of a distinct and definite portion only, and whether the mortgagee has or has not consented to the assignment. GANGA GOBIND MANDAL v. BANI MADHAB GHOSE, **3 B.L.R.A.C 172=11 W.R. 548.** [*F.*, 23 W.R. 25, 31 P.R. 1883; *Expl.*, 23 W.R. 96.]

(3)—*Mortgage — Foreclosure proceedings — Service of notice—Substituted service when permissible—Demand by registered notice—Burden of proof—Evidence.*—In order that the mortgagee should obtain foreclosure of the whole mortgage every mortgagor should be served with a notice. In a suit for foreclosure of a mortgage by way of conditional sale it is for the plaintiff to prove a demand from each mortgagor prior to issue of notice, the failure to prove which would be fatal to his suit. The demand may be made by means of a letter sent through post registered, it would be presumed that the letter reached its destination when it is not returned to the mortgagee through the Dead Letter Office, though the presumption is neither obligatory nor conclusive. The contents of the letter being in the nature of a demand

Regulations—continued.

—2.—**Bengal Regulations**—*continued.*

should be proved. It is not essential that service of notice under the Regulation should be personal. The provisions of the Civil Procedure Code as to service of process, so far as they are not contrary to the Regulation, are applicable by force of s. 647 of the Code, to the service of notices issued under the Regulation. The finding of the District Judge in the foreclosure proceedings that notice has been duly given to the mortgagor is not even *prima facie* evidence of the provisions of the Regulation having been complied with, the services of the petition for foreclosure and the notice in the form prescribed by the Regulation must be strictly proved. Though substituted service is not confined to cases in which it is established that the mortgagor is keeping out of the way, yet the stringent requirements of the Regulation would not, in the absence of strict proof of evasion of service, be complied with by substituted service of notice. Substituted service on one of the mortgagors who was a female not being considered sufficient, and the allegation not having been established that she made an admission of having been duly served with notice the foreclosure proceedings were held as infructuous. SHEIKH FAZAL ILAHI v. HAZARI SINGH, **63 P.L.R. 1902=48 P.R. 1902.**

(4)—*Misprints in notice.—Held*, that mere clerical slips or misprints, which can possibly mislead no one, in a notice issued under Reg. XVII of 1806, do not render the foreclosure proceedings void. The use of the word "Act" in the vernacular and "Resolution" or "Zarlution" for "Regulation" cannot be held to mislead the mortgagor when the application for issue of notice as well as the rest of the notice itself is properly worded in all particulars. JIWAN RAM v. AMIR BEG, **124 P.L.R. 1901=38 P.R. 1901.** (24 P.R. 1895, 25 P.R 1897, 5 P.R. 1901, 9 P.L.R. 1901, *R.*) [*R.*, 21 P.R. 1903=83 P.L.R. 1903, 109 P.R. 1901.]

(5)—*Act* IV *of* 1882—*Procedure—Foreclosure of mortgage.—Held* that where notice of foreclosure of a mortgage by conditional sale had been duly issued in accordance with the provisions of Regulation XVII of 1806, the coming into force of Act IV of 1882 during the time limited by the above mentioned notice would not prevent such notice taking the legal effect provided for by the Regulation. BAIJ NATH RAI v. SHEOBARAN RAI, **A.W.N. 1894, 2.**

(6)—*Interest—Reg.* XV *of* 1793.--Reg. XVII of 1806 is not inconsistent with Reg. XV of 1793, as the former refers to accumulations of interest, whatever the rate may be, and the latter to rates of interest. RAJA BARDA KANT RAI v. BHAGWAN DAS, **1 A. 344.**

(7)—*Mortgage--Foreclosure--Notice.*—A notice issued by the District Court under Reg. XVII of 1806, which did not bear the signature of the Judge whose seal alone was fixed to the document, was held to be informal and bad, and the foreclosure proceedings were, therefore, invalid *ab initio.* BASDEO SINGH v. MATADIN SINGH, **A.W.N. 1882, 25.**

(8)—*Foreclosure proceedings taken under the Regulation, validity of—Notice issued under the Regulation, procedure necessary to be observed in the issue of—Duty of Civil Court—Redemption, Suit for—Objection to attachment—Dismissal for want of prosecution, effect of—Regular suit necessary to set aside the order.*—A person, who relies upon the foreclosure of a mortgage under Regulation XVII of 1806, must prove that each step required by that Regulation was properly performed. Where, therefore, it is proved that the notice issued to the mortgagors did not contain the signature of the presiding officer, the mere fact that the order passed stated "as the service has been duly effected, let the application be consigned to the records," was no proof that the prescribed procedure had been followed. In the absence of proof of such procedure, the foreclosure cannot be deemed to have been complete. The action of the Civil Court in issuing and serving notice is purely ministerial, and it is only when a mortgagee seeks for possession of property that the Court is called upon to decide judicially whether the prescribed procedure has been followed. When an objection to an attachment had been thrown out on the ground that the objector failed to deposit the necessary process-fee, the order disallowing the objection is conclusive against the party against whom it has been passed, if no regular suit has been brought within a year to get the said order set aside. DHARMA v. MADAR SINGH, **12 Ind. Cas. 345.** (11 O. C. 180, *F.*)

(9)—*Mortgage* — Onus — *Promulgation of statute.*—Reg. XVII of 1806 took effect, not from the date on which it was passed by the Governor-General in Council, *viz.*, 11th September 1806, but from the date of its promulgation. Suit in 1863 for the redemption of certain property in Zillah Sarum conveyed to the defendant by a deed of conditional sale in 1801, the day of payment on failure of which the sale was to become absolute being the 28th September 1806. *Held* that the *onus* of showing that the Regulation was promulgated in Sarum prior to the 28th September, 1806, lay on the plaintiff who sued for redemption; and that, as he had failed to give such evidence, his suit must be dismissed. SARIFUNNISA v. SHEIKH INAYET HOSSEIN, **B.L.R. Sup. Vol. 415=5 W.R. 88.** [*R.*, 1 M. 22, 6 C. 564=7 C.L.R. 583, 8 M. 185; *Cons.*, 7 B.L.R. 136, P.C.=13 M.I.A. 560=15 W.R. P.C. 35; *D.*, 14 W.R. 375.]

(9-a)—*Punjab Alienation of Land Act* (XIII *of* 1900), *s.* 9—*Mortgage of conditional sale—Mortgagor not member of agricultural tribe—Service of notice under Regulation* (XVII *of* 1806)—*Commencement of year of grace—Mortgagor notified as member of agricultural tribe subsequent to commencement of year of grace-*

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

But before its expiry—Suit for possession after expiry of year of grace—Not a suit on mortgage—Power of Deputy Commissioner to interfere—Power of Civil Court to make reference.—On 23rd July, 1909, a notice of foreclosure was issued under Regulation (XVII of 1806), to a mortgagor who was not then a member of an agricultural tribe under the Land Alienation Act. The notice was served on 17th August, 1909, and the year of grace began to run against the mortgagor. On 26th May, 1910, the mortgagor's tribe was declared to be an agricultural tribe. After the expiry of the year of grace, the mortgagee sued the mortgagor for possession of the mortgaged land as proprietor thereof. *Held*, that :—(1) the suit for possession was not a *suit on a mortgage* ; (2) as soon as the year of grace expired, the mortgagee became *ipso facto* full owner of the mortgaged land (38 P.R. 1904, 20 P.R. 1905, 38 P.R. 1905, R.); (3) the fact that the mortgagee became a member of an agricultural tribe before the expiry of the year of grace could not stop the year of grace from running, with the effect of vesting in the mortgagee the proprietary rights in the land at its expiration ; (4) the mortgage had ceased to exist after the expiry of the year of grace, and that, consequently, the Deputy Commissioner was precluded from exercising his powers of interference under s. 9 (2) of the Punjab Land Alienation Act ; (5) the Civil Court was not bound to make a reference under s. 9 (3) of the Act, as the suit was not instituted on a mortgage. BULANDA v. DIWANU, **109 P. W.R. 1912=14 Ind. Cas. 332.**

(10)—This circular enjoins observance of the proper practice with regard to the taking of formal contemporaneous proof of the service of notice in foreclosure-proceedings under Regulation XVII of 1806. Civ. Cir. No. 8 of 7th March 1874, **21 W.R. H.C. Rules and Ors. 16.**

(11)—*See* ACT I OF 1868, s. 6, 2 C.P.L.R. 130.

(12)—*See* CIV. PRO. CODE, 1908, s. 16, 12 C. 614.

(13)—*See* CIV. PRO. CODE, 1908, s. 105, 162 P.L.R. 1903=71 P.R. 1903.

(14)—*See* CIV. PRO. CODE, 1908, s. 115, A.W.N. 1882, 2, A.W.N. 1882, 32.

(15)—Suit for redemption — Proceedings under, necessary to extinguish title of mortgagor—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 23, 25, 9 Ind. Cas. 431.

(16)—*See* LETTERS PATENT, HIGH COURT, 1865—CALCUTTA, s. 12, 11 B.L.R. 301.

(17)—Suit for foreclosure—Suit for possession barred—Effect—*See* LIMITATION ACT, 1908, s. 31, 9 Ind. Cas. 1038.

(18)—*See* LIMITATION ACT, 1908, art. 120, 14 A. 405, F.B.=A.W.N. 1892, 108, A.W.N. 1886, 69.

(19)—*See* LIMITATION ACT, 1908, arts. 134, 148, 9 A. 97.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(20)—*See* LIMITATION ACT, 1908, art. 135, 16 C. 693=16 I.A. 85, P.C.

(21)—Mortgage by conditional sale—Bar of remedy while Regulation was in force—No revival of remedy after T. P. Act—*See* LIMITATION ACT, 1908, arts. 135, 147, 8 C P.L.R. 83.

(22)—Suit for redemption of a mortgage by way of conditional sale — *See* LIMITATION ACT, 1908, art. 148, P.L.R. 1900, p. 167.

(23) — *See* MORTGAGE — CONDITIONAL SALE, 15 W.R. 35, P.C.=7 B.L.R. 136=13 M.I.A. 560.

(24)—Mortgage—Conditional sale — Agreement to pay interest annually and in default of payment for six years mortgage to become sale—Applicability of, to such agreement—*See* MORTGAGE—CONSTRUCTION OF MORTGAGE-DEEDS, 50 P.R. 1906.

(25)—*See* MORTGAGE—CONSTRUCTION OF MORTGAGE-DEEDS, 3 C.L.J. 601, P.C.=10 C. W.N. 778=28 A. 496=3 A.L.J. 712=1 M.L.T. 297.

(26)—*See* MORTGAGE — REDEMPTION, 5 W.R.P.C. 47=10 M.I.A. 340, W.R. 1864, 183, 28 P.R. 1908=41 P.W.R. 1908=141 P.L.R. 1908=7 B.L.R. 136, P.C.=13 M.I.A. 560=15 W.R. 35, 6 B.L.R. App., 53=14 W.R. 278.

(27)—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 10 W.R. 86=1 B.L.R. S.N. 3.

(28)—*See* MORTGAGE—MISCELLANEOUS, W.R. 1864, 189.

(29) — *See* PRE-EMPTION — RIGHT TO PRE-EMPT, 35 P.R. 1881, 11 A. 164=A.W.N. 1889, 48.

(30)—*See* RES JUDICATA—GENERAL, A. W.N. 1892, 51.

(31)—*See* RES JUDICATA—PARTIES, P.L. R. 1900, p. 241.

(32)—*See* REVISION—GENERAL, 3 A. 576.

(33)—*See* TRANSFER OF PROPERTY ACT, 1882, s. 2, 2 C.P.L.R. 130.

(34)—*See* VENDOR AND PURCHASER—MISCELLANEOUS, Marsh 632.

(35)—S. 7—*See* INTEREST — SPECIAL CASES, 28 P.R. 1897.

(36)—S. 7— *See* MORTGAGE — FORECLOSURE, 9 W.R. 116.

(37)—S. 7—*See* MORTGAGE—REDEMPTION, 3 A. 653, F.B.=A.W.N. 1881, 42, Marsh 617, 3 B.L.R. A.C. 141.

(38)—S. 7—*See* BEN. REG. I OF 1798, B. L.R. Sup. 598, F.B.=6 W.R. 225.

(39)—*Ss. 7 and 8—Mortgage by way of conditionale sale—Foreclosure proceedings—Notice—Defects in—Demand of interest that was not due.*—A notice under Reg. XVII of 1806 is not defective merely because it was issued by one of the mortgagees, nor does demand of interest more than the amount due render the notice

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

invalid. BAWA DALIP SINGH v. BAWA JAIMAL SINGH, **134 P.L.R. 1910=8 Ind. Cas. 555.** (3 A. 653, 3 A. 182, 84 P.R. 1882, *R.*)

(40)—*Ss. 7 and 8—Notice, Irregularity in.*—When the notice issued to the mortgagor under Regulation XVII of 1806 was headed—"Application for issue of a notice of foreclosure under ss. 7 and 8 of Regulation XVII of 1806," and the body of the notice contained the words "it is notified to you by this notice that if you shall not pay up the entire mortgage-money, etc., noted in the application, and thus redeem the said land in the manner provided for in the foregoing section of the said Regulation within one year, the mortgage will be finally foreclosed." *Held* that the omission to specify s. 7 in the notice was fatal to the validity of the notice. The word 'section' in the notice being singular the mortgagor had not noticed which of the two sections specified in the heading were referred to. RAM CHAND v. SANDAL KHAN, **83 P.L.R. 1903=21 P.R. 1903.** (5 P.R. 1901=2 P.L.R. 1900, p. 465, 28 P. R 1901, 9 P.L.R. 1901, 38 P.R. 1901, 124 P.L.R 1901, 123 P.R. 1894, 24 P.R. 1895, 28 P,R. 1897, *R.*) [*R.*, 28 P.R. 1908.]

(41)—*Ss. 7, 8—Mortgage—Foreclosure proceedings—Prescribed procedure imperative—Omission to affix seal on notice—Fatal defect—Punjab Land Alienation Act (XIII of 1900), s. 9 (3)—Consignment of foreclosure proceedings to record-room—Commencement of Act before expiry of year of grace—No pending proceedings.*—Where foreclosure proceedings were consigned to the record-room before the year of grace had expired, and after the consignment of the record, but before the expiry of the year of grace, the Punjab Alienation of Land Act came into force: *Held*, that there were no proceedings *for the enforcement of the conditional sale clause pending* before the Court at the time of the commencement of the Act. *Held*, also, that:—1. Where a mortgagee sues for possession of the mortgaged property, upon the ground that he has become owner thereof under the terms of the conditional sale clause, it is *incumbent* upon him to prove affirmatively, that each and all of the conditions prescribed by ss 7 and 8 of Regulation XVII of 1806 have been duly fulfilled. He must show that the foreclosure proceedings were valid in every respect. His plaint should distinctly allege, not only that the year of grace had expired, but that the procedure prescribed by law, both preparatory to and in connection with the notice of foreclosure, had been duly observed. A plaintiff, who neither sets forth these necessary particulars in his plaint, nor adduces any proof in support of the special relief which he seeks to enforce, cannot avoid the consequences of his neglect, by merely relying on the circumstances that the defendant did not plead the non-observance of the prescribed procedure but defended the suit on other grounds. The provisions of Regulation XVII of 1806 are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often poor and ignorant men, from fraud and oppression on the part of the money-lenders. The prescribed procedure must, therefore, be strictly followed. The omission to affix the seal of the District Judge upon the foreclosure notice renders the foreclosure proceedings bad in law and is fatal to a suit by the mortgagee for possession as owner. MUSSAMMAT BAKHTAWARI v. SHIBAN LAL, **69 P.W.R. 1912=13 Ind. Cas. 621=121 P.L.R. 1912=59 P.R. 1912.** (16 P.R. 1888, 106 P.R. 1889, *R.*; 105 P.R. 1907=184 P.W.R. 1907; *D.*, 11 C. 111=11 I.A. 186, 185 P.R. 1889, *F.*)

(42)—*Ss. 7, 8—Mortgage by way of conditional sale—Foreclosure—Notice.*—When it appeared that, in the notice issued under ss. 7 and 8 of Regulation XVII of 1806, the year of grace was set down as running from the date of the notice itself, and not from the date of service of notice. *Held* that the defect in the notice was fatal. THAKUR DAS v. MUHAMMAD BAKHSH, **74 P.L.R. 1906.** (46 P.R. 1904, 3 C. 397, *F*; 99 P.R. 1895, *R.*)

(43)—*Ss. 7 and 8—Defective notice—Redemption in the manner provided for by the Regulation—Mortgagor instituting a suit for redemption within the year of grace.*—*Held*, that a notice under s. 8, Reg. XVII of 1806, is not defective, merely because the designation of the District Judge is not written but is impressed by a seal. *Held*, also, that a notice in which the mortgagor is informed that if he shall not redeem the property mortgaged in the manner provided for in s. 7 within one year from the date of the notice, the mortgage will be finally foreclosed is valid, although no mention of interest is made in it. *Held*, further, that the mortgagor's right to redeem is lost if he does not tender or deposit the principal and the amount of interest due within the year of grace, and his filing a suit to get determination of the amount due to the mortgagee has not the effect of extending the period of one year allowed by the Regulation. FAKIRA v. PIYARE LAL, **57 P.L.R. 1901=21 P.R 1901.**

(44)—Ss 7, 8—*See* MORTGAGE—REDEMPTION, 9 A. 20=13 I.A. 113, P.C.

(45)—Ss. 7 and 8—*See* MORTGAGE—MISCELLANEOUS, 134 P.L.R. 1901.

(46 & 47)—Ss. 7,8—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 2 (*c*), 67, 86, 6 A. 262, F.B.=A.W.N. 1884, 79.

(48 & 49)—Ss. 7 and 8—Mortgage by way of conditional sale, foreclosure of—*See* TRANSFER OF PROPERTY ACT, 1882, s. 99, 157 P.L.R. 1906=2 P.R. 1907.

(50)—*S. 8—Mortgaged property situate on two districts—Foreclosure—Service of notice.*—Where mortgaged property is situate in two

Regulations—continued.

——2.—Bengal Regulations—*continued.*

districts, an order made by the Judge of one district for foreclosure of the whole of the mortgaged property is a sufficient compliance with Bengal Regulation XVII of 1806, s. 8. [*F.*, 2 A. 313, 5 C.L.R. 599.] Service of the order of foreclosure on the widow of a deceased mortgagor, who was also the guardian of a minor adopted son of the deceased, is effectual as regards the widow and the adopted son. RASMONEE DABEA v. PRAN KISHEN DASS, **7 W.R.P.C. 66=4 M.I.A. 392=1 Suther. 207 =1 Sar. 369.**

(51)—*S.* 8—*Mortgage—Notice.—Held*, that it is not necessary that the actual wording of s. 8 of Reg. XVII of 1806 be reproduced in the notice word for word and that the use of words ' pay off ' instead of ' redeem ' did not invalidate the notice. MUSSAMMAT SARDHARI v. CHIRANJI LAL, **9 P.L.R. 1901=28 P. R. 1901.** [*R.*, 21 P.R. 1903=83 P.L.R. 1903.]

(52)—*S.* 8—*Mortgage—Foreclosure.*—S. 8 of Reg. XVII of 1806 contemplates a previous demand of payment of the mortgage money but it is not necessary that the demand should be for any specific amount. *Held*, that a notice issued under s. 8 of Reg. XVII of 1806 is not invalid if the official designation of the Judge signing it is not in his handwriting. *Held*, further, that a mistake in the description of the property given in the notice does not make it invalid. WALI MUHAMMAD v. RAMJI LAL, **P.L.R. 1900, p. 465=5 P.R. 1901.** [*R.*, 21 P.R. 1903=83 P.L.R. 1903; *D.*, 109 P.R. 1901.]

(53)—*S.* 8—*Mortgage by conditional sale—Validity of notice of foreclosure—Appeal—Objection to notice made, on appeal, for the first time.*—A notice issued under s. 8 of the Regulation cannot be held to be defective simply because (1) the area of land and *khasra* and *khewat* numbers were entered neither in the notice nor in the application for its issue, (2) the amounts of principal and interest were not specified in the notice, and (3) the signature of the Judge on the notice was not his proper official signature, the official designation being in print instead of being in the Judge's own hand. Where a defendant, in a suit for possession of immoveable property, on a deed of conditional sale, alleged to have been foreclosed under the Regulation, had practically admitted the validity of a notice issued under the Regulation, it is doubtful whether the defendant is entitled on appeal to raise, for the first time, objections to the validity of the notice. BHAGIRATH v. NATH MAL, **105 P.R. 1907.** (16 P.R, 1888, 11 C. 111, P.C. *R.*)

(54)—*S.* 8—*Mortgage of house by way of conditional sale—Reg.* XVII *of* 1806, *applicability of.*—The provisions of Reg. XVII of 1806 apply to a mortgage by way of conditional sale of houses, so as to prevent the sale from becoming absolute until foreclosure proceedings have been taken under s. 8 of that Regulation, on account of the fact that both in the older Reg.

Regulations—continued.

——2.—Bengal Regulations—*continued.*

I of 1798 and in the recent repealed preamble of Reg. XVII of 1806 the words " landed property " are used, though in the same preamble, the word " land" occurs; that the words " land," " landed property," and " grounds" are used in a very general way throughout these Regulations, notably so in the Regs. VII of 1795 and and II of 1805 ; and that there seems no reason why the evils set forth in the preambles of Regs. I of 1798 and XVII of 1806 should not apply to the house property as well as to landed property. RANJIT v. YIRKHA, **117 P.R. 1885.** [*Cons.*, 88 P.R. 1888, 18 P.R. 1898 ; *D.*, 108 P.R. 1912=17 Ind. Cas. 864.]

(55)—*S.* 8—*Redemption proceedings — Right when lost.*—Before a mortgagor in a case of mortgage by conditional sale, executed before the Act of 1882, could be held to have entirely lost his right to redeem under the Regulation XVII of 1806, it must be proved that the procedure prescribed therein had been strictly followed, *e.g.*, it must be proved that there was a previous demand by the mortgagee from the mortgagor of payment of the mortgage-debt. Where, therefore, the mortgagee produced a copy of the proceedings, which directed him to bring a suit, *held* that there was not sufficient compliance with the Reg. XVII of 1806 and the mortgagor did not lose his right to redeem. BADAL RAM v. TAJ ALI, **4 A.L.J. 717=A.W.N. 1907, 266.** (N.W.P. 1868, 358, *R.*)

(56)—*S.* 8—*Mortgage by conditional sale—Foreclosure*— Parwanah—" *Official signature* " —*Procedure.*—*Held* that a *parwanah*, or notification to the mortgagor, issued in a suit for foreclosure of a mortgage by conditional sale under the provisions of s 8 of Reg. XVII of 1806, which bore the seal of the Court and the initials of the Judge of the Court from which it issued, was a good and sufficient notification within the meaning of the Regulation. BHAGHWAT KURI v. BALDEO RAI, **A.W.N. 1906, 309=29 A. 145=3 A L.J. 857.** (11 C. 111, *D.*; 16 A. 59, *quoad hoc, Overruled.*)

(57)—*S.* 8—*Mortgage by conditional sale—Stipulated period—Covenant accelerating payment—Mortgagee spending money for protecting property and for improvement — Interest.* — Under s. 8, the right of the mortgagee by conditional sale to apply for foreclosure does not arise, until the period stipulated in the proviso for redemption has expired. That period is not affected or altered by a contract in the mortgage deed, making, without reference to redemption, the whole principal lent payable upon failure to pay interest at a certain time. A separate stipulation which, for other purposes, accelerates the time at which the principal is to become due, and makes no provision for the mortgagor making payment for avoiding forfeiture, cannot be taken into account in considering what are to be regarded as the ' stipulated period.'' Compound interest on sums spent by the mortgagee to protect the

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

subject of the security, or simple interest on money spent in improvement, will not be allowed. KISHORE MOHUN ROY v. GANGA BABU DEBI, **5 M.L.J. 261, P.C.=23 C. 228=22 I A. 183=6 Sar. 249.**

(58)—*S.* 8 — *Extension of time by mutual agreement—Right of mortgagee to immediate decree under Reg.* XVII *of* 1806—*Transfer of Property Act, s.* 2.—It is within the power of parties to a mortgage to bargain as they choose in the way of enlargement of time in cases under Reg. XVII of 1806; such extension of time is not fatal to the whole proceeding. The year of grace allowed by s. 8 is a matter of procedure. Where valid and effectual proceedings taken under Reg. XVII of 1806 had arrived at a close (*i.e.*, the period of grace under s. 8 had expired) when the regulation was still in force, the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely; such right would fall under cl. (*c*) of s. 2 of the Transfer of Property Act and would be enforceable even after the Act came into operation. BAIJNATH PERSHAD NARAIN SINGH v. MOHESWARI PERSHAD NARAIN SINGH, **14 C. 451.** [*F.*, 20 B. 759; *D.*, 14 C. 599, 15 C. 357; *R.*, 11 M. 403.]

(59)—*S.* 8—*Forclosure—"Parwanah" signed by Subordinate Judge in charge of the current duties of the District Judge's office under s.* 8 *of Act* VI *of* 1871.—*Held* that a "*parwanah*" purporting to be issued under the provisions of s. 8 of Regulation XVII of 1806, but signed, not by the District Judge but by the Subordinate Judge in charge of the current duties of the office of the District Judge was not a good notice in law. PIRBHU LAL v. GANPAT, **A.W. N. 1894, 53.**

(60)—*S.* 8—*Mortgage by conditional sale—Right of entry on default of payment--Foreclosure proceedings—Suit for possession--Cause of action—Limitation Act,* XIV *of* 1859, *s.* 1, *cl.* 12—*Effect of foreclosure proceedings—Foreclosure proceedings—Notice—Copy of application--Presumption as to service--Validity of proceedings.*—Where a *kut-kobala* or a Bangalee deed of conditional sale expressly reserves to the mortgagee the right of entry upon the mortgaged premises on default of payment within the stipulated time, Reg. XVII of 1806, or any other law, does not render such a stipulation inoperative between the parties, and the mortgagee is entitled to take possession of the properties mortgaged, immediately on default of payment. Therefore the cause of action for a suit instituted by the mortgagee against the mortgagor to recover possession of the mortgaged property arises on the date of that default. No new cause of action arises by reason of the foreclosure proceedings. Consequently such a suit instituted more than 12 years from the date of default in payment of the mortgage debt would be barred by limitation under Act XIV of 1859, s. 1, cl. 12. The effect of the foreclosure proceedings laid down in Reg. XVII of 1806 is simply to bar the right of redemption. If, on the day of the expiry of the year of grace, a valid subsisting right of a mortgagee exists in a holder of a *kut-kobala*, the omission of the borrower to repay the mortgage loan before that date has the effect of transferring the rights on the latter to the former, who acquires from that date absolute ownership in the property mortgaged. But if, on the other hand, the mortgage rights of a holder of a *kut-kobala* have been extinguished by lapse of time or other causes, previous to that date, the foreclosure proceedings, even if duly carried out, are entirely ineffectual, and do not affect any person's right in the least. [*F.*, 12 C. 614; *R.*, 11 A. 144, 26 A. 4; *D*, 22 W.R. 543=14 B.L.R. 315, 6 C. 564=7 C.L.R. 582, 10 C. 68.] Where, in foreclosure proceedings, the mortgagee has failed to establish that the notice of the proceedings to be served upon the mortgagor was accompanied by a copy of the application, as required by Reg. XVII of 1806, this omission has the effect of rendering the foreclosure proceedings invalid and ineffectual. Where it is shown that a notice of foreclosure was served according to the usual course of business in the Sheriff's office, it may be assumed, in the absence of any very satisfactory contradiction, that a copy of the application was duly served therewith. But where, in the order of the Judge, in the return of the Sheriff, and in the deposition of the serving peon, only a notice is mentioned and it appeared that according to the practice of the High Court on the original side, had the application accompanied the notice, it would have been so mentioned in the order of the Judge and the return of the Sheriff, it cannot be presumed that the copy of the application accompanied the notice. DENONATH GANGOOLY v. NURSING PROSHAD DASS, **14 B. L R. 87=22 W.R. 90.** [*F.*, 2 C. 311.]

(61)—*S.* 8—*Suit for foreclosure—Barred by limitation if no proceedings taken under the Regulation — Limitation, period of* 12 *years—Limitation Act* (1877), *art.* 147—*Transfer of Property Act, no provision for foreclosure before passing of.*—A mortgage by conditional sale made in 1865 provided that the mortgage money should be repaid in 1866. In a suit for foreclosure and for possession of the mortgaged property brought in 1910, *held* that no proceedings having been taken under Regulation XVII of 1806, and the mortgagee's right to make an application for foreclosure having become extinct by reason of efflux of time, he could not take possession without obtaining foreclosure in accordance with the provisions of the Regulation and the claim was barred by time. *Held*, further, that art. 147, Limitation Act (1877), did not apply to foreclosure proceedings under Regulation XVII of 1806. SHYAM CHANDER SINGH v. BALDEO, **10 A.L.J. 522=17 Ind. Cas. 467.**

(61-*a*)—S. 8—*See* LIMITATION ACT, 1908, art. 144, 11 A. 144.

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

(62)—S. 8—*See* LUNATIC, 10 B.L.R. 364=19 W.R. 163.

(63)—S. 8—*See* MORTGAGE—GENERAL, 2 N.L.R. 113.

(64)—S. 8—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGEE AND MORTGAGOR, 1 W.R. P.C. 19=10 M I.A. 1.

(65)—S. 8—*See* MORTGAGE—CONDITIONAL SALE, 109 P.R. 1901, 75 P.R. 1874.

(66)—S. 8—*See* MORTGAGE—REDEMPTION, 5 W.R. Mis. 31, 14 W.R. 278.

(67)—S. 8—*See* Nos. 39 to 48, *supra*.

———**Reg. XVIII of 1806 (Canal Tolls).**

[REP., ACT XII OF 1873.]

See BEN. REG. VI OF 1819, s. 3, B.L.R. Sup. Vol. 630=7 W.R. 191.

———**Reg. XIX of 1806 (Duty on Spirits.)**

[REP. BEN. REG. IX OF 1810.]

(1)—Butwara *Law — Jurisdiction of Civil Courts.*—Any possession, which may be given or be said to be given, under the Butwara Law, can have no force against third persons, who were no parties to it. By a *Butwara*, the rights of under-tenure-holders are in no way affected, and though, as between share-holders, the assignment of specific lands to each share-holder has a binding effect, yet such arrangement does not, of itself, entitle the share-holder to obtain *khas* possession, to the deprivation of the rights of the tenants on the land. There is no jurisdiction in the Civil Court to disturb a *Butwara* effected by properly constituted authorities in accordance with law. BEMOLA-SOONDURY CHOWDHRAIN v. PUNCHANUN CHOWDHRY, **3 C. 705.**

———**Reg. IV of 1808 (Kanungoes, Benares, etc.)**

[REP. (EXCEPT IN CERTAIN AREAS) ACT XIX OF 1873.]

See KANUNGO, 2 P.R. 1867, Rev.

———**Reg. VII of 1809 (Stamps).**

[REP. BEN. REG. I OF 1814.]

S. 1—*See* APPEAL—ORDERS, 3 B.L.R. A.C. 370=12 W.R. 323.

———**Reg. XIX of 1810 (Bengal Charitable Endowments, Public Buildings and Escheats.)**

[SHORT TITLE GIVEN, ACT I OF 1903. REP. AS TO ENDOWMENTS FOR THE SUPPORT OF MOSQUES, HINDU TEMPLES OR OTHER RELIGIOUS PURPOSES, BEN. REG. XVII OF 1816, S. 16. REP. AS TO PROVISION BY BOARD OF REVENUE FOR DUE REPAIR OF PUBLIC EDIFICES OF THE DESCRIPTION OF BRIDGES, SERAIS, AND KATTRAS, ACT XX OF 1863. TITLE AND SS. 1, 2, 3, 5, 6, 7, 8, 10, 14, 15 REP. IN PT., SS. 3, 4, 8, 9, 12, 13 AM., ACT I OF 1903. REP. (IN AGRA), ACT VIII OF

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

1884. (IN ASSAM), ACT V OF 1897. DECLARED IN FORCE—THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6; IN AJMERE (WITH A MODIFICATION), REG. III OF 1877, S. 3.]

(1)—*See* ACT XX OF 1863, ss. 14, 18, 6 P.L.R. 1901.

(2)—*See* LIMITATION—GENERAL, 6 W.R. P.C. 3=2 M.I.A. 390.

(3)—Endowments affected by, management of—*See* RELIGIOUS ENDOWMENT, 34 C. 587.

———**Reg. V of 1812 (Bengal Land-revenue Sales.)**

[SHORT TITLE GIVEN, ACT I OF 1903, S. 2 EXPLD. (IN BENGAL), BEN. REG. XVIII OF 1812, S. 2. S. 28 REP. IN PT., BEN. REG. XII OF 1824. S. 28, RESIDUE REP., BEN. REG. VII OF 1830. SS. 5 TO 23 REP., ACT X OF 1859. S. 1 REP., SS. 2, 3, 4, 26, 27, REP. IN PT., ACT XVI OF 1874. SS. 24, 25, REP. IN PT., ACT XII OF 1876. SS. 2, 3, 4, 26, 27 REP. (IN EASTERN BENGAL AND LOCALLY IN BENGAL), ACT VIII OF 1885. S. 25 AM., SS. 26, 27, REP. IN PT., ACT I OF 1903. REP. (IN AGRA, EXCEPT CERTAIN AREAS), ACT XIX OF 1873; (IN ASSAM, EXCEPT THE LUSHAI HILLS), REG. I OF 1886. DECLARED IN FORCE—THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6; IN THE SONTHAL PARGANNAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—*Notice of suit for arrears of rent—Decree in former suit.*—A suit for arrears of rent at a certain rate decreed in a former suit may be maintained without notice under Reg. V of 1812; the decree itself being held to be sufficient notice. RAMJEEBUN BOSE v. TRIPOORA DOSSEE, **W.R.F.B. 93=Marsh 396=2 Hay 449.**

(2)—*Payment of Tehwari and Salami—Reg. V of* 1812.—*Held* that certain items designated *tehwari* and salami, not being uncertain and arbitrary in their character, were not illegal cesses, but specific sums which the tenants agreed to pay to the landlord as part of the consideration upon which the tenancy was created, and were therefore recoverable under the Reg. V of 1812. PUDMANAND SINGH BAHADUR v. BAIJ NATH SINGH, **15 C. 828.** (11 C. 175, *R.*) [*Diss.*, 17 C. 726, F.B.]

(3)—*See* APPEAL—ACTS AND REGULATIONS, 3 W.R. Mis. 17.

(4)—*See* ENHANCEMENT OF RENT—ENHANCEMENT, NOTICE OF, W.R. 1864, 312, 2 W.R. Act X, Rul. 73.

(5)—*See* EXECUTION OF DECREE—EXECUTION BY COLLECTOR, 22 W.R. 212.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(6)—*See* LANDLORD AND TENANT—FORFEITURE, W.R. F.B. 34.

(7)—*See* RENT, SUIT FOR, W.R. F.B. 93.

(8)—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 5 W.R. P.C. 41=1 M.I.A. 383.

(9)—S. 3—*See* BEN. ACT VIII OF 1885, s. 2, cl. 4 and s. 179, 10 C.W.N. 527=4 C.L.J. 527.

(10)—S. 3—*See* APPEAL—ACTS AND REGULATIONS, 19 W.R. 170.

(11)—S. 3—*See* CESS, 22 C. 680.

(12)—S. 10—*See* ENHANCEMENT OF RENT—GENERAL, 12 B.L.R. 229, P.C.=19 W.R. 353.

(13)—*S.* 26—*Reg.* V *of* 1827, *s.* 3—*Appeal against order for attachment and appointment of manager.*—There is no appeal to the High Court against an order of the Judge of the District Court issuing a precept to the Collector to hold an estate in attachment and to appoint a manager under s. 26, Reg. V of 1812, and s. 3, Reg. V of 1827. *In the matter of the petition of the* COLLECTOR OF FURREEDPORE, **12 B.L.R. 366, F.B.**

(14)—*S.* 26—*Reg.* V *of* 1827—*Joint undivided estate—Management by Collector—Surplus profits, disposal of High Court's power of superintendence.*—When a joint undivided estate has been attached under s. 26, Reg. V of 1812, and made over to the management of a Collector under Reg. V of 1827, the Zillah Judge has jurisdiction to direct the Collector to divide the surplus profits of the estate among the several share-holders according to their respective shares, and the High Court cannot, under its general powers of superintendence over the Subordinate Courts, interfer with the order of the Judge. *In the matter of the petition of the* COLLECTOR OF RUNGPORE, **B.L.R. Sup. Vol. 655=7 W.R. 273=2 Ind. Jur. N.S. 178.**

(15 & 16)—S. 26—*See* APPEAL—ACTS AND REGULATIONS, 20 W.R. 262.

(17)—S. 26—*See* DISTRICT JUDGE, JURISDICTION OF, 20 W.R. 54.

——**Reg. VIII of 1812 (Saltpetre).**

[REP. BEN. REG. IV OF 1814.]

Effect of—*See* NIMAK SAYER MAHAL, 13 C.W.N. 454=36 C. 267=1 Ind. Cas. 967.

——**Reg. XIV of 1812 (Leases, Ceded and Conquered Provinces, Cuttack).**

[REP. ACT XXIX OF 1871.]

(1)—*S.* 2—*Construction.*—The proper construction of s. 2, Reg. XIV of 1812, is that the lease therein referred to is to be null and void as against the Government but not against the Court. KARUNNAKER MAHATI v. NILADHRO CHOWDHRY, **5 B.L.R. 652=14 W.R. 107.** [*R.*, 6 N.W.P. 373.]

——**Reg. XX of 1812 (Registry of Deeds).**

[REP., ACT XVI OF 1864.]

Regulations—continued.

——2.—**Bengal Regulations**—*concluded.*

S. 5—*See* NEGOTIABLE INSTRUMENTS—HUNDIS—MISCELLANEOUS, 4 W.R. 98.

——**Reg. I of 1814 (Stamps).**

[REP., BEN. REG. X OF 1829.]

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 9 W.R. 86.

——**Reg. IV of 1814 (Repealing Bengal Reg. VIII of 1812).**

[REP., ACT VIII OF 1868.]

Effect of—*See* NIMAK SAYAR MAHAL, 13 C.W.N. 454=36 C. 267=1 Ind. Cas. 967.

——**Act XIX of 1814 (Partition of revenue-paying estates).**

[REP. (IN AGRA), ACT XIX OF 1863; (IN BENGAL AND EASTERN BENGAL), BEN. ACT VIII OF 1876; (IN ASSAM, EXCEPT THE LUSHAI HILLS), REG. I OF 1886.]

(1)—*See* BURDEN OF PROOF—INTERVENORS, 17 W.R. 143.

(2)—*See* BURDEN OF PROOF—PARTITION, 16 W.R. 200.

(3)—*See* CONTRIBUTION, SUIT FOR—VOLUNTARY PAYMENTS, 5 W.R. 112.

(4)—Partition under—Revision by Civil Court—*See* JURISDICTION OF CIVIL COURTS, 4 C. 510.

(5)—*See* JURISDICTION OF CIVIL COURTS, 2 W.R. Mis. 51.

(6)—*See* PARTITION—EFFECT OF PARTITION, 16 W.R. 110.

(7)—*See* PARTITION—PARTITION, HOW EFFECTED, 22 W.R. 453, 5 C.L.R. 257, P.C.

(8)—*See* PARTITION—PRIVATE PARTITION, 66 P.R. 1869.

(9)—*See* PARTITION—RIGHT TO PARTITION, 17 W.R. 137, 21 W.R. 225.

(10)—*See* PARTITION—SUITS FOR PARTITION—JURISDICTION OF CIVIL COURT, 8 B.L.R. App. 72=17 W.R. 217, 16 W.R. 190, 6 W.R. 15, 18 W.R. 147, 2 B.L.R. App. 40 (*b*).

(11)—*See* PARTITION—MISCELLANEOUS, 4 B.L.R. App. 97, 1 B.L.R. S.N. 6.

(12)—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—SETTING ASIDE SALE AND ITS EFFECT, 8 B.L.R. 230=17 W.R. 21.

(13)—S. 3—*See* JURISDICTION OF CIVIL COURTS, 20 W.R. 182.

(14)—S. 4, cl. 2, s. 20—*See* JURISDICTION OF CIVIL COURTS, 6 B.L.R. 658=15 W.R. 471.

(15)—*S.* 9—Butwara—*Enhancement of rent—Jurisdiction—Reg.* XIX *of* 1814, *s.* 9, *Act* XX *of* 1859, *s.* 13.—Plaintiff and defendant were co-sharers in the same village. By a subsequent *butwara*, defendant's dwelling-house was included in plaintiff's share, and the Collector under s. 9, Reg. XIX of 1814, directed that it, together with 7 *bighas* of adjacent land, should be retained by defendant on his paying

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

plaintiff an yearly rent of Rs. 3 a *bigha*. Plaintiff then sued to enhance the rent. *Held* that the Revenue Courts had no jurisdiction to try a suit like this. *Per Glover, J.* The rent so fixed on that land must be considered the fixed rent of the homestead of the house and ground and not, therefore, capable of enhancement. SHAW KHAIRUDDIN AHMED v. SHEIKH ABDUL BAKI, **3 B.L.R. A.C. 65=11 W.R. 410.** [*F.*, 17 W.R. 151; *D.*, 16 W.R. 140.]

(16)—S. 9—*See* ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 9 W.R. 145.

(17)—S. 20—*See* LIMITATION ACT, 1908, art. 138, W.R. 1864, 30.

(18)—S. 20—*See* PARTITION—EFFECT OF PARTITION, 1 W.R. 323.

(19)—S. 20—*See* PARTITION — MISCELLANEOUS, 12 W.R. 134.

(20)—S. 20—*See* NO. 14, *supra*.

(21)—S. 30—*See* PARTITION — PRIVATE PARTITION, 2 C.L.R. 134.

(22)—S. 30—*See* PARTITION—RIGHT TO PARTITION, 5 W.R. 186.

——**Reg. XXVI of 1814 (Civil Procedure).**

[REP., ACT XII OF 1873.]

(1)—*See* REVIEW—JURISDICTION TO REVIEW, 8 W.R. 483.

(2)—S. 4—*See* REVIEW—REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE, 3 W.R. P.C. 45=7 M.I.A. 283.

(3)—S. 10—*See* NEW TRIAL, 1 W.R. P.C. 51=8 M.I.A. 199.

(4)—S. 10—*See* PRACTICE AND PROCEDURE, 9 M.I.A. 39.

(5)—S. 10—*See* PRIVY COUNCIL, PRACTICE OF—RE-HEARING, 1 W.R. P.C. 51=8 M.I.A. 199.

(6)—S. 10—*See* BEN. REG. IV OF 1793, 5 M.I.A. 271.

(7)—S. 10, cl. 3—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 1 W.R. P.C. 19=10 M.I.A. 1.

——**Reg. XXVII of 1814 (Vakils).**

[REP., ACT XVI OF 1874.]

(1)—S. 25—*See* COSTS — TAXATION OF COSTS, 6 W.R. Mis. 35.

(2)—S. 25—*See* LEGAL PRACTITIONERS—PLEADER — REMUNERATION, 1 Ind. Jur. N.S. 334=6 W.R. 108.

——**Reg. XXIX of 1814 (Bengal Ghatwali Lands.)**

[SHORT TITLE GIVEN, ACT I OF 1903. S. 3, REP. IN PT., S. 5 AM., ACT I OF 1903. DECLARED IN FORCE IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—*Ghatwali estates in Beerbhoom—Land taken for public purposes—Right of zemindar*

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

to compensation money—Right of Ghatwal to compensation money.—In the ghatwali estates, which are situated in the district of Beerbhoom and which have become a subject of special legislation (*viz.*, Reg. XXIX of 1814) neither the zemindar nor the under-tenants of the ghatwal have any right to claim a participation in the compensation money given for land, appertaining to the ghatwali estate, taken up for public purposes. As the title of a ghatwal is not that of an absolute owner, and as he is only entitled to enjoy the profits of the ghatwali mahal during his life without power of alienation, the compensation money obtained in respect of such land is only a money equivalent of a portion of that mahal. He can therefore only enjoy its interest without any right of spending any portion of it. He is bound to keep its interest as a part of the ghatwali property, so that his successor may obtain it, quite undiminished in value. The above observations apply only to the principal amount of the compensation money. But as to the interest which subsequently accrues, the ghatwal is entitled as absolute owner. RAM CHUNDER SINGH v. RAJA JOHER JUMMA KHAN, **14 B.L.R. App. 7 =23 W. R. 376.**

(2)—*See* GHATWALI TENURE, 18 W.R. 91, 9 C. 187, P. C.=9 I.A. 104.

(3)—S. 2—*See* GHATWALI TENURE, 22 C. 156.

(4)—S. 4—*See* ACT X OF 1870, 23 W. R. 376.

——**Reg. V of 1816 (Bengal Kanungos).**

[SHORT TITLE GIVEN, ACT I OF 1903. EXT. BEN. REG, I OF 1819, S 4 (1). SS. 1, 3 REP. IN PT., ACT XVI OF 1874, SS. 5, 11 AM. S. 10, REP. IN PT., ACT I OF 1903. REP. (IN ASSAM), ACT XII OF 1891.]

——**Regs. V of 1816, XII of 1817, I of 1819.**

Construction of—*See* PATNI TENURE, 2 Ind. Cas. 998.

——**Reg. VI of 1816 (Settlement, Cuttack etc.)**

[REP., ACT VIII OF 1868.]

Power of Courts to settle cases by oath—Reg. III of 1802—*See* ACT X OF 1861, 4 M. H.C. App. 3.

——**Reg. XI of 1816 (Succession, Cuttack),**

[REP., ACT XI OF 1893.]

S. 3—*See* HINDU LAW—INHERITANCE, 3 W.R. 116.

——**Reg. XIX of 1816 (Ferries).**

[REP., BEN. REG. VI OF 1819.]

(1)—Ferry right—Extinction of the right—Ben. Reg. XIX of 1816—Limitation Act, 1908, s. 23—*See* FERRY, 18 C. 652.

(2)—*See* BEN. REG. VI OF 1819, s. 3, B.L.R. Sup. 630=7 W.R. 191.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

——**Reg. V of 1817 (Hidden Treasure).**

[REP., ACT VI OF 1878.]

(1)—S. 6—*See* TREASURE TROVE, 4 W.R. Mis. 7.

(2)—S. 8—*See* HIDDEN TREASURE, 15 W. R. 525.

——Reg. **XII of 1817 (Bengal Patwaris.)**

[SHORT TITLE GIVEN, ACT I OF 1903. EXT., BEN. REG. I OF 1819, S. 4 (2). S. 32 SUPPLEMENTED, ACT XX OF 1848. SS. 2, 4, 5, 6, REP. SS 9, 11, 27, 31, 32, 33, REP. IN PT., ACT XVI OF 1874. SS. 8, 13, 15, 16, 17, 30, 33 REP. IN PT., SS. 26, 28 REP. ACT XII OF 1876. SS. 31, 35 AM., S. 32 REP. IN PT., ACT XII OF 1891. TITLE AND SS. 1, 23, 27, 29, 30 REP. IN PT., S. 18 A.M, ACT I OF 1903. REP (IN AGRA, EXCEPT IN CERTAIN AREAS), ACT XIX OF 1873; (IN ASSAM), ACT XII OF 1891. DECLARED IN FORCE IN THE SONTHAL PARGANAS; REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—Construction of—*See* PATNI TENURE, 2 Ind. Cas. 998.

(2)—S. 16.—*See* EVIDENCE ACT, I OF 1872, s. 35, 23 C. 366.

(3)—S. 16—Teiskhana Register prepared by patwari, not a public document—*See* EVIDENCE ACT, 1872, ss. 35, 74, 18 C. 534.

——**Reg. XX of 1817 (Bengal Police).**

[SHORT TITLE GIVEN, ACT I OF 1903. FORMS 2, 3, 8, 14 REP., REG. VII OF 1829. S. 30 (4) REP., ACT XVIII OF 1835. S. 27 REP., ACT X OF 1859. SS. 9, 12 TO 20, 22 TO 26 REP., ACT XVII OF 1862. SS. 1 TO 8, 10, 11, 29 (10), (11), 30 (3), (6), 31, 33, 34 REP., SS. 29 (1) TO (4), (9), 30 (2) REP. IN PT., ACT XVI OF 1874. S. 29 (5) TO (8) REP., ACT VIII OF 1875. S. 28, 32 REP., SS. 21 (10), 29 (1) TO (4) REP. IN PT., ACT XII OF 1876. S. 21, REP. LOCALLY IN BENGAL, BEN. ACT VI OF 1870, S. 2, AS MOD. BY BEN. ACT I OF 1871, S. 1. S. 21 REP. LOCALLY IN BENGAL, BEN. ACT V OF 1887, S. 38. TITLE AND S. 30 (HEADING) REP. IN PT., S. 29 (HEADING) & CL. (12) AM., FORMS 1, 4, 5, 7, 9 TO 12, 15 TO 21 REP., ACT XII OF 1891. REP. IN PT., (IN AGRA), ACT XVI OF 1873. REP. (IN ASSAM), ACT V OF 1897. S. 29 AND S. 30, CLS. 1, 2 AND 5, DECLARED IN FORCE THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6, AND SCH. IV, AS AMENDED BY ACT XII OF 1891. *Obsolete in Eastern Bengal.*]

(1)—Whether obliges *Daroga* to keep register of *Chowkidari chakran lands*—*See* EVIDENCE ACT, 1872, ss 32 (2), 35, 13 C.W.N. 71, 1 Ind. Cas. 376.

(2)—*S.* 10—*Stipulation in* kabuliat, *between* putnidar *and Zamindar, repayment of* dak *charges.*—A stipulation, in *putni Kabuliat* of

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

1855, between a zamindar and a *putnidar*, that the latter shall pay the salary and expenses of *amlahs* of *dak chowki* houses and appoint them and superintend their work, under the system of Zemindari *dak* then prevalent, imposes upon the *putnidar* the liability of paying *dak* charges, although the system of running *dak* has come to an end. JILLAR RAHMAN v. BIJOY CHAND MAHTAP, 28 C. 293. (3 W. R.S.C.C. Ref., 17, *F.*; 4 W.R. 6, *R.*)

(3)—S. 21—*See* LIMITATION ACT, 1908, art. 7, 18 W.R. 298.

——**Reg. III of 1818 (Bengal State Prisoners.)**

[SHORT TITLE GIVEN, ACT V OF 1897. SUPPLEMENTED, ACTS XXXIV OF 1850 AND III OF 1858. SS. 4, 9, REP IN PT., S. 8 REP., ACT XVI OF 1874. S. 9 A.M. ACT XII OF 1891. S. 4 REP. IN PT., ACT I OF 1903 DECLARED IN FORCE—THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT, EASTERN BENGAL AND AGRA, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, SS. 6, 7, IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.; IN THE ANGUL DISTRICT, REG. I OF 1894, S. 3; IN THE CHITTAGONG HILL-TRACTS, REG I OF 1900, S.4; IN THE ARAKAN HILL DISTRICT, REG. IX OF 1874, S. 3; IN LOWER BURMA, ACT XIII OF 1898, S. 8; IN UPPER BURMA (EXCEPT THE SHAN STATES), ACT XIII OF 1898, S. 4; IN KACHIN HILL-TRACTS, AS REGARDS HILL TRIBES, REG. I OF 1895, S. 3; IN CERTAIN TRACTS IN THE CHIN HILLS, REG. V OF 1896, S. 3; IN THE PUNJAB, ACT IV OF 1872, S. 3; DECLARED IN FORCE IN THE N.-W. FRONTIER PROVINCE, REG VII OF 1901, S. 4; IN THE CENTRAL PROVINCES AND THE DISTRICT OF SAMBALPURE, ACT XX OF 1875, S. 3; IN OUDH (WITH MODIFICATIONS, AND WITH THE EXCEPTION OF S. 10), ACT XVIII OF 1876, S. 3; IN AJMERE, REG. III OF 1877, S. 3; IN BRITISH BALUCHISTAN, REG. I OF 1890, S. 3.]

(1)—*Nature, validity and scope of Regulation —Reg.* III *of* 1818—*Applicability of Regulation to Calcutta—Impropriety of issuing writ where it will be disobeyed.*—Reg. III of 1818 having been passed by legislative authority which had no power to bind European British subject it must be taken as applicable, and enacted with reference only to natives and other persons subject to the jurisdiction of the Provincial Courts. The Regulation appears to have been passed by the Vice-President in Council under the provisions of the 37 George III, c. 142, s. 8, not 13 George III, c. 63, s. 36. The Regulation is one which falls within that class of laws which authorizes the infliction of penalties, the privation of liberty, even the destruction of life, with a view to the future prevention of crime, and insuring the safety and well being of the public. It falls within the principle *salus populi suprema lex.* It

Regulations—continued.

——2.—Bengal Regulations—*continued.*

makes provision against the possibility that the party may be confined on charges which may be false and malicious and which he has no opportunity of answering. It was passed by legislative authority having full power to enact it as it stands. It does no more than give to the Governor-General in Council a power analogous to that which the Parliament of the United Kingdom exercises when by a legislative enactment it suspends the *Habeas Corpus* Act. In enacting Act III of 1818 which extended the effect of the Regulation to Calcutta, the Indian Legislature did not exceed its powers. Where the Superintendent of the jail holds the prisoner under a warrant in writing of the Governor-General in Council, such order must prevail as against the command of any writ which the High Court has the power to issue. In such a case, the Court ought not to issue a writ which it would be the duty of the Superintendent of the jail to disobey. *In the matter of* AMEER KHAN, **6 B.L.R. 392.**

(2)—British subject arrested in Calcutta and detained in the mofussil—*See* ACT OF STATE, 6 B.L.R. 392.

(3)—Inferences to be drawn from fact of deportation under—*See* LIBEL, 13 C.W.N. 895=6 M.L.T. 73=36 C. 883=3 Ind. Cas. 224.

(4)—Deportation under—Libel—Mitigation of damages—*See* LIBEL, 14 C.W.N. 713=1 Ind. Cas. 81=37 C. 760.

(5)—*See* MAIN PRIZE, WRIT OF, 6 B.L.R. 456.

(6)—S. 2—*See* HABEAS CORPUS, 6 B.L.R. 459.

——Reg. I of 1819 (Bengal Kanungos and Patwaris.)

[SHORT TITLE GIVEN, ACT I OF 1903. SS. 1, 2, 3 REP., ACT XII OF 1873. TITLE AND S. 4 (5) REP. IN PT, ACT XII OF 1891. S. 4 AM., S. 4 (6) REP. IN PT., ACT I OF 1903, REP. (IN AGRA, EXCEPT CERTAIN AREAS), ACT XIX OF 1873; (IN ASSAM), ACT XII OF 1891. DECLARED IN FORCE IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

Construction of—*See* PATNI TENURE, 2 Ind. Cas. 998.

——Reg. II of 1819 [Bengal Land-revenue Assessment (Resumed Lands).]

[SHORT TITLE GIVEN, ACT I OF 1903. SS. 11, 12, 13 (3), 14, 19 EXT., BEN. REG. VII OF 1822, S. 19 (2). SS. 5, 6, 8, 10, 11, 13, 15, 22; AM., BEN. REG. IX OF 1825, S. 5. AM., BEN. REG. XIV OF 1825, S. 6. SS. 22 TO 24 AM., BEN. REG. III OF 1828, S. 10. S. 30 REP., BEN. ACT VII OF 1862. S. 19 (2) REP., ACT XII OF 1873. SS. 2, 24 (2), 25, 27 REP., SS. 19 (1), 20, 21, 26 REP. IN PT., ACT XVI OF 1874. SS. 11, 19 REP. IN PT., ACT XII OF 1876. S. 29 REP. SS. 4, 12 REP. IN PT., SS. 6, 12, 26 (2) AM., ACT XII OF 1891. S. 3 (1) REP. IN PT., SS. 13 (3), 14, 21 (2) AM., ACT I OF 1903. REP. (IN AGRA, EXCEPT CERTAIN AREAS) ACT XIX OF 1873; (IN ASSAM EXCEPT THE LUSHAI HILLS), REG. I OF 1886. DECLARED IN FORCE—THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6; IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3 AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—*Milkiat* property, released after proceedings held under Regulation, covered by entry in Collectorate register of revenue-free estates—Ordinary *milkiat* property not so registered—Distinction—Applicability of s. 78, Bengal Act VII of 1876, to such estates—*See* BEN. ACT VII OF 1876, s. 78, 35 C. 747.

(2)—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 4 M.I.A. 466.

(3)—Purview of—*See* CIV. PRO. CODE, 1908, ss. 92 and 93, 2 C L.J. 431.

(4)—Resumption proceedings—Question whether lands are endowed or not—Adjudication not final nor foreign to enquiry—*See* DEBUTTER PROPERTY, 6 Ind. Cas. 26.

(5)—*See* JURISDICTION OF CIVIL COURTS, 17 C. 590=17 I.A. 40.

(6)—*See* LIMITATION—MISCELLANEOUS, 4 M.I.A. 466.

(7)—*See* PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTION, 4 M.I.A. 466=1 Sar. 385.

(8)—*See* BEN. REG. XIX OF 1793, s. 10, 8 B.L.R. 566 P.C.=14 M.I.A. 152=20 W.R. 459.

(9)—*See* RESUMPTION, RIGHT OF—GENERAL, 1 W.R. 116.

(10)—*See* RESUMPTION, RIGHT OF—PRACTICE AND PROCEDURE, 3 W.R. P.C. 45=7 M.I.A. 283.

(11)—S. 16—*See* RESUMPTION, RIGHT OF—PRACTICE AND PROCEDURE, 13 W.R. 180.

(12)—*S.* 30—*Act* X *of* 1859, *s.* 28—*Lakhiraj—Resumption—Revenue and Civil Courts—Jurisdiction.*—The plaintiff, the purchaser of a putnee lease, sought to obtain a declaration of his *mal* right by setting aside an alleged rent-free tenure in certain lands held rent-free from the time of a former talookdar, alleging that he had called for the defendant's documents; and, as the defendants refused to produce them, the plaintiff instituted this suit before the Collector under Reg. II of 1819. The defendant pleaded a lakhiraj title from before 1790. The suit was referred to the Civil Court under Bengal Act VII of 1862, and the plaintiff obtained a decree. On appeal by the defendant,—*Held* that, prior to the passing of Reg. II of 1819, under their ordinary jurisdiction, the Civil Courts were competent to entertain regular suits by zemindars for declaration

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

of their right to resume revenue illegally alienated subsequently to 1790, and for possession of the land held rent-free under grants of titles which had their origin subsequently to 1790. *Held, by Trevor, J., Seton-Karr, J., and Glover, J.*, that such suits were unaffected by the passing of Reg. II of 1819, s. 30, which related only to resumption of lakhiraj existing prior to 1790. *Norman, C.J., Phear, J., and Jackson, J., dissenting held* that, since the passing of Reg. II of 1819, regular suits for the resumption of *all* tenures held rent-free, in which the defendant alleged a valid rent-free grant, have been instituted and down to the passing of Bengal Act VII of 1862, might have been maintained or referred to the Collector under s. 30 of that Regulation. *Held*, by a majority of the Court (*dissentientibus Trevor, J., Seton-Karr, J., and Glover, J.*) that the jurisdiction of the Civil Court to try this cause was not affected by s. 28 of Act X of 1859. SONATAN GHOSE v. MOULVI ABDUL FARAR, **B. L. R. Sup. Vol. 109=2 W.R. 91.** [*F.*, 2 W.R. 258, 7 W.R. 470; *Appr.*, 8 B.L.R. 566=14 M.I.A. 152=20 W.R. 459; *Appl.*, 16 W.R. 173; *R.*, B. L. R. Sup. Vol. 162, 4 W.R 53, B. L. R. Sup. Vol. 774=9 W.R. 1, F.B., 8 B. L. R. App. 85, Note=15 W.R. 474, 8 B.L.R. App. 87, Note=15 W.R. 440, 24 W.R. 447, 8 C. 230, 16 C. 449; *D.*, 34 C. 223=5 C.L.J. 192.]

(13)—*S.* 30—*Resumption—Decrees—Presumption—Errors of procedure—Invalid decrees.*—In a suit for resumption where plaintiff stated that defendant was holding the land in dispute under a pretended *lakhiraj* title, without specifying whether that title was anterior or posterior to December, 1790, it was found that defendant had not proved that his alleged *lakhiraj* existed prior to that date, and the suit was decreed. *Held* that, from the fact of the Court having adopted a procedure which is only sanctioned in the special cases provided for by s. 30, Reg. II of 1819, it was not a necessary inference that the decree was made under that Regulation. *Held*, that, even if made under s. 30, Reg. II of 1819, a resumption-decree bearing an earlier date than 2 W.R. F.B., 9 would not establish that the grant resumed was of earlier date than 1st December, 1790. A decree made under Reg. II of 1819 prior to 2 W.R. F.B., 9, for the resumption of grants of latter date than 1st December, 1790, cannot be held to be void, for error in procedure in a trial does not *per se* render void a decree which, on the face of it is one the Court was competent to make. MADUSUDHAN SAGORY v. NIPAL KHAN, **8 B.L.R. App. 87, Note=15 W.R. 440.** [*F.*, 8 B.L.R. App. 82=17 W.R. 363; *Appr.*, 8 B.L R. App. 85, Note=15 W.R. 474; *Expl.*, 16 C. 449.]

(14)—S. 30—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 2 W.R. 302.

(15)—S. 30—*See* COLLECTOR, 1 Ind. Jur. O. S. 84.

(16)—S. 30—*See* COLLECTOR, W.R. F.B. 70, Marsh 265=2 Hay 107, Marsh 483.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(17)—S. 30—*See* LAKHIRAJ TENURE, B.L. R. Sup. Vol. App. 8=2 W.R. 207.

(18)—S. 30—*See* BEN. REG. XIX OF 1793, s. 10, B.L.R. Sup. App. 8=2 W.R. 207, B.L.R. Sup. Vol. 162.

(19)—S. 30—*See* RES JUDICATA—COMPETENCY OF COURT, W.R. F.B. 70=Marsh 265=2 Hay 107, 1 W.R. 218.

(20)—S. 30—*See* RESUMPTION, RIGHT OF—GENERAL, W.R. 1864, 132, 2 W.R. 91.

(21)—S. 30—*See* RESUMPTION, RIGHT OF—PRACTICE AND PROCEDURE, 15 W.R. 483.

———**Reg. VI of 1819 (Ferries.)**

[REP., (EXCEPT IN BENGAL AND EASTERN BENGAL) ACT XVII OF 1878 (IN BENGAL AND EASTERN BENGAL), BEN. ACT I OF 1885.]

(1)—*Reg.* VI *of* 1819, *not applicable to farmer of tolls.*—However analogous the position of a farmer of tolls and a farmer of a ferry may be, Reg. VI of 1819 which applies to the former does not extend to the farmer of the tolls. *In the matter of the petition of*, BUNKOBEHARRY GHOSE, **11 W.R. 26.**

(2)—*See* CONTRACT ACT, 1872, s. 23, 2 A. 411 F.B.

(3)—*S.* 3—*Reg.* XVIII *of* 1806, XIX *of* 1816—*Act* VIII *of* 1859, *s.* 1—*Ferry—Resumption—Compensation.*—When a ferry previously held under private management has been declared to be a public ferry by the Government under s. 3, Reg. VI of 1819, an individual claiming compensation for the loss alleged to have been sustained by him in consequence of the extension of the authority of the Government, cannot maintain an action in the Civil Courts to enforce his claim. THE COLLECTOR OF PUBNA v. RAMANATH TAGORE, **B.L.R. Sup. Vol 630=7 W.R. 191.** [*R.*, 34 C. 470=5 C. L.J. 669=11 C.W.N. 356.]

———**Reg. VIII of 1819 (Bengal Patni Taluqs).**

[SHORT TITLE GIVEN, ACT V OF 1897. SUPPLEMENTED, AND APPLICATION OF SS. 9, 11, 13, 15 AND 17 EXT., BEN. REG. I OF 1820. S. 9, REP. IN PT. AND SUPPLEMENTED, ACT XXV OF 1850. SUPPLEMENTED, ACT VI OF 1853. SS. 18, 19, REP. ACT X OF 1859. AM., APPLICATION OF S. 13 EXT., S. 16 REP., BEN. ACT VIII OF 1865. APPLICATION OF S. 13 EXT. (IN ASSAM), BEN. ACT VIII OF 1869, S. 62, SS. 2, 3 (3) 8 (2), 9, 15 (2) REP. IN PT., ACT XVI OF 1874. TITLE AND PREAMBLE REP. IN PT., ACT XII OF 1891. SS. 9, 14 (2) AM., S. 17 (8) REP. IN PT., ACT I OF 1903. DECLARED IN FORCE IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—*Suit to set aside sale—Rights of unregistered proprietor.*—An unregistered proprietor of a putni tenure can sue to set aside a sale held under the Regulation. JOYKRISHNA MUKHOPADHYA v. SARFANNISSA, **15 C. 345.**

Regulations—continued.

——2.—**Bengal Regulations** —*continued.*

(2)—Puttah *as to* patni *taluqs including* jote jamas—*Sale for arrears of rent, inapplicability of the regulation as to.*—A *pattah*, by which certain specified Taluqs were granted on *patni* tenure by the predecessors-in-title of the present plaintiffs to those of the present defendants, included in it certain *jote jamas* and *lakheraj* lands as well and one entire annual amount was reserved as the rent due for the *patni* lands and the *jote jamas* together. *Held* that inasmuch as, by the above settlement on lease, which included *jote jama* and rent-free lands, there was no appropriation of what the rent was in respect of the land covered by the *patni* tenure and what the rent was that was reserved in respect of the *jote jamas*, the settlement cannot be properly regarded as a *patni* tenure within the meaning of the Regulation so as to warrant proceedings of sale for arrears of rent under the same. Also, where, in point of law the Regulation has no application, the mere fact that the parties have stated that it shall apply cannot render the same applicable. HAYES v. RUDRANUND THAKUR, **33 C. 381=3 C.L.J. 373.**

(3)—*Unregistered tenant—Notice of sale not given—Suit to set aside sale and to recover possession.*—Plaintiff sued for a declaration of his right to, and for possession of, a certain tenure which stood in the name of one C; the plaintiff alleged that the right, title and interest of the latter in the tenure were sold in 1863 in execution of a decree held by the talukdar, K, and that her husband had then become the purchaser. The talukdar subsequently brought a suit against C for rent and ejectment and obtained an *ex parte* decree in execution of which he ousted the plaintiff's husband. The plaintiff brought this suit after the death of her husband. The defendant pleaded that the plaintiff ought to have paid the rent decreed against the recorded tenant and that her failure to pay the same made the plaintiff liable to be ejected. *Held* that until the plaintiff adopted means to have her name registered in the zamindar's *serishta* and was so registered as transferee, the defendant was not bound to give notice to the plaintiff to pay the arrears of rent due on the tenure which he had purchased and that the plaintiff's suit should be dismissed. BHOBO TARINEE DOSSEE v. PROSONNO MOYEE DOSSEE, **13 B.L.R. 150, Note.**

(4)—*Sale of tenure—Purchaser's name not registered—Sale—Notice.*—A suit by the purchaser of a tenure which is liable to be sold under Reg. VIII of 1819, who has not registered his name as tenant, for the reversal of the sale on the ground of no notice of sale having been served upon him, is liable to be dismissed, inasmuch as an unregistered tenant is not entitled to notice of sale. DHUNPUT SINGH ROY BAHADOOR v. VILLAYET ALI, **13 B.L.R. 153, Note=15 W.R. 211.**

(5)—*Rent sale under Bengal Reg.* VIII *of* 1819—*Notice of sale—Mode of service—Validity of sale.*—The procedure laid down in Reg. VIII of 1819 as to service of notice must be strictly followed to give validity to a sale under it; so that where service upon the defaulter personally was proved, but not service at his *kachari*, *held*, the sale must be set aside. MAHOMED ZAMIR v. ABDUL HAKIM, **12 C. 67.** (9 C. 619 =10 I.A. 19, 9 C. 931, *F.*) [*F.*, 27 M. 94= 13 M.L.J. 479; *Appl.*, 19 C. 699; *Expl.*, 19 C 703.]

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(6)—*Attachment for arrears of rent—Wrongful attachment—Liability to account for receipts and disbursements under.*—Under Regulation VIII of 1819, a sezawal cannot be deputed and lands attached under its provisions, unless the arrears of rent claimed shall have been actually due for an entire month before the date of attachment. Whenever a person is proved to have exercised the power of attachment alluded to above illegally, he is bound to give a true and full account of all receipts (unauthorised cesses not excepted) and disbursements made by his agents, during his attachment, and only such disbursements as are shown to be necessary and *bona fide* can be allowed. GOBIND CHUNDER BURMONO v. ALLABUX, **2 Hay 347.**

(7)—*Putni Regulation* (VIII *of* 1819)—*Putni sale—Claim by se-putnidar in the surplus sale-proceeds.*—A se-putnidar who is not an assignee of the defaulter-putnidar is not entitled to participate in the surplus proceeds of the sale of the putni for its own arrears held under the Putni Regulation. MOTI LAL GHOSE v. BISSESSUR HAZARA, **3 C.W.N. 60.**

(8)—*Arrears of rent—Patni sale—Purchaser.*—No sales for arrears of rent, not even sales under Reg. VIII of 1819, have *ipso facto* the effect of cancelling tenures created by defaulting owners; they merely give to a purchaser the power to cancel such tenures if he thinks proper. MADHUSUDHAN KUNDU v. RAMDHAN GANGULI, **3 B.L.R. A.C. 431=12 W.R. 383.**

(9)—*Scope of Regulation.*—Reg VIII of 1819 was intended to apply to leases that might have been avoided by the grantor or his heirs during the time that the rule of 1793, rendering all leases granted for a term exceeding ten years, was in force, but which (so far from having been avoided) had been acted upon by both parties, after the expiration of the ten years, and were treated and considered as in existence at the time of the passing of the Regulation. SHEO PESHAD SINGH v. KALLY DASS SINGH, **5 C. 543=5 C.L.R. 138.**

(10)—*Proceedings under Reg.* VIII *of* 1819 *for recovery of rent and sale of tenure—Illegal exaction of rent—Act* X *of* 1859, *s.* 23, *cl.* 2.—Where, a tenant, on his tender of the balance of rent being refused by the Zemindar, had deposited it in the Munsif's Court under s. 46 of Act VIII of 1869 (B.C.), the Zemindar got an order for sale of the tenure, upon proceedings under Reg. VIII of 1819, despite the tenant's protest that the rent had been already

Regulations—continued.

— 2.—**Bengal Regulations**—*continued.*

paid, and the tenant paid the rent claimed again to prevent the sale, a suit for the recovery of the amount by the tenant was one cognizable by the Small Carse Court, under s. 6, Act XI of 1865, and therefore a special appeal was barred by s. 27, Act XXIII of 1861. As the Zamindar had recourse to the provisions of law to bring the tenure to sale, it was not an "illegal exaction of rent" so as to bring the tenant's suit, for the recovery of the sum paid by him, under cl. 2, s. 23 and s. 10 of Act X of 1859. KRISHNA KISHOREE SHAHA v. BISESHUR MOZOOMDAR, **4 C. 595=3 C.L.R. 177.** (2 Hay 519, *F.*)

(11)—*Notice — Irregularity — Sale, setting aside.*—In a suit to set aside a sale held under the Putni Regulation, it was found that the notices were stuck up in the Collector's Office Board, outside the Court, from 10 A. M. to 5 P. M., and were not put up at all on Sundays. *Held* that this was a sufficient compliance with the terms of the Regulation. SACHI NANDAN DUTTA v. MAHARAJ BEJOY CHAND MAHATAP BAHADUR, **11 C.W.N. 729.** (32 C. 953, *Expl. & D.*)

(12)—*Patni tenure—Creation of tenure—Two estates comprised in one tenure—Power given by Kabuliyats to bring tenure to sale under Reg.* VIII *of* 1819, *legality of—Suit for declaration that tenure liable to sale under Regulation —Party—Collector not made party to suit—Suit improperly framed—No declaration should be made.*—A patni tenure comprised two estates bearing separate *towji* numbers. By the kabuliyat, express power was given to the landlord, in default of payment of any part of the rent due for any year, to bring the tenure to sale under Reg. VIII of 1819. The landlord made two applications to the Collector to sell the tenure under the Regulation. Both were refused, and on the second occasion, the Collector's action was upheld by the Board of Revenue. The landlord brought a suit for rent and interest and a declaration of his right to have the tenure sold under the Regulation. The Collector was not made a party to the suit. *Held*, that the Collector ought to have been made a party, and that, the suit not being properly framed, no declaration should be made. MANINDAR CHANDRA NANDI v. ANNODA MOHAN ROY, **15 Ind. Cas. 586.**

(13)—*Sale set aside—Rent for period between sale and reversal, patnidar, liable for.*—When a sale of a *patni* under Reg. VIII of 1819 is subsequently set aside, the zemindar is entitled to rent from the patnidar for the period intervening between the sale and its reversal. If the patnidar has been dispossessed by the auction-purchaser during this period, he will be entitled to mesne profits from the latter. AMRITA SEKHAR BANERJEE v. BEJOY CHAND MAHTAB, **4 C.L.J. 547.**

(14)—This circular declares that certificate of payment of purchase-money of tenure sold

Regulations—continued.

—2.—**Bengal Regulations**—*continued.*

under Reg. VIII of 1819 is not liable to stamp as conveyance. **Rev. Cir. No. 4, 25 W.R. Rev. Cir. 6.**

(15)—*See* ABATEMENT OF RENT, 1 C.L.R. 526.

(16)—*See* BEN. ACT VIII OF 1885, s. 184, art. 2 (*b*), sch. III, 23 C. 191.

(17)—*See* BEN. ACT VIII OF 1885, s. 195 (*e*), 17 C. 162.

(18)—*See* BURDEN OF PROOF—RENT, SALE FOR ARREARS OF, 21 W.R. 397.

(19)—*See* EVIDENCE — MISCELLANEOUS, DOCUMENTS, 8 B.L.R. 504, P.C.=16 W.R. 29, P.C.=14 M.I.A. 259.

(20)—*See* EXECUTION OF DECREE—MISCELLANEOUS, 2 C.L.R. 283.

(21)—*See* LANDLORD AND TENANT — TRANSFER OF TENANT'S INTEREST, 12 W.R. P.C. 43.

(22)—*See* LIMITATION—MISCELLANEOUS, 11 W.R. P.C. 5=2 B.L.R. P.C. 10=12 M.I.A. 244.

(23)—*See* LIMITATION ACT, 1908, arts. 29, 62, 30 C. 440=7 C.W.N. 520.

(24)—*See* LIMITATION ACT, 1908, art. 139, 4 B.L.R. App. 86=13 W.R. 267, 11 W.R. 102.

(25)—*See* LIMITATION ACT, 1908, art. 144, 19 C. 787.

(25-*a*)—*See* PATNI TENURE, 6 W.R. 8.

(26) — *See* PRINCIPAL AND AGENT — AUTHORITY OF AGENTS, 14 W.R. 36.

(27)—*See* RENT, SUIT FOR, 2 B.L.R. P.C. 10=11 W.R. P.C. 5=12 M.I.A. 244.

(28)—*See* RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, 12 W.R. P.C. 43=3 B.L.R. P.C. 48=13 M.I.A. 160.

(29)—*See* REVIEW—GROUND FOR REVIEW, 17 W.R. 182.

(30)—*See* RIGHT OF SUIT—GENERAL, 3 C.L.J. 288.

(31)—*See* SALE—SALE FOR ARREARS OF RENT—GENERAL, 1 C.L.R. 236.

(32)—*See* SALE—SALE FOR ARREARS OF RENT—DEFAULTERS, W.R. F.B. 92.

(33)—*See* SALE—SALE FOR ARREARS OF RENT—DEPOSIT OF MONEY AND STAYING SALE, 13 C. 331, 11 W.R. 357.

(34)—*See* SALE—SALE FOR ARREARS OF RENT—INCUMBRANCES, 15 W.R. 446.

(35)—*See* SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 11 W.R. 87=9 B.L.R. 89, Note, 16 W.R. 128, W.R. 1864, 4, 24 W.R. 129, 24 W.R. 63, 20 W.R. 132.

(36)—*See* SALE—SALE FOR ARREARS OF RENT—SURPLUS PROCEEDS OF SALE, RIGHT TO, 20 C. 241.

(37)—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 6 B.L.R. App. 5=14 W.R. 283.

Regulations —continued.

——2.—**Bengal Regulations** —*continued.*

(38) — *See* VENDOR AND PURCHASER—BREACH OF WARRANTY, 18 W.R. 276.

(39 & 40)—*S.* 3, *cl.* 3—*Act* VIII *of* 1885 (*Bengal*), *s.* 3—*Rent, meaning of lease, construction of.*—Where by a *putni* lease, the annual *jama* (rent) was fixed at Rs. 6,000 and, besides the said rent, the putnidar (lessee) undertook to deposit into the Collectorate the Government Revenue of Rs. 40,156-4-9½ fixed for the share of estate granted in *putni* and payable by the lessor, *kist* by *kist*, failing which, the *putni* lease was to be cancelled and would become null and void and the landlord was to take *khas* possession. *Held*, that the payment by the *putnidar* of the Government Revenue, though no doubt was a part of the consideration to be tendered by the lessee for the enjoyment of the tenure, it was not money payable to the landlord and as such was not rent within the meaning of s. 3 of the Bengal Tenancy Act and could not be recovered as rent under the special provisions of the Putni Regulation. MAHARAJA BAHADUR SIR JOTINDRA MOHAN TAGORE v BIBI JARAO KUMARI, **3 C.L.J. 7=10 C.W.N 201=1 M.L.T. 8=33 C. 140, P. C=33 I.A. 30.**

(41)—*Ss.* 3, 6—*Compensation money—Apportionment—Putnidar, transferee of, and zemindar—Non-registration of transferee's name in Zemindar's sherista—Transferee, status of.*—The omission by a transferee from a putnidar to pay a fee and security to the Zemindar does not affect in any way his title. His rights are perfected upon the transfer by the putnidar and are not in any way contingent for their validity upon the payment of the fee and the security. The only effect of the failure of the transferee to secure registration of his name is that the landlord is not bound to recognize his purchase and may sell up his tenure in execution of a decree for arrears of rent obtained against the registered tenant. The status of a *putnidar* or *durputnidar* does not depend upon registration or consent of the zemindar. The compensation money in the hands of the Collector represents the value of the land acquired by the State. That sum has to be distributed amongst the holders of interest of different degrees in the land acquired Each claimant can prove the value of his interest, in other words, the measure of the loss sustained by him by the acquisition, and when he does this, he becomes entitled to a proportionate share of the compensation money. If the zemindar allow an abatement of rent to the *putnidar*, the rent abated primarily represents their annul loss, and they may reasonably claim, out of the compensationmoney, the capitalised value of that rent. But if they do not allow any abatement of rent, if they recover from the *putnidar* the whole of the original rent although the latter has lost the income derivable from the acquired portion of the land, they do not suffer any immediate loss by reason of the acquisition. GANPAT SINGH v. MOTI CHAND, **16 C L J. 301=17 Ind. Cas. 171.** (12 C. 622, 15 C. 345, *R.*)

(42)—Ss. 3, 11—*See* SALE — SALE FOR ARREARS OF RENT—INCUMBRANCES, 21 C. 720, N.

(43 & 44)—S. 5—*See* ABWABS, 9 Ind. Cas. 47.

(45)—*Ss.* 5 *and* 6—*Transferee of a putni—Deposit by unregistered transferee.*—The zemindar is not bound to accept payment of rent from an unregistered transferee of a *putni*, nor is he bound to recognise any deposit of rent made by such a transferee in his own name. A payment by the transferee, to prevent an impending sale, for which the zemindar had applied in spite of the tender and deposit of rent, cannot, therefore, be recovered back by suit. SAIBESH CHANDRA SARKAR v. KUMAR BONOWARI MUKUNDA DEB, **10 C.L.J. 453=4 Ind. Cas. 371.** (14 W.R. 489, 17 C. 162, 20 W.R. 380, P.C., *Relied upon*; 24 W.R. 63, *D.*)

(46)—Ss. 5 & 7 — *See* SALE—SALE FOR ARREARS OF RENT—RIGHTS AND LIABILITIES OF PURCHASERS, 20 C. 247.

(47)—*S.* 6—Putni, *share of, without the consent of the Zemindar, effect of—Co-sharer landlords collecting share of rent separately, if constitutes separate tenancy—Sale in execution of decree for share of rent, effect of.*—A purchaser of a share of a *putni* acquires a valid title in the property although his purchase was not recognised by the Zemindar. He is not exempted from liability for rent jointly with the transferor if the landlord chooses to recognise him as one of the joint-holders of the *putni*. S 6 of the Putni Regulation only prevents any splitting of the tenure and apportionment of the rent without the sanction of the landlord. (26 C. 103, *F.*; 11 W.R. 294, *D.*) One of the co-sharers in the Zemindari who had a 5 annas interest brought a suit for his share of the rent against the registered *putnidar* and obtained a decree, in execution of which, he sold a 5 annas interest in the *putni*. *Held*, that the effect of the sale was precisely the same as that of a sale under a money-decree; that is, the right, title and interest of the judgment-debtor at the time of the attachment passed. (20 W. R. 275, *D.*) No separate tenancy is constituted under a co-sharer landlord merely by his collecting his share of the rent separately from the tenant. AOSUB ALI PRAMANIK v. BISSESHURI, **8 C.L.J. 554.**

(48)—*S.* 6—*Appeal—Second appeal found unsustainable—Extraordinary jurisdiction of High Court.*—No appeal lies from an order of the Civil Court under s. 6 of Bengal Reg. VIII of 1819. A party appealing to the High Court, when the law gives him no right of appeal, cannot, at the hearing, ask the Court to treat the appeal as an application for the exercise of its extraordinary jurisdiction. *In re* SOORJA KANT ACHARJ CHOWDRY, **1 C. 383.**

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(49)—S. 6—*See* APPEAL—ACTS AND REGULATIONS, 25 W.R. 222.

(50)—S. 6—*See* LANDLORD AND TENANT—TENANTS' LIABILITY FOR RENT, 26 C. 103 =3 C.W.N. 38.

(51)—S. 6—*See* LANDLORD AND TENANT—TRANSFER OF LANDLORD'S INTEREST, 25 C. 445=2 C.W.N. 108.

(52)—S. 6—*See* NOS. 41, 45, *supra.*

(53)—S. 7—*See* No. 46, *supra.*

(54)—*Ss.* 7, 15—*Arrears of rent — Patni Talook*—Amaldastak.— If, by reason of the patnidar's not giving security, the Zamindar withholds his *amaldastak* and also abstains from availing himself of the power which the law gives him of collecting the rents himself, it would be inequitable to allow him to recover from the patnidar the rent which the withholding of the *amaldastak* has prevented his collecting. SREEMUTTY BIDHOOMOOKHI DEBI v. RAJA NILMONY SINGH DEO, **1 C. L R. 464.**

(55)—*S.* 8—*Construction of.*—The provision in s. 8 of Reg. VIII of 1819 requiring the notice of sale to be punished before the 15th Bysack applies to the notice to be published in the mofussil and not to the notice to be affixed at the Collectorate. The words "the same shall then be stuck up in some conspicuous part of the Cutchery" in s. 8 only mean that the petition should be stuck up in a conspicuous part of the Cutchery within a reasonable time before the sale. SHEIK NIAMAT ULLAH v. A.H. FORBES, **2 C.W.N. 459.**

(56)—*S.* 8—*Suit for rent — Publication of sale notice.*—If there is a *cutcheri* upon the land of the defaulting putnidar (*i.e.*, the land of the taluk in question), the notice, under s. 8 of Reg. VIII of 1819, must be published at that *cutcheri* ; if there is no such *cutcheri*, the notice must be published at the principal town or village within the taluk. THE MAHARAJAH OF BURDWAN v. KRISTO KAMINI DASI, **9 C. 931=13 C L.R. 427, F.B.** [*F.*, 12 C. 67.]

(57)—*S.* 8—*Sale of patni talook—Service of notice—Sufficient service—Defaulting co-sharer.*—A and B were co sharers of a patni which was sold for arrears of rent by the Zamindar and purchased by C. In a suit by A against B and C and the Zamindar, the plaintiff alleged that no sufficient notice had been given. *Held*, on the question of notice, that once it was found that the notice had been posted up in the cutcherry of the defaulter in accordance with cl. 2, s. 8, Reg. VIII of 1819, it was not essential to the validity of the sale that any other notice should have been given to the defaulters themselves, or that the service should have been verified in the manner directed by the section. JOTENDRO MOHUN TAGORE v. DEBENDRO MONEE, **2 C.L.R. 419.** (9 W.R. 242, 16 W.R. 80, *Cited & F.*)

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(58)—*S.* 8—*Sale of putni taluk for arrears of rent—Publication of notice.*—All the formalities required by Reg. VIII of 1819 must be strictly complied with, before a summary sale by auction of a putni taluk for a non-payment of rent should be proceeded with. The zemindar, who institutes the proceeding, is exclusively responsible for its regularity. The due service or publication of the notice should not be left a matter of controversy but the evidence should be secured immediately and exist in writing, and be referred to by the proper officer as part of the foundation of the sale. MAHARAJAH OF BURDWAN v. TARASUNDARI DEBI, **9 C. 619=10 I.A 19=13 C.L R. 34 P C.=4 Sar 414.** [*F.*, 9 C. 931, F.B. *on appeal*, 14 C. 365 P.C., 12 C. 67, 27 M. 94=13 M.L.J. 479; *Appl.*, 19 C. 699 ; *Rel. on.* 19 C. 703; *Expl.*, 14 C. 365, P.C.=14 I.A. 30; *R.*, 18 C. 363, F.B., 2 C.W.N. 459, 27 C. 308.]

(59)—*S.* 8—*Arrears of rent—Sale of putni tenure—Defect in notice required by Reg.* VIII *of* 1819, *s.* 8—*Notices of mid-year sales and of sales for a year's rent in default, under cls.* 3 *and* 2 *respectively, difference in.*—A zamindar having an interest in a putni taluq has under the provisions of Reg. VIII of 1819, a power of sale in the case of default in payment of the rent ; but that power of sale, which is given as a very summary remedy, and which may be exercised immediately on arrears arising, is given under important conditions, the fulfilment of which is of the utmost consequence not only to the person having a right to the taluq but to all those who have rights under him ; not only to the putnidars, but to the sub-lessees, mortgagees, and other incumbrancers whose rights may be affected or extinguished by the sale taking place. Such a power of sale is only exercisable subject to a condition as to notice to the defaulter. To bring into operation the provisions of cl. 3, s. 8, relating to a mid-year sale, the serving a notice, according to that section, intimating to the putnidar that payment of ¾ of the balance due will prevent a sale, is a condition precedent to any sale taking place under this clause. Where a notice relating to a mid-year sale followed cl. 2 instead of cl. 3, s. 8, and intimated that payment of the whole arrear would be the only way to stay the sale, *held*, that the notice was essentially defective. AHSANULLA KHAN BAHADUR v. HARI CHARAN MAZUMDAR, **20 C. 86, P.C.=19 I.A. 191=6 Sar. 252.** [*F.*, 20 C. 746.]

(60)—S. 8—*See* SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 2 Hay 398.

(61)—S. 8—*See* WITNESS—WEIGHT TO BE ATTACHED TO EVIDENCE, W.R. 1864, 381.

(62)—*S.* 8, *cl.* 2—*Statutory sale of under-tenure—"Substantial" construction of word—Special leave to appeal to Privy Council—Practice.*—The statutory sale of an under-tenure under Reg. VIII of 1819 cannot be set aside, because

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

one of the witnesses to the notice (which was in fact served) turns out not to be substantial. The High Court's construction of the word 'substantial' in s. 8 of the above Regulation, as meaning a wealthy man from whom damages could be recovered by the putnidar in the event of the attestation being false, was held by the Privy Council to be too limited a view; wealth being only one element in the position and status of the witness. If he lived in the neighbourhood, and was a respectable man and of good character, their Lordships saw no reason why the Judge might not properly come to the conclusion that he was a substantial person. [*R.*, 25 W.R. 141, 18 C. 363; *D.*, 14 C 365 = 14 I.A. 30, P.C.] Where special leave to appeal to the Privy Council is granted on a petition wherein material mis-statements are made, objections should be taken by the respondent by a preliminary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on, has been entered on. Where it was not clear that material mis-statement in the petition had been made with an intention to deceive, and the objection to the appeal was only taken at a late stage of the hearing, the Judicial Committee declined to dismiss the appeal, but refused the appellant the costs of the appeal. RAM SABUK BOSE v. KAMINEE KOOMAREE DOSSEE, **14 B.L.R. 394, P.C. = 23 W.R. 113 = 2 I.A. 71 = 3 Sar. 432.** [*F.*, 4 A. 500 = 9 I.A. 70, P.C.]

(63)—*S.* 8, *cl.* 2—*Suit for rent—Notice of sale.*—It is not enough if the notice of sale under Reg. VIII of 1819 is served upon the zemindar or his agent; the object of the Regulation being to make known also to the holders of the under-tenures and ryots and the residents of the place that the patni will be sold if the arrears are not paid off within the time specified, the notice must be stuck up in the zemindar's cutcherry as prescribed in cl. 2, s. 8 of the Regulation. If the notice of sale is not so published, there will be such a material irregularity as to avoid the sale. GOBIND LALL SEAL v. CHAUDHURRY MAITY, **9 C. 172.**

(64)—*S.* 8, *cl.* 2—*Service of notice of sale, proof of.*—Due service of notice in the manner prescribed by Reg. VIII of 1819, s. 8, cl. 2, is essential to the validity of the sale; so long as that service is effected, the provisions as to the verification of the service are merely directory and the non-observance of those provisions would not vitiate the sale. BHUGWAN CHUNDER DASS v. SUDDER ALLY, **4 C. 41 = 2 C.L.R. 357.** (9 B.L.R. 91 = 14 W.R. 489, 9 W.R. 242, 14 B L.R. 393 = 23 W.R. 113, *R.*; 25 W.R 14, *D.*)

(65)—*S.* 8, *para* 2—*Notice of sale of tenure under Reg.* VIII *of* 1819—*Mode of publication—Local publication of notices—Object—"Mofussil," construction of.*—If there is *katchari* on the land of the defaulting putnidar (*i.e.* the land which the zemindar is seeking to sell for default

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

of rent), the notice must be published there; and if there is no such *katchari*, it must be published at the principal town or village on the land in question. The notice must be published in the manner prescribed in s. 8, para. 2; service on the defaulting putnidar personally alone is insufficient. [*R.*, 17 C. 474, 19 C. 703, 27 C. 308.] The object of directing local publication of notices is to warn the under-lessees of the contemplated sale proceedings and also to advertise the sale to those who might bid; and this object would be frustrated if it were deemed sufficient to publish the notices at a distant *katchari* or to serve them personally on the putnidar. The word "mofussil" in "the notice required to be sent into the mofussil" in para. 2, s. 8 of the Regulation, is opposed to the *sadar katchari* of the zemindar, and refers to the subordinate estate, the subject of the sale proceedings. The failure by a zemindar to publish the notice of sale either at the *katchari* or any other place upon the land of the defaulting putnidar was *held* in the case to constitute a non-observance of "a substantial part of the prescribed process," and to afford "a sufficient plea" for the defaulting putnidar within the meaning of the Regulation. THE MAHARANI OF BURDWAN v KRISHNA KAMINI DASI, **14 C. 365, P.C. = 14 I.A. 30 = 4 Sar. 772.**

(66)—S. 8, cl, 2 — *See* SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 19 C 699, 2 W.R. 188, 9 W.R. 242.

(67)—S. 8. cl. 2—*See* STATUTE, CONSTRUCTION OF, 2 W.R. 188.

(68)—*S.* 8, *cls.* 2, 3—*Arrears of a half-year's rent—Sale—Non-compliance with substantial requirement of regulation justifying reversal of sale, when?—Non compliance, when not a ground of setting aside the sale—"Certificate to which effect," meaning of—Service sworn to before Munsif — Certificate of Munsif.*—If a zemindar chooses to bring into operation the provisions of cl. 3, s. 8, Regulation VIII of 1819, and to get a half-year's rent by means of the regulation, he must strictly comply with the condition laid down in that section. All the requirements in cl. 2 of s. 8, must be imported into cl. 3 of that section *mutatis mutandis*; therefore, the service of notice is a condition precedent to the sale being held and the notice so served must be a good notice, that is to say, it must be a notice, which shall put all parties concerned in saving the tenure from sale in possession of the knowledge of what really they will have to do if they desire to save the tenure and would-be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the property. A substantial compliance with the substantial portions of the Regulation is a condition precedent to the right of the zemindar to bring the tenure to sale under the provisions of the Regulation, and a non-compliance with any one

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

of the substantial requirements "is, in the words of s. 14, a *sufficient plea*" to set aside the sale. [*Affirmed*, 20 C. 86, P. C.] In mid-year sales for six months, arrears, the Legislature does not deal so harshly with the defaulter as it does in respect of a year's arrears of rent. In mid-year sales for six months' arrears, if a notice, instead of showing that the sale may be prevented by payment of the whole of the balance du , or of 75 % of such balance, states that the sale will take place unless the whole of the balance is paid, as in a proceeding under cl. 2 for the whole year's arrears, it is a non-compliance with a substantial requirement of the Regulation, such as to justify the reversal of the sale. [*Affirmed*, 20 C. 86, P.C.] The provisions of cl. 3 of s. 8 are not so stringent as those of cl. 2 of the same. Non-publication, therefore, of the petition to the Collector containing a specification of the balance of rent due, as required by cl. 3 is not a ground for setting aside the sale; similarly non-presentation of the petition on the precise day, the 1st Kartick, specified in cl. 3, s. 8, is no ground for setting aside the sale, the presentation of the petition on the 2nd Kartick, when the 1st was a Sunday, being a sufficient compliance with the section. [*R.*, 2 C.W.N. 459; *Affirmed*, 20 C. 86, P.C.] The words "*certificate to which effect*" in cl. 2, s. 8, mean a certificate to the effect that the peon did come before the Munsif or Police officer, as the case may be, and did make a voluntary oath as to the service of the notice. Where, after serving notice, the peon went before the Munsif with an affidavit which had been prepared and sworn to, the *jurat* of the Munsif would have been as much a certificate as if the peon had made a deposition on oath and the Munsif had recorded the fact of his so having made the deposition on oath. AHASANULLA KHAN BAHADOOR v. HURRI CHURN MOZOOMDAR, **17 C. 474.** [*Affirmed*, 20 C. 86, P.C.]

(68-*a*) - S. 8 cl. 3—*See* SALE—SALE FOR ARREARS OF RENT—RIGHTS AND LIABILITIES OF PURCHASER, 15 W R. 180.

(69)—*Ss.* 8 *and* 10—*Publication of notice of sale—Form of notice—Order as to lots to be sold.*—This was a suit to set aside a sale for arrears of rent held under Bengal Regulation VIII of 1819. Plaintiff alleged that the sale could not stand by reason of various irregularities in contravention of the rules especially as to the publication of the Zemindar's petition to the Collector and of the notice to the tenants under the 2nd clause of s. 8 of the Regulation. *Held*, the provisions of the Regulation have been seriously disregarded and the irregularities in the case are sufficient to vitiate the sale. The original petition and the original notice ought to have been stuck up and not certified copies of them. The notice must have specified, in order, the lots to be sold and should have throughout remained stuck up

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

until taken down at the time of the sale. BEJOY CHAND MAHATAP v. ATULYA CHARAN BOSE, **32 C. 953=3 C.L.J. 46.** [*Expl. & D.*, 11 C.W.N. 729.]

(70)—*Ss.* 8, 10, 14—*Patni sale only voidable, not void—Suit to set aside sale—Mortgagee of defaulting patnidar, if entitled to bring such suit—Notice in ss.* 8 *and* 10, *what to contain—One lot comprising several tenures—Notices specifying only one, bad—Sale irregular—Patni Regulations, provisions to be strictly complied with.*—A patni sale is not void, but only voidable, by reason of any irregularities in the transaction, and it can only be avoided by a suit under the provisions of s. 14 (1) of the Patni Regulation. (20 C. 746, 10 Ind. Cas. 90, 13 C.L.J. 404, 16 C.W.N. 805, *R.*) A mortgagee of the defaulting *patnidar* is entitled to bring such a suit. The notice mentioned in ss. 8 and 10 of the Regulation must contain the various lots to be sold with the amounts claimed in respect of them. Where a lot comprised three tenures and the notice specified only one: *Held*, that the notice was bad and the sale irregular and liable to be set aside. The provisions of the Patni Regulation, which allow of sales in a summary manner, must be strictly complied with. HARIHARNATH DAS v. RAJANI KANTA LAIK, **15 Ind. Cas. 537.**

(71)—*Ss.* 8, 11—*Reg.* I *of* 1820—*Act* X *of* 1859, *s.* 105—*Patnee—Durputnee—Transfer — Sale of putnee taluk for arrears of rent—Effect on durputnee*—A Zemindar had created a *patnee* tenure in respect of a taluk in his Zemindari. The *putneedar* had, in his turn, granted a *durputnee*. In execution of a decree obtained by the zemindar against his *putneedar* for arrears of rent due to him, he brought the *putnee* taluk to sale and purchased it himself. The Zemindar was, later on, put in possession of the property purchased by him. The *durputneedar* now sued to recover possession of the taluk by avoiding the sale. The question for decision was whether the purchaser of the *putnee* taluk could disturb the possession of the *durputneedar*. *Held* that, under the description *putnee taluk* and *durputnee taluk*, it must be *prima facie* intended that the tenure called a *putnee* tenure was one transferable by sale, and upon the creation of which, it was stipulated by the terms of the engagements interchanged that, in case of an arrear occurring, the estate might be brought to sale. If so, according to the terms of Reg. VIII of 1819, the tenure might not only be brought to sale, but it might be sold free from incumbrances. Consequently, according to the effect of s. 105 of Act X of 1859 and ss. 8 and 11 of Reg. VIII of 1819, and probably also of Reg. I of 1820, the effect of the sale of the *putnee* taluk was to destroy all incumbrances which had been created by the *putneedar* including the *durputnee*. The suit was therefore not maintainable. BRINDABUN CHUNDER SIRCAR CHOWDHRY v. BRINDABUN CHUNDER DEY CHOWDHRY, **13 B.L.R. 408=21 W.R. 324=1 I.A. 178, P.C.=3 Sar. 365.**

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

(72)—*Ss.* 8, 14—*Publication of notice—Onus—Putni sale set aside—Auction purchaser, right of.*—The burden of proving that the publication of the sale notice, if the same be in controversy, is duly made in compliance with Reg. VIII of 1819, is on the landlord. (9 C. 619, P.C., 14 C. 365, P.C., *R.*; 9 W.R. 242, *Expl.*) On the setting aside of a *putni* sale, the auction-purchaser, under s. 14, Reg. VIII of 1819, is clarly entitled to get back his purchase-money together with interest on it. BEJOYCHAND MAHATAB v. AMRITA LAL MUKERJEE, **27 C. 308.**

(73)—*Ss.* 8 (2) *&* 14—*Omission to serve notice—Prejudice.*—Omission of service of notice in strict compliance with s. 8 (2), on the spot or at the cutchery not 'sufficient plea,' under s. 14, in the absence of proof that under-tenants were prejudiced by the sale. GOUREE LALL SINGH v. JOODHISHTEER HAJRAH, **1 C. 359 = 25 W.R. 141.** [*D.*, 4 C. 41; *Diss.*, 2 C. 311; *R.*, 13 C.L.R. 429, 14 C.365 = 14 I.A. 30; *Compare*, 32 C. 953.]

(74)—*S.* 8, *cl.* 2 *&* s. 14—*Publication of notice.*—Non-publication of the notice of sale previous to the day of sale or receipt of notice on the date of sale not a 'sufficient plea,' within the meaning of s. 14, to set aside a sale. MATEENGEE CHURN MITTER v. MOORRARY MOHUN GHOSE, **1 C. 175 = 24 W.R. 453.** [*R.*, 1 C. 359; *Diss.*, 18 C. 363, F.B.] *See, also*, BAIKANTHA NATH SINGH v. MAHARAJAH DHIRAJ MAHATAB CHAND BAHADUR, **9 B.L.R. 87 = 17 W.R. 447**; RAM SABUK BOSE v. KAMINEE KOOMAREE DOSSEE, **14 B.L.R. 394, P.C. = 23 W.R. 113 = 2 I.A. 71.**

(75)—*Ss.* 8, *cl.* (2) *&* 14—*Putni tenure being sold for arrears of rent—Compliance with rules for publication of notice essential to validity of sale—Notice of sale not stuck up within the meaning of s.* 8, *cl.* 2—"*Sufficient plea*" *within the meaning of s.* 14 *to have sale set aside.*—Compliance with the rules for publication of notice in a conspicuous part of the Collector's Cutcheri, in accordance with s. 8, cl. (2) of Reg. VIII of 1819, is an essential preliminary to the validity of the sale. Where, upon evidence, it was established that the notice of sale was not stuck up at all within the meaning of s. 8, cl. 2 of Reg. VIII of 1819: *held* that it was a "sufficient plea" for the defaulting *putnidars*, within the meaning of s. 14, for having the sale set aside. RAJ NARAIN MITRA v. ANANT LALL MUNDUL, **19 C. 703.**

(76)—*Cl.* 3, *s.* 8 *and s.* 14—*Publication of notice.*—The words "cause similar publication to be made" in cl. 3 of s. 8 of Reg. VIII of 1819, refers to a publication similar to that, which is prescribed by the preceding cl. 2; the requirements in that clause, so far as the publication of the notice of sale and the period at which it is to be published, must be imported into cl. 3 *mutatis mutandis.* Reg. VIII of 1819 is a very important regulation and ought, as a rule, to be strictly observed. Non-compliance with the direction in s. 8, cl. 3, of the Regulation to publish the notice referred to therein before the 15th Kartick is a "sufficient plea within the meaning of s. 14 of the Regulation, for setting aside the sale. SURNOMOYI DEBYA v. GRISH CHUNDER MOITRA, **18 C. 363, F.B.** (1 C. 175, *Diss.*)

(77)—*S.* 9—*Suit to recover the deficiency for which defaulting purchaser is answerable, if maintainable in Civil Court.*—A suit to recover the deficiency for which defaulting purchaser is made answerable under s. 9 of Reg. VIII of 1819 is maintainable in a Civil Court. RAGHU RAM HAZRA v. MOHESH CHANDRA BANDOPADHYA, **7 C.W.N. 111.**

(78)—*S.* 9—*Agreement of putnidar with stranger for purchase by latter and reconveyance to former—Legality—Contract Act* (IX *of* 1872), *s.* 23.—A contract entered into by a *putnidar* with a stranger, stipulating that the latter would purchase the *putni* which had been advertised for sale under Reg. VIII of 1819, and reconvey it to the *putnidar* receiving the amount of the purchase-money with interest and a further sum in addition from him, is invalid under the provisions of s. 23 of the Contract Act, as being in contravention of the provisions of s. 9 of the Putni Regulation. MOHAN LAL BABU v. UDAI NARAIN BHADURI, **14 C.W.N. 1031.**

(79 & 80)—*S.* 9—*Purchase by one of the defaulters, effect of—Contribution, Suit for—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 61 *and* 99.—When, at a sale under Reg. VIII of 1819, a *putni* is purchased by one of the defaulters, there is nothing in the Regulation to make the sale absolutely void, though it is voidable. Payment of any rent for the *putni* by the purchaser, until the sale is set aside, is made on his own account. For a suit for contribution for such payment, against the former co-owners of the *putni*, the cause of action does not arise and limitation does not begin to run until the sale is set aside. MATANGINI DEBYA v. PRASONNAMOYEE DEBYA, **3 C.L.J. 93.**

(81)—*Ss.* 9, 13, *cl.* (3) (4)—*Payment of patni rent by* darpatnidar—*No* darpatni *rent due at the time—Payment from private fund—Possession taken by* darpatnidar—*Suit for arrears of* darpatni *rent—Set off, whether can be claimed by* darpatnidar *without rendering account—Eviction by landlord—Suspension of rent—What is necessary to constitute eviction—Actual physical expulsion, if necessary—Mesne profits, decree for, obtained by evicted tenant, whether revives claims for rent—Defaulting* patnidar *purchasing tenure—Evicting* darpatnidar—*Annulment of* darpatni.—The plaintiffs were the *patnidars* and the defendants *dar-patnidars* under them. The defendants, to preserve their own interest, made certain payments to save the *patni* from sale for arrears of rent under Regulation VIII of 1819, s. 13. While making the payments, the defendants stated that the rent due from them had been paid in full and that

Regulations —continued.

——2.—**Bengal Regulations**—*continued.*

what was paid was an advance from private funds. They then obtained possession of the *patni taluk*. The plaintiffs brought a suit for rent in respect of the *dar-patni*. The defendants did not offer to render an account of the sums collected by them during their possession of the tenure, but asked that the amount sought to be recovered by the plaintiffs may be set off against the amount deposited by them: *Held*, that the defendant's plea must be overruled, that they could not drive the plaintiffs to a separate suit to determine whether they had or had not by means of their possession already realized the amount advanced by them, and that the defendants were not entitled to claim a set-off. The principle of law is that a landlord who has evicted his tenant is not entitled to claim rent from him in respect of the period of eviction. (6 Ind. Cas 478, 11 C.L J. 591, 5 Ind. Cas. 105, 11 C.L.J. 601, *Rel. upon.*) To constitute an eviction within the meaning of the above rule, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord, with the intention of depriving the tenant of the benefit of the enjoyment of the demised premises or any part thereof, will operate as an eviction. (17 C.B. 30, 25 L J.C.P.44, 1 Jur. N.S 1099, 4 W.R. 56, 14 W. R. 58, *F.*) The fact that the evicted tenant has obtained a decree for mesne profits does not revive the claim for rent which was extinguished by reason of the misconduct of the landlord; the decree for mesne profits in his favour does not necessarily restore him to all the advantages he would have enjoyed, had his possession not been illegally disturbed. (13 W.R. 338, 6 Ind. Cas. 478, 11 C. L.J. 591, *Rel. upon*; 14 W.R. 43, *R.*) A defaulting *patnidar* purchased in the name of another person the *patni* in arrears, in contravention of the express provisions of s. 9 of the Patni Regulation, and took possession of the *dar-patni* tenure in the name of the ostensible purchaser: *Held*, that the *patnidar* was not entitled to annul the *darpatni* tenure created by himself, and as he, under colour of law, evicted the *darpatnidar*, he was not entitled to get any rent from the latter for the period of dispossession. KALANAND SINGH v. JARAO KUMARI, **17 Ind. Cas. 238**.

(82)—*Ss.* 9, 14—*Ejectment*—Putni *sale*—*Sale, when confirmed—Sale, when no balance due, if valid—Sale, when notice not served, if void — Sale, validity, if can be collaterally impeached— Costs.*—A sale under the *Patni* Regulation does not require to be confirmed. Such a sale becomes final and conclusive when the whole of the purchase money has been paid under s. 9 of the Regulation, and a suit to set aside a sale of *putni taluk* sold for current arrears of rent is to be instituted within one year from the date of such payment. (13 C.L. J. 339, *R.*) S. 14 of the *Putni* Regulation contemplates a suit for reversal of the sale on the ground that no balance was due. When a

Regulations—continued.

——2.—**Bengal Regulations** —*continued.*

putni sale is impeached on the ground that the notices required by the Regulation have not been duly served, the sale is voidable and capable of reversal in a suit properly constituted and commenced under s. 14 of the *Putni* Regulation. The validity of a *putni* sale may not be attacked collaterally in a suit for ejectment brought by the purchaser or his representative in interest. A judgment rendered by a Court having jurisdiction over the parties and the subject-matter, unless reversed or annulled in some appropriate proceeding, is not open to contradiction or impeachment in respect of its validity, verity, or binding effect, by parties or privies in any collateral action or proceeding. The position is different when a judgment shows on its face that it is void for want of jurisdiction either of the person or the subject-matter; such a judgment is treated as a nullity, collaterally impeachable by any person interested, wherever it is brought in question. But the doctrine has no application to a case where the validity of the sale is intended by the Legislature to be determined in a suit, properly constituted and brought in a Court of competent jurisdiction, within the time allowed by law, and against parties sought to be affected by the result. In deciding a question of costs, the Court is entitled to consider not merely the conduct of the parties in the actual litigation, but also the matters which led up to the litigation. RAMSONA CHOWDHURANI v. SONAMALA CHOWDHURANI, **13 C.L.J. 404=10 Ind. Cas. 90=16 C.W.N. 805.**

(83)—S. 10—*See* NOS. 69 and 70, *supra.*

(84)—*S.* 11—Res judicata—*Decision in rent suit by defaulting patnidar—Subsequent rent suit by purchaser of patni under Patni Regulation—Whether former decision* res judicata *in later suit—Action in ejectment by purchaser at patni sale—Limitation—Incumbrance—Adverse possession, when incumbrance.*—Although the position of a purchaser at a patni sale may not be precisely that of a purchaser at a revenue sale, (7 Ind. Cas. 849=13 C.L.J. 293=15 C. W.N. 706, *R.*) yet he is not privy in estate to the defaulting proprietor and does not derive his title from him, as, under s. 11 of the *Patni* Regulation, he acquires property free of all encumbrances that might have been created upon it by the act of the defaulter, his representatives or assignees. (5 B.L.R. App. 5= 14 W.R. 283, 12 C. 82(90), *Relied on.*) Therefore, a suit for rent by the purchaser cannot be barred as *res judicata*, because a previous suit for rent by the defaulter failed on the ground that the relationship of landlord and tenant between the then plaintiff and the defendant was not established. If an action in ejectment is brought by the purchaser, limitation will run against him only from the date when his purchase became final. (25 C. 167, *F.*) The interest of a person in adverse possession is an incumbrance only when the adverse possession had continued for the statutory period.

Regulations—continued.

——**2.—Bengal Regulations**—*continued.*

(11 Ind. Cas. 453=14 C.L.J. 136, *Relied upon.*) Therefore, where the defaulting *patnidar* was not dispossessed for ten years before the *patni* sale, the trespasser's title by adverse possession had not been prefected, and consequently there was no incumbrance to be annulled by the purchaser. SATISH CHANDBA SINHA v. MUNJANALI DEBI, **15 Ind. Cas. 869=17 C. W.N. 340.**

(85)—*S.* 11—*Cancellation of under-tenures—Sale for arrears.*—Lands appertaining to a certain talook were sold for arrears of rent under Reg. VIII of 1819. The plaintiff was holding the same from the owner under a *kaimi jumma* tenure. *Held* that under s. 11 of that Regulation, the plaintiff's tenure was cancelled. MOHINI CHUNDER MOZUMDAR v. JOTIRMOY GHOSE, **4 C.L.R. 422.** (4 C.L.R. 6, 10 M.I.A. 123, *R.*)

(86)—*S.* 11—*Arrears of rent—Sale of sub-tenures—Encumbrances—Regs.* VII *of* 1799, VIII *of* 1819, I of 1820 *and* VIII *of* 1831—*Act* X *of* 1859, *s.* 105.—Ben. Reg. VIII, s. 11 of 1819, it is true, gives express power to sell the tenure, free from all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives or assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. A mortgagee had foreclosed under Ben. Reg. XVII of 1806, and a decree was made in 1854 for possession of the mortgaged taluk. In 1855, a summary suit was brought by the zemindar against the heirs of the talukdar (the mortgagor) for arrears of rent, to which the mortgagee was not made a party. A decree for sale was made *ex parte*, and the taluk sold by auction, under Act VI of 1858. The mortgagee then brought a suit to recover possession of the taluk, and to set aside the sale by the zemindar for arrears of rent. *Held* reversing, the decision of the High Court, that, as it was an istimrari taluk the zemindar had no power, by the Bengal Regulations, or Act X of 1859, s. 105, to sell the tenure, and the sale declared invalid. FORBES v. BABOO LUTCHMEPUT SINGH, **10 B.L.R. 139, P.C.=17 W.R. 197=14 M.I.A. 330=2 Suther. 654=3 Sar. 27.** (W.R. F.B., 260, *Appr.*) [*R.*, 21 W.R. 94.]

(87)—*S.* 11—*Effect of Regulation--Putnidar.*—Effect of Ben. Reg. VIII of 1819, s. 11, in respect of *Putnee* tenures. *Held*, that a sale or transfer of *Putnee* tenure by a *Putneedar* is not binding, unless made in strict conformity with the provisions of that Regulation. Regulation VIII of 1819 regarding the relative rights of zemindars and *patni talukdars* considered. Where a share in a *putnee taluk* is transferred by a registered *putnidar* without the express consent of the zemindar and in disregard of the Regulation cited, the transfer is not binding on the zemindar. WATSON v. THE COLLECTOR OF JILLA

Regulations—cotninued.

——**2.—Bengal Regulations**—*continued.*

RAJSHAHYE, **3 B.L.R. P.C. 48=13 M.I.A. 160=12 W.R. P.C 43=2 Suther. 269=2 Sar. 500.** [*R.*, 8 C.L. J. 554; *L.*, 17 C. 398.]

(88)—S. 11—*See* RENT, 13 B.L.R. 198=21 W. R. 326.

(89)—S. 11—*See* SALE—SALE FOR ARREARS OF RENT—INCUMBRANCES, 21 C. 702.

(90)—S. 11, cl. 1—*See* PATNI TENURE, 15 W.R. 445.

(91)—S. 11, cl. 2—*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 5 W.R. Act X, Rul. 63.

(92)—*S.* 11, *cl.* 3—*Incumbrance—Cancellation of.*—A purchaser of a *putni* taluk at a sale held under Reg. VIII of 1819 is entitled to cancel the tenancy of those who are not *khudkasht* raiyats (*i.e.* resident and hereditary cultivators of the lands in dispute) and who do not come within the proviso to cl. 3, s. 11 of the Putni Regulation, and to eject them. It is immaterial whether they are occupancy or non-occupancy raiyats. JOGESHWAR MAZUMDAR v. ABED MAHOMED SIRKAR, **3 C.W.N. 13.**

(93)—*S.* 11, *cl.* (3)—*Incumbrance, annulment of — Raiyati rights* — Khudkasht *raiyat.*—A *raiyat* is not protected from ejectment under s. 11, cl. (3) of the *Putni* Regulation by a purchaser at a sale under the Regulation, unless he is a *khudkasht* or a resident cultivator. ISHAN CHANDRA NANDI v. GOUR MOHAN PODDAR, **15 Ind. Cas. 468.** (3 C.W.N. 13, *F.*)

(94)—S. 11—*See* NOS. 42, 71, *supra.*

(95)—Ss. 12, cl. 4, 18—*See* LIMITATION ACT, 1908, s. 12, 5 W.R. 100.

(96)—*S.* 13—*"Profits," meaning of--Mortgagee of tenure in possession under s.* 13—*Liability for rent.*—The word "profits" in the 4th clause of s. 13 of Reg. VIII of 1819 means that which remains to the putnidar after the payment of the rent of the putni. Where the subject of a mortgage is leasehold property, and the mortgagee is put in possession, under circumstances which amount to an assignment of the leasehold interest, the mortgagee becomes liable as a rule to pay the rent. (10 C. 443). So that, a mortgagee, who enters into possession of a tenure under s 13 of Reg. VIII of 1819, must pay the rent to the landlord, before applying the collections to the liquidation of his own debt; and consequently the tenure-holder will not be liable, in case of default, for the rent, during the period of such possession. LALA BHARUB CHANDRA KARPUR v. LALIT MOHUN SINGH, **12 C. 185.**

(97)—S. 13—*See* SALE—SALE FOR ARREARS OF RENT—DEPOSIT OF MONEY AND STAYING SALE, 8 C. 954.

(98)—S. 13, cl. 3—*See* SALE—SALE FOR ARREARS OF RENT—DEPOSIT OF MONEY AND STAYING SALE, 12 W.R. 313.

(99)—*S.* 13, *cls.* (3) (4)—Darputnidar, *deposit by—Possession obtained on untrue allegation—Rent, suit for, by* putnidar—Darputnidar, *if*

Regulations - continued.

—2. - **Bengal Regulations**—*continued.*

can set off—Putnidar, *defaulting, purchase by —Effect of —Partial eviction —Eviction, what is —Mesne profits, obtaining, effect of.*—A *darputnidar*, when he made a deposit to save the *putni* tenure from sale, stated specifically, that the rent due from him had been paid in full and what was lodged was an advance from private funds. Upon this representation deliberately made, he obtained possession of the *putni* taluk and was in possession when the *putnidar* brought a suit for rent for three years against him. It was found in the rent suit that the *darputnidar* when he made the deposit, was in arrear of a portion of the rent. *Held* that the *darputnidar* could not deduct the amount deposited from the claim of the rent under cl. (3) of s. 13 of the *Putni* Regulation, as his case fell under cl. (4) of that section. It was not open to him to resile from the position he deliberately took up at the time he made the deposit. A defaulting *putnidar*, by his purchase at a sale under the Putni Regulation, does not acquire a right to annul a *durputni* tenure created by himself or his predecessor. He cannot take recourse to the provisions of the *Putni* Regulation to enable him to effectuate a fraud upon the under-tenure-holder. Where the *putnidar* deliberately brought a *putni* tenure to sale, and, in defiance of a statutory provision, by purchasing the property himself, took possession of the *darputni* tenure in the name of the ostensible purchaser. *Held*, that the *putnidar* was not entitled to claim rent from the *darputnidar* in respect of the period of eviction. A landlord, who has evicted his tenant, is not entitled to claim rent from him in respect of the period of eviction. To constitute an eviction, it is not necessary that there should be an actual physical expulsion from any part of the premises; any act of a permanent character done by the landlord, with the intention of depriving the tenant of the enjoyment of the demised premises or any part thereof, will operate as an eviction. The fact that the evicted tenant has obtained a decree for mesne profits does not revive the claim for rent which was extinguished by reason of the misconduct of the landlord. The decree for mesne profits in his favour does not necessarily restore him to all the advantages he would have enjoyed, had his possession not been illegally disturbed. KAMALANAND v. JARAO KUMRI, **17 C.L.J. 96.**

(100)—*S.* 13 (4)—Dar-putnidar *put in possession for paying* putni *rent—Payment of further arrears when in possession—Payments of first charge on the* putni—*Bengal Tenancy Act* (VIII *of* 1885,) *s.* 171 (1), (*b*)—*Mortgagee's prior right to surplus sale proceeds—Contract Act* (IX *of* 1872), *s.* 69.—Where a *dar-putnidar*, having advanced certain arrears of rent due on a *putni* which was already subject to defendant's mortgage, was placed in possession of the *putni* under para. 4, s. 13 of Reg. VIII of 1819, and then, the plaintiff, an assignee of the *dar-putni*, paid the next three instalments of the *putni* rent, but failing to pay the fourth instalment,

Regulations - continued.

—2.—**Bengal Regulations**—*continued.*

the *putni* was sold under the Regulation: *Held* --That the plaintiff was not entitled to recover out of the surplus sale-proceeds the instalments of rent paid by him when he was in possession of the *putni*. That, as regards the arrears paid by the *darputnidar*, assuming that the amount was a charge on the *putni*, defendant's mortgage of prior date had priority over it. *Quære* —Whether it was open to the *darputnidar* to seek the relief provided by s. 171. sub-s. (1), cl. (*b*) of the Bengal Tenancy Act, and, if it was, whether the remedy was available after election by him of the remedy under s. 13, cl. (4) of the *putni* Regulation. *Held*, further, that the plaintiff could not claim on the basis of s. 69 of the Contract Act RAMJIBAN BHADRA v. TAZUDDIN KAZI, **15 C.W.N. 404 =9 Ind. Cas. 489**.

(101)—S. 13, cl. 4—Durpatnidar's lien, if superior to landlord's charge—*See* LANDLORD AND TENANT— MISCELLANEOUS, 7 C.L.J. 952=35 C. 737.

(102)—S. 13, cl. 4—*See* SALE—SALE FOR ARREARS OF RENT — DEPOSIT OF MONEY AND STAYING SALE, 4 B.L.R.F.B. 77=13 W.R.F.B. 1.

(102-*a*) -S. 13—*See* NO. 81, *supra*.

(103)—*Ss.*13 *and* 14, *cl.* (4)—*Under-tenure-holder making deposit—Suit for possession, if necessary—Lien when extinguished—Statutory lien—Contract how revived—Estoppel—Silence —Statement by putnidar, who has no interest, if binds transferee.—Per Stephen, J.*—A special suit to declare the lien, created by s. 13, cl. 4 of the *Putni* Regulation, terminated by satisfaction of the debt is unnecessary, when the plea of suit is set up as a reply to a claim for rent and the defendant uses it only as a basis for resisting that claim. The creation of a *gribi* estate is formal act both according to the language of Reg. VIII of 1819, s. 14, and according to universal practice and cannot be inferred from the conduct of parties. When a contract has terminated, it cannot be revived unless by the incorporation of its terms is a new one. *Per Mookerjee, J.*—The under-tenure-holder who makes the deposit under s. 13, cl. 4 of Putni Regulation is entitled to remain in possession only so long as the full amount advanced, with interest, is not realized from the usufruct of the tenure. If, after his debt has been satisfied, he does continue in occupation, he does so at his peril and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagee in possession who stays on the premises after his dues have been satisfied. The lien is extinguished by satisfaction of the debt from the profits of the tenure. No order of the Collector is necessary in this behalf, nor his recourse to a regular suit essential to alter the legal position of the parties. The moment the lien is extinguished, the defaulter becomes entitled to recover possession. S. 13, cl. 4 of the *Putni* Regulation makes it a condition precedent

Regulations—continued.

— **2.—Bengal Regulations**—*continued.*

to the creation of the lien that the amount lodged should be advanced from private funds and should be paid by the tenure-holder after he had already paid the whole of the rent due from himself. The lien in question is creation of the Statute; and statutory liens cannot be created by consent; the provision of the law must be strictly complied with before reliance can be placed upon the lien. A mere treatment of the under-tenure-holder by the landlord as a usufructuary encumbrancer is not sufficient to create the statutory lien. A statement in the plaint, unchallenged and made by the putnidar after his interest has been transferred is in no way binding upon the transferee. (1 C.L.J. 23=32 C. 357, *R.*) When silence is of such a character and under such circumstances that it would be a fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel. JAKHOMULL MEHARA v. SARODA PROSAD DEY, **7 C.L.J. 604.**

(104)—*S.* 14—*Limitation — Rent claim deposited to prevent sale—Excess rent, exaction of —Refund, Suit for—Special limitation under S.* 75, *Bengal Tenancy Act* (VIII *of* 1885) *and art.* 14, *Limitation Act* (1908), *applicability of.* —Where the putnidar sued for a declaration that the taluk held by him bore money rents and not paddy rents, and for refund of the amount deposited by him in excess of the proper rent under s. 14 of Reg. VIII of 1819: *Held*—That the suits were not governed by the special limitation prescribed by s. 75 of the Bengal Tenancy Act and by art. 14 of Act IX of 1908. S. 75 of the Bengal Tenancy Act contemplated exactions by means other than the process of law. Further, the special limitation prescribed by s. 75 of the Bengal Tenancy Act applies only where a tenant sues for penalty in addition to the excess amount realised by the landlord. It does not take away the right to recover the excess realised by the landlord, apart from the provisions of that section, within the ordinary period of limitation. The determination of what is the rent payable for a tenure is beyond the scope of the Collector's power under s. 14 of the Putni Regulation. The Collector's investigation and award under this section refer only to a particular demand and they do not stand in the way of a suit for declaration as to the proper rent payable for the tenure. To bring a suit for refund of the excess amount realised by the zemindar in proceedings under the Putni Regulation, it is not necessary to set aside the Collector's award under s. 14 of the Regulation. There is no provision of law for setting aside such an award. NAGENDRA LAL CHOWDHRY v. SRIMATI RAJU BIBEE, **17 C.W.N. 374=17 Ind. Cas. 504.** (24 A. 467, 29 C. 367, *D.*; 9 C.L.J. 91, *R.*)

(105)—*S.* 14—*Sale of putni taluk—Suit to set aside by unregistered proprietor—Right of suit.*—An unregistered proprietor of a putni

Regulations—continued.

— **2.—Bengal Regulations**—*continued.*

tenure can sue to set aside a sale held under Reg. VIII of 1819. Although a zamindar is not bound to recognise any one except the registered tenant, in any proceedings taken with reference to any matter connected with the tenure, it is nevertheless open to any person interested in that tenure, or, as the law puts it, "desirous of contesting the right of the zamindar" to sue him on account of any illegal act, by which his rights may have been affected in respect of that tenure. CHUNDER PERSHAD ROY v. SHUVADRA KUMARI SHAHEBA, **12 C. 622.** [*F.*, 15 C. 345.]

(106)—S. 14—*See* SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 20 C, 746, 21 W.R. 252.

(107)—S. 14—*See* VOLUNTARY PAYMENT, 26 C. 896.

(108)—S. 14, cls. 1 (6)—*See* SALE—SALE FOR ARREARS OF RENT — DEPOSIT OF MONEY AND STAYING SALE, W.R. 1864, 53.

(109)—S. 14—*See* Nos. 70, 72 to 76, 82, 103, *supra.*

(110)—S. 15— Confirmation of sale—Sale when becomes final and conclusive—*See* LIMITATION ACT, 1908, art. 12, 13 C.L.J. 339.

(111)—*Cl.* 1, *s.* 15—*Certificate under—Unregistered certificate.*—A certificate of payment under cl. 1, s. 15 of Reg. VIII of 1819 is admissible in evidence without registration. *Quære*—Whether an unregistered sale certificate under s. 315 of the old Civ. Pro. Code (of 1877), is admissible in evidence. ABDOOL AZIZ BISWAS v. RADHA KANTO KOBIRAJ, **5 C. 226.** (6 M. H.C. App. 39, *R.*)

(111-*a*)—S. 15—*See* No. 54, *supra.*

(112)—*S.* 17, *cl.* 3—*Arrears of rent of a patni.* —By cl. 3, s. 17 of Regulation VIII of 1819, arrears of rent for a patni being considered personal debts, a person who was no party to an original decree for arrears of rent on account of a patni cannot be held liable for them. INDER CHUNDER BANERJI v. ESHUN CHUNDER ROY, **1 Hay 474.**

(113)—*S.* 17, *cl.* (3)—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 65—*Conflict between—Rent—First charge.*—S. 65 of the Bengal Tenancy Act cannot be held to give to the landlord the first charge on the sale proceeds of a *putni mahal*, for arrears of rent due beyond those of the current year in which the sale took place or of the year which had expired, if the sale took place at the commencement of the following year, inasmuch as, under the provisions of s. 17 of Reg. VIII of 1819, such antecedent balances are expressly declared to be recoverable only as personal debts of the landlord. (6 C.W.N. 794, *Diss.*) There is a conflict between s. 65 of the Bengal Tenancy Act and s. 17, cl. (3) of the Reg. VIII of 1819. (6 C.W.N. 794, *Diss.*) Where the arrears of rent claimed are for balances due for periods prior to the current year, for which the arrears are due when the sale is held in the middle of the year,

Regulations – continued.

——2.—**Bengal Regulations**—*continued.*

or prior to the year proceeding if the sale be held at the commencement of the following year, these balances must be treated as personal debts recoverable under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the Tenancy Law, and in such a case, the provisions of s. 65 of the Bengal Tenancy Act would not have any application. JOGONATH v. SYED MOHI-UD-DIN MIRZA, **6 Ind. Cas. 371.**

(114)—*S.* 17, *cl.* (*c*)—*Antecedent balances, if recoverable by re-sale of the tenure.*—Under the provisions of s. 17, cl. (*c*) of the Putni Regulation, arrears of rent for a period antecedent to the period, to recover the rent of which the tenure had been sold, must be regarded as personal debts recoverable under the ordinary procedure for the recovery of debts and not by re-sale of the tenure. KSHITISH CHANDRA ACHARYA CHOWDHURY v. KHULNA LOAN COMPANY, LTD., **16 C.W.N. 804=14 Ind. Cas. 728.** (6 C.W.N. 794, *F.*; 37 C. 747, *Diss.*)

(115)—S. 17—*See* BEN. ACT, VIII OF 1885, ss. 65, 195 (*e*), 6 C.W.N. 794.

(116)—S. 17, cl. 6—*See* DAMAGES—DAMAGES, SUITS FOR, 21 W.R. 219.

(117)—*S.* 18—*Arrears of rent decreed, cause of action on non-payment of—Regular suit under Reg.* VIII *of* 1819, *s.* 18.—Non-satisfaction of the decree passed in a summary rent suit, *i.e.*, the non payment of the arrears rent decreed therein, provides cause of action for a regular suit under s. 18, Reg. VIII of 1819. NOBO KISHEN MOOKERJEE v. MODHOOSOODHUN GANGOOLY, **4 W.R. 99.**

(118)—*S.* 18, *cl.* 4—*Limitation—Cause of action—Ineffectual execution proceedings in summary trial.*—Regular suit against a gumashta's immoveable property under cl. 4, s. 18, Reg. VIII of 1819, after failure to recover in execution in a summary suit under Reg. VII of 1799. *Held*, that the cause of action in the regular suit was the same as that in the summary suit, and that the period of limitation must be reckoned from the time at which the plaintiff discovered that he could not obtain satisfaction of the decree in the summary suit. SREENATH GHOSAL v. BISSONATH GHOSE, **B.L.R. Sup. Vol. App. 10=5 W.R. 100.**

——**Reg. X of 1819 (Salt).**

[REP., ACT VIII OF 1875.]

S. 36—*See* SALT, 1 Hay 247.

——**Ben. Reg. XVI of 1819, Ferries (amending.)**

See BEN. ACT I OF 1866.

——**Reg. I of 1820 (Bengal Patni Taluqs).**

[SHORT TITLE GIVEN, ACT V OF 1897. AM., BEN. ACT VIII OF 1865, S. 3. S. 2, AM. AND REP. IN PT., ACT I OF 1903. DECLARED

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

IN FORCE IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S 3.]

See BEN. REG. VIII OF 1819, ss. 8, 11, 13 B.L.R. 408, P.C.=21 W.R. 324=1 I.A. 178.

——**Reg. VI of 1822 (Court of Wards).**

[REP., IN BENGAL (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, BEN. ACT IV OF 1870; IN AGRA (EXCEPT CERTAIN AREAS), ACT XIX OF 1873; IN THE CENTRAL PROVINCES AND THE SAMBALPUR DISTRICT, ACT XVII OF 1885.]

(1)—*See* COURT OF WARDS, B.L.R. Sup. Vol. 199=3 W.R. 82.

(2)—*See* SALE—SALE FOR ARREARS OF RENT—MISCELLANEOUS, 23 W.R. 362.

——**Reg. VII of 1822 (Bengal Land-revenue Settlement Regulation).**

[SHORT TITLE GIVEN ACT I OF 1903. PORTIONS EXT., BEN. REG. IX OF 1825, SS. 2, 3, 5 (9). REP. IN PT., S. 5 EXPLD., S. 23 SUPPLEMENTED, BEN REG. IX OF 1833, SS. 2, 3, 5 TO 11 SS. 23 (3) REP. IN PT., ACT VIII OF 1835. S. 31 (2) REP. IN PT., ACT XXV OF 1837. EXT., ACT XXXI OF 1858. S. 22 REP. SS 20 *et seq.* REP., IN PT., ACT X OF 1859. EXT., ACT XI OF 1859, S. 60. S. 25 REP., ACT XX OF 1865. S. 29 SUPPLEMENTED, BEN. ACT III OF 1868. S. 2 (1) TO (5) REP., SS. 2 (6), 5 (2), 6 (1), 7 (1), 9 (2), 12 (2), 15, 16, 17, 20 (2), 23 (3), 29 (5) 30, 31 (2), 33 (1) REP., IN PT., ACT XVI OF 1874. S. 27 REP., S. 29 (1), (5) REP. IN PT., ACT XII OF 1876: TITLE REP. IN PT., ACT XII OF 1891. TITLE AND SS. 1, 7 (1), (6), 29 (1), 31 (2), 33 (1), 35 REP. IN PT., SS. 2 (6), 3, 5, 6 (2), 7 (1), 8, 9 (3) 10 (1), (3), (9), 13, 16, 17, 20, 23 (1), 24 (2), 26 32, 33 AM., SS. 5 (1), 6 (4), 7 (4) REP., ACT I OF 1903. REP. (IN AGRA, EXCEPT CERTAIN AREAS), ACT XIX OF 1873, REP. (IN ASSAM, EXCEPT THE LUSHAI HILLS), REG. I OF 1886.]

(1)—*Settlement from Government—Rate of rent recorded—Letting lands to tenants—Rate of rent.*—Where a person takes settlement of land from Government at a certain rate which is recorded under Reg. VIII of 1882, he is not bound by such rate but may let the land to tenants at any other rate that may be agreed upon. ZEMIR MANDAL v. TARINI CHARAN SINGH, **11 C.L.J. 60=5 Ind. Cas. 296.** [*Appr.*, 11 C.L.J. 364=37 C. 449=14 C.W.N. 470=5 Ind. Cas. 565.]

(2)—*Thakbust award — Ben. Reg.* VII *of* 1822—*Act* XIII *of* 1848—*S.* 32, *Act* VIII *of* 1859 — *Pendency of appeal to the Privy Council.*—An award under Bengal Reg. VII of 1822, of the thakbust of survey authorities, in a disputed question of boundaries, having been made in 1848, a suit was brought in 1861, respecting the same boundaries. *Semble*, that as the award had not been contested during the three years limited by Act XIII of 1848, it operated as a bar to the suit,

Regulations—continued.

——2—**Bengal Regulations**—*continued.*

By s. 32, Act VIII of 1859, a plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time. In deducting any period under Reg. VII of 1822, it must be shown that plaintiff was "from good and sufficient cause precluded from obtaining redress." The pendency of an appeal to the Privy Council does not put party, who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties. RAJA SAHIB PRAHLAD SEN v. MAHARAJAH RAJENDRA KISHOR SINGH. **2 B.L.R. P.C. 111 (137)=12 M.I.A. 292=12 W.R. P.C. 6=2 Suther. 225 =2 Sar. 430.** [*Appr.*, 15 W.R. 191; *R.*, 15 W. R. 232, 9 C. 125.]

(3)—Wajib-ul-arz—*Cess—Government sanction.*—A *wajib-ul-arz* prepared under the authority of Reg. VII of 1822, contained a provision as to *Chaukidari* cess. *Held*, that, unless it was shown that it was specially sanctioned by the Government, it was an illegal and unauthorised cess. MAHTAB GIR v. RAMZANI, **8 Ind. Cas. 689.**

(4)—*Settlement proceedings under Reg.* VII *of* 1822, *read with Reg.* IX *of* 1825—*Raiyati land held by Settlement Officer to belong to defendant's and not to plaintiff's holding—Decision if "award"—Plaintiff's suit to recover—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 14, 46—*Tenant if may sue to recover from person with whom land settled by landlord and by whom he has been dispossessed—Issues, trial of —Several issues if should be tried together.*—Where a Collector, in settling land under Reg. VII of 1822, decided that a certain area of land did not form part of the plaintiff's holding as alleged by them, but was part of the defendants' holding. *Held*—that the decision of the Collector was not an award within the meaning of art. 46, Limitation Act of 1877. *Held*, further—that an order by which land belonging to the plaintiffs was given by the Collector to others without any warrant of law need not be set aside by the plaintiffs, and art. 14, Limitation Act, does not apply to a suit by the plaintiffs to recover the land. It was not intended by the provisions of Regulation VII of 1822 that the Collector should decide disputes as to title between raiyats in which the zamindars or Sadar malgujars had no interest and which could in no way affect the assessment. S. 14 of the Regulation does not apply to a case in which rival tenants claim, not only a tenancy of the same nature, but the same land under the same nature of tenancy. The decision in 20 C. 709 was never intended to be applied to a tenant seeking to recover his own holding. The practice of trying all the issues in a case together defeats the object of the law in requiring the various issues to be kept separate and distinct, and cannot but lead to confusion. RAJANI KANT MUKERJI v. RAM DULAL DAS, **17 C.W.N. 55=17 Ind. Cas. 881.**

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(5)—*See* BEN. ACT XIII OF 1848. W.R. F. B. 12=1 Ind. Jur. O.S. 5=Marsh 37.

(6)—*See* BEN. ACT VI OF 1870, ss. 60, 61, 9 Ind. Cas. 322.

(7)—*See* ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 16 C. 586.

(8)—*See* ESTOPPEL—DENIAL OF TITLE, 10 W.R. 22=1 B.L.R.A.C. 1.

(9)—*See* LIMITATION—LAW OF LIMITATION, W.R. 1864, 140.

(10)—*See* LIMITATION—MISCELLANEOUS, 12 W.R. P.C. 6=2 B.L.R.P.C. 11=12 M.I. A. 292.

(11)—*See* LIMITATION ACT, 1908, art. 45, 5 C.L.R. 452.

(12)—*See* LIMITATION ACT, 1908, art. 45, 3 A. 738.

(13 & 14)—*See* LIMITATION ACT, 1908, art. 46, 6 W.R. 75.

(15)—*See* MAHOMEDAN LAW—DOWER, 6 B.L.R. 54=14 W.R. 239.

(16)—*See* POSSESSION—ADVERSE POSSESSION, 10 M.I.A. 511.

(17)—*See* PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, 26 A. 549=1 A.L.J. 279, 7 A.L.J. 1040, F.B.=7 Ind. Cas. 680.

(18)—*See* RES JUDICATA—MATTERS IN ISSUE, 1 B.L.R.A.C. 1=10 W.R. 22.

(19)—*See* RIGHT OF SUIT—AWARDS, SUITS CONCERNING, 7 N.W.P. 169.

(20)—*See* SETTLEMENT — EFFECT OF SETTLEMENT, 6 W.R. Act X, Rul. 107.

(21)—*See* SETTLEMENT — RIGHT TO SETTLEMENT, 6 W.R. 218.

(22)—*See* SURVEY AWARD, 11 W.R. 389.

(23)—S. 6, cl. 3—*See* GRANT—CONSTRUCTION, 4 B.L.R. P.C. 36=13 W.R. 31.

(24)—*Ss.* 7, 9—*Rent, Enhancement of—Settlement officer, powers of—Jamabandi.*—Where a settlement was carried out under Reg. VII of 1822. *Held*, that the Settlement Regulation did not authorise the settlement of fair rents. All that the settlement officer was entitled to do was to record the existing rent. ISHUR CHANDRA SARKAR v. TROYLUKHYA NATH SINGHA, **17 C W.N. 865=19 Ind. Cas. 675.**

(25)—*S.* 9—*Duties of Collectors and Settlement Officers—Entries in* khewats *and* khataunis—*Indian Evidence Act* (I *of* 1872), *s.* 35—*N. W.P. Land Revenue Act* (XIX *of* 1873), *s.* 91.—The language of Reg. No. VII of 1822, regarding the particulars which a Settlement Officer had to enter in the record prepared by him, is extremely wide. The information which he had to collect was intended to be utilised in the Courts of Justice in determining the rights of litigants before them. The Settlement Officer was directed to ascertain "the real nature and extent of the interests held, more especially where several persons may hold

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

interests in the same subject-matter of different kinds or degrees." This would include the case of mortgagors and mortgagees whose interests in property are of different kinds or degrees, and entries in *khewats* and *khataunis* would be admissible under s. 35, Indian Evidence Act, to prove the existence of a disputed mortgage. Any entry contained in a *wajib-ul-arz* prepared under the provisions of Act XIX of 1873, is *prima facie* evidence of its accuracy. ROBERT SKINNER v. CHANDAN SINGH, **6 A. L.J. 197=31 A. 247=2 Ind. Cas. 215.** [*R.*, 5 Ind. Cas. 77.]

(26)—*S.* 9—*Act* XIX *of* 1873, *s.* 91—*Rent-roll—Presumption.*—According to s. 9 of Reg. VII of 1822, the decisions of the Courts are to be regulated by the rolls of rent and modes of payments avowed and ascertained at the Settlement, and recorded in the Collector's proceedings, until distinctly altered by mutual agreement or after full investigation in a regular suit. This Regulation was repealed by Act XIX of 1873, s. 91 of which enacted that all entries in the record of rights made and attested as the law directs shall be presumed to be true until the contrary is proved. But before a rent-roll is entitled to the benefit of the presumption in its favour which the law gives, it is essential that a Court be satisfied that it is a trustworthy document, and is what it purports to be—the record of rents avowed by the parties and ascertained by the Settlement Officer. PARAHU v. GANPATJI, **A.W.N. 1886, 26.**

(27)—S 9—*See* ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT OF, 6 W.R. Act X, Rul. 5.

(28)—S. 9—*See* EVIDENCE—SECONDARY EVIDENCE, 1 Agra 139.

(29)—S. 9, cl. 1—*See* JURISDICTION OF CIVIL COURTS, 1 A. 373.

(30)—S. 9—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 32 C. 463, 32 C. 463, Note.

(31)—S. 9—Right of zamindar to establish market and to collect cesses, &c., on his own land—*See* MARKET, A.W.N. 1907, 248=4 A. L J. 728=29 A. 740.

(32)—S. 9—*See* PRE-EMPTION—MISCELLANEOUS, A.W.N. 1904, 117.

(33)—S. 9—*See* SETTLEMENT — MISCELLANEOUS, 23 W.R. 436.

(34)—S. 9—*See* NO. 24, *supra.*

(35)—*S.* 10, *cl.* 1—*Arrangements made at the settlement, alterable during the settlement term, only on consent—Reg.* VII *of* 1882, *Government engagements under, Civil Courts not competent to interfere with.*—Where the parties have been managing a village and making collections not according to a private arrangement between themselves but according to the arrangement fixed at the settlement, such arrangement cannot be altered during the term of the settlement except by consent. A decree such as was passed

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

by the Assistant Commissioner providing for the management of the village and the payment of the Government revenue being made by the plaintiffs in future, would be inoperative as *ultra vires.* The Settlement Officer makes the settlement with the superior proprietor, and by cl. 1, s. 10 of Reg. VII of 1822, Government is empowered to make its election which of two classes of proprietors it will admit to engagements, and the Civil Courts have no power to question the exercise of its discretion in the matter. GHYNA v. MUSSUMAT HURDEVI, **42 P. R. 1869.**

(36)—*S.* 10, *cl.* 3—*Lumbardars, appointment of, rests with Government and not with Civil Court.*— The selection and appointment of Lumbardars belongs to the Government under cl. 3, s. 10, Reg. VII of 1822, and the Civil Courts have no jurisdiction in the matter. The Chief Court accordingly refused to determine the question which arose as to the propriety of the order by which the Deputy Commissioner had set aside an order of a previous officer who had recorded the defendants exclusively as Lumbardars. MAHOMED BUKSH v. HUSSA, **27 P R. 1869.**

(37)—S. 10, cl. 3—*See* RIGHT OF SUIT—CONTRACTS, SUITS ON, 16 P.R. 1870.

(38)—S. 10, cls. 3, 4, 5, 7 and 8—Tanki-tenure, nature of settlement of—Origin and incidents of such tenure—Liability of entire village to be sold on default, so as to destroy the rights of all the tenure-holders—*See* LANDLORD AND TENANT—MISCELLANEOUS, 7 C. L.J. 460.

(39)—S. 10, cl. 8—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—TENURES THAT ARE PROTECTED IN SUCH SALES, 14 W.R. 1.

(40)—S. 14—*See* JURISDICTION OF CIVIL COURTS, 6 C.L.R. 365.

(40-*a*)—S. 20—*See* SETTLEMENT—MODE OF SETTLEMENT, 2 Agra 258.

(41)—S. 33—*See* SURVEY AWARD, 1 Agra 267.

——**—Reg. X of 1822 (Garo Hillmen).**

[REP., ACT XXII OF 1869.]

(1)—Ss. 2, 3, 8 — *See* DECLARATORY DECREE, SUIT FOR — MISCELLANEOUS, 9 W.R. 426.

(2)—S. 3—*See* NO. 1, *supra.*

(3)—S. 8—*See* NO. 1, *supra.*

——**—Reg. XI of 1822 (The Bengal Government Indemnity Regulation).**

[SHORT TITLE GIVEN, ACT I OF 1903. REP. (EXCEPT SS. 2, 36, 38), ACT XII OF 1841. TITLE REP. IN PT., ACT XII OF 1891. S. 2 REP., ACT I OF 1903. REP. IN PT. (IN AGRA, EXCEPT CERTAIN AREAS), ACT XIX OF 1873. REP. (IN ASSAM, EXCEPT THE LUSHAI HILLS). REG. I OF 1886. SS. 36 AND 38 DECLARED IN FORCE THROUGHOUT BENGAL (EXCEPT

Regulations—continued.

——2—**Bengal Regulations**—*continued.*

THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6, S. 38 DECLARED IN FORCE—IN THE ANGUL DISTRICT, REG. I OF 1894, S. 3; THROUGHOUT AGRA, EXCEPT AS REGARDS THE SCHEDULED DISTRICT, ACT XV OF 1874, S. 7; IN OUDH, ACT XVIII OF 1876, S. 3.]

(1)—*See* BENAMI TRANSACTION—GENERAL, 5 W.R. 154.

(2)—*See* PATNI TENURE, 13 W.R. P.C. 24 =13 M.I.A. 317.

(3)—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—PURCHASERS, RIGHTS AND LIABILITIES OF, 3 W.R. 178.

(4)—*See* TENURE, 23 W.R. 245.

(5)—S. 6, cl. 3—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 6 W.R. P.C. 15=3 M.I.A. 42.

(6) S. 29—*See* LIMITATION ACT, 1908, arts. 134, 148, 9 A. 97.

(7)—*S.* 30—*Government sale of land—Effect on under-leases.*—By s. 30, all under-leases are extinguished by a Government sale of the proprietor's lands for arrears of revenue, and an auction-purchaser takes the lands clear of all under-tenures. WATSON v. SREEMUNT LAL KHAN, **5 M.I.A. 447=1 Sar 468.**

(8)—S. 30—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 5 M.I.A. 447.

(9)—Ss. 30 to 33—*See* ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT OF, 11 W.R. P.C. 10=12 M.I.A. 263.

(10)—Ss. 30, 32, 33—*See* SERVICE TENURE, 10 M.I.A. 123.

(11)—Ss. 30, 32, 33—*See* SETTLEMENT—EVIDENCE OF SETTLEMENT, 3 W.R.P.C. 5 =10 M.I.A. 165.

(12)—Ss. 30, 33—*See* ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT TO, 2 B.L.R. P.C. 23=12 M.I.A. 263=11 W.R.P.C. 10.

(13)—S. 31—*See* No. 9, *supra.*

(14)—S. 32—*See* Nos. 9, 10, 11, *supra.*

(15)—S. 33—*See* Nos. 9, 10, 11, 12, *supra.*

(16)—S. 34—Representation—Entire estate in Collector's rent roll—*See* BEN. ACT XI OF 1859, s. 37, 12 C.L.J. 407=8 Ind. Cas. 786.

——**Reg. VI of 1823 (The Bengal Indigo Contracts.)**

[SHORT TITLE GIVEN, ACT I OF 1903. SUPPLEMENTED, BEN. REG. V OF 1830. SUPPLEMENTED, AND S. 5 (3) REP., ACT X OF 1836. SS. 7, 8 REP., ACT VII OF 1870. SS. 3 (1), 6 REP. IN PT., ACT XVI OF 1874. SS. 1, 3 (7) REP. IN PT., ACT XII OF 1876. PREAMBLE AND S. 3 (4), (5), (6), (7), (9) REP. IN PT., S. 6, AM., ACT XII OF 1891. S. 4 (2) REP. IN PT., ACT I OF 1903. REP. (IN ASSAM), ACT XII OF 1891. DECLARED IN FORCE THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT), EASTERN BENGAL AND AGRA, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, SS. 6, 7.]

(1)—*See* DAMAGES—MEASURE AND ASSESSMENT, 1 Agra 69.

(2)—S. 5, cl. 2—*See* DAMAGES — MEASURE AND ASSESSMENT, 3 Agra 77.

(3)—*S.* 5, *cl.* (4)—*Contract to sow indigo—Default in sowing.*—*Held* that, in a contract to sow indigo, not sowing would be *prima facie* evidence of dishonesty; and that, in order to claim the benefit of cl. 4 of s. 5 of Regulation VI of 1823, it was necessary to show that the negligence to sow had been accidental. LAL MAHOMED BISWAS v. WATSON, **1 Ind. Jur. N.S. 3=4 W.R. 62.**

(4)—*S.* 6—*Suit under—Maintainability.*—A plaint under Reg. VI of 1823 was presented to the District Judge of Azamgarh to recover certain moneys on certain indigo contracts with interest. The District Judge rejected the plaint, being of opinion that the whole of Reg. VI of 1823 had been repealed or become absolute. *Held* on appeal that the Regulation had not become repealed by Act XVI of 1874 or any other enactment and that the Judge's reasons for rejecting the plaint were wrong. MARTIN v. KAULESHAR RAI, **A.W.N. 1888, 155.**

——**Reg. I of 1824 (Acquisition of Land for Public Purposes).**

[REP., ACT VIII OF 1868.]

(1)—*Lands within zemindari used for salt works and relinquished by Government—Right of Government to re-settle such lands—Assessment.*—Upon the relinquishment by Government of lands, used for salt works till after the Regulation I of 1824, situate within a permanently settled zemindari, the mutual rights of the zemindar and the Government are governed by that regulation. Such lands, whether belonging to a permanently-settled estate or not, were held "rent-free" by the Salt Department; and the fact of "khalari" payments having been made to the zemindar by Government would not interfere with the right of the Government to re-settle the lands with any person, though, on a re-settlement with others, the zemindar should be assessed only, to the extent of the lands held by him. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RANI ANANDOMOYI DEBI, **8 C. 95, P.C.=8 I. A. 172=4 Sar. 281=5 Ind. Jur. 612.**

(2)—S. 9, cl. 11, s. 14—*See* SETTLEMENT—MISCELLANEOUS, 23 W.R. 197.

(3)—S. 14—*See* No. 2, *supra.*

——**Reg. I of 1825 (Criminal Procedure).**

[REP., ACT XVII OF 1862.]

Land taken by Government without formality prescribed by—Right of owner to maintain suit against Government for rent—*See* TRESPASS, Marsh 56=W.R. F.B. 18=1 Hay 122.

Regulations—continued.

—— 2.—**Bengal Regulations**—*continued.*

——— **Reg. VII of 1825 (Execution of Decrees).**

[REP., ACT XVI OF 1874.]

(1)—*See* JURISDICTION—SUITS FOR LAND, 1 A. 431.

(2)—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHT OF PURCHASER ON SETTING ASIDE SALE, 4 B.L.R. F.B. 11=12 W. R. 8.

(3)—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 3 W.R. 70.

(4)—*See* VENDOR AND PURCHASER — BREACH OF WARRANT, 18 W.R. 276.

(5)—S. 5—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 8 M.I. A. 427.

(6)—S. 5—*See* SUMMARY SUIT, 8 M.I.A. 427.

(7)—S. 7—*See* ATTACHMENT—LIABILITY FOR WRONGFUL ATTACHMENT, 20 W.R. 433.

——— **Reg. IX of 1825 (Bengal Land-revenue Settlement.)**

[SHORT TITLE GIVEN, ACT I OF 1903. EXT., ACT XI OF 1859, S. 60. S. 5 (9) REP. IN PT., ACT XX OF 1865. PREAMBLE AND SS. 2 (1), 3, 8 REP IN PT., S. 9, REP., ACT XII OF 1891. SS. 3, 4, 5 (8), 6, 8 AM., S. 5 (10) REP. IN PT., ACT I OF 1903. REP (IN AGRA, EXCEPT CERTAIN AREAS), ACT XIX OF 1873. REP. (IN ASSAM, EXCEPT THE LUSHAI HILLS), REG. I OF 1886, DECLARED IN FORCE THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICTS) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6.]

(1)—*See* BEN. ACT XIII OF 1848, W.R. F.B. 12=1 Ind. Jur. O.S. 5=Marsh 37.

(2)—*See* ESTOPPEL—DENIAL OF TITLE, 10 W.R. 22=1 B.L.R.A.C. 1.

(3)—*See* POSSESSION—ADVERSE POSSESSION, 10 M.I.A. 511.

(4)—*See* RES JUDICATA — MATTERS IN ISSUE, 1 B.L.R. A.C. 1=10 W.R. 22.

(5)—S. 5—*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 9 W.R. 426.

(6)—S. 9—*See* EVIDENCE — SECONDARY EVIDENCE, 1 Agra 139.

——— **Reg. XI of 1825 (Bengal Alluvion and Diluvion).**

[SHORT TITLE GIVEN, ACT V OF 1897. SUPPLEMENTED (IN BENGAL AND EASTERN BENGAL), BEN. ACT IV OF 1868. S. 4 (1) REP. IN PT. (IN EASTERN BENGAL AND LOCALITY IN BENGAL), ACT VIII OF 1885. S. 5 REP. IN PT. ACT I OF 1903, AM. (IN PUNJAB AND N-W. FRONTIER PROVINCE), PUN. ACT I OF 1899, S. 4. DECLARED IN FORCE — THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT), EASTERN BENGAL AND AGRA EXCEPT AS REGARDS THE SCHEDULED DISTRICTS. ACT XV OF 1874, SS. 6, 7; IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1889, S. 3; IN THE PUNJAB, ACT IV OF 1872, S. 3; IN THE N.-W. FRONTIER PROVINCE, REG. VII OF 1901, S. 4; IN THE CENTRAL PROVINCES AND THE SAMBALPUR DISTRICT, ACT XX OF 1875, S. 3; IN OUDH (WITH MODIFICATIONS, AND WITH THE EXCEPTION OF S. 1), ACT XVIII OF 1876, S. 3.]

(1)—*Right to* Chur *land* — Incrementum latens—*Reg.* XI *of* 1825—*Law in Bengal.*—Suit for a portion of *chur* land thrown up by a tidal and navigable river. The appellants sought to disturb a possession of 7 years' duration, and proved the land to be a re-formation on a site identical with lands originally included in their zamindary and afterwards swept away: *Held*, that they had a better title to it than the respondents who claimed it as an accretion to their settled *chur*, but failed to prove that it was a gradual and imperceptible accretion as contemplated by law. Review of the law of alluvion in Bengal as declared by Regulation XI of 1825 and decided cases. NOGENDER CHUNDER GHOSE v. MAHOMED ESOF, **10 B.L.R. 406, P.C.=18 W.R. 113=3 Sar. 151.** [*F.*, 22 W.R. 238, 22 W.R. 324=14 B.L.R. 219, *Appr.*, 3 C.L.J. 316; *R.*, 21 W.R. 446, 2 B. 19, 8 C.W.N. 676, 6 C.L.J. 149.]

(2)—This circular in consequence of certain Rulings of the High Court and the Judicial Committee of the Privy Council, modifies orders made under Regulation XI of 1825 and Act IV (B.C.) of 1868. **Rev. Cir. No. 5, 23 W.R. Rev. Cir. p. 33.**

(3)—*See* ALLUVION—GENERAL, 53 P.R. 1867, 47 P.R. 1868, 72 P.R. 1869, 15 P.R. 1872, 17 W.R. 163, 12 W.R. 229.

(4)—*See* ALLUVION—FORMATION OF CHURS OR ISLANDS, 4 W.R. 59, 5 W.R. 139, 9 W.R. 312, 6 B.L.R. 255=14 W.R. F.B. 25, 3 W.R. 94.

(5)—*See* ALLUVION—LAND INUNDATED AND REFORMED, 72 P.R. 1869, 47 P.R. 1868, 15 P.R. 1872, 12 P.R. 1870, 6 C.L.R. 249, P.C.=7 I.A. 73.

(6)—*See* ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 5 C.L.R. 33.

(7)—*See* LANDLORD AND TENANT—ACCRETION TO TENURE, 4 C.W.N. 508, 2 Hay 515, 3 Agra 152.

(8)—*See* LIMITATION ACT, 1908, art. 3, 7 I.A. 73.

(9)—Re-settlement of land by Government as ruling power with those entitled to such settlement under, and Act XXXI of 1858—Effect — *See* SETTLEMENT — EFFECT OF SETTLEMENT, 20 C. 732.

(10)—S. 2, cl. 4—*See* ALLUVION—CHARGE IN COURSE OF RIVERS, 14 W.R. 268.

(11)—*S.* 2—*Usage governing rights of proprietors of contiguous estates, divided by a river.*—In 1837, land which had gradually accreted

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

to the plaintiff's zemindari on the north side of the river G, which separated two districts, was temporarily assessed at a low rate, the land then being scarcely culturable. In 1847, the value of the land having meanwhile increased, the settlement was renewed at a greater revenue. On the expiration of this settlement in 1857, the land in consequence of a sudden change in the river G, was found capable of identification on the southern side of the river. There was no evidence of any usage within s. 2 of Reg. XI of 1825, that the main channel of the river G should be taken as the constant boundary, not only between the two districts, but also between the zamindaries on each bank divided by the river. *Held* (reversing the judgment of the High Court), that the plaintiff was entitled to the land and to have a settlement made in respect of it. RUGHOOBUR DYAL SAHOO v. KISHEN PERTAB SAHEE, **5 C L R 418, P.C.=6 I.A. 211=4 Sar. 64.**

(12)—S. 2—*See* ALLUVION—GENERAL, 11 W.R.P.C. 42=3 B.L.R.P C. 5=13 M.I.A. 1.

(13)—S. 2—*See* ALLUVION — CHANGE IN COURSE OF RIVERS, 3 B.L.R.P.C. 5=11 W.R.P.C. 42=2 Suther. 47 = 13 M.I.A. 1= 2 Sar. 473.

(14)—*Ss.* 2, 4, *cls.* (1) *and* (2)—*Sudden change of river course—Land cut off from one village and added to another—Land recognisable—Suit regarding land—What section of the Regulation applicable.*—By a sudden change in the course of a river, a piece of land was cut off from one village, and added to another, and it was clearly recognisable on the spot: *Held*, that a suit regarding the land was not governed by s. 2 but by s. 4, and again not by cl. (1) but by cl. (2) of the latter section of Reg. XI of 1825. MUHAMMAD HUSAIN v. MUHAMMAD SHOQAT HUSSAIN, **9 Ind. Cas. 263.**

(15)—Ss. 2, 4, cl. (2)—*See* ALLUVION—CHANGE IN COURSE OF RIVERS, 6 I.A. 211.

(16)—Ss. 2, 4 (iii)—*See* CUSTOM, 6 A. 479 =A.W.N. 1884, 185.

(17)—S. 3, cl. 3—*See* ALLUVION—FORMATION OF CHURS OR ISLANDS, 6 W.R. 123.

(18)—*S.* 4—*Alluvion—Submersion of land under water Re-appearance on its old site—Sufficient identification—Ownership.*—Land belonging to the plaintiff which had submerged under a river re-appeared on its old site and was sufficiently identified to be the plaintiff's land. It had not come out by gradual accretion nor by sudden cutting off by the action of the river. *Held*, that the plaintiff was entitled to the land, that s. 4 of Reg XI of 1825 did not apply to the case. BHAGWAN RAI v. GOPI RAI, **10 Ind. Cas. 311.**

(19)—*S.* 4—*Gradual accretion.*—Land which is washed away and which re-appears afterwards on the old ascertained site is not land gained by increment within the meaning of the Regulation, and such land continues to be the property of the original owner, unless his title to it after such re-appearance is extinguished by adverse possession for over twelve years on the part of a trespasser. BAHADUR RAI v. RAM JANAM RAI, **1 A.L.J. 371.** (13 M.I.A. 467, 3 C. 796, A.W.N. 1882, 8, *R.*)

(20)—*S.* 4—*Possession, Suit for—Accretion—Holding of tenant.*—The rule that, when it is once admitted that the plaintiff was the landlord, then *prima facie* all the land belonged to him and he was entitled to possession of it till the contrary could be proved by those who claimed some title to the land, is not applicable, when, on the plaintiff landlord's own showing, the state of things was such that the land would be presumed to fall under s. 4 of Reg. XI of 1825 and to be an accretion of the *jote* of the defendant. CHOWDHURY MAHADEO PERSHAD v. MATHURA TANTI, **11 C.L.J. 148=5 Ind. Cas. 723.**

(21)—*S.* 4—Mouzahs *on opposite sides of river—Claim for alluvion.*—Plaintiffs and defendants were zemindars of two *mouzahs* on the opposite sides of a river. The suit was brought for alluvial land on the plaintiffs' side of the river. The main defence was that the land had been bodily washed across, and, therefore, it still remained the property of the defendants. The land undoubtedly belonged to plaintiffs under the *deep stream rule* and defendants failed to prove, before the Assistant Commissioner, that the land came under the '*rooh girdanee*' rule. It appeared that the accreted land had not merely moved on by the shifting of the river; but had been completely submerged and thrown up again in a new form quite unrecognizable. *Held* that the defence failed. There was another accretion moving bodily from the defendants' side, of which defendants still remained in possession; and it was held that if the land in suit lay between this detached piece and the river, the only question would be how much of it lay directly in front of the defendants' land and how much in front of the plaintiffs'. NOORDEEN v. FUTTEH ALI, **65 P.R. 1869.**

(22)—*S.* 4—*Alluvion—Gained by gradual accession.*—Where it was found that there was no gradual accession and the site was identifiable, *held*, that in the absence of local usage, and in accordance with the general principles of equity, the application of which is expressly directed in the fifth clause of s. 4 of Reg. XI of 1825, the plaintiffs were entitled to the land in suit. HASHMAT v. DULLA, **171 P.L.R. 1901=66 P R. 1901.** (5 B.L.R. 521, 36 P.R. 1898, *F.*; 19 A. 238, *D.*)

(23)—*S.* 4—*Diluviated land, rights to.*—The Regulation refers only to cases of gain, of acquisition by means of gradual accession, which an individual proprietor may make from that which has been part of the public territory, the public domain, and not the confiscation or destruction of any private person's property.

Regulations —continued.

——2.—**Bengal Regulations**—*continued.*

Diluviated lands re-forming on their old sites remain the property of their original owner, and it is immaterial whether the lands have re-formed gradually or otherwise. The plaintiffs owned a two annas share in a village called A and the defendant owned a village called D. The river Rapti flows between the two villages. The plaintiff sued to be maintained in proprietary possession of a certain plot, alleging that such plot had appertained to his village, and that it had been submerged by the Rapti, and that it had re-appeared and accreted to his village. The defendant denied all these allegations and asserted the contrary. The lower appellate Court decreed in favour of the defendant on the ground that the land had been the subject of fluvial action for 10 years, and that, in the course of time, had gradually accreted to the village, D, without deciding to which village it had previously appertained. *Held*, that the case should be remanded to the lower appellate Court for deciding whether the site on which the alluvion had appeared was part of village A or village D. RAMCHARAN TIWARI v. JASAI PANDEY, **A.W.N. 1882, 8.** (3 C. 796, 13 M.I.A. 467, *R.*) [*R.*, 1 A.L.J. 371.]

(24)—S. 4—*See* BEN. ACT XXXI OF 1858, 7 C.W.N. 846.

(25)—S. 4—Right of ryot having no pre-existing rights to land, to later accretion to such land—*See* BEN. ACT VIII OF 1885, ss. 20, 180, 33 C. 444=4 C.L.J. 63.

(26)—S. 4—*See* ALLUVION—GENERAL, 14 W.R. 254.

(27)—S. 4—Alluvion — Gradual accession—*See* ALLUVION,—CHANGE IN COURSE OF RIVERS, A.W.N. 1905, 271=2 A.L.J. 821=28 A. 256.

(28)—S. 4—*See* ALLUVION —CHANGE IN COURSE OF RIVERS, A.W.N. 1885, 173.

(29 & 30)—S. 4—Title to gradual accretions by alluvion—*See* ALLUVION — FORMATION OF CHURS OR ISLANDS, 14 C.P.L.R. 97.

(31)—S. 4—*See* ALLUVION—LAND INUNDATED AND REFORMED, 5 B.L.R. 521, P.C.= 14 W.R. P.C. 11=13 M.I.A. 467, Marsh 136 =W.R. F.B. 45=1 Ind. Jur. O.S. 44.

(32)—S. 4—*See* LANDLORD AND TENANT—ACCRETION TO TENURE, 15 W.R. 87, 16 W. **R. 95.**

(33)—*S.* 4, *cl.* 1—*Alluvial lands—Accretion——Re-formation.*—According to cl. 1, s. 4, Reg. XI of 1825, all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment. Mere proof of identity of site (without proof of ownership) is not sufficient to defeat the right by accretion which the law gives to an adjacent owner. KATTERMONEE DOSSEE v. RANEE MONMOHINEE DABEE, **B.L.R. Sup. Vol. 353=3 W.R. 51.** [*Disappr.*, 5 B.L.R. 521=13 M.I.A. 467=14 W.R. 11, P.C.; *F.*, 6 W.R. 40, 8 W.R. 206, 9 W.R. 312, 14 W.R. 164; *Appl*, 8 W.R. 164; *R.*, 5 W.R. 283, W.R. 1864, 64, 7 W.R. 103, 2 B. 19, 10 C.W.N. 540=4 C.L.J. 51.]

(34)—*S.* 4, *cl.* 1—*Construction.*—The meaning of the clause is that the incidents of the original tenure attach to the increment. GOLAM ALI v. KALI KRISHNA THAKUR, **7 C. 479=8 C.L.R. 517.** [*Commented on*, 11 C. 696; *R.*, 26 C. 739.]

(35)—*S.* 4, *cl.* 1—*Accretion to parent tenure —Rate of rent.*—The words "increase of rent to which he may be justly liable" in cl. 1, s. 4 of Reg. XI of 1825, indicate that it was not intended to lay down any inflexible rule applicable to all cases. In the absence of any special circumstances, the rate of rent to be assessed upon the accretion should be in proportion to that paid for the parent tenure. CHOORAMONI DEY v. HOWRAH MILLS COMPANY, LIMITED, **11 C. 696.**

(36)—*S.* 4, *cl.* 1—*Occupancy ryot, Right of—Jote tenure.*—The terms of Reg. XI of 1825, s. 4 (cl. 1) are clear. *Held* by the *Full Bench.* —A person who has an occupancy right in a *jote* is entitled to the benefit of s. 4, cl (1) of Reg. XI of 1825. GOURHARI KAIBURTO v. BHOLA KAIBURTO. **21 C. 233, F.B.** (15 W.R. 87, 149, 16 W.R. 95, *F.*; 24 W.R. 404, *N.F.*) [*F.*, 8 C.L.J. 541, 5 C.L.J. 26, Note; *Expl. & D.*, 33 C. 444=4 C L.J. 63; *R.*, 13 C.W. N. 267=8 C.L.J. 538.]

(37)—*S.* 4, *cl.* 1—*Admissibility* — Dastak — *Registration Act* (III *of* 1877), *s.* 17, *cl* (*d*)—*Non-occupancy raiyat* — *Accretion.*—An unregistered *dastak*, which merely allows the plaintiff to take possession of the land and to cultivate it, is not a lease for any term exceeding one year, or a lease from year to year or a lease reserving a yearly rent, within the meaning of cl. (*d*) of s. 17 of the Registration Act, and is, therefore, admissible in evidence. A non-occupancy raiyat can claim a newly-formed land as an accretion to his holding under cl. (1), s. 4 of Reg. XI of 1825. AHMED BEPARI v. TOKI MAHOMED, **8 C.L J. 538=13 C.W.N. 267= 4 Ind. Cas. 511.** (16 W.R. 95, *R.*) [*R.*, 13 C.W.N. 269=8 C.L.J. 537=4 Ind. Cas. 518.]

(38)—*S.* 4, *cl.* (1)—*Non-occupancy raiyat—Accretion.*—A non-occupancy tenant can acquire a right to hold a newly-formed land as an accretion to his holding under cl. (1) of s. 4 of Reg. XI of 1825. AMJAD ALI v. KADERJAN BIBI, **8 C.L.J. 537=13 C.W.N. 269 =4 Ind. Cas. 518.** (8 C.L.J. 538, *F.*; 4 W.R. 57, 4 C.L.J. 63=33 C. 444, *D.*)

(39)—*S.* 4, *cl.* 1—*Non-occupancy riayat—Accretion—Terms of holding accreted land.*—S. 4, cl. (1) of Reg. XI of 1825 applies to the case of a person who is not an occupancy raiyat. (4 C.L.J. 63=33 C. 444, *Expl.*) The person to whose land the accretion is formed is entitled to hold the accreted land on the same terms as

***Regulations*—continued.**

——2.—Bengal Regulations—*continued.*

that by which the land to which it is an accretion is held. MIAJAN v. AKRAM ALI BHUIYA, **8 C.L.J. 541.** (21 C. 233, *F.*) [*R.*, 8 C.L.J. 537.]

(40)—*S* 4 (i)—*Dhardhura.*—The law in Reg. XI of 1825, s. 4 (i) as to gradual accession of land, does not apply where the land is claimed according to the custom of dhardhura. ISHRI PRASAD v. JAGMOHAN RAM, **A.W.N. 1881, 2.**

(41)—S. 4, cl. 1—*See* ALLUVION—GENERAL, 19 A. 238=A W.N. 1897, 39.

(42)—S. 4 (1) — *See* ALLUVION — LAND INUNDATED AND REFORMED, 11 W.R 189.

(43)—S. 4, cl. 1—*See* LANDLORD AND TENANT—ACCRETION TO TENURE, 6 W.R. Act X, Rul. 48, 2 Agra 406, 9 W.R. 379, 4 W.R. 57, 26 C. 739.

(44)—S. 4, cls. 1 and 4—*See* ALLUVION—FORMATION OF CHURS OR ISLANDS, 4 W.R. 54.

(45)—*S.* 4, *sub ss.* 1 *and* 5, *Reg.* XI *of* 1825—*Change in the river's course—Alluvion and diluvion.*—The mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B could never deprive A of the lands and transfer them to B. If, after temporary aberrations, a river at last leaves the land of A in *statu quo ante* in contiguity to the lands of B, it cannot be held to be an accession to B, his next neighbour. Neither the specific provision of Reg. XI of 1825, nor the general principles of equity and justice, lend the slightest support to the pretension of the appellant, which is to land that would be gained, not from the river, but from a neighbour. JAGGOT SINGH v. BRIJ NATH KUNWAR, **27 C. 768, P.C.=27 I.A. 81=4 C.W.N. 555=7 Sar. 699.** [*F.*, 5 C.L.J. 47, Note; *D.*, 1 M.L.T. 101.]

(46)—*Act* XVIII *of* 1876, *s.* 4, *cl.* (2)—*Alluvion and diluvion—Ownership, change of—Reformation—Principles.*—A river, which separated two estates situated respectively on its north and south banks, shifted its course to the north laying bare to its south certain lands which originally belonged to the estate on the north bank but so as still to leave a channel between this land and the estate on the south bank. *Held*, that this was not a case of slow and gradual accretion by the inch or foot or yard. The original ownership of the re-formed land, therefore, remained unaffected. THAKURAIN RITRAJ KOER v. THAKURIAN SHARFARAZ KOER. **9 C.W.N. 889, P.C.=27 A. 656=2 A.L.J. 623=8 O C. 293=2 C.L.J. 185=7 Bom. L.R. 872=15 M.L.J. 349=32 I.A. 165=8 Sar. 873.** (13 M.I.A. 467, *R.*)

(47)—S. 4, cl. 2—*See* ALLUVION—LAND INUNDATED AND REFORMED, 22 W. R. 238, W.R. 1864, 64.

(48)—*S.* 4, *cl.* (3)—*Suit for possession—Reformation—Accretion—Accession, Meaning of—Government, rights of, if different from that of*

***Regulations*—continued.**

——2.—Bengal Regulations—*continued.*

private owner—Submersion—Continuity, presumption of case not made in the plaint, if open to plaintiff—Adverse possession—Maps, Thak and Survey, effect of—Presumption—Onus of proof of lands existent at the Permanent Settlement—Abandonment of submerged land, proof of.—When Government acquires property under cl. (3) of s. 4 of Reg. XI of 1825, either as an island surrounded by an unfordable channel or as an accession to lands held by Government, it does not become a trustee for the public; it is entitled to deal with the property in the same way as any other part of the territory of the State at its disposal. If it permanently or temporarily settles the estate to which it has thus acquired title, the holder of the settlement is entitled to the benefit of the principle of reformation, and when question arises between Government itself and a neighbouring riparian owner, Government should not be placed in a worse position than a person who has derived title from it and it is not precluded from claiming the land upon submergence and after reappearance. (13 M.I.A. 467, 5 B.L.R. 521, 10 B.L.R. 406, *R.*) No inflexible rule can be laid down as to the manner in which an intention not to abandon submerged lands may be proved, but it would depend upon the circumstances of each particular case. Mere submergence of lands in the possession of Government does not operate in law as an abandonment on its part and a reversion thereof to the public territory. The state of things described in the Thak and Survey Maps cannot be presumed to have existed at the time of the Permanent Settlement. The question what lands were included in the Permanent Settlement is a question of fact and not of law, which may or may not be satisfactorily proved by subsequent Survey Maps. The onus of proving that any particular lands were included in the Permanent Settlement of 1793, is clearly on those who affirm that such was the case and the burden of proof is not necessarily shifted by the production of the Thak and Survey Maps showing that specific lands are included in a particular estate. The Thak and Survey Maps are valuable evidence of the state of things at the time they are made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement. ANANDA HARI BASAK v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **3 C.L.J. 316.** (30 C. 291, *F.*)

(49)—S. 4, cl. 3—*See* ALLUVION—FORMATION OF CHURS OR ISLANDS, 6 B L.R. 343=14 W.R. 352, 9 W.R. 401, 6 B.L.R. App. 93=14 W.R. 424, 17 W.R. 73, 6 B.L.R. 261, Note=13 W.R. 366.

(50)—S. 4, cl. 3—*See* ALLUVION—LAND INUNDATED AND REFORMED, W.R. 1864, 73.

(51)—S. 4, cl. 3—*See* CHUR LANDS, 14 W. R.F.B. 25.

(52)—S. 4, cl. 3—*See* RIGHT OF SUIT—GENERAL, 12 W.R. 204.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(53)—S. 4, cls. 3 and 5—*See* ALLUVION—MISCELLANEOUS, 2 Agra 342.

(54)—S. 4, cl. 4—*See* ALLUVION—GENERAL, 10 W.R. 68.

(55)—S. 4, cl. 4—*See* ALLUVION—FORMATION OF CHURS OR ISLANDS, 20 W.R. 276.

(56)—*S. 4, cl. 5—Act* IX *of* 1847, *s. 7—Reappearance of submerged land as chur—Right of Government.*—Where the site of a submerged village formed part of a permanently settled estate and the proprietor thereof continued to pay her quota of Government revenue, although the village was submerged, the submergence of the site does not deprive the owner of her property, and its re appearance on the old site as an island surrounded by a channel which is not fordable, does not entitle the Government to take possession of it under Reg. XI of 1825, s. 4, cl. 3, referred to in Act IX of 1847, s. 7. COLLECTOR OF RAJSHAHYE v. RANI SHAMASOONDREE DEBIA, **14 B L R. 219 =22 W.R. 324**. [*R.*, 2 B. 19.]

(57)—S. 4, cl. 5—*See* ALLUVION — LAND INUNDATED AND REFORMED, 8 W.R. 287.

(58)—S. 4—*See* NOS. 14 TO 16, *supra.*

(59)—S. 5—*See* ALLUVION — LAND INUNDATED AND REFORMED, 14 W.R. P.C. 11= 5 B.L.R. 521=13 M.I.A. 467.

(60)—S. 5, cl. 5—*See* ALLUVION—MISCELLNEOUS, 8 W.R. 206.

———**Reg. IV of 1827 (Sadr Amins.)**

[REP., ACT X OF 1861.]

(1)—S. 3—*See* TITLE, 5 W.R. P.C. 61=1 M.I.A. 494.

———**Reg. V of 1827 (Bengal Attached Estates Management).**

[SHORT TITLE GIVEN, ACT V OF 1897. SS. 2, 3, 4 REP. IN PT., ACT XVI OF 1874. S. 2 REP. IN PT., S. 3 AM., ACT I OF 1903. DECLARED IN FORCE—THROUGHOUT BENGAL (EXCEPT THE SAMBALPUR DISTRICT), EASTERN BENGAL AND AGRA, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, SS. 6, 7; IN THE CENTRAL PROVINCES AND THE SAMBALPUR DISTRICT (WITH AN EXCEPTION AND A MODIFICATION) ACT XX OF 1875, S. 3: THIS MODIFICATION REP. IN THE SAMBALPUR DISTRICT, ACT VII OF 1905; IN AJMERE (WITH MODIFICATIONS), REG. III OF 1877, S. 3.]

(1)—*See* BEN. REG. V OF 1812, s. 26, B.L.R. Sup. 655=7 W.R. 273=2 Ind. Jur. N. S. 178.

(2)—S. 3—*See* APPEAL—ACTS AND REGULATIONS, 20 W.R. 262.

(3)—S. 3—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 4 B.L.R. App. 80=13 W.R. 194.

(4)—S. 3—*See* BEN. REG. V OF 1812, s. 26, 12 B.L.R. 366, F.B.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(5)—S. 26—*See* EXECUTION OF DECREE—EXECUTION BY COLLECTOR, 22 W.R. 212.

———**Reg. III of 1828 [Bengal Land-revenue Assessment (Resumed Lands).]**

[SHORT TITLE GIVEN, ACT I OF 1903. S. 9 REP., ACT XII OF 1873. S. 10 (4), (5) REP. IN PT., S. 11 (1) REP., ACT XVI OF 1874. TITLE, SS. 1, 10 (2), 12, 13 (1), (2), REP. IN PT., SS. 2 to 8 REP., SS. 10 (2), (3), 13 (1) AM., ACT I OF 1903. S. 13 (2) REP., BEN. ACT I OF 1905. REP. (IN AGRA, EXCEPT CERTAIN AREAS), ACT XIX OF 1873. REP. (IN ASSAM, EXCEPT THE LUSHAI HILLS), REG I OF 1886. DECLARED IN FORCE THROUGHOUT BENGAL, (EXCEPT THE SAMBALPUR DISTRICT) AND EASTERN BENGAL, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 6.]

(1)—*Sunderbuns.*—Though certain portions of Reg. III of 1828 go to show that the Sunderbuns, up to that date, continued the property of the State and had not been permanently settled with any one, that was intended to be said generally with regard to the tract of country known as Sunderbuns taken as a whole, and it could not have been intended to undo the effect of any lease granted by any duly constituted Revenue authority. *Per Banerje, J.*, TAMOHA BIBI v. ASHUTOSH DHUR, **14 C.W.N. 513.**

(2)—*See* LIMITATION — MISCELLANEOUS, 4 M.I.A. 466.

(3)—*See* PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTION, 4 M.I.A. 466.

(4)—*See* SPECIAL COMMISSIONERS, 1 W.R. P.C. 20=9 M.I.A. 479.

(5)—*See* WASTE LANDS, 26 C. 792=3 C.W.N. 695.

(6)—S 4, cl. 5—*See* REVIEW—REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE, 3 W.R. P.C. 45=7 M.I.A. 283.

(7)—*Reg.* III *of* 1828 (*Bengal*), *s.* 13, *cl.* (2)—Sunderbuns—*Limitation—Question of disputed boundaries—Onus.*—The *Sunderbuns* were not included in the perpetual settlement but remained the property of the Government. Bengal Regulation III of 1828 made provision for the immediate settlement of the limits of the *Sunderbuns* by fixing peremptorily a period at which the demarcation of those limits should be final. Any person objecting to the line of demarcation could not be heard unless he declared and offered proof that, at the time of the survey by the Commissioner appointed under the said law, he was in occupation of a definite quantity of land cleared under cultivation within that time. A person in occupation of cultivated land might, within three months, either pray for further investigation or put forward his claim to hold particular lands free from assessment. [*F.*, 13 W.R. 180.] Where boundaries have been determined by the Commissioner under cl. 2, s. 13, of Bengal Regulation III of 1828, and no appeal therefrom made to the Special Commissioner within

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

three months, such determination is a bar to a suit seeking to open the question of boundaries. In a question of disputed boundaries between the permanently assessed *mouzah* of a neighbouring zemindari adjoining the *Sunderbuns*, the Zamindar having taken a lease from Government of part of the lands as within the limits of the *Sunderbuns* but afterwards claimed by him as part of his mouzahs, the *onus* is upon him to identify the lands so claimed as forming part of his settled estate. RAJA BARADAKANT ROY v. THE COMMISSIONER OF THE SUNDERBUNS. **2 B.L.R.P.C. 33=12 M.I.A. 225=11 W.R.P.C. 14=2 Suther 184=2 Sar. 413.**

——**Reg. VII of 1828 (Benares Family Domains.)**

[SHORT TITLE GIVEN, ACT I OF 1903, REP. IN PT. AND AM., ACT XIV OF 1881.]

(1)—S 13—*See* CIV. PRO. CODE, 1908, s. 17, A.W.N. 1894, 4.

(2)—*S.* 20—*Family Domains of the Maharajah of Benares—Jurisdiction of Civil Courts.*—The lessees of a village lying within the Family Domains of the Maharaja of Benares, constructed a dam across a stream running between that village and a village called K, lying down the stream and within the jurisdiction of the Civil Courts of Mirzapore. The proprietors of the village K, objected to this and one of the Mirzapore Magistrates made an order directing that an opening should be kept open in the dam. Therefore, the lessees of the former village sued the proprietors of the latter village and others in a Court established under Reg. VII of 1828, for the Family Domains, for a declaration of their right to construct the dam, and the cancelment of the Magistrate's order. The proprietors of the latter village on the other hand, subsequently brought the present suit against the lessees of the former village in the Court of the Munsif of Mirzapore, claiming to restrain them from closing the opening which was to be left in the dam and from obstructing the flow of water. *Held* that the present suit was not barred by the provisions of s. 12 of Act No. X of 1877, as the injunction sought by the plaintiffs did not fall within the category of claims mentioned in s. 20 of Reg. VII of 1828. MAHARAJAH OF BENARES v. JAGGANNATH DAS, **A.W.N. 1881, 116.**

——**Reg. X of 1829 (Stamps.)**

[REP., ACT XXXVI OF 1860.]

(1)—*See* PRIVY COUNCIL, PRACTICE OF—VALUATION OF APPEAL, 8 M.I.A. 193.

(2)—*See* STAMP, 2 W.R. P.C. 9=8 M.I.A. 492.

(3)—*See* STAMP ACT, 1862, 3 W.R. Act X, Rul. 142.

(4 & 5)—S. 17—*See* PRIVY COUNCIL, PRACTICE OF—VALUATION OF APPEAL, 7 M.I.A. 261.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(6)—S. 17—*See* STAMP, 7 M.I.A. 261.

——**Reg. XIV of 1829 (Security from foreign litigants.)**

[REP., ACT X OF 1861.]

(1)—S. 2, cl. 1—*See* SECURITY FOR COSTS, 7 M.I.A. 431.

(2)—S. 2, cl. 1—*See* WAIVER, 7 M.I.A. 431.

——**Reg. V of 1831 (Munsifs, Sadr Amins and Principal Sadr Amins.)**

[REP. ACT XVI OF 1868.]

S. 26, cl. 2—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 13 M.I.A. 343.

——**Reg. VI of 1831 (Appellate Judges at Allahabad.)**

[REP., ACT XII OF 1891.]

(1)—*S. 7—Reference to Judge of one High Court—Establishment of another High Court—Practice.*—An appeal had been brought to the Sudder Adawlut of the North Western Provinces, and the Judges of that Court gave a decision. Then an application had been made for a review, and an order was made that the case should be heard on review. It was so heard before four Judges, who were equally divided in opinion. By the law as it then stood, the case was, under the provisions of s. 7, Reg. VI of 1831, referred for the opinion of one or more Judges of the High Court of Calcutta. In the meantime, the Crown did erect a High Court at Agra in the North Western Provinces, which had the effect of abolishing the jurisdiction of the Sudder Adawlut. The Chief Justice of the Agra High Court gave a decision in the case. *Held*, that the Chief Justice had jurisdiction to hear such reference and determine the case. MUSSAMAT UDEY KUNWAR v. MUSSAMAT LADU, **6 B.L.R. 283, P.C.=13 M.I.A. 585=15 W.R. P.C. 16=2 Suther. 388=2 Sar. 628.**

(2)—S. 7—*See* HIGH COURT, JURISDICTION OF CALCUTTA, 15 W.R. P.C., 16=6 B.L.R. 283=13 M.I.A. 585.

——**Reg. VIII of 1831 (Summary suits for arrears of Rent.)**

[REP., ACT X OF 1859.]

S. 4—*See* BEN. REG. VII OF 1799, B.L.R. Sup. 626, F.B.=2 Ind. Jur. N.S. 119=7 W.R. 185

——**Reg. VII of 1832 (Modifying Ben. Reg. V of 1831.)**

[REP., ACT VI OF 1871.]

(1)—S. 7—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 3 W.R. Mis. 19.

(2)—S. 9—Effect of apostacy—*See* HINDU LAW—CONVERSION, 4 A.L.J. 365=A.W.N. 1907, 151=29 A. 487.

(3)—S. 9—Scope and effect—*See* HINDU LAW—CONVERSION, 15 C.W.N. 545, P.C.=8 A.L.J. 552=13 Bom. L.R. 427.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(4)—S. 9—*See* HINDU LAW—CONVERSION, 25 A. 546=A.W.N. 1903, 137.

(5)—S 9—*See* HINDU LAW—INHERITANCE, 3 W.R. 206.

———**Reg. IX of 1833 [Bengal Land-revenue (Settlement and Deputy Collectors)]**

[SHORT TILTE GIVEN, ACT I OF 1903. SS. 14, 15 REP. ACT X OF 1859. S. 19 REP., ACT X OF 1873 S. 4 REP., ACT XVI OF 1874 TITLE AND S 1, AM. AND REP. IN PT., S. 2 REP , SS. 3, 8, 24, 25 REP. IN PT., SS. 12, 13, 16 AM., ACT I OF 1903. REP. IN PT. (IN AGRA EXCEPT CERTAIN AREAS), ACT XIX OF 1873, AM. (IN AGRA), ACT XIX OF 1886 REP. (IN ASSAM, EXCEPT THE LUSHAI HILLS), REG. I OF 1886. DECLARED IN FORCE THROUGHOUT AGRA, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 7.]

(1)—*See* BEN. ACT XIII OF 1848, W.R.F.B. 12=1 Ind. Jur. O.S. 5=Marsh 37.

(2)—*See* POSSESSION— ADVERSE POSSESSION, 10 M.I.A. 511.

(3)—Ss. 6, 7 and 9—*See* RIGHT OF SUIT—AWARDS, SUITS CONCERNING, 2 Agra 340.

(4)—S. 7—*See* NO. 3, *supra.*

(5)—S. 9—*See* JURISDICTION OF CIVIL COURTS, 4 W.R. 79.

(6)—S 9—*See* RIGHT OF SUIT—AWARDS, SUITS CONCERNING, 7 N.W.P. 169.

(7)—S. 9—*See* NO. 3, *supra.*

———**Reg. XIII of 1833 (Zilas of Ramgar, Jungle Mahals and Medinapore.)**

[REP., ACT XII OF 1876.]

S. 2—*See* RES JUDICATA—COMPETENCY OF COURT, Marsh 80=W.R. F.B., 26=1 Hay 148.

*———**Reg. III of 1872 (Sonthal Parganas Settlement.)**

[S. 9 AM., S. 19 REP., REG. II OF 1886, SS. 4, 5. S. 4, REP., S. 6 AM., REG. V OF 1893, SS. 2, 24. S. 3, SCH, AM., REG. III OF 1899, S. 3. S. 25, SCH. REP. IN PT., ACT I OF 1903. S. 9 SUPPLEMENTED, REG. II OF 1904. SCH. REP. (AS TO BEN ACT VIII OF 1862), ACT IV OF 1907. SS. 5, 11, 13, 25, 26 AM., SS. 5 A. 25 A. 27, 28, INS., S. 8 REP. IN PT., S. 23 REP. S. 24, AM. AND REP. IN PT., REG. III OF 1908. DECLARED IN FORCE IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG III OF 1899, S. 3.]

(1)—*The Sonthal Pergunnahs, Reg.* III *of* 1872—*Partition of* mal raiyati *land between mal raiyats—Whether binding on the ghatwal.*—As between two *mal raiyats* with whom a settlement has been made under Reg. III of 1872, there may be a partition of the waste and jungle lands, though such partition cannot be binding upon the superior landlord, the *ghatwal*, and will only subsist during the currency of the settlement. DOMAN PANDEY v. PANCHU KOLE, **5 C.W.N. 185.**

(2)—S 3 Suits exceeding Rs. 1,000 in value, in Sonthal Pergunnahs — Effect of s. 2, Act XXXVII of 1855 and s 3, Reg. III of 1872, when read together—Act XII of 1887, suits exceeding Rs. 1,000, to be tried in Courts established under—*See* BEN. ACT XXXVII OF 1855, s. 2, 18 C. 133.

(3)—*S.* 5—*Suits referred to by Reg.* III *of* 1872, *s.* 5—*Officers competent to try—Settlement proceeding before the Deputy Commissioner—Appeal to High Court.*—The officers appointed under s. 2 of Act XXXVII of 1855, and not the settlement officers as such, are those empowered to try the suits referred to by Reg. III of 1872, s. 5, and to certify issues under the section to the Civil Courts. Where a Deputy Commissioner tried certain issues referred to him as a Civil Court under Reg. III of 1872, s. 5, by a Settlement Officer, and, having been previously invested with the powers of a Settlement Officer himself, amended the settlement record in accordance with his findings, *held* that no appeal lay to the High Court, if the Deputy Commissioner acted as Settlement Officer, and that his having tried the issues as a Civil Court without jurisdiction was not, in view of his being invested with the powers of a Settlement Officer, such an irregularity as to necessitate the interference of the High Court to set aside his order. TARINI PERSHAD MISRA v. MAHAMUD CHOWDHURY, **7 C. 376.**

(4)—*S* 5 — *Jurisdiction to try suits— Act* XXXVII *of* 1855, *s.* 2—*Appeals from orders of Settlement Officers.*—Under Notification of 7th May, 1872 of the Lieutenant Governor of Bengal, which was in force at the time of this appeal, it was directed that, until further orders, the officers appointed under s. 2 of Act XXXVII of 1855 should entertain and adjudicate suits for land under s. 5 of Sonthal Reg. III of 1872. *Held* that, according to this Notification, the officers appointed under s. 2 of Act XXXVII of 1855, and not the Settlement Officers, as such, were the persons empowered to try suits, and, consequently, to certify issues to the Civil Courts under s. 5 of Reg. III of 1872. The High Court had no jurisdiction to hear an appeal from an order made by a Settlement Officer in the *Sonthal Pergunnahs* as such. TARINI PROSAD MISSER v. HURRISH CHUNDER CHOWDHRY, **8 C.L.R. 548.**

(5)— *S.* 5— *Settlement proceedings —Civil Court's jurisdiction.*—During the time of the settlement in the Sonthal Pergunnahs, the plaintiff instituted certain proceedings and complained that she had not been able to get possession of certain lands of which she had a mokurari lease from the defendant. Somehow or other the matter came before the Sub-Judge and the Settlement Officer gave permission to

* The star mark indicates that this regulation was passed by the Imperial Legislature, though applicable only to certain province.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

the Sub-Judge to try this case without payment of stamp fees; the matter was treated by the Sub-Judge as a regular suit and was tried by him accordingly, though without recording issues. The Sub-Judge dismissed the case, but the decree was not made until after the settlement had terminated. *Held* that, so far as the proceedings before the Sub-Judge were concerned, the matter could properly be regarded as proceedings taken under the Civ. Pro. Code, although the proceedings before him were not necessarily irregular in consequence of his failure to record issues, and that s. 5 of Reg. III of 1872 was not applicable to the case. SONAMONI DASI v. LILANUND SINGH, **11 C.L.R. 30.**

(6)—S. 5—*See* APPEAL—ACTS AND REGULATIONS, 6 C.L.R. 555.

(7)—Ss. 5 and 8—Suit instituted before Settlement Officer under Regulation without Court-fee—Suit transferred to Civil Court—Institution Court-fee whether necessary—*See* COURT-FEE, 12 C.W.N. 917.

(8)—S. 8.—*See* NO. 7, *supra.*

(9)—*Ss.* 9. 11, 25—*Settlement record, entry in, effect of—Conclusive as to rights of parties having subsisting interest — Reversioner, not bound.*—Ss. 9, 11, and 25 of the Sonthal Parganas Settlement Regulation make an entry in a settlement record conclusive as to the rights of the parties who have subsisting interest and who are in existence at the time the record is made. When, therefore, an estate was represented by a Hindu widow and she allowed another person, one of the reversioners, to be recorded as the owner, the other reversionary heir, after the death of the widow, is not bound by the record, but may question its validity on the ground of collusion between the widow and the recorded owner. KANGAI CHANDRA MONDAL v. MADHU SUDAN MONDAL, **17 C.L.J. 587=20 Ind. Cas. 417.**

(10)—S. 11—*See* EXECUTION OF DECREE—MISCELLANEOUS, 7 C.L J. 101.

(11)—S. 11—*See* NO. 9, *supra.*

(12)—*Ss.* 11 *and* 25—*Suit for establishment of* lakhiraj *title and amendment of record-of-rights*—Lakhirajdar, *proprietor — Jurisdiction —Suit for declaration that lands are* lakhiraj—*Onus.*—In a suit for establishment of *lakhiraj* title and amendment of the record-of-rights, *held*, that the *lakhirajdar* is a proprietor within the meaning of s. 25, Reg. III of 1872. The jurisdiction of a Civil Court in this case was not barred by ss. 11 and 25 of the Regulation. (18 C. 146, *D.*) When the plaintiff in the above case seeks to have it declared that the lands are his *lakhiraj*, the onus is, in the first place, on him to prove that they are so. RAMRANJAN CHUCKERBUTTY v. NANDA LAL LAIK, **22 C. 473.**

(13)—*Ss.* 11, 25—*Settlement Record, entry in, effect of—Conclusive as to rights of parties—Proprietor and tenant.*—At the last Cadastral

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

Survey in Sonthal Parganas, certain land in mouza B was included in mouza A by the Assistant Settlement Officer and specifically excluded from mouza B. The order of the Assistant Settlement Officer was affirmed on appeal, and on revision by the final Court. In a suit brought by the proprietor of the mouzas A and B against the makararidars and darmakararidars of mouza A for a declaration that the disputed land was not included in mouza A. *Held*, that, as a final decree under s. 11 of the Sonthal Parganas Settlement Regulation was passed against him by the Settlement Court, the suit was barred under s. 25 of that Regulation. RAJA RAM RANJAN v. SATIS CHANDRA, **17 C.L.J. 599.** (18 C. 146, *F.*)

(14)—*S.* 24, *meaning of.*—S. 24 of the Regulation means that a record of rights must (that is, it is compulsory on the Settlement Officer to do it) be notified and published in the manner directed therein, that is, by posting it conspicuously in the village; and that it is discretionary with the Settlement Officer to publish it in any other manner that he may think convenient, for the purpose of informing persons interested in the settlement proceedings of the result of the enquiry which he had made. NADIAR CHAND SINGH v. CHUNDER SIKHUR SADHU, **15 C. 765.**

(15)—*Ss.* 24, 25—*Suit to set aside order of Settlement Officer—Limitation.*—The words in s. 25 of Reg. III of 1872 indicate that a suit, brought to set aside an order of the Settlement Officer, is within time if brought within three years from the date of the publication (of the record of rights required to be notified under s. 24), or if there is any subsequent order of the Revenue Court, from such date. The order of the Revenue Court must be one which follows and does not precede the publication of the record-of-rights. RAM NARAIN SINGH v. RAM RANJUN CHUCKERBUTTY, **13 C. 245.**

(16)—*Cl.* 4, *s.* 25 — (*Sonthal Perguunahs Settlement*), *application of—Suit to establish that defendant was not tenant of lands in dispute—Matter decided by Settlement Court.*—According to the grammatical construction of cl. 4 of s. 25 of Reg. III of 1872, the introductory words, which impose a personal limitation on the jurisdiction of the Civil Courts, must apply to suits of all the three classes to which the clause relates, so that the bar to the jurisdiction can take effect only when the suit is a suit to contest the finding or record of a Settlement Officer, and involves also the determination of the rights of the zemindars or other proprietors as between themselves. [*D.*, 22 C. 473; *F.*, 17 C.L.J. 599.] Where the defendant had been recorded in the record of rights made by the Settlement Officer as a tenant of the lands in dispute, and a suit was brought to establish, by avoiding the instrument under which he held, that he was not a tenant and to oust him of his possession, the

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

High Court was of opinion that the suit must be held to 'regard' a matter decided by a Settlement Court in the sense of s. 11 and to be consequently unmaintainable. RAM CHURN SINGH v. DHATURI SINGH. **18 C. 146.** [*D.*, 22 C. 473 ; *F.*, 17 C.L.J. 599.]

(17)—S. 25—*See* Nos. 9, 12, 13, 15, *supra.*

*——— **Reg. III of 1879 (The Assam Local Rates).**

[S. 5, REP. INPT., ACT V OF 1897.]

(1)—*S.* 317 — *Rates payable by tenant, amount of contract by tenant to pay in excess of maximum — Realisation in execss, whether gives landlord any right.*—The maximum rate at persent imposed under s. 3 of the Assam Local Rates Regulation is one anna in the Rupee. And although a contract between the landlord and tenant for the latter to pay the full amount of local rate may be justified, one to pay anything in excess of that maximum is not legal. A landlord cannot get a decree for rates at more than one anna in the Rupee, even if for a long time he had been realising more than that. UPENDRA NATH SEN v. KAMESWAR KOLITA, **5 Ind. Cas. 80.**

*——— **Reg. I of 1886 (The Assam Land and Revenue).**

[SS. 70 (1), 72, 74 (2), 75, 79, 81, 85 AM., REG. II OF 1889, S. 1, AM., ACT V OF 1897. SS. 12, 68, 90 (2) AM., SS. 53A, 69A, 116A, 144A INS., REG. II OF 1905, WHERE AND WHEN NOTIFIED.]

(1)—S. 8—*See* NO. 4, *infra.*

(2)—S. 8 (*b*)—'Acquired'—Actual possession of, and settlement with, third person—Heirs of original settlement holder if can claim settlement—*See* EX-PARTE DECREE, 15 C.L.J. 241.

(3)—*S.* 6, *r.* 80 (*i*) *of the Government Rules —Settlement of land, first applicant if entitled to—Jurisdiction of Civil Court.*—Rule 80, cl. (*i*) of the rules framed under Reg. I of 1886 lays down a principle for the guidance of settlement officers, and does not confer a right on the first applicant to a settlement. It directs that, in cases where settlement is not made with the first applicant, the reasons therefor should be stated in writing. It does not follow from this that if the reasons are not recorded, the first applicant is entitled to a settlement. (17 C. 819, 24 C. 239, *D.*) Under s. 6 (*a*) of the Regulation, no right to settlement arises merely by reason of the fact that the plaintiff was the first applicant. ANANDA KISHORE SEN v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **14 C.W.N. 990=7 Ind. Cas 90.**

(3-*a*)—S. 12—*See* NO. 4, *infra.*

* This star mark indicates that this Regulation was passed by the Imperial Legislature, though applicable only to certain provinces.

Regulations—continued.

——2.—**Bengal Regulations**—*continued.*

(4)—*Ss.* 39 *and* 151, 2 *Prov.* (*b*), 12 *and* 154 *of the Assam Land and Revenue Reg.*, 1886—*Effect when read together—Rights of settlement holder—Order by Government of India before passing the Assam Regulation regarding right of* nisf-kherajdar.—Ss. 39 and 151, read together, amount to this—that a settlement made by a Settlement Officer, unless interfered with by the Chief Commissioner, is *final* ; but the settlement-holder *does* not thereby acquire any *right* to the property as against any other person claiming rights to it. When property has been settled with a *nisf-kherajdar* by the Revenue authorities, *held* that, having regard to the provisions of s. 2, prov. (*b*), s. 12 of the Regulation, and the order of the Government of India, a Civil Court can only give the *nisf-kherajdar*, who objects to that settlement, a declaration of his right to a settlement of the lands in question, and cannot, in view of s. 154, give him a decree for possession. MADHUB NATH SURMA v. MYARANI MEDHI, **17 C. 819.** [*R.*, 24 C. 239.]

(5)—*S.* 59—*Suit for rent due before Regulation came into force.*—S. 59 of the Regulation applies to rent becoming due subsequently to the Regulation coming into force, and not to rents already due on the date of its coming into operation. BROJO NATH CHOWDHRY v. BIRMONI SINGH MONIPURI, **15 C. 227.**

(6)—*Ss.* 70, 71, *Assam Land and Revenue Regulation* (1886)—*S.* 37, *Act* XI *of* 1859—*Incumbrance—Laches of old proprietor—Right of purchaser at revenue sale*—Shikmi haziram *rights—Pleading—Changing nature of defence in Appellate Court.*—On a construction of the provisions of ss. 70 and 71, Assam Land and Revenue Regulation, *held*, that the word "property" in s. 71 includes not merely an entire estate but also a share in an entire estate in respect of which revenue has been separately apportioned ; consequently, a purchaser of a part of a permanently settled estate is entitled to the benefit of s. 71 of the Act, quite as much as a purchaser of an entire estate. The "incumbrance" under s. 71 of the Regulation, includes not merely an incumbrance created by the previous holder, but also an incumbrance created by his acquiescence or laches, and a purchaser at a revenue sale is entitled to avoid the interest acquired by any one by adverse possession. [*F.*, 3 C.L.J. 387.] When defendants claim to hold certain lands as part and parcel of their *shikmi haziram taluq*, and not as cultivating *raiyats* of those lands, they cannot be allowed to change their ground in the High Court. MAHOMED NASIM v. KASI NATH GHOSE, **26 C. 194=3 C.W.N. 108.**

(7)—*Ss.* 70, 71 — *Annulment of incumbrances—Effect of sale—Part of estate.*—The purchaser of a share of an estate at a sale held under s. 70 of the Assam Land and Revenue Regulation is entitled to hold the property free of all incumbrances. The word 'property' in s. 71 includes not only an entire estate but also

Regulations—continued.

—2.—**Bengal Regulations**—*continued.*

a share in an entire estate. (26 C. 194, *F.*) The purchaser, moreover, is entitled so to hold as soon as his purchase is completed. It is not necessary for him to take any steps to have the property freed from incumbrances. An incumbrance existing not only upon the part of the estate sold, but also over other parts, is, after the sale, annulled so far as it extends over the part of the estate which has been sold JAWAD ALI v. JNANADA SUNDARI DUTT, **3 C.L.J. 387.**

(8)—S. 71—*See* NOS. 6, 7, *supra.*

(9)—*Ss.* 96 *to* 98, 119, 154, *sub-section* (1) *cl.* (*e*)—*Suit for partition—Suit for possession by purchaser of land dispossessed after purchase, maintainability of—Imperfect partition—Civil Court, jurisdiction of.*—The plaintiff, in this case, sought to recover possession by partition of a small portion of land in two plots in the district of Sylhet as forming the land which he had purchased out of the share of a former proprietor. In a previous suit between the parties, the Civil Court declared that, if the Collecter refused partition, the plaintiff might apply to it for partition. The Collector having refused partition, the plaintiff again applied to the Civil Court for partition. Both the lower Courts decreed for the plaintiff. The main ground of appeal to the High Court was that the partition sought for, being an "imperfect partition" within the meaning of s. 96 of the Assam Land and Revenue Regulation, the suit was not maintainable, having regard to the provisions of s. 154, cl. (*e*) of the said Regulation. *Rampini J.* was of opinion that the suit related to a case of imperfect partition and was not maintainable in a Civil Court. On the other hand, *Brett, J.* was of opinion that the present case was not one for imperfect partition as defined in the Regulation and was one which was not covered by the Regulation. Further, the vendor of the plaintiff was in exclusive possession of the land claimed, prior to the purchase and the plaintiff, after his purchase, was in possession and was afterwards dispossessed. Under the ordinary law, he was entitled to have the land, which he purchased, determined and separated and possession of it given to him and that was the relief he sought for in the suit. The Assam Regulation contained no provision to meet the circumstances of the present case. Consequently, he was of opinion that the suit was maintainable. In consequence of this difference of opinion, the case was referred to *Ghose, J. Held*, in the present case, the claim was not for a perfect partition and it was doubtful whether a perfect partition could be claimed by the plaintiff in this case from the Revenue authority. Whatever that might be, the present claim was not for "imperfect partition," as defined in the Regulation. (23 C. 514, *D.*) For, the expression "imperfect partition" as defined in the Regulation, is only referable to a division of the *entire* estate and not to a specified portion thereof. If it was not for 'imperfect partition,' then under s. 11 of the Code of Civil Procedure the Civil Court must have jurisdiction to entertain the suit, there being nothing in the Regulation barring the cognizance of such a suit. Further, the Revenue authorities had no jurisdiction under the regulation to grant the relief which the plaintiff asked for and the legislature could not have intended that the plaintiff should have no relief even in the Civil Court. Appeal dismissed. GOURI KRISHNA SYAM CHOWDHURY v. INDRAMANI DEBI, **1 C. L. J. 421=32 C. 1036.**

(9-*a*)—S. 96—*See* NO. 16, *infra.*

(10)—S. 97—*See* NO. 8, *supra.*

(11)—S. 98—*See* NO. 8, *supra.*

(12)—S. 119—*See* NO. 8, *supra.*

(13)—S. 151—*See* NOS. 4, 8, *supra.*

(14)—*S.* 154—*Assam Land and Regulation,* 1886—*Suit for possession and for declaration of right to settlement—Civil Court—Jurisdiction.*—A question merely as to the right to obtain a settlement from the Revenue authorities does not seem to be excluded from the jurisdiction of the Civil Court by the provisions of s. 154 of the Assam Land and Revenue Regulation. In a suit for possession and for a declaration of plaintiff's right to a piece of land on the strength of possession and a pattah from the cadestral survey authorities, the Civil Courts cannot give the plaintiff more than a declaration of his right to a settlement. A decree for possession, if given, must be set aside. PATAN MARIA v. BHABIRAM DUTT BARNA, **24 C. 239=1 C.W.N. 94.** (17 C. 819, *F.*) [*F.*, 12 C.W.N. 40, Note.]

(15)—*S.* 154—*Declaration, Suit for, that lands settled with plaintiff by revenue authorities had been wrongly included within the lands subsequently settled with defendant, if lies—Plaint, misdescription in—Amendment, if absolutely necessary to entitle plaintiff to relief.*—A suit lies for a declaration that certain plots of land settled with the plaintiff by the revenue authorities had subsequently been wrongly included in the settlement made with the defendant, notwithstanding the provisions of s. 154 of the Assam Land and Revenue Regulation. (17 C. 819, 24 C. 239, 1 C.W.N. 94, *R.*) If a Court comes to a clear finding that certain plots of land of the plaintiff's settlement have been, to the extent alleged in the plaint, actually included wrongly in one of the plots of the defendant's settlement, it would not be justified in withholding the relief to which the plaintiff is entitled, merely on the ground that the plaint contained a misdescription as to the number of the plot of the defendant's settlement and that the plaint had not been amended. NASIR MEA v. ARMAN ALI, **17 C.L.J. 118=18 Ind. Cas. 745.**

(16)—Ss. 154 (*c*), 96—*See* PARTITION—SUITS FOR PARTITION, JURISDICTION OF CIVIL COURT IN, 23 C. 514.

Regulations—continued.

——2.—**Bengal Regulations**—*concluded.*

* ——— **Reg. V of 1893 (The Sauthal Parganas Justice.)**

[S. 4 AM. REG. III OF 1899, S.2. S. 2, REP. ACT I OF 1903. DECLARED IN FORCE IN THE SANTHAL PARGANAS REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3.]

(1)—*S.* 15—*Sanction for prosecution—Appeal against order of Deputy Commissioner of Sonthal Perganas revoking sanction granted by Subordinate. Court — Jurisdiction — S.* 195, *Crim. Pro. Code.* — For the purposes of s. 195, Crim. Prc. Code, the Court of the Deputy Commissioner of Sonthal Perganas shall be deemed to be subordinate to the Court of the Commissioner of Bhagalpur. An appeal against an order of the former Court revoking a sanction granted by a Court subordinate to it, lies to the latter Court and not to the High Court. MANNA LAL CHOWDHRY v. PADMAN MISSER, **30 C. 916.**

(2)—S. 24 — *See* CONTRACT ACT, 1872, ss. 23, 24, 26C, 23S.

———**Reg. XIX of 1854.**

See PARTITION—MISCELLANEOUS, 14 W. R. 335.

—— 3.—**Bombay Regulations.**

———**Reg. I of 1800 (Civil Court, Surat.)**

[REP., BOM. REG. I OF 1827.]

(1)—S. 13—*See* LIMITATION — MISCELLANEOUS, 1 M.I.A. 414, 5 W R. P.C. 31=1 M.I.A. 154.

(2)—S. 13—Application of—*See* MORTGAGE —REDEMPTION, 11 Bom. L.R. 318=2 Ind. Cas. 469.

———**Reg. II of 1800 (Suits in such Courts.**

[REP., BOM. REG. I OF 1827.]

S. 7—*See* ABATEMENT OF SUIT, 5 W.R. P. C. 59=1 M.I.A. 470.

——**Bom. Reg. I of 1814 (Interest).**

[REP. BOM. REG. I OF 1827.]

See JUDICIAL OFFICERS, LIABILITY OF, 3 B.H.C. App. 1.

———**Reg. II of 1827 (Caste questions; Pleaders).**

[REP. IN PT., ACT I OF 1846; ACT X of 1861; ACT X OF 1873; ACT XII OF 1873; ACT XII OF 1876; BOM. ACT VI OF 1866; (LOCALLY) ACT XIV OF 1869. REP. IN PT. AND AM., ACT XVI OF 1895. CH. VI REP. ACT XVIII OF 1879, S.42 (AS AM. BY ACT I OF 1903), WHEN NOTIFIED. SS. 21, 47 TO 54 AND 56 DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF BOMBAY, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 5.]

* This star mark indicates that this regulation was passed by the Imperial Legislature, though applicable to certain provinces

Regulations—continued.

——3.—**Bombay Regulations**—*continued.*

(1)—*See* ACT XXIII OF 1871, s. 4, 17 B. 224.

(2)—*See* LEGAL PRACTITIONERS—PLEADER—APPOINTMENT AND APPEARANCE, 12 B. 85.

(3)—S. 5 — *See* CIV. PRO. CODE, 1908, s. 115, 10 B. 610, F B.

(4)—S. 5—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 7 B. 341.

(5)—S. 5, cl. 2—*See* REGISTRATION ACT, 1908, ss. 73, 74 and 75, 3 B. H. C. A. C. 104.

(6)—S. 5, cl. (2)—*See* SUPERINTENDENCE OF HIGH COURT, 20 B. 50.

(7)—*S.* 11—*Caste question—Suit for declaration to be called the Ayya of Hiremath—Use of name—Allegation of damages.*—The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and he asked for a perpetual injunction to restrain the defendants from using the name "Ayya of Hiremath." The first Court, *held* that the suit was barred by s. 11 of Reg. II of 1827. On appeal, the lower appellate Court *held* that the plaintiff was not entitled to the office claimed by him. On second appeal, the plaintiff contended that his case fell within the principle that the unauthorised use of the name of one person by another gave a cause of action to the former where the use was calculated to deceive and inflict pecuniary loss. *Held*, (i) That the question for determination was whether any damages had been incurred or not: but the plaint did not afford any clear indication that what was complained of was the user of a name by the defendant in a manner calculated to deceive any one. (2) That all that the plaintiff complained of was that the defendant had assumed a name to which the plaintiff alone had the exclusive right; and that that assumption would enable, and had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriated to himself fees, which would have gone into his (plaintiff's) pockets. It was, therefore, a claim to a caste office or to enjoy certain privileges and honours at the hands of the members of a caste in virtue of that office. That was a caste question, not cognizable by Civil Court (6 B. 725, *Appl.*) The law does not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of a name by a stranger. The mere assumption of that name which is the patronymic of a family, by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which law affords no redress. GADIGEYA ADIVEYA HIREMATH v. BASAYA MALLAYA RAPATI, **12 Bom. L.R. 358=6 Ind. Cas. 519 =34 B. 455.**

Regulations—continued.

——**3.—Bombay Regulations**—*continued.*

(8)—*S.* 21 — *If applicable to suits between Mahomedans.*—A dispute as to the right to an office, as for example the office of *Khatib* among the Mahomedans, is not a caste question within the meaning of the term as used in s. 21 of Reg. II of 1827, which has no application to suits between Mahomedans. SAYED HASHUN SAHEB v. HUSSANSHA, **13 B. 429.** [*R.*, 12 C.L.J. 74=14 C.W.N. 1057.]

(9)—*S.* 21—"*Caste,*" *Construction of—Caste question — Arrangement between members of caste for purpose of paying off debts of caste.*—The term "caste" in s. 21 of Reg. II of 1827, is not necessarily confined to Hindus, but comprises any well-defined native community governed, for certain internal purposes, by its own rules and regulations. In the present case, an agreement had been entered into by the members of a certain Mahomedan caste for the purpose of paying off the debts of the caste out of certain contributions to the caste funds; and a suit was brought to recover a certain sum from a member of the caste, on the basis of this agreement. *Held* that it was a caste question, and as such was not cognizable by the Civil Courts. ABDUL KADIR v. DHARMA, **20 B. 190.** [*R*, 26 B. 174, 31 B. 366=9 Bom. L.R. 451.]

(10)—S. 21—Yajman vritti—Rights of officiator — Jurisdiction — *See* HINDU LAW — GENERAL, 13 Bom. L.R. 1171.

(11)—S. 21—Suit by some members of a caste for declaration of exclusive right to worship at temple, cognisability of, by Civil Court—*See* JURISDICTION OF CIVIL COURTS, 7 B. 323.

(12)—S. 21—*See* JURISDICTION OF CIVIL COURTS, 6 B. 725, 11 B. 534, 19 B. 507, 5 B. 83, 5 B. 84, F.B. (note).

(13)—S. 21—*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 2 B. 470.

(14)—S. 21. cl. (1)—*See* RIGHT OF SUIT—CASTE QUESTIONS. SUITS CONCERNING, 3 Bom. L.R. 718, 26 B. 174.

(15)—S. 43—*See* PUBLIC SERVANT, 4 B.H. C. A.C. 93.

(16)—*S.* 52—*Pleader's fees, basis of—Actual value of the property—Plaint must show real value and Court-fee value—Court—Practice.*—On a question raised as to whether the basis for the calculation of pleader's fees under s. 52, Reg. II of 1827, should be the actual value of the property or the valuation of the claim for Court-fee purposes: *Held*, that the words of the Regulation point to the actual value as the basis of the remuneration, while the Court-fee value in suits of this class may bear no relation to the actual value. The principle and rule of taxation ought as far possible to be such as to secure that the successful party should recover from his opponent such costs as are necessary to enable him to place his case properly before the Court, and this end

Regulations—continued.

——**3.—Bombay Regulations**—*continued.*

can best be secured by adopting the actual value as the basis of the taxation. In view of this conclusion, it will in future be right for the real as well as the Court-fee value to be stated on every plaint and memorandum of appeal, and, in case of dispute, for an issue to be raised as to the real value. MEHERBAI v. MAGANCHAND, **7 Bom. L R. 131=29 B. 229.**

(17)—*S.* 54—*One pleader appointing another on his behalf—Civ. Pro. Code, s.* 36—*Chap* 1, *cl.* 18(i) *of the High Court Circular Orders—Proviso to the rule not* ultra vires, —This was a reference for the opinion of the High Court concerning the legality of the proviso to cl. 18 (i) of chap. I, of the Circular Orders of the High Court directing that one pleader may appoint another pleader to appear on his behalf and that the hearing of the case should in such cases be allowed to proceed unless the Court sees reason to the contrary. It had to be determined whether the above rule was consistent with cl. 1 of s. 54 of Reg. II of 1827, and the High Court was of opinion that there was nothing inconsistent with that enactment in a rule authorising one pleader to ask another to hold a brief for him. The section regulates the mode of the appointment of the pleader and is intended to prevent a client being prejudiced by the absence of his pleader and the rule authorises the pleader so appointed to transact, with the leave of the Court, the business entrusted to him. The rule was passed with the object of facilitating the work of the Court and obviate unnecessary adjournments of cases, and was never intended for the purpose of allowing the more experienced pleaders to get their client's business transacted by the agency of their inexperienced juniors. So, where the client objects to such a procedure on the part of his own pleader, the Court would then "see reason to the contrary," as also where the Court itself considers that the rule was being abused, and would act accordingly. *In re* SHIDAPPA, **22 B. 654.** [*R.*, 9 O.C. 65.]

(18)—S. 54. cl. 1—*See* LEGAL PRACTITIONERS—PLEADER, APPOINTMENT AND APPEARANCE, 1 Bom. L.R. 92=23 B. 657.

(19)—*S.* 56 — *Pleader — Misconduct—Disciplinary jurisdiction—High Court.*—Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice, give them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt. A pleader presiding at a public meeting and procuring the passing thereat of a resolution contemptuously denouncing or protesting against the conduct of a Judge of the High Court in passing sentence at a trial at the Criminal Sessions is guilty of misbehaviour under s. 56 of Reg. II of 1827. GOVERNMENT PLEADER v. J. M. SAMANT, **10 Bom. L.R. 1169=33 B. 252.**

Regulations—continued.

——3.—**Bombay Regulations**—*continued.*

(20)—*S.* 56 — *High Court — Disciplinary jurisdiction — Pleader — Misbehaviour — Not limited to professional misconduct.*—The disciplinary jurisdiction of the High Court under s. 56 of the Bom. Reg. II of 1827 is not, in cases of a pleader's alleged misconduct, limited to the misconduct committed in the course of his professional duties. The occurrence of the word "misbehaviour" in juxtaposition with "criminal offence" suggests that the misbehaviour need not be necessarily restricted to professional misbehaviour. There is no reason to suppose that the Legislature intended in this matter to enact a laxer rule of practice in India than the rule which prevails in England. THE GOVERNMENT PLEADER BOMBAY v. ANNAJI NARAYAN DESHPANDE, **15 Bom. L R. 231=14 Cr. L.J. 257=19 Ind. Cas. 529=37 B. 354.** (33 B. 252=10 Bom. L.R. 1169, (1842) 10 M. and W. 28 (34), (1860) 3 E. and E. 34 (38), (1868) L.R. 3 Q B. 543, (1893) 2 Q B. 439, (1805) 6 East, 126, (1778) 2 Cow. p. 829, *R.*)

——**Reg. IV of 1827 [Civil Courts (Law to be observed.)]**

[REP. IN PT., ACT X OF 1861; ACT XVII OF 1862; ACT VI OF 1874. REP. IN PT. (LOCALLY)—ACT XIV OF 1869; BOM. ACT V OF 1879. S. 26 AND S. 69, CLAUSES SECOND AND THIRD, DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF BOMBAY, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 5.]

(1)—*See* NAWAB OF SURAT, 12 B.H.C. 156.

(1-*a*)—S. 26—*See* EASEMENT, 1 Bom. L.R. 170=23 B. 666.

(2)—S. 26—*See* ENGLISH LAW, 2 B.H.C. 36, 52.

(3)—S. 26—*See* MAHOMEDAN LAW—WAKF, 1 B.H.C. 36.

(4)—S. 27, cl. 1—*See* EVIDENCE — MISCELLANEOUS, 4 W.R. P.C. 94=6 M.I.A. 448.

(5)—Ss. 62 and 66—*See* SALE—SALE IN EXECUTION OF DECREE — PURCHASERS, RIGHT OF, 12 B.H.C. 15.

(6)—S. 66—*See* NO. 5, *supra.*

——**Reg. V of 1837 (Acknowledgment of Debts; Interest; Mortgages.)**

[REP. IN PT., ACT XXVIII OF 1855; ACT IX OF 1871; ACT XII OF 1873; ACT XII OF 1876; ACT IV OF 1894. REP. IN PT. (LOCALLY)—ACT XVII OF 1879, S. 12; ACT IV OF 1882. PREAMBLE AND SS. 9, 14 AND 15 DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF BOMBAY, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 5.]

(1)—*Acquisition of title by prescription—Reg. V of 1827—Nature of possession—Extinction of right to property—Act XIV of 1859 (Limitation Act).*—In the Bombay Presidency, it is only in those cases in which the possession of property has been of such a duration and character as to come within Reg. V of 1827 that the result of extinguishing the original right to the property follows under Act XIV of 1859. PARASHRAM JATHMAL v. RAKHMA, **15 B. 299.**

(2)—*See* LIMITATION — MISCELLANEOUS, 1 B.H.C. 64.

(3)—*See* RELINQUISHMENT OF PORTION OF CLAIM, 21 B. 267.

(4)—*S.* 1—*Prescriptive title.*—A person in uninterrupted possession of land for more than 30 years acquired a prescriptive title to the land and became its absolute owner under the section, even as against the Crown. *N.B.*—The Regulation has since been repealed by the Limitation Act, IX of 1871. THE COLLECTOR OF THANA v. DADABHAI BOMANJI, **1 B. 352.** [*R.*, 14 B. 213.]

(5)—*S.* 1—*Trust property—Endowment of village for performing Karpur Mangalarti—Swami of the Math, a trustee of the village—Alienation of village by Swami—Possession of alienee for thirty years—Possession ripened into title—Limitation Act* (XIV *of* 1859), *ss.* 1 (12), 2—*Limitation Act* (IX *of* 1871), *s.* 2—*Repeal of s.* 1 *of Bom. Reg.* V *of* 1827—*Rule of positive prescription not affected by law of limitation—Construction of Statutes—Existing Acts should be harmoniously construed.*—The village of Gangapur was granted in Inam in 1678 to the Swami of a Math, by way of trust for the purpose of meeting the expenses of a religious service, known as "Karpur Mangalarti," in the temple of Shri Rama. In 1830, the then Swami gave the village by way of gift (*Krishnarpana*) to the defendants who went into its possession as proprietors. Under the terms of the gift, the defendants were to pay Rs. 20 per year as Judi on the land; but in 1830 the payment was discontinued, and a fresh deed of gift was passed in favour of defendants. In 1911, the plaintiff, the present Swami of the Math, sued to obtain a declaration that the village belonged to him and to recover possession of the same from the defendants. The defendants contended that the suit was barred by limitation. *Held*, (1) that the Swami and his successors held the village as trustees, for the legal property was by the original grant vested in the Swami, while the equitable estate was in the juridical person, the idol. (1901) A.C. 118, 121, *F.*; 9 B. 425, 27 M. 435, *R.*) (2) That the defendants having gone into possession of the property as proprietors in 1830, their possession had ripened into title in 1860, by virtue of the provisions of s. 1 of the Bombay Reg. V of 1827. (3) That s. 1 of the Bombay Regulation was not affected by s. 2 of the Limitation Act (XIV of 1859), which did not come into operation till the 1st January, 1862; and that it remained in force until it was repealed by the Limitation Act (IX of 1871). (4) That, s. 1 of the

***Regulations*—continued.**

——3.—Bombay Regulations—*continued.*

Bombay Regulation, being an enactment of positive prescription, was not affected by Act XIV of 1859 which was a Statute of limitations. (1 B. 286, 1 B. 592, *F.*; 10 B.H.C. 231, (1829) 9 B. and C. 750 (752), *R.*) (5) That the fact that defendants were alienees from a trustee did not weaken their position, for s. 2 of the Limitation Act of 1859, which dealt with trustees, was but a section dealing with limitation of suits, and could not affect s. 1 of the Regulation which dealt with positive prescription. Where a later Act of Legislature does not purport or affect to supersede an earlier Act, the Court will endeavour to read the two enactments together and to avoid conflict if possible. RANGACHARYA v. DESACHARYA, **15 Bom. L.R. 178=37 B. 231=19 Ind. Cas. 387.**

(5-*a*)—S. 1—*See* LIMITATION—LAW OF LIMITATION, 1 B.H.C. 41.

(6)—S. 1—*See* LIMITATION ACT, 1908, s. 26, 16 B. 592.

(6-*a*)—S. 1—*See* LIMITATION ACT, 1908, art. 144, 13 B.L.R. 254, P.C.=21 W.R. 178=10 B.H.C. 281=1 I.A. 34.

(7)—S. 1—*See* POSSESSION—ADVERSE POSSESSION, 1 B. 592.

(8)—*Ch.* I, *s.* 1, *cl.* (*i*)—*Hindu family—Ancestral estate—Suit for share—Applicability—Uninterrupted possession—Thirty years—Prescriptive title—Limitation Act,* 1859 *and Act* IX *of* 1871, *sch.* I, *s.* 22—*Repeal of statute—Absence of express words—Right acquired under repealed statute.*—The section in the Regulation is applicable to a suit to recover a share in undivided, immoveable estate belonging to a Hindu family. (3 B.H.C.A.C. 170, 173, *F.*) Under the Regulation, a person in uninterrupted possession of an immoveable estate as proprietor for more than 30 years, acquired a prescriptive title in the estate. It not merely barred the remedy of any other claimant, but it extinguished his right itself. [*R.*, 9 B. 198, F.B., 21 A. 204.] Reg. V of 1827 was unaffected by the Limitation Act of 1859, but it was expressly repealed by Act IX of 1871. The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect, in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force (*Restall* v. *London and South Western Railway Co.*, L.R. 3 Exch. 141; *Oldreene* v. *Puckridge*, L.R. 3 Exch. 145, *R.*) Act IX of 1871, although it repealed Reg. V of 1827 cannot affect any prescriptive right or title which had, under ch. I, s. 1 of that Regulation, been acquired by any possessor of immoveable property before Act IX of 1871 was passed, inasmuch as neither by express words nor by clear implication does there appear to have been any intention on the part of the legislature to take away any such right or title. Accordingly, a suit instituted since 1st April 1873, for a share of immoveable property, was barred, inasmuch as the defendant had uninterrupted and exclusive possession of that property for more than 30 years, as well before the commencement of the suit, as before the 1st April 1873; and therefore, art. 127, sch. II of Limitation Act IX of 1871, was inapplicable to the suit. SITARAM VASUDEV v. KHANDERAV BALKRISHNA, **1 B. 286.** [*F.*, B. 295, 2 B. 148, F.B., 153 P.L.R. 1901, 90 P.R. 1904=88 P.L.R. 1904.]

(8)—*S.*1, *cl.* 1—*Money payment.*—Money-payment is not "immoveable property" within the meaning of Bom. Reg. V of 1827, s. 1, cl. 1. THE GOVERNMENT OF BOMBAY v. DESAI KULLIANRAI HAKOOMUTRAI, **14 M.I.A. 551=3 Sar. 103.**

(8-*a*)—S. 1, cl. 1—*See* PESCRIPTION—EASEMENTS—GENERAL, 2 B.H.C. 334.

(8-*b*)—S. 3—*See* ACT OF STATE, 2 M.I.A. 37.

(9)—S. 4—*See* DEBT, 8 B.H.C.A.C. 150.

(10)—S. 4—*See* HEREDITARY OFFICE, 5 W.R.P.C. 121=2 M.I.A. 23.

(11)—S. 7—*See* HINDU LAW—MINORITY, 2 B.H.C. 325.

(12)—S. 7, cl. 2—*See* LIMITATION—MISCELLANEOUS, 6 W.R. P.C. 38=3 M.I.A. 138.

(13)—S. 12—*See* HINDU LAW—USURY, 3 B.H.C. A.C. 23.

(14)—*S.* 15, *cl.* 3—*Usufructuary mortgage—Sale.*—S. 15, cl. 3, of Reg. V of 1827, does not authorize the sale of a usufructuary mortgage. KRISHNAJI v. WASUDEO, **3 Bom. L.R. 156.**

(15)—S. 15 (3)—*See* MORTGAGE—CONSTRUCTION OF MORTGAGE DEEDS, 16 B. 303, 20 B. 296.

(16)—S. 15 (3)—*See* MORTGAGE—USUFRUCTUARY MORTGAGE, 11 Bom. L.R. 1315=34 B. 128=4 Ind. Cas. 595.

——Reg. VI of 1827 (Pauper Suits and Appeals.)

[REP., ACT X OF 1861.]

See COURT, 1 B.H.C. 102.

——Reg. VII of 1827 (Panchayats).

[REP., ACT X OF 1861.]

(1)—*See* ARBITRATION—REFERENCE TO ARBITRATION, 6 M.I.A. 134.

(2)—*See* AWARD, 7 W.R. P.C. 8=3 M.I.A. 383.

——Reg, VIII of 1827 (Administration of Estates.)

[REP. IN PT., ACT XII OF 1873; EXTENDED TO SINDH, BOM. ACT XII OF 1866, S. 12. APPLICATION OF S. 10 RESTRICTED (LOCALLY) BOM. ACT IV OF 1890, S. 58 (3). DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF BOMBAY, EXCEPT AS REGARDS THE SCHEDULED DISTICTS, ACT XV OF 1874, S. 5.]

Regulations—continued.

——3.—**Bombay Regulations**—*continued.*

(1)—*Reg.* VIII *of* 1827, *certificate of heirship not obtainable by minor under.*—Having regard to all the provisions of Reg. VIII of 1827, a certificate of heirship cannot be granted under that Regulation to a minor. BAI BAIBA v. BAI DAGUBA, **6 B. 728.** [*R.*, 7 B. 341.]

(2)—*See* CERTIFICATE OF ADMINISTRATION—MISCELLANEOUS, 12 B. 150, 14 B. 236, 19 B. 320.

(3 & 4)—*See* SUCCESSION CERTIFICATE ACT, 1889 ss. 19, 28, 19 B. 399.

(5)—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 28, 18 B. 748.

(6)—Certificate of heirship under—Effect—*See* WILL—GENERAL, 1 S.L.R. 196.

(7)—S. 2—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 26, 17 B. 230.

(8)—S. 4—*See* CERTIFICATE OF ADMINISTRATION—MISCELLANEOUS, 20 B. 548.

(9)—S. 7—*See* CERTIFICATE OF ADMINISTRATION—MISCELLANEOUS, 11 B. 368.

(10)—*S.* 9—"*Determined*" *meaning of*—*Appeal*—*Order to deliver property.*—S. 9 of Reg. VIII of 1827 empowers the District Court to make an order directing the administrators appointed under the Regulation to make over the property, "when it has been determined" between the rival claimants who is the heir of the deceased, but, to give full effect to the object of the Regulation, the word "determined" must be understood as "finally determined." Where a District Judge judicially declares one of the two rival claimants to be the heir of the deceased, it cannot be said that that order is final as long as the party against whom that decision has been given has a right of appeal. Therefore, a District Judge would be illegally exercising his jurisdiction under the Regulation if he passes an order, before the expiry of the time allowed for appeal, directing the administrators appointed under the Regulation to make over the property of the deceased to the successful claimant. SHRI VISHVAMBHAR PANDIT v. SHRI VASUDEV PANDIT, **16 B. 708.** (15 C. 47, 16 B. 711 = P.J. 1887, 152, *R.*)

(11)—S. 9—*See* CERTIFICATE OF ADMINISTRATION—MISCELLANEOUS, 13 B. 37.

(12)—S. 10—*See* PARTIES TO SUIT—SUBSTITUTION OF PARTIES TO SUITS, 21 B. 102.

——**Reg IX of 1827 (Registration).**

[REP., ACT XVI OF 1864.]

S. 3, cl. 2—*See* REGISTRATION ACT, 1908, S. 50, 3 B.H.C.A.C. 167.

——**Reg. XVI of 1827 (Collectors of Land Revenue).**

[REP. IN PT., ACT XI OF 1843; ACT X OF 1873; ACT XII OF 1873; ACT X OF 1876; ACT XII OF 1876; BOM. ACT V OF 1866; BOM. ACT III OF 1874; RESIDUE REP. (LOCALLY) BOM. ACT V OF 1879.]

Regulations—continued.

——3.—**Bombay Regulations**—*continued.*

(1)—*See* Bom. ACT III OF 1874, 4 C.W.N. 517, P.C. = 24 B. 556 = 27 I.A. 86 = 2 Bom. L. R. 548.

(2)—Vatan property, mortgage by holder of life-interest in—Descent of interest to mortgagor's son effect of, on mortgage—*See* VATAN, 6 B. 211.

(3)—*See* VATANDAR, 2 Bom.L.R. 548 = 24 B. 556.

(4)—Ss. 19, 20—Acquisition of larger interest by the mortgagor after the date of the mortgage—Rights of mortgagee—*See* MORTGAGE—GENERAL, 12 Bom. L.R. 143 = 34 B. 175 = 5 Ind. Cas. 866.

(5)—*S.* 20—*Alienation of* vatan *property*—*Bombay Act,* III *of* 1874.—A mortgage by a *vatandar* of *vatan* property, executed in 1871, *i.e.* at a time when Reg. XVI of 1827 was yet in force, was held to be void in its inception, as against the heir of the then *vatandar* (the mortgagor). Nor could the subsequent repeal of Reg. XVI of 1827 by Bom. Act III of 1874 validate the mortgage as against the heir. KALU NARAYAN KULKARNI v. HANUMAPA *bin* BHIMAPA, **5 B. 435.** [*Appr.*, 24 B. 556; *R.*, 5 B. 437, 18 B. 22, 34 B. 175 = 12 Bom.L. R. 143.]

(6)—*S.* 20—Talvar *lands, invalidity of partial alienation of, under s.* 20 *of Reg.* XVI *of* 1827—*Suit to eject lessee of the lands.*—The lands from which the plaintiff sought to eject the defendant in this case were lands pertaining to a *talwar* or *shetsanadi* vatan, of which the defendant was a lessee from the last full owner. According to Regulation XVI of 1827 ss. 19 and 20, as construed by Act XI of 1843 s. 15, the *shetsanadis* who, from time to time, held the vatan in succession, were hereditary district or village officers. The emoluments annexed to the office were inalienable under the provisions of s. 20 of the Regulation. The defendant therefore acquired no title at all under lease by the holder of vatan, the lease having been invalid as a partial alienation opposed to the above Regulation; and was therefore liable to be ejected by the life-owner entitled to possession. PURSHOTTAM TALWAR v. MUDKANGAVDA SHIDAMGAVDA, **7 B. 420.**

(7)—S. 20—*See* BOM. ACT III OF 1874, s. 10, 5 B. 283, F.B.

(8)—S. 20—*See* LIMITATION ACT, 1908, art. 124, 5 B. 437.

(9)—S. 20—*See* NO. 4, *supra.*

——**Reg. XVII of 1827 (Land Revenue).**

[REP. IN PT., ACT XXVI OF 1871; ACT XII OF 1873; ACT X OF 1876; ACT XII OF 1876; BOM. ACT VII OF 1863; BOM. ACT II OF 1866. RESIDUE REP. (LOCALLY), BOM. ACT V OF 1879.]

(1)—Revenue Courts within contemplation of—Mamlatdar's Court regarded as Revenue Court.—*See* BOM. ACT XVI OF 1838, s. 1, cl. 2, 14 B. 372.

(2)—*See* INAMDAR, 17 B. 422.

Regulations—continued.

——**3.—Bombay Regulations**—*continued.*

(3)—*S.* 5—*Rights of Government—Revenue—Inferior and superior holder--Privity of estate.*—The Government, and, therefore, the holder of the rights of Government can, under s. 5, on failure of the superior holder to pay the revenue, realize it from the inferior holder, *e.g.*, a mortgagee in possession. The laws for realizing the land revenue establish a kind of privity of estate between the superior and inferior holder, by which the latter, taking the profits of the land, must satisfy the obligations of the former to Government independently of, and even in opposition to, any agreement between the two contracting parties. The liability adheres to the occupation and enjoyment, and cannot be got rid of, except through its resignation by the Sovereign or his representatives. KRISHNAJI RAVJI GODBOLE v. RAMACHANDRA SADASHIV, **1 B. 70.**

(4)—S. 31, cl. 3—*See* RENT, SUIT FOR, 2 B. H.C. 185.

———**Reg. XVIII of 1827 (Stamps).**

[REP., ACT XXXVI OF 1860.]

(1)—*See* WILL—MISCELLANEOUS, 2 B.H. C. 52.

(2)—*S.* 10—*Objection to validity of document—Objection on merits.*—An objection to the validity of a document, as distinguished from its inadmissibility in evidence, or from a prohibition to Courts of justice or public officers to act upon it, is an objection on the merits. Two documents which were executed in the Island of Bombay respectively under date the 29th August 1851 and 4th August 1852, and which did not appear to have been originally expressly intended to operate within any of the zillahs subordinate to the Presidency of Bombay, *held*, not to come within the scope of Reg. XVIII of 1827. That Regulation, being an enactment imposing stamp duties upon the subject, must be strictly construed, and although the High Court believed that those documents were actually intended to operate, so far as the particular property in question in the suit was concerned, in the zillah of Tana, the High Court declined to hold "expressly" to mean the same as "actually," as nothing appeared on the face of either of those documents to show where the property mentioned in them was situated. GIRDHAR NAGJISHET v. GANPAT MOROBA, **11 B.H.C. 129.** [*R.*, 13 B. 493.]

(3)—*S.* 10—*Lease—Contract of indemnity—Stamp— Mortgage— Stamp duty— Tender—Special appeal—Practice.*—One of the terms of a mortgage stipulated that the mortgagor should hold the estate for the term of the mortgage at a certain rent and make good any losses arising to the mortgagee from the default of tenants, the amount with interest being also recoverable at the time of redemption. The mortgagee now sought to enforce the stipulation. *Held*, that the stipulation could not be construed as being a lease or its counterpart or other engagement of a similar nature relating to the rent of land, passed between a landholder and his tenant. It is not an engagement for the payment of rent during the continuance of the lease or for the performance of any other condition on which the continuance of the lease depends; but it is a contract of indemnity against losses to be incurred after the determination of the lease and could have no operation so long as the lease was in existence. Therefore such an agreement is not exempt from stamp duty under s. 10, cl. (3) of Reg. XVIII of 1827. Courts cannot allow a party to remedy his own wilful omission to render his evidence admissible. Where a party failed to tender the stamp duty and penalty on a document which the Courts below had held to be insufficiently stamped, the High Court will not allow him to do so in special appeal. RAMAKRISHNA GOPAL v. VITHEE SHIVAJI, **10 B.H.C. 441.**

(4)—*S.* 10—*Unstamped instrument—Penalty—Admissibility in evidence.*—Under Reg. XVIII of 1827, a party has a right to have an instrument stamped on payment of the prescribed penalty. The regulation does not, like the later Stamp Acts, forbid the execution of instruments on unstamped paper, but merely says that they shall not be valid unless stamped. On payment of such stamp-duty, the Courts are bound to admit the instrument in evidence. No Court can reject such an instrument on the ground that the party intended to evade payment of the proper stamp-duty. ANTAJI NILKANTH v. JANARDAN VASUDEV, **10 B.H.C. 358.**

(5)—S. 10—*See* STAMP ACT, 1879, s. 24, cl. (3), 13 B. 493.

(6)—S. 10, cl. 1 and s. 12, cl. 2—*See* STAMP ACT, 1862, 15 W.R. P.C. 33=14 M.I.A. 24.

(7)—S. 12, cl. (2)—*See* STAMP, 10 B. 239.

(8)—*S.*13—*Question as to intention of parties in stamping document insufficiently—Act* XXXVI *of* 1860, *s.* 13 *and Act* X *of* 1862, *s.* 15.—In the case of documents insufficiently stamped under Reg. XVIII of 1827, the question does not properly arise under s. 13 of the Regulation, whether the intention of the parties in not sufficiently stamping them was to defraud the Government of its revenue. The language of s. 13 of Act XXXVI of 1860 first rendered the question important; and Act X of 1862, s. 15 is still more explicit. KASTUR BHAVANI v. APPA **5 B. 621.**

———**Reg. XXVI of 1827 (Kazis).**

[REP., ACT XI OF 1864.]

See MAHOMEDAN LAW—KAZI, 1 B. 693, 3 B. 72.

———**Reg. XXVIII of 1827 (Commencement of Bombay Regulations).**

[REP., ACT XII OF 1873.]

(1)—*S.* 14, *cl.* 1—*Purchaser of mortgagor's interest in execution sale—Third party—Stamp.*—

Regulations—continued.

——3.—**Bombay Regulations**—*continued.*

The purchaser at Court sale of the right, title and interest of the mortgagor is a 'third party' within the meaning of cl. 1, s. 14 of Reg. XXVIII of 1827. Therefore, as against him, a mortgage bond passed by such judgment-debtor to a mortgagee is valid, not from the date of its execution, but only from the date on which it was stamped. NARAYAN DESHPANDE v. RANGUBAI, **5 B. 127.**

———**Reg. XXIX of 1827 [Dekhan and Khandesh (Puna, Ahmednagar and Khandesh Districts).]**

[REP. IN PT., BOM. REG. IV OF 1828; ACT VI OF 1842; ACT XI OF 1846; ACT IV OF 1868; ACT XIV OF 1869; ACT X OF 1876; ACT XII OF 1876; ACT IV OF 1894; SUPPLEMENTED, BOM. REG. I OF 1831 (AS AMENDED BY BOM. REG. XVI OF 1831, S. 2); ACT XIX OF 1835. APPLICATION EXTENDED TO OTHER TERRITORY—BOM. REG. VII OF 1830 (AS AMENDED BY ACT XVI OF 1895); BOM. ACT III OF 1863, S. 4; BOM. ACT XIV OF 1866, S. 3.]

(1)—*See* ACT XXIII OF 1871, s. 4, 17 B. 224.

(2)—*See* JURISDICTION—GENERAL, 2 M.I.A. 107.

(3)—*See* JURISDICTION—MISCELLANEOUS, 1 B.H.C. 96.

(4)—*S.* 6—*Act* XXIII *of* 1871 (*Pensions*), *s.* 4—*Bombay Jurisdiction Act* (X *of* 1876), *s.* 4—*Act* XI *of* 1852, *effect of attachment under*—*Release of attachment—Adverse nature of possession by Collector subsequent to.*—A decree had been awarded to the plaintiff's predecessor-in-title, as mortgagee, giving him possession and enjoyment of certain inam lands and of payments from the Government treasury, called "mokasa amals." The possession of the decree-holder and his successors continued down to 1852, when the inam happened to be attached on behalf of the Government, pending an enquiry into the title of its holders under Bom. Act XI of 1852. On the attachment having ceased in 1865, the Government had ordered the restoration of the property to the decree-holder and his successors, and in 1883, the plaintiff, as such successor, instituted this suit for getting possession of the inam lands and recovering arrears of the amals due. This suit was held to be not cognisable by the Civil Courts. Under Reg. XXIX of 1827, s. 6, the Government thinking fit to appropriate an inam, to refuse payment of an annuity, or to exact land-tax where the land-owner averred it was not due, could not be sued for such act in the Civil Courts. And Acts XXIII of 1871 and X of 1876, excluding the jurisdiction of the Civil Courts over suits relating to pensions and grants of land revenue, and over claims to hold land wholly or partly free from the land-tax, though they preserved fully acquired rights and even inchoate ones involved in pending suits, created no rights to relief against the Government where none subsisted before. Plaintiff therefore had no remedy under Reg. XXIX of 1827 and the above-mentioned Acts, and, if he had any, it was barred by limitation before the institution of the present suit. Against the limitation pleaded in bar of the suit on behalf of the Government, it was urged that the property having been taken possession of by the Government with a view to adjudicating on the rights set up to it, must be held to have been in *custodia legis* and then retained by the Government on a constructive trust which would endure until the restoration of the property, but it was held that the Government having seized the lands in question as its own and not as on behalf of any rival claimants thereto, they could not be properly deemed to have been in *custodia legis* and that the claim to them was therefore barred. Also, the plaintiff's right to the periodical payments, even if otherwise cognizable, would be barred by the subsequent total discontinuance of them for more than twelve years before the suit. SHIVRAM DINKAR GHARPURAY v. THE SECRETARY OF STATE FOR INDIA, **11 B. 222.** [*D.*, 29 B. 480=7 Bom. L.R. 497.]

———**Reg. XIII of 1830 (Jurisdiction of Jagirdars, etc.)**

[REP. IN PT., ACT XII OF 1873; ACT XII OF 1876. AM., ACT IV OF 1894. EXT. ACT XV OF 1840. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF BOMBAY, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 5.]

See JURISDICTION—MISCELLANEOUS, 1 B.H.C. 96.

* ——— **Reg. III of 1892 (Sindh Frontier Regulation.)**

[REP. IN PT., ACT XVI OF 1895.]

(1)—*Ss.* 4, 5 (3), (*a*), (*c*), (*e*) 6 *and* 7—*Suit filed after reference by District Magistrate—Decision of Council not signed by all, validity.*—Where a suit was filed after the District Magistrate had made a reference to the Council of Elders, and it did not come on for final hearing until after he had passed a decree under s. 5 (3) (*a*) of the Regulation, *Held*, that the suit was barred under s. 7. The words "take cognizance of" in s. 7, mean something more than "entertain a suit." When once a District Magistrate had made a valid reference to the Council of Elders, the jurisdiction of Civil Courts is ousted until he either referred the parties to a civil suit or declared that further proceedings under s. 5 were not required. *Vide* s. 5 (3) (*c*) and (*e*). The decree by the Council of Elders, under s. 6, has the same effect as a decree of a Civil Court of ultimate resort, and s. 12, Civ. Pro. Code is a bar to the present suit.

* This star indicates that this regulation was passed by the Imperial Legislature, though applicable only to certain provinces.

Regulations—continued.

——**3.—Bombay Regulations**—*concluded.*

Held, that under s. 4, it is sufficient if three of the Elders have signed the decision, though all may not have signed. MUSSAMAT HAVA v. MUSSAMAT JAMZADI, **3 S.L.R. 100=3 Ind. Cas. 902**

(2)—S. 5—*See* NO. 1, *supra.*

(3)—S. 6—*See* NO. 1, *supra.*

(4)—S. 7—*See* NO. 1, *supra.*

——**4.—Burma Regulations.**

* ——— **Reg. VIII of 1874 (Arakan Hills Civil Justice Regulation).**

[AM., REG. V OF 1876, REG. II OF 1892, ACT VI OF 1900. S 47.]

(1)—S. 18—*See* EVIDENCE ACT, 1872, ss. 62, 91, 110, U.B.R. 1892—1896, Vol. II, 234.

(2)—S. 53—*See* BUDDHIST LAW—GIFT, U.B.R. 1892—1896, Vol. II, 400.

* ———**Reg. V of 1887 (Upper Burma Municipality.)**

[REP. IN. PT. ACT XIII OF 1898, S. 18. A.M., ACT XIII OF 1898, S. 16, AS TO REPEAL OF REG. V OF 1887 IN PARTICULAR MUNICIPALITIES, SEE BUR. ACT III OF 1898, SS. 1, 5, 14, 15.]

(1)—*Municipal and Local Department Notification No.* 146.—The rules which will be found in Municipal and Local Department Notification No. 148, dated 11th December, 1900, and which so far as the payment of toll licenses is concerned, are the same as those in force before that date, have the force of law. Rule 4 provides that money shall not be received at the Municipal office for credit to the Municipality, but that when money is presented, a chalan shall be prepared and handed to the person desirous of paying money, and that he shall present the chalan and pay the money at the Treasury for credit to the Municipality. A payment to the Secretary is therefore not a legal acquittance, and if money were paid to the Secretary, and the Secretary embezzled it, the person who paid it would not thereby be relieved from liability. When a person from whom money is due to the Municipality alleges that in contravention of this rule he paid the money at the Municipal Office, and it appears that the money was not paid to the Treasury, it is not a valid defence in a suit by the Municipal Committee to recover the money. THE PRESIDENT KYAUKSE MUNICIPALITY v. MAHLAWIN, **U.B.R. 1902—1903, Vol. II, Civil, Upper Burma Municipal Regulation 1.**

* ———**Reg. I of 1896 (Upper Burma Civil Courts).**

[REP. IN PT., ACT XIII OF 1898, S. 18. AM., ACT XIII OF 1898, S. 16; REG. VIII OF 1900;

* This star mark indicates that this Regulation was passed by the Imperial Legislature even though applicable to certain provinces.

Regulations—continued.

——**4.—Burma Regulations**—*continued.*

NEW S. 13 SUBSTITUTED, S. 14 REP., S. 36; VIRT. REP. IN PT., REG. V OF 1903; SS. 15, 17, AM., REG. III OF 1905.]

(1)—Twinzas *and* twinzayos—*Peculiar rules of succession among the owners of the right of digging for petroleum oil at Yenangyaung—Custom—Evidence—Civil Courts Regulation—Land suit—Immoveable property.*—This was a suit to decide rival claims to the right of obtaining licenses to dig for petroleum. *Held* that the suit was not barred in the Civil Courts by the Land Revenue Regulations as Government was no party to the suit and would not be bound by the decree, which would only go so far as to settle disputes between the private parties themselves. Whether Government should choose to recognize the claims of either one or other would be quite an independent matter. The Lower Courts were divided in opinion as to whether the right claimed was of the nature of an interest in immoveable property or not Assuming that the *ayo* or *twinzayo* in dispute rendered the suit a land suit, the point for determination was whether the appellants had succeeded in making out a better title to the *ayo* than the respondent, who had been in possession for some years. The appellant claimed to have been dispossessed by the respondent, but there could be no doubt whatever that, as the Courts below had found, he had entirely failed to make out any case for himself. The *ayo* was what is called a female *ayo* that is, a right, the succession to which is confined to females, and it was clear that under this rule the respondent succeeded to it. She was in possession in 1249, when she obtained certain well-licenses, though it was contended that this was allowed to be done by her as it was then done erroneously in the case of any outsider. But it really did not seem to be, very material whether she had formal possession or not till 1252 B.E. after the birth of the other appellant. The original plaint, however, admitted the succession by the respondent, and there could be no reasonable doubt, from all the evidence, that she succeeded in due course upon the death of the previous holder of the *ayo*, in 1247. The only really important question was that put forward in the original plaint, namely, whether Ma Thin, as the direct descendant of Ma Pu Le, acquired on birth the right of ousting respondent as a more distant and collateral relation. It appeared that a female descended from a male might succeed to a female *ayo*, for respondent herself seemed to have derived her descent from a male; but that a female nearer in blood could oust one more distant in blood, already in possession, there was little or nothing to show. Some witnesses for plaintiffs spoke of no such a custom as understood in their opinion, but they were not disinterested persons, and they were unable to quote any actual instance of such a custom except one, and that a doubtful one. That was the solitary case brought forward, and it had not been shown upon what principle precisely it

Regulations—continued.

—— 4.—**Burma Regulations**—*continued.*

had been decided. *Held* that, under the circumstances, there was no sufficient proof of a certain, invariable, and clearly established custom and that, as the burthen of proof lay on the plaintiffs, their suit had rightly been found to have failed. MAUNG THA ZIN v. MA IN, **U.B.R. 1892—1896, Vol. II, 327.** [*R.*, U.B.R.1906,1st Qr., Land Revenue Regulation, 1.]

(2)—Ss. 3 (1), 13—*See* COURT FEES ACT, 1870, s. 7, cls. (IV) and (C) and (VIII), s. 12 (ii); art. 17, cl. 1 of sch. II, U.B.R. 1897—1901, Vol. II, 355.

(3)—S. 4—*See* MARRIAGE, U.B.R. 1897—1901, Vol. II, 488.

(4)—*S.* 10, *Sub-divisional Court having jurisdiction under, entertaining a suit of the Township Court, whether a mere irregularity.*—Where the suit in question ought to have been brought in the Township Court but happened to be entertained by the Sub-divisional Court, in contravention of s. 15 of the Code of Civil Procedure, it was *held*, that this was a mere irregularity, which did not vitiate the proceedings, since the Sub-divisional Court had jurisdiction under s. 10 of the Regulation. NGA SA GYI v. NGA YE BAN, **U.B.R. 1905, Civil Procedure, 36.** [*R.*, U.B.R. 1910, 4th Qr., Civil 66.]

(5)—S. 13—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 15, U.B.R. 1908, Third Quarter, Provincial Small Cause Courts Act, 3.

6)—S. 13—*See* NO. 2, *supra.*

(7)—S. 27—*See* COSTS — TAXATION OF COSTS, U.B.R. 1897—1901, Vol. II, 203.

* —— **Reg. III of 1889 (Upper Burma Land and Revenue).**

[REP. IN PT., ACT XIII OF 1898, S. 18; REG. IV OF 1896, S. 4. AM., ACT XIII OF 1898, S. 16; REG. III OF 1894; REG. II OF 1895; REG. III OF 1898; REG IV OF 1900. REP. IN PT. AND AM., REG. V OF 1901, S. 12(1) AM., REG. III OF 1903, SS. 34, 35, 36 REP., BUR. ACT II OF 1905; SS. 32, 33, REP. LOCALLY, BUR. ACT III OF 1905 (WHEN NOTIFIED). APPLICATION OF CERTAIN PROVISIONS EXT., BURMA ACT III OF 1905, S. 30 (WHEN NOTIFIED). S. 31 AM., REG VI OF 1907.]

(1)—S. 23—*See* BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, U.B.R. 1892—1896, Vol. II, 224.

(2)—S. 25—*See* CIV. PRO. CODE, 1908, s. 60, U.B.R. 1897—1901, Vol. II, 258.

(3)—*S.* 53 (2)—*Interest in land under, whether an easement of way is an—Civil Courts, whether could entertain a suit regarding such right.*—Plaintiff sued for a declaration of a right of way as an easement over certain State Land in

* This star mark indicates that this Regulation was passed by the Imperial Legi slature hough applicable only to certain provinces.

Regulations—continued.

——4.—**Burma Regulations** - *concluded.*

the occupation of defendant. The latter objected that the suit was barred by s. 53 (2) (ii) of the Regulation and the question had to be decided what was to be understood by the word 'interest' in the said section. *Held*, the present suit to establish a right of way should be regarded as a suit to establish an 'interest' in State Land within the meaning of s. 53 of the Regulation and that the jurisdiction of the Civil Courts to entertain the suit was barred by the Regulation. MI MA GYI v. NGA SHWE ZIN, **U.B.R. (1906) Land and Revenue Regulation 1.** (U.B.R. 1897—1901, 207, 209, *R.*)

(4)—*S.* 53(2) (*ii*)—*Suit to recover a* twinyo *or* ayo, *whether cognisable by a Civil Court.*—The subject-matter of this suit was a *twinyo* or *ayo*, which was an interest in immovoable property forming State-land. *Held*, therefore, that, under s. 53 (2) of the Upper Burma Land and Revenue Regulation, a suit to recover such a *twinyo or ayo* was not within the cognizance of the Civil Courts. MI MIN DWE v. MA MA KIN KIMIYIN MIBAYA, **U B.R. (1906) Land and Revenue Regulation 1.** (U.B.R. 1892—1896, Vol. II, 327, U.B.R. 1897—1901, Vol. II, 443, U.B.R. 1897—1901, Vol. II, 207, 209, 211, *R.*)

(5)—S. 53 (2) (ii)—*See* CIV. PRO. CODE, 1908, s. 9, U.B.R. 1897—1901, Vol. II, 207.

* —— **Reg. II of 1897 (Upper Burmah Registration Regulation).**

(1)—*S.* 3—*Tari palms — Cocoanut trees—Standing timber.*—Tari palms and cocoanut trees are not "standing timber" as referred to in s. 3 of the Upper Burma Registration Regulation, but are immoveable property. MAUNG PO HTIN v. MAUNG TE, **U.B.R. 1902—1903, Vol. II, Civil, Upper Burma Registration Regulation 3.**

——5.—**Madras Regulations.**

——**Reg. II of 1802 (Jurisdiction of Civil Courts).**

[REP., ACT III OF 1873.]

(1)—Suit by mortgagor to recover possession --Limitation—*See* LIMITATION—GENERAL, 2 M.H.C. 382.

(2)—S. 17—*See* CONVERTS, 1 W.R.P.C. 1= 9 M.I.A. 195.

(3)—*S.* 18, *cl.* 4—*Attachment of debt—Bond—Suit on bond on lapse of twelve years—Limitation.*—A debt-bond was attached in execution of a decree after it had become due and the attachment continued for more than twelve years. Thereupon, the bond was brought for sale and purchased by the present plaintiff, who sued upon the bond to recover the amount due thereunder. *Held* that while the bond was attached by the Court and placed under its power and control, no one could deal with it except

* This star mark indicates that this Regulation was passed by the Imperial Legislature even though applicable to certain provinces.

Regulations—continue d.

——5.—**Madras Regulations**—*continued.*

by the direction and order of the Court. The attachment was good and sufficient cause precluding the obtaining of redress within the meaning of Reg. II of 1802, s. 18, cl. 4, and saved the bond from limitation. KADARBACHA SAHIB v. RANGASWAMI NAYAK, **1 M. H.C. 150.**

(4)—S. 18, cl. 4—*See* LIMITATION—GENERAL, 6 M.I.A. 232.

(5)—S. 18, cl. 4—*See* LIMITATION—MISCELLANEOUS, 1 W.R.P.C. 30=9 M.I.A. 66.

———**Reg. III of 1802, (Madras Administration of Estates.)**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT, MAD. REG 5 OF 1829, S. 2; ACT X OF 1861; ACT XVII OF 1862; ACT III OF 1873; ACT XVI OF 1874; ACT XII OF 1876; ACT XI OF 1901, SCH. III; MAD. ACT V OF 1867; MAD. ACT II OF 1869. S. 1 AND PART OF S. 16 DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULE DISTRICTS ACT XV OF 1874, S. 4, AND SCH. 2, AS AMENDED BY ACT XII OF 1891.]

(1)—Powers of Courts to settle cases by oath —Reg. VI of 1816—*See* ACT X OF 1861, 4 M. H.C. App. 3.

(2)—S. 16, cl. 1—*See* CONVERTS, 1 W.R.P. C. 1=9 M.I.A. 195.

(3)—*S.* 16, *cl.* 7—*Dismissal of petition claiming property of an intestate—Appeal.*—No appeal lies from the order of a District Judge passed under s. 16, cl. 7 of Madras Reg. III of 1802. NARASAYYA v. THE COLLECTOR OF ANANTAPUR, **24 M. 95.**

——**Reg. XVII of 1802 (Registry of Wills and Deeds).**

[REP., ACT XVI OF 1864.]

(1)—*S.* 3—*Simple bond payable by instalments—Necessity for registration.*—A simple bond payable by instalments was not capable of registration under s. 3 Reg. XVII of 1802. KARUPANNA NAYAK v. NALLAMMA NAYAK, **1 M H.C. 209.** [*Appr.*, 1 B. 125; *R.*, 2 A. 322.]

(2)—*S.* 3, *cl.* 3—*Hypothecation bond capable of registration.*—A deed of hypothecation fell under the head of mortgage capable of registration under cl. 3, s. 3, of Reg. XVII of 1802. KADARSA RAUTAN v. RAVIAH BIBI, **2 M.H.C. 108.** [*R.*, 4 M.H.C. 434.]

(3)—S. 11—*See* EVIDENCE— SECONDARY EVIDENCE, 3 M.I.A. 156.

——**Reg. XXV of 1802. (Madras Permanent Settlement).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN. PT. MAD ACT, II OF 1869. S. 11 REP. IN NOTIFIED ESTATES, MAD. ACT II OF 1894. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

1)—*Scope of Regulation.*—It was not within the scope of Reg XXV of 1802 to effect any alteration in the quality of the estate, though it might doubtless be done by law. It was framed with a view to the land revenue but not otherwise to infringe or limit the rights of anybody. MUTTU VADUGA v. DORA SINGHA TEVAR, **3 M. 290=8 I.A. 99, P.C.=4 Sar. 239 =5 Ind. Jur. 438.**

(2)—*Srotriyamdar — Suit for dismissal of Karnam* —A Srotriayamdar cannot sue for the dismissal of the Karnam of his village, under Reg. XXV of 1802, as he is neither a Zemindar, nor other landholder paying a peshkash, fixed under that Regulation. His remedy is to complain to the Collector of the district. RAMACHANDRA v. APPAYYA, **7 M. 128.** [*D.*, 12 M. 188.]

(3)—*Non-compliance with—Effect.*—A grant of a portion of a Zamindary, not complying with the requirements of Reg. XXV of 1802, does not confer a good title on the grantee. SRI RAJA SETA RAMA KRISHNA RAYUDAPPA RANGA RAO BAHADUR GARU v. STRI JAGUNTI SITAYAMMA GARU, **3 M.H.C. 67.**

(4)—*Restriction upon alienation of Zamindari lands—Permanent lease of such lands—Lease not valid as against Government and heirs and successors of Zamindar.*—Reg. XXV of 1802 imposed upon proprietors a restriction upon the alienation of proprietary rights, except in the manner therein specially provided, and rendered void any alienation made in contravention of the Regulation as against the Government and the heirs and successors of the proprietor who made the transfer. But such alienation was valid against the proprietor himself. A permanent lease by the proprietor is as much within the operation of Regs. XXV and XXX of 1802, as an absolute gift or sale. SUBBARAYULU NAYAK v. RAMA REDDI, **1 M. H.C. 141.** [*Overruled*, 4 M.H.C. 396; *Not F.*, 4 M.H.C. 463; *F.*, 1 M.H.C. 349, 3 M.H.C. 5, 2 M. H. C. 131, 22 M. 383, P.C.]

(5)—*Rights of property in existence, not affected—Statute of limitation — Sadr Adalat decision in No.* 6 *of* 1821.—In a suit brought by a Zamindar to recover either assessment at the rate of Rupees 5,000 per annum, or a *parganna*, part of the plaintiff's zamindari, the defendant pleaded that he had held the *parganna* as his own before and ever since the permanent settlement, and that the claim was barred by both the old and the new Statutes of Limitation. The Lower Court overruled both the pleas, the first, because it held that under Reg. XXV of 1802, the Zamindar's title could not be questioned; the second, because it considered that the Sadr Adalat decision in a Suit No. 6 of 1821 prevented the application of the statute on the ground of subsequent hostile possession, and that the plaintiff had 12 years from the time he came into possession. *Held*, first, that there is nothing in the Regulations relating to the permanent settlement showing

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

an intention to affect rights of property in existence at the period of their being passed. Secondly, that the decision in No. 6 of 1821 will not be followed, at all events in a case in which the present claimant is the grandson of him against whom, as to property of a normal character, the statute would have begun to run. SRI KRISHNA DEVU GARU v. SRI RAJA RAMCHANDRA DEVU MAHARAJULU GARU, **3 M.H.C. 153.**

(6)—*Regs.* XXV *and* XXIX *of* 1802 (*Madras*) —*Suit for dismissal of Karnam, not entertainable by District Munsiff.*—A suit by a Zemindar for the dismissal of certain Karnams in his Zamindari was held to have been rightly brought in the Court of the District Judge. The Subordinate Court, and the District Court, where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802, and a District Munsiff, therefore, has no jurisdiction in such cases. VENKATA NARASIMHA v. SURYANARAYANA, **12 M. 188.**

(7)—*Reg.* IV *of* 1822—*Landlord and tenant —Holders of* Kudivaram *in perpetuity—Right of landlord to recover value of trees cut by tenants.*—Plaintiffs, the lessees of a zamindari sued to recover the value of trees cut and carried away by the tenants from their holdings. The tenants were admittedly the holders of the *Kudivaram* right in perpetuity. There was no proof that they derived their title from the zamindar or that their ordinary *Kudivaram* right was limited by any contract or special or local usage. *Held* that the zamindar was not the owner of the soil in the strict English sense, and consequently plaintiffs had no right to the trees growing on the land. NARAYANA AYYANGAR v. R. G. ORR, **26 M. 252=12 M.L.J. 449.** [*F.*, 29 M. 24=16 M.L.J. 8; *Appl.*, 5 M.L.T. 210; *D.*, 30 M. 155=17 M.L.J. 64=2 M.L.T. 25.]

(8)—*Succession to an hereditary estate.*—The acceptance of a sanad in common form under Reg. XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate. KACHI KALIYANA v. KACHI YUVA, **7 Bom. L.R. 907 =2 C.L.J. 231, P.C.=28 M. 508= 10 C.W.N. 95=15 M.L.J. 312=2 A.L.J. 845=32 I.A. 261 =8 Sar. 855.**

(9)—*See* COLLECTOR, 3 M.H.C. 35.

(10)—Effect of acceptance of *sannad* in common form—*See* HINDU LAW—IMPARTIBLE ESTATE, 2 C.L.J. 231. P.C.=10 C.W.N. 95=15 M.L.J. 312=2 A.L.J. 845=7 Bom. L.R. 907=1 M.L.J. 12=32 I.A. 261=28 M. 508.

(11)—*See* HINDU LAW—INHERITANCE, 13 M. 406, P.C.=17 I.A. 134.

(12)—*See* HINDU LAW—WIDOW, 17 M.L.J. 243=2 M.L.T. 316=30 M. 356.

(13)—Inam title-deeds granted by government—Inam settlement—Construction of deed —*See* INAM, 27 M. 465, Note.

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

(14)—*See* PERMANENT SETTLEMENT, 25 W.R. 3.

(15)—Zemindar, right of—Poramboke—*See* ROAD, 5 M.L.T. 225.

(16)—*See* SERVICE TENURE, 10 M. 1.

(17)—*See* UNSETTLED POLLIAM, 6 M.H.C. 208.

(18)—*S.2—"Proprietors of land"--Reg.* XXXI *of* 1802, *object of—Reg.* XXV *of* 1802—*Polliam—Polliam of Marungapuri.*--The affirmative words of s. 2 of Madras Reg. XXV of 1802 did not either give new rights to the owners of lands not permanently assessed, or take away from them any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. The words "proprietors of land" as used in the Bengal Code of 1793 and in the Madras Code of 1802 refer to, "zemindars independent talookdars, and others who pay the revenue assessed upon their estates immediately to Government." The words "proprietary possession," as used in the recital of Madras Reg. XXV of 1802, must also be read in a similar sense as meaning the possession and rights of a "proprietor" in the technical sense in which that word is used, *viz.*, the person who pays the revenue immediately to Government. The preamble of Madras Reg. XXV of 1802 recognizes the right of private property, and does not assert a right on the part of Government to deprive or dispossess zemindars in their life-time, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue. [*F.*, 12 B.H.C.O.C. 1; *R.*, 2 B. 19, 1 M. 69, 1 M. 174, 1 M. 205, F.B., 3 B. 452, 11 M. 309.] The object of Madras Reg. XXXI of 1802 was merely the protection of the revenue from invalid lakhiraj grants and to provide for the mode of trying claims to hold lands exempt from payment of revenue. It was not intended to confer upon Government any title which did not then exist, or to assert that, according to the usages of the country, there was no private right to lands. The words "alienations of land" refer not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue. [*F.*, 12 B.H.C.O C. 1.] A polliam may be hereditary though not permanently settled under Madras Reg. XXV of 1802. The existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are judicially determinable on legal evidence. [*R.*, 4 M. 250, 10 M. 1, 1 M.L.J. 326.] The polliam of Marungapuri is an ancestral hereditary tenure, and not subject to the appointment of Government. OOLAGAPPA CHETTY v. ARBUTHNOT, **14 B.L.R. 115, P.C.=6 I.A. 268, 282=21 W.R. 38=3 Sar. 318.** [*R.*, 1 M.L.J. 326.]

Regulations—continued.

—**5.—Madras Regulations**—*continued.*

(19)—*S.* 3—*Landlord and tenant*—*Reg.* XXV *of* 1802, *s.* 3—*Determination of assessment*—*Reference to sunnuds and kabuleats.*—By Reg. XXV of 1802, s. 3, in all cases of disputed assessment, reference shall be had to sunnuds and kabuleats, and judgment shall be given by the Courts in conformity with the conditions under which the agreement may have been formed in each particular case. GOPALADASU GARU v. PERRAJU, **12 M.L.J. 126.** [*F.*, 33 M. 171=19 M.L.J. 734=6 M.L.T. 268=3 Ind. Cas. 747.]

(20)—*S.* 3—*Scope of.*—S. 3 of Reg. XXV of 1802, imposes restrictions on alienations, only to secure the interests of the public revenue, and a zemindar has no power to disturb grants, otherwise valid, made by his predecessor, or titles to inams acquired by prescription. VIZIANAGARAM MAHARAJA v. SURYANARAYANA, **9 M. 307, P.C.=13 I.A. 32 =4 Sar. 696.** [*R.*, 26 M. 589, F.B.]

(21)—*S.* 4—*Lands held rent-free on service tenure before permanent settlement*—*Whether lakhiraj*—*Presumption*—*Right of Government to impose assessment thereon.*—From the fact that certain inams were granted by a zemindar before the permanent settlement as reward or emoluments for private services rendered to him, on condition that they should be held so long as the services continued to be rendered, no presumption can arise that the lands were at the permanent settlement exempt from the payment of public revenue, and the burden is on the Government to show that they were lakhiraj at the settlement, so as to enable it to impose full assessment on the lands. SREE RAJAH VENKATARANGAYYA APPA ROW BAHADUR ZAMINDAR v. DORANKI APPALARAJU, **20 M.L.J. 728=8 Ind. Cas. 546.** (6 W.R. 121, 9 I.A. 104, 13 M.I.A. 438, *R.*)

(22)—*S.* 4—*Land exempt from the payment of public revenue at the time of the permanent revenue settlement*—*Competency of Government to impose a public assessment on the land.*—Certain land was exempted from the payment of public revenue at the time of the permanent revenue settlement. S. 4 of Reg. XXV of 1802 declares that the Government at the permanent settlement has "reserved to itself the entire exercise of its discretion in continuing or abolishing" the exemption of such lands from liability to pay assessment to Government, and the permanent settlement of the land revenue was made excluding the said land. *Held*, that it was, therefore, fully competent to Government to impose a public assessment on the land. There is no period of limitation prescribed by any law within which alone the Government should exercise its prerogative of imposing assessment on land liable to be assessed to the public revenue. BODDUPALLI JAGANNADHAM v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **27 M. 16.**

(23)—*S.* 4—*Muhtarafa*—*Trade-tax, zemindar's right to collect*—*Reg.* XXV *of* 1802.—The zemindar of Karvetnagar has not the right of collecting the muhtarafa or trade-tax from artizans in his Zemindari, delegated to him by Government, and the assignees of the Zemindar cannot legally exercise this right. *Quære*, —Whether it was competent to Government to commit the collection of this branch of the revenue to zemindars for their own benefit. VEDANTA v. KANNIYAPPA, **9 M. 14, F.B.** [*R.*, 16 M. 34.]

(24)—*S.* 4—*Right of zemindar to jodi payable by Agraharamdars*—*Rate of jodi in Inam title-deed not binding on zemindar.*—A zemindar is always entitled to collect the jodi at the rate at which it was being paid by the Agraharamdars at the time of the permanent settlement. The provisions of s. 4 of Regulation XXV of 1802 do not relate to the jodi payable to the zemindar and included in the assets on which the peishcush of the zemindari was fixed. It would be clearly inconsistent with the principles of the permanent settlement that one of the sources of revenue to the zemindar, on which his peishcush was fixed, should be varied at the will of Government or their Deputy, the Inam Commissioner. Any order passed by the Commissioner fixing the rate of jodi would, therefore, be *ultra vires* and could not bind the then zemindar or his successors. SOBHANADRI APPA RAU v. GOPALKRISTNAMMA, **16 M. 34.** [*Appr.*, 16 M. 40.]

(25)—*S.* 8—*Alienation of part of Zamindari*—*Adverse possession*—*Title.*—An alienation by a Zamindar of the Zamindary or any part of it is void, if the provisions of s. 8 of Reg. XXV of 1802 are not complied with. (*Holloway, J. dissentiente).* [*R.*, 4 M.H.C. 396, 22 M. 383, 26 M. 589, F.B.] But if the alienee holds the land for a lengthened period on a claim of right, the suit by the alienor to recover possession will be barred by limitation. SYED ALI SAIB v SRI RAJA SANYASIRAZ PEDDABALIYARA SIMHULU BAHADUR, **3 M.H.C. 5.** [*Not F.*, 8 A. 475; *R.*, 3 M.H.C. 153.]

(26)—*S.* 8—*Grant by Zamindar in contravention of Regulation*—*Validity.*—Where an absolute grant by a Zamindar of a part of a Zemindari did not comply with the conditions specified in s. 8 of Reg. XXV of 1802, the grant was voidable on the determination of the Zamindar's interest by death, at the instance of the Zamindar's successor or a purchaser of the part from the successor. A dispossession of the grantee by a purchaser from the successor of the Zamindar was legal. PICHAKUTTI CHETTY v. PONAMMA NACHIAR, **1 M.H.C. 148.** [*R.*, 2 M.H.C. 128, 27 M. 435.]

(27)—*S.* 8—*Madras Act.* I *of* 1876, *ss.* 2, 6.—An alienee of a portion of a zemindari is entitled to separate registration and assessment under Madras Act I of 1876. Though all the parties do not concur in applying within the meaning of s. 2 of the Act, a Civil Court has power to order separate registration and assessment under s. 6 of the Act. KAMALAMMAL v. RAJU NAIKER, **19 M. 308=6 M.L.J. 179.**

Regulations—continued.

—5.—**Madras Regulations**—*continued.*

(28)—*S.* 8—*Separate assessment—Separate registration—Power of Government to revise Collector's order — Remedy by civil suits — Powers of Board—Power of Government.* — Government has no power to cancel an order passed by Collector under s. 8 of the Madras Reg. XXV of 1802 and Act I of 1876 for separate registration and separate assessment duly sanctioned by the Board of Revenue. Such an order of the Collector can only be questioned in a Civil Court. As regards the apportionment of the assessment, an appeal limited in time does lie to the Board of Revenue. But the only power reserved to the Governor in Council is the power unlimited in point of time of requiring adjustment of the separate assessment, if it appears that there has been fraud or material error in the apportionment. Separate registration is a matter of private right with which the Government has no business to interfere. FISHER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **3 C.W.N. 161=26 I.A. 16=22 M. 270=7 Sar. 459.**

(29)—*S.* 8—*Zemindari — Self-acquisition — Perpetual lease at low rent by acquirer.*—A perpetual or permanent lease at a low fixed rent made by a zemindar who obtained the zemindari by self-acquisition is binding upon his successors, although the instrument was not registered under Reg. XXV of 1802, s. 8. MUTTU VIRAN CHETTY v. RANI KATTAMA NATCHIYAR, **4 M.H.C. 463** [*R.*, 22 M. 383, P.C.]

(30)—*S.* 8—*Permanent lease of village in Muttah by Muttahdar, not registered—Validity.* —A permanent lease of a village in a Muttah by the Muttahdar is not invalidated, by s. 8 of Reg. XXV of 1802, although the lease has not been registered as required by that section. KONDAPPA NAIK v. ANNAMALAY CHETTI, **4 M.H.C. 396.** (1 M.H.C. 14, *Overruled.*) [*R.*, 4 M.H.C. 463]

(31)—*S.* 8—*Perpetual lease of portion of zemindari not a transfer.*—This appeal arose in a suit brought by the respondent to establish a claim to hold in perpetuity, at a fixed rent, certain villages forming part of the appellant's zemindari. The first Court passed a decree in favour of the plaintiff and the Sudder Adawlut confirmed that judgment. Among other contentions, appellant urged that whatever might be the respondent's right in point of fact, he was precluded from recovering by an objection of law, *viz.*, that the plaintiff's title was not registered according to Madras, Reg. XXV of 1802, s. 8 and it was said to have been settled in India that, although an instrument not registered might be good against the zemindar who executed it, the successor was not bound by it. The judicial committee, were, however, of opinion that there was no ground on which it could be held that an instrument good against the party making it might be had against the heirs of that party, where the latter, the ancestor, has had absolute power of alienation.

Regulations—continued.

—5.—**Madras Regulations**—*continued.*

There was, in this case, however, no ground for the above objection, because there was not any alienation of the zamindari or any part of it. There was merely a perpetual lease of a distinct portion of the zamindari which constituted such a distinct portion even before the title of the appellant to the zamindary accrued, and such a lease could not be considered as a transfer coming within the words of Reg. XXV of 1802. Further, the title of the respondent had been recognised not only by the zamindars who created it, but by subsequent zamindars, and there had been a possession under it of above fifty years. VENKATESWARA NAICKER v. ALAGOOMOOTHOO SERVACAREN, **4 W.R.P.C. 73=8 M.I.A. 327=1 Suther. 440=1 Sar. 788.** [*Expl.*, 4 M. 148 ; *R.*, 3 M.H.C. 5, 4 M.H.C. 396, 4 M.H.C. 463, 17 W.R. 346, 26 M. 589.]

(32)—S. 8—Madras Reg. XXV of 1802, landholders to be registered under—Effect of non-registration—*See* MAD. ACT VIII OF 1865, 23 M. 221.

(33)—S. 8—*See* MAD. ACT VIII OF 1865, s. 1, 8 M. 351.

(34)—S. 8—Mortgage of a zamindari village —Court-sale in execution of the decree—Payment by mortgagee of proportionate share of peishcush—Mortgagee-purchaser not a zamindar to enforce acceptance of patta—*See* MAD. ACT VIII OF 1865, s. 3, 5 M. 145.

(35)—S. 8—*See* MAD. ACT I OF 1876, ss. 5, 6, 7, 8, 22 M. 270, P.C.=26 I. A. 16=3 C. W.N. 161.

(36)—*S.* 9 *and Reg.* XXVI *of* 1802 (*Madras*), *s.* 2 —*Madras Act* I *of* 1876—*Separte registration —Suit.*—An application to a Collector to grant separate registration of a portion of a permanently settled estate which has been alienated by Court sale is one under the provisions of Madras Regulations XXV of 1802, and XXVI of 1802, and not under Act I of 1876. Where the Collector rejects the application, a suit lies against him to compel such registration. BOMMARAZU v. SESHAMMA, **22 M. 438.**

(37)—*S.* 9—*Madras Act* II *of* 1864—*Apportionment of rent.*—Under Regulation XXV of 1802 and Act II of 1867, the *peishcush* due by the Zemindar to Government is a charge on every part of the Zamindari. [*R.*, 10 M. 266, 29 M. 29.] Where a *maganam* has into the possession of different purchasers, in the absence of a sub-division under s. 9 of the Regulation of 1802, the apportionment of rent may not be binding upon the Government, but it does not follow that it may not be good as between the parties to the suit. THE ZEMINDAR OF RAMNAD v. RAMAMANY AMMAL, **2 M. 234.** [*R.*, 10 M. 266, 29 M. 29.]

(38)—*S.* 11—*Suit by karnams improperly removed from office—Jurisdiction of Munsiff's Court, not barred.*—There is nothing in the language of s. 11 of Reg. XXV of 1802 to exclude the jurisdiction of other Courts than the Court of Adawlat in suits by karnams

Regulations—continued.

——**5.—Madras Regulations**—*continued.*

improperly removed from office, as is done in express words in the case of suits by a Zemindar to remove a karnam from office. BHASKARA SETUPATI v. VALASUBRAMANIA PILLAI, **1 M.L.J. 238.**

(39)—*S.* 11—*Karnam, Dismissal of—Damages—Loss of salary.*—A zemindar cannot dismiss a karnam from his office without an order of the Civil Court. *Obiter*:—Where a karnam who has been dismissed from his office by a zemindar sues for restoration of his office and for the recovery of damages, the Courts are not restricted to limiting the damages to the salary attaching to the office for the time during which the karnam was out of office. AMBALAVANA PANDARA SANNADHI v. SHUNMUGA SUNDARAM PILLAI, **9 M.L.J. 143.**

(40)—S. 11—*See* CIV. PRO. CODE, 1908, s. 96, 24 M. 39.

(41)—S. 11—*See* KARNAM, 20 M. 145.

(42)—*S.*12—*Revenue Recovery Act,* II *of* 1884 (*Madras*), *ss.* 32, 41.—The purchaser at a Revenue sale is *prima facie* entitled to demand the faisal rate. PALANI v. PARAMASIVA, **13 M. 479.**

——**Reg. XXVI of 1802 (Madras Land Registration).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT. MAD. ACT II OF 1864, S. 65. REP. IN PT. AND AM., ACT XI OF 1901, SCH. II. SS. 1, 2 AND 3 DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACV XV OF 1874. S. 4.]

(1)—*See* MAD. ACT II OF 1864, 27 M. 386.

(2)—*See* MAD ACT VIII OF 1865, ss. 3, 80, 26 M. 589, F.B.

(3)—*See* POSSESSION—ADVERSE POSSESSION, 20 M. 6.

(4)—S. 2—*See* MAD. REG. XXV OF 1802, s. 9, 22 M. 438.

(5)—*S.* 3—"*Entire estates*" *meaning of.*—The words "entire estates" in s. 3, Reg. XXVI of 1802, do not mean all the estates of an individual. The plural "estates," has reference to the plural "persons," and when used with reference to one person, must be read in the singular "estate." NARAYANA RAJA v. RAMACHANDRA RAJA, **26 M. 521=13 M.L J. 139.**

(6)—S. 3—"Defaulter," who is the—*See* MAD. ACT. II OF 1864. ss. 3, 35, 6 M.L.T. 198 =19 M.L J. 627=33 M. 41=3 Ind. Cas. 624.

(7)—S. 3—*See* MAD. ACT II OF 1864, ss. 5, 55, 44, 26 M. 521=13 M.L.J. 139.

——**Reg. XXVII of 1802 (Recovery of Arrears of Revenue).**

[REP., MAD ACT II OF 1864, S. 65.]

(1)—*Scope of Reg.* XXVII *of* 1802.—The whole scope and purposes of Reg. XXVII of 1802 is to provide summary process for the recovery of arrears of revenue, that is (as expressed in cl. II of s. 2), the whole or any portion of the month's kist payable by the holder of the land according to his *kabuliyat* and remaining unpaid on the first of the next month. ELLAIYA v. LATE COLLECTOR OF SALEM, **3 M.H.C. 59.**

——**Reg. XXVIII of 1802 (Distress).**

[REP., MAD. ACT VIII OF 1865, S. 89.]

See MAD. REG. V OF 1822, s. 18, 1 M.H.C. 230.

——**Reg. XXIX of 1802 (Madras Karnams).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT. MAD. REG. II OF 1906, S. 7; ACT XII OF 1876. REP. IN PT. (EXCEPT IN SCHEDULED DISTRICTS), MAD. ACT, III OF 1895. REP. IN NOTIFIED ESTATES, MAD. ACT II OF 1894. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MAD. EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

(1)—*See* CIV. PRO. CODE, 1908, s. 96, 24 M. 39.

(2)—*See* MAD. REG. XXV OF 1802, 12 M. 188.

(3)—S. 5—*See* KARNAM, 20 M. 145.

(4)—*S.* 7—*Heirs.*—In s. 7 of Reg. XXIX of 1802, the term "heirs" means persons who, in the event of death, would inherit from their preceding incumbent. ARUMUGUM v. VIJAYAMMAL, **4 M. 338.** [*R.*, 9 M. 283]

(5)—*S.* 7 — *Hereditary karnam — Order of succession.*—"Heirs of the preceding karnam" in s. 7 of the Regulation mean his next-of-kin according to the order of succession of the several grades of legal heirs and not heirs in the order of succession to undivided divisible ancestral property. Thus, a daughter's son of a woman, who held the office of hereditary karnam after her husband, is preferable to her husband's paternal uncle's son. SEETHARAMAYYA v. VENKATA RAZU, **18 M. 420.**

(6)—*Scope of.*—Where the office of Karnam in a Zemindari village is hereditary in the plaintiff's family, the Raja cannot nominate an outsider to the office, so long as there are qualified heirs of the last holder in existence, as such a course is opposed to Reg. XXIX of 1802 which provides that the heirs shall be chosen except in the case of incapacity. VENKAYYA v. SUBBARAYUDU, **9 M. 283.** [*R.*, 10 M. 226; *D.*, 12 M. 188.]

(7)—*S.* 7—*Karnam--Incapacity of next-heir—Minority—Appointment by landholder without proof of incapacity next heir in the Zilla Court.*—Minority is a ground on which the heir may be lawfully passed over, and a selection to the office of Karnam in a Zemindari village made by the landholder from among the other members of the family, and s. 7 of Reg. XXIX of 1802 has no application to a case in which there can be no dispute as to the incapacity, such as

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

the admitted minority of the legal heir. VENKATANARAYANA v. SUBBARAYUDU, **9 M. 214.** [*R.*, 10 M. 226.]

(8)—*S.* 7—"*The heirs of the preceding Kurnum,*" *meaning of.*—The words "The heirs of the preceding Kurnum" in s. 7 of Reg. XXIX of 1802 mean his next of kin according to the order of succession of the several grades of legal heirs, and not, heirs in the order of succession to undivided divisible ancestral property. N. KRISHNAMMA v. N. PAPA, **4 M.H.C. 234.** [*F.*, 18 M. 420; *Appr.*, 4 M. 283.]

(9)—*S.* 7—*Incapacity of next heir—Nearest male sapinda—Right to sue for office.*—Under s. 7 of Reg. XXIX of 1802 the heir of the preceding Kurnam should be chosen by the landholders concerned for the vacant office of Kurnam, and on proof of incapacity of the heir, the landlord may exercise his discretion in the nomination of persons; so that though the heir may be incapacitated, a sapinda of the deceased Karnum is not entitled to the office against the will of the landholder. CHANDRAMMA v. VENKATRAJU, **10 M. 226.** [*R.*, 12 M. 188.]

(10)—*S.* 7—*Karnam in Zamindari village—Title to office.*—Under Reg. XXIX of 1802, s. 7, the heir of the preceding karnam must be chosen and is the lawful claimant to hold the office. SUBBARAYADU v. GANGARAJU, **11 M. 196.**

(11)—*S.* 7—*Suit for office of karnam and possession of inam lands annexed thereto—Jurisdiction.*—Suit to recover the office of karnam and the inam lands annexed thereto. The suit was instituted in the Court of the District Munsif. The defendant contended that the suit was cognizable only by the District Judge, and that the plaintiff was entitled to the assessment only and not to the lands. *Held* that the suit was triable by the District Munsif and that the plaintiff was entitled to claim possession of the lands adjunct to the office of kurnam sued for. JAGANNATHA PILLAI v. SUBBARAYA PILLAI, **22 M. 340.**

———**Reg. XXX of 1802 (Use of Pattas).**

[REP., MAD. ACT VIII OF 1865, S. 89.]

(1)—*See* MAD. ACT VIII OF 1865, 6 M.H.C. 175, 6 M.H.C. 164.

(2)—*See* MAD. REG. V OF 1822, S. 18, 1 M. H.C. 230.

———**Reg. XXXIV of 1802 (Interest).**

[REP., MAD. ACT II OF 1869.]

(1)—*Its applicability to mortgages where redemption is allowed at the end of any year.*—A mortgage instrument which provided that the lands should be made over to the mortgagee for cultivation, that a grain rent, estimated at a certain quantity, should be retained yearly in lieu of interest by the mortgagee, and that, on the expiry of any year, the mortgage might be redeemed and possession recovered, on payment of the principal, falls within the purview of Reg. XXXIV of 1802. TIPPAYYA v. VENKATA, **6 M. 74.** (4 M. 113, *D.*)

(2)—*Iladarawara mortgage — Redemption—Mad. Reg.* XXXIV *of* 1802.—The mortgage called "Iladarawara" of South Canara, is for a long term of years, amounting to a lease of the property for the term agreed upon, and as such, redemption cannot be claimed before the expiry of the term. To such a mortgage, Mad. Reg. XXXIV of 1802 does not apply. PERLATHAIL SUBBA RAU v. MANKUDI NARAYANA, **4 M. 113.** [*D.*, 6 M. 74.]

(3)—*Reg.* XXXIV *of* 1802—*Claim for interest exceeding principal sum due—Maintainability of.*—As Reg. XXXIV of 1802 has been repealed, a claim for an amount of interest exceeding the principal, in a suit between Hindus, is maintainable. ANNAJI RAU v. RAGUBAI, **6 M.H.C. 400.** [*F.*, 31 M. 250=3 M.L.T. 278=18 M.L.J. 245; *R.*, 9 B.H.C. 83, 9 C. 825.]

(4)—*S.* 4—*Amount of interest recoverable not to exceed principal sum due on date of suit.*—The provision in s. 4 of Reg. XXXIV of 1802 against an award of interest in excess of principal has reference only to the regulation of the sum for interest that may be claimed at the time the suit is brought. But the sum to be so limited has no reference to any earlier state of the accounts. Where the lower Court allowed interest in excess of the amount of the principal found due on the date of plaint, the High Court disallowed the excess. KAKARLAPUDI TITARAMARAJ v. UPPALAPAD JANAKAYYA, **1 M.H.C. 5.** [*Cons.*, 20 B. 611.]

(5)—S. 8—*See* MORTGAGE—CONDITIONAL SALE, 15 W.R. P.C. 35=7 B.L.R. 136=13 M. I.A. 560.

———**Reg. II of 1803 (Madras Collectors).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP., IN PT., MAD. REG. II OF 1806; ACT XXIII OF 1871; ACT XII OF 1873; ACT XII OF 1876; MAD. ACT II OF 1864, S. 62; MAD. ACT VI OF 1865; MAD. ACT II OF 1869; S. 25 REP., MAD. ACT I OF 1902. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

(1)—*Scope of Regulation—Darkhast rules—Land Acquisition Act* (X *of* 1870).—Reg. II of 1803, distinctly negatives any independent authority in the Collector to alienate public lands, and the circumstance that the land was granted in lieu of compensation for other land taken up under Act X of 1870, does not make the darkhast rules any the less applicable. NARAYANA v. RAMACHANDRA, **13 M. 485.**

(2)—S. 9—*See* MAD. ACT VIII OF 1865, s. 11, cl. 4, 26 M. 456.

(3)—S. 18—*See* MAD. ACT I OF 1876, s. 7, 26 M. 389.

Advocate High Cou
Jammu & Kashmi
Srinagar.

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

——**Reg. V of 1804 (Madras Court of Wards.)**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT. ACT XXXV OF 1858; ACT XII OF 1876; ACT VIII OF 1890; ACT XI OF 1901, SCH. III REP. IN PT., MAD. ACT II OF 1869. AM. MAD. ACT IV OF 1899. REP., EXCEPT IN SCHEDULED DISTRICTS, MAD. ACT I OF 1902.]

(1)—*See* ACT X OF 1861, 1 M.L.J. 537.

(2)—Debts due by Ward—Acknowledgment of liability by agent of Court of Wards—Effect —*See* LIMITATION ACT, 1908, s. 19, 6 Ind. Cas. 407=8 M.L.T. 105=20 M.L.J. 808.

(3)—*See* LUNATIC, 14 M. 289.

(4)—Ss. 2, 19, 23—*See* MORTGAGE—MISCELLANEOUS, 5 B. 14.

(5)—S. 17—*See* CONTRACT ACT, 1872, s. 25 (3), 19 M. 255.

(5-*a*)—S. 19—*See* NO. 4, *supra*.

(6)—S. 20—Guardian of minor proprietor, under — Minor proprietor causing defaultr service of notice on—*See* MAD. ACT II OF 1864, ss. 25, 27, 12 M. 445.

(6-*a*)—S. 20—*See* DISTRICT JUDGE, JURISDICTION OF, 6 M. 187.

(7)—S. 20—*See* MAD. REG. X OF 1831, s. 2, 10 M. 44.

(8)—S. 23—*See* MAD. ACT XXI OF 1882, s. 10, 11 M. 309, F.B.

(9)—S 23—*See* NO. 4, *supra*.

(10)—S. 30—Rules made under—*See* MAD. ACT IV OF 1899, s. 40, 4 M.L.T. 321.

(11)—*S.* 35—*Rule 7 of rules framed under, Transfer of execution to the Collector—Reference by Collector to District Judge—Order of District Judge.—Effect of Government order rescinding notification empowering Collector to execute decrees.*—A Collector, who was empowered by notification issued by Government under the Regulation, and to whom a decree was transferred for execution, made a reference under Rule 7 of rules framed under s. 35 to the District Judge. The District Judge passed a decision against which an appeal was pending. Since the District Judge's decision, the Government had by a notification rescinded its order providing for the transfer of execution of decrees to that Collector. *Held* that, under the circumstances, the proper course for the High Court to adopt would be to set aside the order of the District Judge, without prejudice to the parties raising the question in dispute, in execution of the decree in a Civil Court. PULABAIYAGARI MUNISAMI CHETTY v. THE RAJAH OF KARVETNAGAR, **30 M. 193.**

——**Reg. IV of 1816 (Village Munsifs).**

[REP., ACT XI OF 1901, SCH. III.]

(1)—*Jurisdiction of Subordinate Judges.*—The terms of the Madras Civil Court's Act are large enough to confer on Subordinate Judges any special jurisdiction which had theretofore

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

been exercised by the Courts whom they superseded, and which at the time of the passing of the Civil Court's Act was still subsisting. A Subordinate Judge has jurisdiction to entertain a complaint under s. 34 of Madras Regulation IV of 1816. PONNUSAMI v. KRISHNA, **5 M. 222, F.B.** [*R.*, 12 M. 188.]

(2)—*Village Munsiff—Power to transfer suits.*—One Village Munsiff cannot transfer, to the file of another Village Munsiff, a suit under Reg. IV of 1816, because one of the parties objects to his trying the suit on the ground of personal hostility. *Per Hutchins, J.*—In such a case, the Village Munsiff should report the matter to the District Judge who should transfer the suit to another Munsiff. LAKSHMAKKA v. BALI, **8 M. 500.**

(3)—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 9 M. 378, F.B.

(4)—*S.* 5—*Suits for sums not exceeding Rs.* 10, *cognizable by Village Munsif's Court—Concurrent jurisdiction of Small Cause Court.*—A Small Cause Court has concurrent jurisdiction to try suits for a sum not exceeding Rs. 10, cognizable by a Village Munsif under s. 5, Reg. IV of 1816. PARASOORAMA PILLAY v. RAMASAMY *alias* C RAMASAWMY, **5 M.H.C. 45** [*R.*, 13 M. 145.]

(5)—S. 5—*See* LIMITATION ACT, 1908, s. 29, (1) (*b*), 9 M. 118.

(6)—*S.* 29—*Appeal.*—Under Reg. IV of 1816, s. 29, there is no appeal against the decision of a Village Munsiff. PONNUSAMI v. PACHAI, **2 M. 336.** [*Overruled*, 5 M. 222.]

(7)—S. 29—*See* JURISDICTION OF CIVIL COURTS, 4 M.H.C. 188.

(8)—*S.* 30—*Decree of Village Munsiff—Sale of immoveable property in execution.*—Immoveable property can be attached and sold in execution of a decree of a Village Munsiff under this Regulation. RAMASAMI v. ANGAPPA, **7 M. 220.** [*Overruled*, 9 M. 378, F.B.]

(9)—*S.* 35—The words in s. 35 of Regulation IV of 1816 "by the party injured" must be restricted to parties to the suit, and cannot be applied to every person who alleges that he has been injured by proceedings of a village Munsiff under the Regulation. RAMAN v. PAKUCHI, **9 M. 385, F.B.**

——**Reg. V of 1816 (Madras Village-panchayats.)**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT. MAD. REG. IX OF 1828; ACT XXVIII OF 1885; ACT VII OF 1870; ACT XII OF 1876, S. 16 (2) AM., MAD. ACT, IV OF 1904, S. 2. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

(1)—*S.* 17—This section has not been rescinded but is still in force. GOPALU v. VENKATADAS, **7 M. 552.**

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

——**Mad. Reg. VI of 1816 (Native Commissioners).**

[REP., ACT III OF 1873.]

S. 11—*See* VALUATION OF SUITS, 6 M.H.C. 151.

——**Reg. VII of 1816 (District Panchayats).**

[REP., ACT III OF 1873.]

See MAD. REG. XII OF 1816, 8 M. 569.

——**Reg. XII of 1816 (Madras Village Lands Disputes).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT., ACT XII OF 1876; MAD. ACT II OF 1869; MAD. ACT IV OF 1897. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

(1)—*District panchayat—Reg.* VII *of* 1816—*Act* III *of* 1873—*Reference to District panchayat by Collector—Conditions precedent.*—Neither the total repeal of Reg. VII of 1816 by the Madras Civil Courts Act, nor the partial repeal of Reg. XII of 1816, so far as it contained words of reference to Reg. VII of 1816, warrants the inference that the jurisdiction created by the later enactment has been abolished. It, therefore, follows that District panchayats have still jurisdiction under Reg. XII. [*R.*, 15 M. 1.] Before the Collector can exercise his power of ordering a compulsory reference to a District panchayat, there must be an inquiry as to whether the parties will submit to the jurisdiction of a Village panchayat, an objection by either party to such reference, and a request then made by one of the parties in writing, that the matter in dispute may be referred to a District panchayat. CHICARI ZEMINDAR v. PEDDA KIMEDI ZEMINDAR, **8 M. 569.** [*R.*, 15 M. 1.]

(2)—*Deputy Collector—Power to refer cases for disposal to—District Munsif under Reg.* XII *of* 1816—*Authority, delegation of, under s.* 3, *Act* VII *of* 1857.—A Deputy Collector, who has been invested by a Collector with all the powers of a Covenanted Assistant Collector or with the special power to determine claims under Reg. XII of 1816, is competent to refer cases under the Regulation for disposal to a District Munsif. The authority to refer cases must be delegated under s. 3, Act VII of 1857. The mere fact that a Deputy Collector has been placed in independent charge of a division of a District does not itself convey such authority. ANONYMOUS, **4 M.H.C App. 1.**

(3)—*See* MAD. REG. V OF 1822, s. 18, 1 M.H.C. 230.

(4)—*See* PANCHAYAT, 15 M. 1.

——**Reg. XIV of 1816 (Vakils).**

[REP., MAD. ACT II OF 1882.]

(1)—S. 22—Suit remitted by order of appellate Court for re-hearing—Proceeding on such order, to be regarded as further proceeding in trial—Vakil changing sides—*See* LEGAL PRACTITIONERS—PLEADER—APPOINTMENT AND APPEARANCE, 4 M.H.C. App. 43.

(2)—Ss. 30, 31—Appointment of two Vakils by same party—Applicability of rule as to payment of moiety of fees to each Vakil—*See* LEGAL PRACTITIONERS—PLEADER—REMUNERATION, 1 M.H.C. 369.

(3)—S. 31—*See* NO. 2, *supra.*

——**Reg. XV of 1816 (Civil Jurisdiction Procedure).**

[REP., MAD. ACT II OF 1869.]

(1)—*See* HINDU LAW — JOINT FAMILY, 6 W.R. P.C. 50.

(2)—*See* RES JUDICATA—GENERAL, 10 W.R. P.C. 1=11 M.I.A. 50.

(3)—S. 10—*See* PLEADINGS, 3 M.I.A. 278.

(4)—S. 10, cl. 3—*See* CHAMPERTY, 3 W.R. P.C. 33=8 M.I.A. 170.

(5)—S. 10, cls. 3, 4—*See* RIGHT OF SUIT—CASTE QUESTIONS, SUITS CONCERNING, 7 W.R. P.C. 7=3 M.I.A. 359.

——**Reg. VII of 1817 (Madras Endowments and Escheats.)**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT., ACT XX OF 1863. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

(1)—*Quære:*—Whether, so long as Regulation VII of 1817, subsisted, it was competent to the Government absolutely to divest itself of the obligations imposed on it by the Regulation. APPASAMI v. NAGAPPA, **7 M. 499.** (7 M.H.C. 77, *Observed in.*) [*R.*, 29 M. 534=16 M.L.J. 435=1 M.L.T. 127.]

(2)—*See* ACT XX OF 1863, 6 M.L.J. 14, 7 M.H.C. 77.

(3)—*See* ACT XX OF 1863, ss. 2, 13, 14, 22 M. 223.

(4)—*See* ACT XX OF 1863, s. 7, 13 M. 277.

(5)—*See* EVIDENCE — MISCELLANEOUS, 1 I.A. 209.

(6)—*See* HINDU LAW—RELIGIOUS ENDOWMENTS, 1 I.A. 209.

(7)—*See* JURISDICTION OF CIVIL COURTS, 7 M.H.C. 117, 6 M. 361.

(8)—Power of Collector under—*See* RELIGIOUS ENDOWMENT, 27 M. 291=8 C.W.N. 545=31 I.A. 83=14 M.L.J. 200, P.C.

(9)—*See* RELIGIOUS ENDOWMENT, 7 M.H.C. 306.

(10)—*Preamble, ss.* 2, 3—*Applicability of Regulation to future endowments — Board of Revenue—Powers of superintendence—Power to make over to Local Board—Madras Act* V *of* 1884 (*Local Boards*), *s.* 51—*Distribution of* Neermoru—*Provision for* Archana—*Religious purposes.*—The distribution of *neermoru*, etc.

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

to people attending a festival cannot be regarded as a religious charity, nor can a small provision for making *Archana* to the Goddess every Friday be so regarded. Reg. VII of 1817 is intended to apply not only to existing endowments but also to future endowments. (22 M. 223, *R.*) The use of the expressions 'have been' and 'such endowments' in s. 2, does not show that the Regulation was restricted in its application to existing endowments. The words 'were' and 'have been' in s. 3 were used as applicable at the time when the Board of Revenue would be called upon to take action. The Board of Revenue, under the provisions of Reg. VII of 1817, has power to appoint trustees to charitable endowments in certain cases, but it has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. (7 M.H.C. 77, 29 M. 534, 17 M. 212, *R.*) S. 51 of Act V of 1884 empowers the Board of Revenue to make over to a Local Board both the management, in virtue of its right of superintendence, and its own right of superintendence. T. VENKATACHALLA PILLAI v. THE TALUQ BOARD, SAIDAPET, **21 M.L.J. 305.** (31 M. 111 and 20 M.L.J. 885, *R.*)

(11)—Ss. 2, 7, 8, 13—Powers of Board of Revenue—*See* MAD. ACT V OF 1884, s. 51, 8 M.L.T. 341=20 M.L.J. 885=8 Ind. Cas. 488.

(12)—S. 3—*See* NO. 10, *supra.*

(13)—S. 7—*See* NO. 11, *supra.*

(14)—S. 8—*See* NO. 11, *supra.*

(15)—S. 13—*See* NO. 11, *supra.*

(16)—Cls. 2, 13 and 18—*See* ACT XX OF 1863, 1 M.L.T. 127=16 M.L.J. 435=29 M. 534.

(17)—S. 18—*See* NO. 16, *supra.*

——**Reg. VII of 1818 (Pauper Suits).**

[REP., ACT X OF 1861.]

(1)—S. 5—*See* LIMITATION—MISCELLANEOUS, 1 W.R. 30, P.C.=9 M.I.A. 66.

(2)—S. 18, cl. 5—*See* PAUPER SUITS, 1 W.R. P.C. 30=9 M.I.A. 66.

——**Reg. VIII of 1818 (Appeals to Privy Council).**

[REP., ACT VI OF 1874.]

(1)—S. 4—*See* PRACTICE AND PROCEDURE, 6 M.I.A. 309.

(2)—S. 4—*See* PRIVY COUNCIL, PRACTICE OF—MISCELLANEOUS, 5 M.I.A. 300.

——**Reg. V of 1882 (Jurisdiction of Collectors.)**

[REP., MAD. ACT VII OF 1865, S. 89.]

(1)—*Applicable only to land subject to permanent assessment.*—Regulation V of 1822 is inapplicable to land held under a mirasidar or any ordinary proprietor. The mirasidars, being ordinary proprietors not holding from or under the Government, and having lands not permanently assessed to the revenue, were a different class for whom special provision had not been made by Reg. V of 1822. That Regulation applied only to land held under a permanent assessment from Government. ENAMANDARAM VENKAYYA v. VENKATANARAYANA REDDI, **1 M.H.C. 75.** [*Disappr.*, 6 M.H.C. 164.]

(2) — *Mirasidar.* — Reg. V of 1822, is inapplicable to land held under a mirasidar or any ordinary proprietor. YANAMANDRAM VENKAYA v. SHILLAKURU VENKATA NARAIN REDDY, **1 Ind. Jur. O.S. 131.**

(3)—*See* MAD. ACT VIII OF 1865, 6 M.H.C. 164.

(4)—Matter determined by Collector under—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 M.H.C. 475.

5)—*S.* 8—*Applicable only to permanently settled estates.*—S. 8 of Reg. V of 1822, has reference only to Zamindars or other proprietors of estates permanently settled under the Regulations of 1802. NALLATAMBI PATTAR v. CHINNA DEYVANAYAGAM PILLAI, **1 M.H.C. 109.**

(6)—*S.* 18—*Applicability to disputes respecting irrigation—Procedure regulating dispute under Regulation.*—Reg. V of 1822 did not apply to a suit for damages for the obstruction of an irrigating channel by which water was diverted from a person's land. The Regulation merely authorized the disposal by Collectors of suits summarily cognizable under Regs. XXVIII and XXX of 1802. The disputes mentioned in s. 18, Reg. V of 1822, were subjected to the procedure provided by Reg. XII of 1816. RAGAVENDRA ROW v. MUHAMMAD KANITARGANAR, **1 M.H.C. 230.**

——**Reg. IX of 1822 (Madras Revenue Malversation).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT., MAD. REG. III OF 1823; MAD. REG. VII OF 1828, S. 5; ACT XII OF 1876; ACT XI OF 1901, SCH. III; MAD. ACT II OF 1869. SUPPLEMENTED, ACT XXXVI OF 1837, DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

(1)—*S.* 5—*Sale of land to recover fine imposed by Collector—Title of purchaser.*—The purchaser of land at a sale under the provisions of s. 5, Reg. IX of 1822, for the recovery of a fine imposed by the Collector, does not take it free of prior encumbrances, even though such encumbrances have not been mentioned in the sale proclamation. RAMAN v. HASSAM, **9 M. 247.**

——**Reg. II of 1825 (Stamps).**

[REP. ACT VII OF 1870.]

(1)—*S.* 4—*Allotment of land for maintenance in transfer deed by widow, not a gift.*—A deed of

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

1853 which purported to transfer the property of the executant's husband, subject to the payment of his debts, reserving a plot of land for the maintenance of the executant, and which provided for the re-transfer of the property, in case she should give birth to a son, was held to be not an instrument of gift and to be liable to no stamp duty. REFERENCE UNDER STAMP ACT, s. 49, **16 M. 419, F.B.**

———**Reg. VII of 1828 [Madras Subordinate Collectors and Revenue Malversation (Amendment).]**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT., ACT XII OF 1876, MAD. ACT II OF 1869, SUPPLEMENTED, ACT XXXVI OF 1837. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4.]

(1)—*Rent Recovery Act—Power of Collector to transfer suits.*—The Collector of a District is, under Reg. VII of 1828, competent to transfer suits, under the Rent Recovery Act, filed before an Assistant Collector in his District, to the file of any other Assistant Collector in the same District. KAILASANATHA v. TIRUVENGADA, **7 M. 420.**

(2)—Order confirming sale under Act II of 1864 (Madras Revenue Recovery) by Head Assistant Collector by virtue of powers given him by Regulation—Effect of such order—*See* MAD. ACT II OF 1864, 2 M.L.T. 328=30 M. 367.

(3)—S. 3—*See* MAD. ACT VIII OF 1865, s. 11, cl. 4, 26 M. 456.

———**Reg. VIII of 1828 (Corporal Punishment.)**

[REP., ACT XVII OF 1862.]

(1)—*S. 3—Power of Collector to interfere with decision of Assistant Collectors.*—Under s. 3 of Reg. VIII of 1828, the Collector had the fullest power to confirm, modify or annul any decision passed by the Assistant Collectors subordinate to him, and the decision so arrived at by the Collector was final. The power of the Collector was not confined to orders passed by the Assistant Collectors under Reg. IX of 1822. CHINNA AIYAN v. MAHOMED FAKR-UD-DIN SAHIB, **2 M. H. C. 322.**

———**Reg. IV of 1831 (Grants of Money or Land Revenue).**

[REP., ACT XXIII OF 1871.]

(1)—*See* INAM, 12 W.R. P.C. 33=13 M.I.A. 104.

(2)—*See* LIMITATION—MISCELLANEOUS, 1 W.R.P.C. 30=9 M.I.A. 66.

(3)—*See* LIMITATION ACT, 1908, s. 14, 1 M. H. C. 320.

(4)—*See* RELINQUISHMENT OF PORTION OF CLAIM, 5 M.H.C. 419.

Regulations—continued.

——5.—**Madras Regulations**—*continued.*

(5)—Construction of legislative enactments—Civ. Pro. Code, ss. 205 and 237 how far and Act XXIII of 1838 repeatedly — *See* STATUTES, CONSTRUCTION OF, 4 M.H.C. 277.

(6)—S. 3—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 M.H.C. 277.

———**Reg. VI of 1831 (Madras Hereditary Offices).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT., ACT XXIV OF 1859; ACT XII OF 1876. APPLICATION RESTRICTED, MAD. ACT IV OF 1866. REP. (EXCEPT IN SCHEDULED DISTRICTS), MAD. ACT III OF 1895.]

(1)—Suits under—Applicability of Limitation Act, 1877—*See* MAD. ACT III OF 1895, 9 M.L.T. 430.

(2)—*See* INAM, 3 M.L.T. 343=18 M.L.J. 247, 9 M.L.J. 13.

(3)—*See* JURISDICTION OF CIVIL COURTS, 4 M.H.C. 70.

(4)—*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 8 M. 249, F.B.

(5)—S. 2—*See* SERVICE INAM, 21 M.L.J. 962=2 M.W.N. 1911, 354.

(6)—*S. 3—Suit for emoluments attached to office of kurnam in unsettled district, not sustainable.*—A suit for the emoluments attached to the office of kurnam in an unsettled district is barred by the operation of s. 3, Reg. VI of 1831. THE COLLECTOR OF KISTNA DISTRICT v. K. CHINNAMRAJU, **5 M.H.C. 360.** [*R.*, 17 M. 302, F.B.]

(7)—S. 3—Inam granted as emolument to village blacksmith no limitation or prescription by adverse possession in case of proceedings regarding — *See* JURISDICTION OF CIVIL COURTS, 21 M. 134=7 M.L.J. 196.

(8)—S. 3—*See* JURISDICTON OF CIVIL COURTS, 17 M. 302=4 M.L.J. 100, F.B. 13 M. 41.

(9)—S. 3—Suit to recover damages claimed in respect of profits which the plaintiffs would have derived from Service Inam lands—Small Cause Court--Jurisdiction—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 M.H.C. 383.

———**Reg. X of 1831 (Madras Sale of Minor's Estates).**

[SHORT TITLE GIVEN, ACT XI OF 1901. REP. IN PT., ACT XII OF 1876; ACT VIII OF 1890. DECLARED IN FORCE THROUGHOUT THE PRESIDENCY OF MADRAS, EXCEPT AS REGARDS THE SCHEDULED DISTRICTS, ACT XV OF 1874, S. 4, AS AMENDED BY ACT VIII OF 1900.]

(1)—*See* ACT X OF 1861, 1 M.L J. 537.

(2)—*S. 2—Reg. V of 1804, s. 20 — Sale for arrears of revenue of mitta held by tenants in common during minority of some of the tenants—Validity of sale.*—Where certain minors are the owners of a mitta not as sole proprietors

Regulations—concluded.

——5.—**Madras Regulations**—*concluded.*

but as joint proprietors with others, who are not incapacitated from the management of their inheritance, their case is governed by s. 20 of Regulation V of 1804, and not by s. 2 of Regulation X of 1831, and a sale of the mitta for arrears of revenue is not void, because of the minority of some of the owners. KRISHNA v. MEKAM-PERUMA, **10 M. 44.**

——— **Reg. V of 1832 (Mohtarfatax).**

[REP., ACT XVIII OF 1861.]

(1) — *Muhtarafa — Trade-tax, Zemindar's right to collect—Regulation* XXV *of* 1802, *s.* 4.—The zemindar of Karvetnagar has not the right of collecting the muhtarafa or trade-tax from artizans in his zemindari, delegated to him by Government, and the assignees of the zemindar cannot legally exercise this right. *Quære.*—Whether it was competent to Government to commit the collection of this branch of the revenue to zemindars for their own benefit. VEDANTA v. KANNIYAPPA, **9 M. 14, F.B.** [*R.*, 16 M. 34.]

———**Reg. XI of 1832 (Hidden Treasure).**

[REP., ACT VI OF 1878.]

See TREASURE TROVE, 7 M.H.C. 150.

——6.—**Punjab Regulations.**

* ———**Reg. IV of 1887 (The Punjab Frontier Crimes).**

[REP., REG. III OF 1901.]

(1)—*Ch.* III — Jirga, *resolution of—Civil Courts—When binding on—Jurisdiction—Pre-emption.*—Where, in a suit to enforce a right of pre-emption, it was contended that no suit lay in a Civil Court by reason of a resolution passed by a *jirga* to the effect that members of one *tuman* were not allowed, by custom, to acquire lands in the territory of another *tuman, held*, that, unless any action has been taken in accordance with the provision of Ch. III of the Regulation, no resolution of a *jirga* can constitute a legal bar to plaintiff's suit, in a Civil Court, for pre-emption. ABDUL KHAN v. HAJI SHAH, **26 P. R. 1909 = 48 P.L.R. 1909=35 P.W.R. 1909=1 Ind. Cas. 877.**

Rehan.

Mortgage — Construction of document — "Arth" "Mustaghraq"—Power of sale in default not expressly given—*See* MORTGAGE—FORM OF MORTGAGES, 13 A. 28 = A.W.N. 1890, 216.

Rehearing.

See PRIVY COUNCIL, PRACTICE OF—REHEARING.

See REVIEW.

(1)—*Civ. Pro. Code, Act* X *of* 1877, *s.* 560—*Re-hearing of appeal heard* ex parte.—A re-

* This star mark indicates that this Regulation was passed by the Imperial Legislature though applicable to certain Provinces.

Rehearing—*continued.*

hearing of an appeal heard *ex parte* cannot be granted, unless the respondent satisfies the Court by some legal evidence that the notice of appeal has not been duly served. MAHOMED KALUN v. DINOMOYEE DASHYA, **8 C.L.R. 112.**

(2)—*Re-hearing of* ex parte *appeal—What the applicant must satisfy Court upon.*—Upon a petition for the re-hearing of an appeal heard *ex parte*, the applicant must satisfy the Court that the notice was not duly served or that he was prevented by sufficient cause from attending, when the appeal was called on for hearing. ANUNDA SHAHA BISWAS v. KEMA BEEBEE, **6 C. 548.**

(3)—*Act* VIII *of* 1859, *s.* 119—*Act* X *of* 1859, *s.* 58—*Bengal Act* III *of* 1870—Ex parte *decree—Re-hearing—Procedure.*—An application for the hearing of a case in which judgment was passed *ex parte* or by default by the Revenue Court before the passing of the Bengal Act III of 1870, is governed by the procedure prescribed by s. 119, Act VIII of 1859 and not s. 58 of Act X of 1859. OODWUNT MAHTOON v. BIDDHI CHAND CHOWDHRY, **13 B.L.R. 216, Note= 18 W.R. 207.** [*F.*, 18 W.R. 252.]

(4)—Ex parte *decree affirmed in appeal and special appeal—Re-hearing—Bengal Act* VIII *of* 1869—*Notice of suit—Remand.*—In execution of a decree by the Deputy Collector—confirmed in appeal by the first appellate Court and by the High Court in special appeal—against certain defendants then present and the husband of the first respondent, who had since died and who was not then present, an application was made for the sale of certain of his immoveable properties and thereupon the respondent filed a petition applying for a re-hearing on the ground that her husband had received no notice of the suit. This application was refused by the Munsif to whom it was presented, Act VIII of 1869 (B.C.) having in the meantime come into force, on the ground that the re-hearing was barred by the institution of an appeal and special appeal. *Held*, that the Munsif was clearly wrong, for if the husband of the respondent really had no notice of the suit, he could not be concluded by anything done in it. Where, on appeal from the Munsif's decision, the Judge held that the Munsif had no jurisdiction in the matter, but that the application for the re-hearing should be made in the Revenue Court, *held* that everything that had been done in the case by the Revenue Court and the order of the Judge remanding the case to the Revenue Court must be set aside as altogether without jurisdiction. RAJA MOHESH CHUNDER SINGH SURMAN v. BHOOBUN MOYEE DEBIA, **13 B.L.R. 217, Note=18 W.R. 252.**

(5)—*Act* III (*B.C.*), 1870—*Transfer of suit—Re-hearing — Application under Act* X *of* 1859, *s.* 58—*Jurisdiction.*—A decree for rent was passed *ex parte* against the petitioner on the 7th May, 1870, in the Court of the Deputy Collector. Before any execution had been taken out under that decree, Act III of 1870

Rehearing—*continued.*

(B.C.) came into force; and under s. 2 of that Act the suit was transferred to the Munsif's Court. The petitioner applied to the Deputy Collector for setting aside the *ex parte* decree and for re-hearing. The Deputy Collector did so. *Held* that the Deputy Collector had no jurisdiction in the matter and that, under Act III of 1870, (B.C.) it was by the Munsif and by the Munsif alone that the application for the re-hearing of the case, under s. 58 of Act X of 1859, could be heard. WOOMA CHURN MOOJOOMDAR v. CHUNDER KANT ROY CHOWDHRY, **16 W.R 255.** [*D.*, 18 W.R. 207.]

(6)—*Decree obtained fraudulently—Absence of notice to opposite party—Competency of judgment-debtor to claim re-hearing.*—Where on an *ex parte* decree having been passed against the defendants they represented that the whole case was fraudulent and that they had no notice either of the suit or of the sale under the decree passed in it, the High Court *held* that independent of the question of an ordinary review within 15 days, defendants could claim a re-hearing at any time within 15 days after such steps in execution had been taken as must necessarily bring the decree to their notice. BOIDOO NATH ROY v. BROJO KISSORE CHUCKERBUTTY, **2 W.R. Act X, Rul. 15.**

(7)—*Decree passed* ex parte—*Petition for re-hearing of suit, proof of service of summons necessary before rejection of.*—This was an appeal from an order under s. 58 of Act X of 1859, rejecting an application for re-hearing made by a party against whom a decree was passed *ex parte*. The High Court found that the order of the lower Court was unsupportable and unjustifiable, for, there was not a title of proof, on the record, of due service of summons, and remanded the case for the purpose of deciding whether the summons was duly served on the defendant according to law, observing that not mere formal proof but real and satisfactory proof of service should be required and, if there be any doubt, the defendant ought to be re-heard. KASHEE KANT CHOWDHRY v. BEEJOY GOBIND CHOWDHRY, **2 W.R. Mis. 24.**

(8)—*Arrears of rent*—Ex parte *decree—Setting aside of jurisdiction—Limitation—Act* III *of* 1870 (*B.C.*)—*Act* VIII *of* 1869 (*B.C.*), *s.* 108—*Act* X *of* 1859, *s.* 54.—Where an *ex parte* decree for arrears of rent was passed by a Revenue Court and partially satisfied by attachment and sale of the lessee's property, and on objection taken by the sureties (of the lessee) to the decree on the ground that no summons had been served on them, the Subordinate Judge set aside the decree on the assumption that the case had been transferred to his Court under the provisions of Act III of 1870 (B.C.) and fixed a day for the rehearing of the case, *held*, that the attachment having been issued as the time of the commencement of the above Act, the Act was not applicable. Therefore, even if the *forum* was altered and the Civil Court was substituted for the Revenue Court, the procedure

Rehearing—*concluded.*

would still be regulated by the provisions of the Rent Law. *Held*, further, that, under Act VIII of 1869, s. 108, the procedure would be regulated by Act X of 1859, and that the application to set aside the decree was barred by time under s. 54 of the latter Act. *In the matter of* AJOODHYA RAM KHAN v. SREEMUNT PAL, **19 W.R. 129.**

See ACT VI OF 1882, s. 169, 19 B. 208.

See U. P. ACT XVIII OF 1873, ss. 188, 189, A.W.N. 1881, 141.

Re-hearing—Civ. Pro. Code, s. 623, whether applicable—*See* U.P. ACT XII OF 1881, s. 185, 19 A. 522=A.W.N. 1897, 139.

See APPEAL—MISCELLANEOUS, 12 M I.A. 254.

Of an application—Jurisdiction of Courts—*See* CIV. PRO. CODE, 1908, O. XIX, r. 3, 37 C. 259=6 Ind. Cas. 666.

Respondent's pleader absent—Appeal heard *ex parte*—*See* CIV. PRO. CODE, 1908, O. XLI, r. 21, 11 C.L.R. 164.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 15 M. 82.

Application to High Court for re-hearing, Act XV of 1882, Presidency Small Cause Courts Act, s. 38—*See* HIGH COURT, JURISDICTION OF —BOMBAY, 12 B. 579.

See JUDGE—DEATH OF JUDGE BEFORE JUDGMENT, 3 B.L.R A.C. 105.

See PRACTICE AND PROCEDURE, 13 B.L.R. 216, Note=18 W.R. 207, 13 B.L.R. 217, Note =18 W.R. 252, 2 M.I.A. 181.

Application for rehearing of suit dismissed by Small Cause Court—Ss. 38 and 71, Presidency Small Cause Courts Act (1882)—Court, fee to be paid in full—Supply to deficient Court-fee disallowed after expiry of prescribed period—*See* PRESIDENCY SMALL CAUSE COURT ACT, 1882, ss. 38 and 71, 18 C. 445.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 38, 71, 12 B. 408.

Improper dealing with remanded case—and decision of case on remand for particular purpose—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, Marsh 603.

See SPECIFIC RELIEF ACT, 1877, s. 9, 4 M. 217.

Rejgi.

Rejgi, the hak of, is not affected by Act XX of 1839—*See* BOM. ACT XX OF 1839, 7 Bom. L.R. 798.

Relationship.

See EVIDENCE ACT, 1872, S. 32.

(1)—*Evidence—Admissibility of statement by deceased persons as to heirs in accordance with practice of public office.*—Statements made by a person as to who were her heirs, at times when there was no dispute about the question, and recorded by a *wasiqa* (pension) officer in accordance with the practice in force in such office,

Relationship—*concluded.*

are admissible in evidence to prove relationship. BAQUAR ALI KHAN v. ANJUMAN ARA BEGAM, **25 A. 236, P.C.=30 I.A. 94=7 C.W.N. 465=5 Bom. L.R. 410=8 Sar. 397.**

See PUN. ACT IV OF 1872, s. 14, 151 P.R. 1879.

See CUSTOMS—PUNJAB—ALIENATION, 126 P.R. 1890.

Cultivators related to Zemindar—Assessment of rent—Rate of rent—*See* ENHANCEMENT OF RENT — ENHANCEMENT, LIABILITY TO, 2 Agra 403.

Statement as to, made upon information from others when admissible—*See* EVIDENCE ACT, 1872, s. 32, 26 A. 581=9 C.W.N. 105=6 Bom. L.R. 750=7 O.C. 280=30 I.A. 217, P.C.

See EVIDENCE ACT, 1872, s. 32, cls. 5 and 6, 24 A. 94, P.C.=6 C.W.N. 169=29 I.A. 1=4 Bom. L R. 233.

Evidence as to—*See* EVIDENCE ACT, 1872, ss. 32 (5), 48, 49, 60, 5 C.W.N. 33=27 I.A. 238=23 A. 37, P.C.

Pedigree, proof of—Recognition by widow of relationship—*See* PEDIGREE, 6 C W.N. 169=29 I.A.,1=24 A. 94, P.C.=4 Bom. L.R. 233.

Wife, position of, in the order of relationship—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 4 O.C. 397.

See WAJIB-UL-ARZ, 121 P.R. 1879.

Relationship, Evidence of.

See RELATIONSHIP.

Special means of knowledge—Family priest—*See* EVIDENCE ACT, 1872, s. 32, cl. 5, 4 C. L.R. 173.

Release.

(1)—*Releasor offering to vacate house—Absence of words of conveyance—Whether release operative—Enforceability as a family settlement—Transfer of Property Act* (IV *of* 1882), *s.* 54.—A deed of release, whereby the releasor simply undertakes to vacate his house, may be operative as a *bona fide* settlement of a family dispute, even though it contains no words of conveyance. MUTHUSAWMI PILLAY v. GOVINDASAWMI PILLAY, **9 Ind. Cas. 267=9 M.L.T. 342.** (8 C. 138, *F.*)

(2)—*Joint judgment-debtors — Liability of each.*—It is not open to one of several joint judgment-debtors to obtain a release from the judgment-debt by payment only of his share in such debt. The rule as to joint contractors does not apply to joint judgment-debtors. MUTHRA DASS v. SHEODIAL SINGH, **28 P.R. 1867.**

By co-sharer, if transfer—Stamp—Registration—*See* BEN. ACT VIII OF 1885, ss. 11 and 12, 12 C.W.N. 475.

See CONTRACT ACT, 1872, ss. 2, 10, 11, 217, 248, 23 B. 146.

See CONTRACT ACT, 1872, ss. 62, 63, 1 L.B. R. 170.

Release—*concluded.*

Release, conditional upon future event—Validity—Agreeing to release, whether a mere contract—*See* CONTRACT ACT, 1872, s. 63, 7 M.L.T. 392=20 M.L.J. 383=6 Ind. Cas. 758.

Conveyance by lease and—in fee—*See* EVIDENCE—PAROL EVIDENCE, 5 M.I.A. 72.

Release by one co-parcener to another—Whether it benefits other co-parceners—*See* HINDU LAW—JOINT FAMILY, 11 M. 406.

Members of joint family—Property held by single member—Limitation—*See* HINDU LAW—JOINT FAMILY, 8 M.H.C. 157.

Of one wrong-doer—Effect—Applicability of doctrine—Splitting up claims—Joint decree, if can be passed—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 11 C.L.J. 503=6 Ind. Cas. 69=14 C.W.N. 849=37 C. 559.

Stamp—*See* REGISTRATION ACT, 1908, s. 17, cl. 3, 2 A. 554.

Maintenance right — Registration — *See* REGISTRATION ACT, 1908, ss. 17 and 18, 3 M. 184.

See STAMP ACT, 1879, sch. I, art. 54, 15 M. 259, F.B.

Document by benami purchaser at Court-sale renouncing his claims in favour of true purchaser — Stamp—*See* STAMP ACT, 1899, sch. I, art. 55, 24 A. 372, F.B.=A.W.N. 1902, 71.

Release of one of several joint tort-feasors, whether release of all—*See* TORT, 6 A.L.J. 135=31 A. 173=1 Ind. Cas. 884.

Whether a release by an alleged reversioner, recognising a widow's right of absolute ownership under her husband's will, can be set aside as being transfer of *spes successionis*, within s. 6 (*a*), Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6 (*a*), 18 M. L.J. 469=31 M. 474.

Relief.

See CONSEQUENTIAL RELIEF.

See DECLARATORY DECREE, SUIT FOR.

See PLEADINGS.

See VALUATION OF APPEALS.

See VALUATION OF SUITS.

See VARIANCE BETWEEN PLEADINGS AND PROOF.

(1)—*Meaning of the term "Relief"—"Cause of action".*—"Relief" means the remedy which a Court of Justice may afford in relation to some actual or apprehended wrong or injury. "Relief" is not synonymous with "cause of action" which includes all the reliefs covered by the facts, on the strength of which a plaintiff comes into Court. (*Stuart, C. J.*) SARSUTI v. KUNJBEHARI LAL, **5 A. 345, F.B.** [*R.*, 27 B. 379.]

(2)—*Civ. Pro. Code* (*Act* VIII *of* 1859)—*Rights of parties to suit—Relief prayed for in plaint.*—In suits under the Civil Procedure Code, the Court is bound to take into consideration all

Relief—*continued.*

the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible, but at the same time it should confine itself to granting such relief as is prayed for by the plaint. VIRASWAMI GRAMINI v. AYYASWAMI GRAMINI, **1 M.H.C. 471.** [*F.*, 15 M. 489 ; *R.*, 3 M. H.C. 120.]

(3)—*Suit — Relief granted on grounds not stated in plaint.*—A Court is not competent, when the plaintiff has failed to establish the case set up by him, to give him a decree on grounds which he has not made the basis of the suit. BISHESHAR DAS v. RAM JAISERI DAS, **A.W.N. 1881, 158.**

(4)—*Whether Court can grant relief on other grounds than those put forward in plaint—Practice.*—When a Court sees that a person is entitled to a relief which he asks, although entitled on other grounds than those put forward in the plaint, the Court should give that relief, particularly if the refusing to grant such relief will operate as a bar to any future claim. ULFAT RAI v. SUKPAL RAI, **A.W.N. 1887, 43.**

(5)—*Practice—Grounds not taken in plaint—Relief not to be granted on.*—No relief can be granted on grounds not taken in the plaint. MUHAMMED ALADAT KHAN v. NARPAT, **A.W.N. 1887, 130.**

(6)—*Relief, not asked for in the plaint and not founded on pleadings—Title touched in the issues and put in evidence--Declaration of plaintiff's title—Suit dismissed in a proper decree.*—As a rule, relief not founded on the pleadings should not be granted. But where the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues, but have been fully put in evidence and formed the main subject of discussion and decision in all the Courts, the case is not within the rule, and the Court may make a declaration of the rights of the parties, and may found on the declaration an inquiry into the plaintiff's title. Where the Court makes a declaration in plaintiff's favour in a dismissed suit, the proper course will be to direct an enquiry as to who are the persons entitled and to reserve further directions under which it will be probably found possible to place them in legal possession and so to terminate the litigation. *Quære*—Whether a declaration in a dismissed suit can supply a fresh starting ground? SRI MAHANT GOBIND RAO v. SITA RAM KESHO, **2 C.W.N. 681, P.C=21 A. 53=25 I.A. 195=7 Sar. 370.**

(7)—*Not asked for.*—A plaintiff is not entitled to get any other relief than the particular relief he asked for. KALI KISHORE CHOWDHURY v. GOPI MOHAN ROY CHOWDHURY, **2 C.W.N. 166.**

(8)—*S.* 348, *Civ. Pro. Code — Relief not claimed, not to be decreed.*—The Court is not at liberty to decree to the plaintiff relief he has not claimed. KASIM ALI KHAN v. BIRJI KISHORE, **2 N.W.P. 182.**

Relief—*continued.*

(9)—*General prayer for relief in plaint.*—From a general prayer in the plaint for reliefon behalf of one of several plaintiffs, the Court will not be in a position to grant relief to the other plaintiffs, if such prayer cannot be said to apply to the others, if the cause of action of the one is different from the cause of action of the others, and if the cause of action of the others is not complete before the institution of the suit. A prayer for general relief must be regarded as limited (1) by the facts alleged and (2) by the prayer for express relief. DEBI DAYAL SAHOO v. BHAN PERTAP SINGH, **31 C. 433=8 C.W.N. 408.** (5 B.L.R. 682, 21 O. 116, *R.*) [*R.*, 1 S.L R. 209, 5 N.L.R. 105.]

(10)—*Relief asked for in plaint—Granting of larger relief—Irregularity.*—It is a material irregularity on the part of the Court to grant the plaintiff a relief greater than that claimed in the plaint. DAULAT KHAN v. MUST ALI, **1 P.R. 1892, Rev.**

(11)—*Pleadings and proof — Specific relief prayed for not proved—Decree on general prayers*—Although the plaintiff had failed to prove the case on which he claimed a special relief, the Court in this case *held* that he had established a case in which upon the plaint and the general prayer for relief, he was entitled to a decree. GOBIND CHUNDER MOOKERJEE v. DOORGA-PERSAD, **14 B.L.R. 337=22 W.R. 248.**

(12)—*Remand order, effect of—Prayer for relief, general and special.*—Where a party, dissatisfied with the decision of the lower Court, appeals to the High Court and re-opens the whole case he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of the High Court in his special appeal. It may very well be that a plaintiff being doubtful as to the precise form of relief to which the facts proved may entitle him, may ask the Court to give him such relief as under the circumstances the Court may think fit to give. GUNGARAM DUTT v. CHOWDHRY JUNMAJOY MULLICK, **1 C.L.R. 144.**

(13)—*Prayer for general relief—Grant of specific relief.*—Under the prayer for general relief specific relief may be granted of a different description from the specific relief prayed for by the bill ; provided the bill contains charges, putting material facts in issue, which will contain such relief. COCKERELL v. DICKENS, **2 M.I.A. 353=3 Moo. P.C. 98=1 Mont. D.D. 45=Morton 407=1 Sar. 203.**

(14)—*Relief, prayer for, general.*—Under a prayer for general relief, a plaintiff is not entitled to any relief which is inconsistent with the plaint. A suit by a plaintiff to set aside his father's will on the ground that he had no power to dispose of his property, that the plaintiff was entitled as the eldest son and heir-at-law according to the Hindu Law, should have been dismissed with costs, and no account should have been decreed to the plaintiff in respect of his interest in a portion of the property the bequest of which was in the opinion

Relief—*continued.*

of the Court below, bad for remoteness. HIRALAL MULLICK v. MATILAL MULLICK, **5 B.L.R. 682.** [*Rel. on*, 31 C. 433=8 C.W.N. 408.]

(15)—*Ownership of land, suit for—Easement—Relief claimed.*—In a suit to establish the ownership of land, if it is found that the claim to ownership is entirely unsupported by evidence, any question as to the special right to an easement over the said land or part of it cannot be decided if no such question is raised by the plaint. A question not raised by the plaint ought not to be decided by the Court. LALJI RATANJI v. GANGARAM TULJARAM, **2 B.H.C. 176.**

(16)—*Occupancy right — Ryotee right not pleaded—Award of subordinate right of occupancy.*—A party may have subordinate rights awarded when they arise out of the principal right which he pleads. But, when a party pleads distinctly a jageerdar's proprietary right, a Court cannot award a subordinate right of occupancy which in no way arises out of a jageerdar's proprietary right, but out of a ryotee right never pleaded by defendant and in fact incompatible with defendant's case. PANDEY BISHONATH ROY v. BHYRUB SINGH, **7 W.R. 145.**

(17)—*Possessory suit—Alternative relief.*—Where plaintiffs claim possession, but ask the Court to ascertain at what rate defendants ought to hold in case they should be found entitled to do so, their suit, whether they can obtain the alternative relief or not, should not be dismissed as they may succeed in proving their title to the relief sought. THE LAND MORTGAGE BANK OF INDIA v. NEELOO BHUTTO, **21 W.R. 125.**

(18)—*Alternative titles—Plaint—Inconsistent claims.*—Where the title on which a person sues is put forward in the alternative, and the two parts of the alternative are not inconsistent with each other, he ought to obtain a decree if he makes out either branch of the alternatives. There should not be inconsistent claims in the plaint. A plaintiff can base his claim to land both on a hereditary right, and on a right of occupancy. WOODIT SINGH v. BULDEO SINGH, **21 W.R. 12.**

(19)—*Joint purchasers at sale in execution, rights of—Payment of quota of purchase-money.*—Plaintiff and the defendants joined together in purchasing two-thirds and one-third respectively of the rights and interests of certain judgment-debtors sold in execution of a decree. Plaintiff paid his share of the earnest-money and the whole of the balance of the purchase-money; and, as the defendants failed to reimburse him, he brought the present action to get possession of the whole property, urging that he should be deemed as the whole purchaser. The lower Court ordered that defendants should deposit in Court their share of the purchase-money in four days, and that the plaintiff should be put in possession of his two-thirds of the property. The above order was

Relief—*continued.*

considered by the High Court to be not the proper one which should have been made in the case, for, plaintiff asked for possession and the Court ordered payment by the defendants of the share of their purchase-money due by them to the plaintiff, which was not what the plaintiff had asked for; but, it refused to disturb the order in appeal, as it did substantial justice. BRIJO RAM MISSER v. BHUGWAN DOSS, **7 W.R. 180.**

(20)—*Tort—Proof of wrong—Right to claim relief.*—In the case of a suit for wrong done, the strict rule of law, that a party asking to have a right declared of a specific nature must prove the right which he claims, does not apply. When he proves the wrong done to him, though not exactly to the extent of which he complains, is entitled to relief, though not exactly to the extent or on the very ground on which he asks it. BISHNOO PERSHAD BUNNICK v. RAM COOMAR DEB, **22 W.R. 2.** [*R.*, 9 C.L.J. 623.]

(21)—*Equitable relief—False allegations of fraud.*—Where a party who as the facts really stand would be entitled to equitable relief, misrepresents his case, falsely charges the opposite party with fraud and collusion and does not rely on his equitable rights, he will be debarred by such conduct from obtaining any relief in a Court of equity. DULI CHAND v. MONOHAR LALL UPADHYA, **2 C.L.R. 18.**

(22)—*Practice— Variance between pleading and proof—Relief not asked for.*—In a suit brought to establish a right of ownership of property, it is not competent to the Court to enter into and decide the question of right to an easement over the same. Though the Courts are bound to take into consideration all the rights of the parties to a suit both legal and equitable, and give effect thereof by their decrees, as far as possible, they are not at liberty to grant a relief either not prayed for in the plaint or that does not flow naturally from the ground of claim as stated in the plaint. SAMBAYYA v. GOPALAKRISHNAMMA, **15 M. 489=2 M.L.J. 257.**

(23)—*Mortgagor and mortgagee—Court-sale to first mortgagee, extinction of right of redemption of second mortgagee on—Relief sought in the alternative.*—Ordinarily, a second mortgagee has a right to redeem the first mortgage, but this right ceases when the first mortgage ceases. The above right in the second mortgagee is, in its nature, a right to consolidate the two securities into one as against the mortgagor and to hold them together until they are redeemed, and there can be no right to consolidate when the first security ceases to exist by payment or by a Court-sale, to the first mortgagee, which extinguishes the first mortgage. A sale under the order of the Court extinguishes the first mortgage, and the only right which survives it, in the second mortgagee, is the right to be redeemed. The case should be treated as if the original mortgagor conveyed his whole interest in the property by a

Relief—*continued.*

voluntary sale in extinction of the first mortgage. A plaintiff, who is not a party to the transaction in respect of which allegations are made, can come into Court seeking relief in the alternative, dependent upon what may be found by the Court to be the true facts of the case. (*Per Best, J.*) *Quære.* — Whether a Court is justified in giving the plaintiff a decree for redemption, where the prayer in his plaint has been only for a declaration of his right to redeem? PERUMAL v. KAVERI, **16 M. 121 = 2 M.L.J. 281.** [*R.*, 11 C.P.L.R. 75, 15 C.P. L.R. 188, 28 B. 153; *D.*, 17 M. 62.]

(24)—*Hindu Law—Maintenance—Declaratory decree—Act* VIII *of* 1859, *s.* 342.—When a Hindu widow sues to have her right of maintenance declared, she should ask, not that her right should be declared generally, but for inquiry as to the fit and proper sum for her maintenance; but acting upon the rule in Courts of equity if a plaintiff mistakes the relief to which he is entitled under his special prayer, the Court may afford him the relief to which he has a right under the prayer for general relief, provided such relief is agreeable to the case made by the bill, and the Court ought not to dismiss the case, but frame issues accordingly. S. M. NISTARINI DASI v. MAKKAN LALL DOTT, **9 B.L.R. 11 = 17 W.R. 432.** (11 M.I.A. 7, 468, *F.*) [*R.*, 12 B.H.C. 69, 1 C. 365, 2 B. 494, 11 C.L.J. 2 = 3 Ind. Cas. 408.]

(25)—*Ostensible owner*—Bona fide *purchase—Undisclosed interest—Manager.*—If a person allows property to be purchased for him in the name of another, and takes no steps to show to the world that he is the owner, he must make out a clear right to relief against any one who purchases *bona fide* from the ostensible owner. The purchaser in such a case could hardly be expected to prove that no other person had an undisclosed interest in the property. Where, therefore, a Hindu widow had allowed her husband's brother to act as manager of their family, and, during the course of his management he had executed a mortgage of certain property to pay off certain debts binding on the widow also, *held*, that her ignorance of the mortgage transaction would not avail her in a suit to set aside the mortgage as against her, but that she must prove that she had a title to the property and that the debt to discharge which the mortgage was effected was not binding on her. NIDRA DASSEE v. ABDOOL WAHED, **25 W.R. 532.**

Plaintiff asking for relief larger than the facts asserted by him would warrent—Effect—*See* CIV. PRO. CODE, 1908, O. I, r. 13, O XXI, r. 63, s. 99, 9 C.L.J. 623 = 1 Ind. Cas. 530.

Alternative relief—*See* CIV. PRO. CODE, 1908, O. II, rr. 3, 6, L.B.R. 1872—1892, 355.

Plaint—Prayer for general—Effect of possession—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 20 B. 798.

Suit to declare the membership of a firm—no further relief—Maintainability—*See* DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 93 P.R. 1884.

Relief—*continued.*

Not asked for in plaint and not consistent with plaintiff's case—Court's power to grant—*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 5 C.W.N. 20.

Ancillary prayer failing—Claim for principal relief not lost—*See* DECREE—GENERAL, 11 Ind. Cas. 537.

Decrees of Courts—Specific statement of relief—*See* DECREE—DECREE, FORM OF, 4 C. 69.

See DECREE—DECREE, FORM OF, 2 N.W. P. 415.

Granting of relief not claimed—*See* EX PARTE DECREE, 15 C.L.J. 446.

Fraudulent decree—Special prayer to set aside the decree not made—General prayer for "any other relief"—Maintainability of suit—*See* FRAUDULENT DECREE, 4 Ind. Cas. 356.

When reliefs are cumulative and not alternative—*See* GUARDIAN—GENERAL, 86 P. W.R. 1910 = 7 Ind. Cas. 505 = 213 P.L.R. 1910.

Sought for first time in second appeal—If can be allowed—*See* HINDU LAW—PARTITION, 23 B. 184.

See JURISDICTION—GENERAL, 3 B.L.R. App. 77.

General—Prayer for, effect of—*See* MORTGAGE—GENERAL, 3 O.C. 254.

"Such other, as the Court may think fit," meaning of—*See* MORTGAGE—GENERAL, 29 M. 491.

Suit for foreclosure—Combination of prayer for redemption of prior mortgage—*See* MORTGAGE—REDEMPTION, 14 C.P.L.R. 177.

Partial relief on the footing of defendants' admission—*See* MORTGAGE — REDEMPTION, 1 A. 194, F.B.

Form of—Suit to set aside sale-deed and for confirmation of possession—Declaratory decree—*See* PARDANASHIN WOMAN, 13 B.L.R. 427, P.C = 21 W.R. 340 = 1 I.A. 192.

On facts and documents not stated in pleadings—*See* PLAINT—AMENDMENT OF PLAINT, 11 M.I.A. 468.

Plaint—Grant of relief not prayed for—*See* PRACTICE AND PROCEDURE, A.W.N. 1881, 10.

Practice—on grounds not alleged, whether can be granted—*See* PRACTICE AND PROCEDURE, A.W.N. 1884, 285.

Not asked for in plaint, when amendable—*See* PRACTICE AND PROCEDURE, 21 A. 53, P.C. = 2 C.W.N. 681 = 25 I.A. 195.

See PRE-EMPTION—GENERAL, 1 O.C. 174.

Suit for profits and for such relief as the Court might deem proper—Small Cause—*See* PROFITS, SUIT FOR, P.L.R. 1900, 314.

See PUBLIC WAY, 113 P.L.R. 1901 = 91 P. R. 1901.

Relief—*concluded.*

Prayer for general relief—Relief not prayed for may be granted if not inconsistent with pleadings—*See* RELIGIOUS ENDOWMENT, 3 Ind. Cas. 408=11 C.L.J. 2.

See RENT, 7 O.C. 109.

Election of remedies—*See* RES JUDICATA—ADJUDICATIONS, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129.

Persons against whom no relief is claimed, suit not liable to be dismissed under s. 85, Transfer of Property Act, for non-joinder of—Relief afforded to plaintiffs in such cases—*See* TRANSFER OF PROPERTY ACT, 1882, s. 85, 31 M. 333.

Plaint—Facts proved not consistent with statement in plaint—Relief—*See* VARIANCE BETWEEN PLEADINGS AND PROOF, 3 B.L.R. App. 111=12 W.R. 69.

Alternative reliefs in plaint—Partition—Findings of fact unaccompanied by reasons—Not conclusive in second appeal—Practice—Procedure—*See* VARIANCE BETWEEN PLEADINGS AND PROOF, 19 B. 323.

Relief, Oudh Taluqdars, Act.

See U.P. ACT XXIV OF 1870.

Religion.

See CIV. PRO. CODE, 1908, S. 9.

See JURISDICTION OF CIVIL COURTS.

(1)—*Religious ceremonies—Restraint—Agreement—Effect.*—All persons, whether Hindus or Mahomedans, are entitled to the free exercise of their religious ceremonies, and to hold their festivals at the customary appointed times. They cannot be restricted in the exercise of such rights by the engagements of other persons of their own religion who have no authority to do so. MUZHUR ALLY v. MUSSUMAT RANEE GANESH KOOER, **3 N.W.P. 46.**

Religion, Change of.

Guardian—Minor — Change of religion—Custody—*See* ACT IX OF 1875, s. 2, cl. (*b*), 9 M. 391.

Habeas corpus — Minor — Education and prospects—Change of religion—Natural guardian—Conduct—*See* CUSTODY OF CHILDREN, 16 B. 307.

Right of father to guardianship and control of religion of minor—Right of Court to interfere—*See* GUARDIAN AND WARDS ACT, 1890, s. 17, 25 C. 881=2 C.W.N. 379.

From Hinduism into Mahomedanism does not affect the convert's right to give his Hindu son in adoption—*See* HINDU LAW—ADOPTION, 3 Bom. L.R. 89=25 B. 551.

Before the passing of the Indian Succession Act, as bearing upon his right of inheritance—*See* NATIVE CHRISTIANS, 1 Bom. L.R. 53=23 B. 539.

Does not militate against parcenership among members of a joint family who lived on

Religion, Change of—*concluded.*

such before as well as after conversion to Christianty—*See* SUCCESSION ACT, 1865, s. 25, 8 Bom. L.R. 770=31 B. 33.

Religious Assembly.

(1)—*High priest—Removal from office—Election—Voters, qualifications of—Meeting, notice of—Quorum—Majority, how determined.*—To validate the removal of a high priest from his office by a majority of a religious brotherhood, it is necessary, *first*, to ascertain the voters and their qualifications, *secondly*, to determine whether steps have been taken to enable the brotherhood to express their decision, and, *thirdly*, to determine whether a majority have expressed their wish in favour of removal. The qualifications of voters may depend upon membership of the brotherhood, age, sex, and residence. A question may also arise whether a member or a family is the unit for this purpose. In order that the decision of members assembled at a meeting may be operative, it must have been convened after sufficient notice and due proclamation. The decision of the majority must be determined by reference to votes given at the meeting and cannot be made to depend upon views indicated subsequently in the course of a suit brought to contest the validity of the removal. Whether a quorum is necessary to legalise the decision of the meeting must depend upon the custom of the brotherhood, in the absence of statutory provision or express direction in that behalf by the founder. JURO RAM DAS v. GOBIND DEB MISRA, **12 C.L.J. 497=8 Ind. Cas. 124.**

Religious Association.

Suit by some of the subscribers of a religious and charitable society—Advocate-General consent or sanction, not obtained—S. 539, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, ss. 92, 93, 4 M.L.T. 345=32 M. 131=1 Ind. Cas. 995.

Government sanction if necessary to legalise—Exclusive right of worship—Whether Crown is a necessary party in suit relating to mosque—Court's power to settle a scheme of management of trust—*See* MAHOMEDAN LAW—WAKF, 13 C.W.N. 26, P.C.=4 M.L.T. Special, p. 25=1 Ind. Cas. 314.

Right of member to share in voluntary payments made to a—Suit not cognisable on the Small Cause side—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 13, 28 M. 202.

Religious Ceremonies.

See CIV. PRO. CODE, 1908, S. 9.

See JURISDICTION OF CIVIL COURTS.

Religious Community.

See RELIGIOUS ASSEMBLY.

(1)—*Religious community worshipping at one synagogue—Resolutions at meeting of community dismissing officers of synagogue—Necessity of notice to officers—Decision by domsetic tribunal for community, whether Court can interfere with.*—This suit was instituted by the Advocate-

Religious Community—*continued.*

General at the relation of the managers appearing for themselves and the worshippers of a synagogue of the Beni-Israel community against there others of the same community. Plaintiffs asked for a declaration that the three defendants did not respectively occupy the position of headman, beadle and crier of the synagogue, they having been dismissed from their above offices by resolutions passed at a meeting of the majority of the community. The Court had at first some doubt as to its jurisdiction to hear the suit and whether the suit did not come within the analogy of the class of cases where the Courts have refused to interfere with the autonomy of a caste, but it decided that this community was not a caste, and there were also questions as to the management of the endowment and the right to office of importance and authority. And where the proceedings of the domestic tribunal of the community have not been conducted with fairness, the Court will have jurisdiction to interfere. In this case, the defendants had not been given any previous notice that their conduct and their dismissal were to be discussed at the meeting whose resolutions dismissed them from office. The first defendant held his office as long as he duly performed the duties thereof and not merely at the will of the community. He was not given notice and an opportunity of meeting the charges against him, and had not, therefore, been duly dismissed. The second defendant claimed no family rights to his office, nor had he any vested interest in it. There was no evidence as to the exact terms on which he held his office, and in the absence of such proof, the Court decided that it would be in accordance with equity and fairness to hold that he too was entitled to notice, and an opportunity of defending himself before dismissal. The third defendant, however, was merely a subordinate paid official whom the managers had the power to dismiss. All the managers, save the first and second defendants, concurred in dismissing him, and he was therefore liable to be declared to have been rightly dismissed. If a voluntary society, such as the community in this case, seeks the aid of the Court to enforce its decisions, it must first prove that it has proceeded in conformity with the ordinary principles of justice and fairness. No such proof having been given in this case, the Court refused to award the plaintiffs the relief sought by them. THE ADVOCATE-GENERAL OF BOMBAY v. DAVID HAIM DEVAKAR, **11 B. 185.** [*Not F.*, 21 C. 463; *R.*, 23 B. 122, 24 B. 13, 26 B. 174=3 Bom. L.R. 718, 28 B. 20.]

(2)—*Jurisdiction—Rule for the regulation of the rights of dissident parties in a community distinguished by some religious profession—Sunisi--Shias--Shia Imam--Ismailis--Aga Khan—Khojas—Injunction.*—A suit by certain members of the Khoja community in Bombay for an account of all property belonging to or held in trust for the community in the hands of the treasurer and accountant of the community;

Religious Community—*concluded.*

for a declaration that the treasurer and accountant had ceased to be such officers of the community; for an order directing the treasurer and accountant to deliver all the property of the community in their hands; for a declaration that the property of the community was held and ought to be applied to and for the original charitable, religious, and public uses or trusts to or for which they were dedicated and to none other, for the sole benefit of the Khoja sect and none other and that no person not being or having ceased to be a member of the same, and in particular no person professing Shia opinions in matters of religion, was entitled to any share or interest therein; for a scheme to carry such declaration into effect, and for an injunction restraining one of the defendants from interfering in the management of the property and affairs of the Khoja community or in the election and appointments of officers, from ex- communicating any members of the community, from celebrating marriages, and from demanding or receiving any offering was held to be maintainable in the Civil Courts. In the exercise of its charitable jurisdiction, a Court called upon to adjudicate between the conflicting claims of dissident parties in a community distinguished by some religious profession, will regulate the right of the litigants by reference to the religious tenets held by the community in its origin, and a minority holding these tenets will prevail against a majority which has receded from them. History of the sects of Sunis, Shias and Shia Imami Ismailis. History of Aga Khan. History of the Khojas and their relations with the hereditary Imam of the Ismailis. Relations of Aga Khan with the Jamat of the Khojas of Bombay. The tenets of Muhammadanism to which the first Khojas were converted were those of the Shia Imami Ismaili sect. A person claiming the full privileges of membership in the Khoja community must be one of that sect whose ancestors were originally Hindus, which was converted to, and has throughout abided in the faith of, the Shia Imami Ismailis, and which has always been and still is bound by ties of spiritual allegiance to the hereditary Imams of the Ismailis. No public property impressed with a trust, either express or implied, for the benefit of the whole Khoja community exists. The Aga Khan, as the spiritual head of the Khojas, is entitled to exercise a potential voice in determining who, on religious grounds, shall or shall not remain members of the Khoja community. THE ADVOCATE-GENERAL *ex relatione* DAYA MUHAMMAD v. MUHAMMAD HUSEN HUSENI, **12 B.H.C. 323.** [*R.*, 12 B.H.C. 281, 294, 12 B. 280, 11 Bom. L R. 409.]

Religious Endowments.

See BUDDHIST LAW—ECCLESIASTICAL.

See CIV. PRO. CODE, 1908, S 9.

See CIV. PRO. CODE, 1908, S. 92.

See DECLARATORY DECREE, SUIT FOR—ENDOWMENTS.

Religious Endowments—*continued.*

See HINDU LAW—RELIGIOUS ENDOWMENT.

See MAHOMEDAN LAW—WAKF.

See MALABAR—ENDOWMENT.

See RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO.

See RIGHT OF SUIT—ENDOWMENTS, SUITS RELATING TO.

See TRUST.

See TRUSTEE.

(1)—*S.* 539, *Civ. Pro. Code*, 1877—*Religious trust.*—Trusts for religious purposes were excluded from the purview of s. 539, Civ. Pro. Code, 1877. KARUPPA v. ARUMUGA, **5 M. 383.** [*F.*, 8 B. 432; *R.*, 10 M. 375.]

(2)—*Public temple, Allegation of—Temple, originally private — Subsequent dedication—Necessity for proof of.*—To sustain a plea that a temple is a public one, there must be clear and strong proof of subsequent dedication to the public, if the institution originally belonged to a family. APPU PATTAR v. SRI KURUMBA BHAGAVATI DEVASWOM UTTAMA PANAMPALLI KURUMBA UMMA, **21 M.L.J. 588.**

(3 & 4)—*Gift of idol and land for public religious purpose—Deed not registered—Constitution of donor himself as trustee—Valid dedication to public.*—The plaintiff having discovered an idol while digging on his land, made a gift thereof to the public with a piece of land for the construction of a temple to locate the idol in. In the deed of gift, he stated that neither he nor his heirs would object to the construction of a permanent temple by the public, and constituted himself a dharmakarta of the idol. On his refusing to register the document, it was compulsorily registered. He, thereupon sued to recover the idol and the land and for loss of offerings at the temple built on the land by the public. *Held*, that there was a valid dedication of the land to the public, and the deed did not require registration under s. 122 of the Transfer of Property Act. *Held*, also that as the donor constituted himself a dharmakarta, there was no transfer of property. *Held*, further, that as the declaration of trust was for a public religious purpose, s. 5 of the Trusts Act did not apply. *Held*, moreover, that the compulsory registration of the document was none the less registration under the Registration Act and did not affect the dedication to the public. In the result, plaintiff was *held* not entitled to the relief asked for by him. PALLAYYA v. RAMAVADHANULU, **13 M.L.J. 364.**

(5)—*Debutter—Words of dedication.*—In a deed of gift and dedication or *danapatra*, the donor stated: "The right and power of gift are yours. I and my heirs shall have no liability, claim or right." The deed was executed in favour of the donor's mother, who was to manage the property on behalf of an idol, to whom the property purported to be dedicated. *Held*, that the deed gave a power of alienation to the executee thereof and that there was no absolute dedication of the property in favour of the idol so as to constitute it *debutter* and inalienable. HARA SUNDAR MAJUMDAR v. BASUNTA KUMAR ROY, **9 C.W.N. 154.**

(6)—*Deed—Construction—Charitable purposes—Not void for vagueness— Parties— Persons interested not being upon the record—Effect of.*—Where a deed of endowment recited that the executant had established a *dharmshala* for charitable purposes and he had carried on the charity: *held*, that the trust was not void for vagueness. A trust for such purposes, that is, charity generally, will always be carried out, notwithstanding that the objects of the charity are not specifically defined. (23 B. 725, *D.*) Where the Court finds a properly constituted trust, the fact that the trust was not carried out would not have the effect of annulling it. Where the plaintiffs in a suit ask for possession in the character of trustees of certain endowed property and omit to implead persons interested in a particular item of that property, they cannot in that suit obtain a decree declaring that property subject to the charge of maintaining the trust. GORDHAN DAS v. CHUNNI LAL, **5 A.L J. 23=A.W.N. 1908, 34 =30 A. 111.**

(7)—*Dedication of property to trust—Gift to donee burdened with the obligation to maintain certain religious services— Beneficial enjoyment of the donee after discharge of trust—Attachment of it in execution of decree—Decree—Execution.*—In a deed of partition between a father and his sons, the amount to be annually incurred in the household divine service was put down at 8½ *khandies* of rice, Rs. 17 in cash and 921 cocoanuts. The deed further provided that certain plots of land, the income whereof had been settled to be 10½ *khandies* of rice and 2,200 cocoanuts, should be enjoyed by Vithoba (one of the sons), who should pay the Government assessment and local fund cess, and hand over to the father 8½ *khandies* of rice, Rs. 17 in cash and 920 cocoanuts during his lifetime. The father was to maintain the divine services out of the amount as long as he lived, and after his death, the son Vithoba was to do the same. The deed prohibited Vithoba from mortgaging or selling the plots in question. The defendant No. 1 obtained a decree against Vithal, in execution of which he got attached the latter's interest in the land. The plaintiff filed a suit for a declaration that the land was not liable to be attached and sold, inasmuch as it was properly reserved for the performance of a religious trust:—*Held*, (1) that there was no complete dedication of the property to a religious trust; but that there was merely a gift to Vithoba of the property subject to an obligation to perform certain services, which was imposed as a burden upon him; (2) that, after the discharge of the burden so imposed, Vithoba was left in beneficial enjoyment of the property, which could be attached and sold in execution of the decree against him. DASSA RAMCHANDRA PRABHU v. NARSIMHA DAMODAR BHATT, **13 Bom. L.R. 101=9 Ind. Cas. 768.**

Religious Endowments—*continued.*

(8)—*Religious endowment—Lewatra—Trust*—Onus—*Act* XIV *of* 1859—*Act* XIII *of* 1848.—The appropriation of property to the religious services of a family has never, in modern times at least, been held to require the assent of the State and where such a trust appears to be established as to the lands dedicated, it lies on the opposite party to show some subsequent legal conversion of the lands to the ordinary uses of property. A settlement with Government and possession under it do not necessarily constitute proprietary right, much less can they divest and destroy trusts to which the settlor was subject. A former abuse of trust in another instance cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he was formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be reason for excluding him from the administration of the property as *shebait*. Where a party has purchased joint family property under circumstances which prove that he must have had notice of its having been dedicated to religious purposes, and does not show that he made any inquiries as to his grounds for supposing that the trust was legally at an end, he cannot exonerate the property from the trust attached to it. JUGGUTMOHEENEE DOSSEE v. SOKHEEMONEE DOSEE, **10 B.L.R.=19, P.C=17 W.R. 41=14 M.I.A. 289=2 Suther 512=3 Sar. 23** [*F.*, 2 C.L.J. 448 : *R.*, 5 B. 393, 15 M. 424, 23 C. 645, 1 C.W.N. 493, 27 C. 242, 5 Bom. L.R. 956.]

(9)—*Trust—Private temple of tarwad—Power of karnavan to dispose of its property—Temple properties, whether belong to family—Competency of members of family to put an end to temple.*—Even in the case of private temples in which the public have no interest, properties which are admittedly set apart for the temples cannot be regarded as Tarwad properties. Assuming that the public have no right in the temples, it cannot be doubted that the properties must continue to be regarded as trust property until at any rate all the beneficiaries concerned, that is, all the members of the family to which the temples belong put an end to the temple or the temples, assuming that they could do so. (9 B. 169, *R.*) The *karnavan* of a Tarwad cannot dispose of property belonging to a private temple owned by the Tarwad. *Quære* :—Whether, when a temple has been founded by a tarwad for the benefit of the family, the members for the time being can put an end to the trust, so as to affect those who may be subsequently born in the family? PATTANUR VELANGIRI EDATHIL RAIRU NAMBIAR v. KILOTH THAZHATH VITTIL NARAYAN NAMBIAR, **21 M L.J. 585.**

(10)—*Hindu Law—Religious endowment—Succession to the Gadi of a mahant—Custom—Evidence—Burden of proof--Plaintiff should succeed on the strength of his own title—Pleadings—Practice.*—In determining the right of succession to the property left by the deceased head of a religious institution, the only law to be observed is to be found in custom and practice which must be proved by evidence. The plaintiff, in order to succeed, must prove the custom of the *math* entitling him to recover the office and the property appertaining to it. (9 A. 1, 13 I. A. 100, *F.*) The plaintiff succeeds upon the strength of his own title, rather than upon the weakness of the defendant. GOBIND PARPAN RAMANUJ DAS v. BALA SARAN, **6 Ind. Cas. 709.**

(11)—*Title to the property.*—In cases where there is no evidence as to who founded a religious endowment or as to the terms or conditions of the foundation, the legal inference is that the title to the property or to the management and control of the property, as the case may be, follows the line of inheritance from the founder. MAHARAJA JAGADINDRA NATH v. RANI HEMANTA KUMARI, **6 Bom. L.R. 765=32 C. 129=8 C.W.N. 809=1 A.L.J. 585=31 I.A. 203=8 Sar. 698.**

(12)—*Trust property*—Shebait *failing to nominate a successor—Who should manage—Adverse possession—Pleadings and proof, variance between—Test—Arrangement authorizing joint management, if operative*—The devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created or the usage of the particular institution where no express trust deed exists. (8 W.R 25, P C., 1 I.A. 209, 10 I.A. 32, 9 C. 766, 11 I.A. 94, 10 C. 901, *R.*) Where the worship of an idol is founded, the office of *shebait* is vested in the heirs of the founder in default of evidence to show that he has disposed it of, otherwise. (17 C. 3, 16 I.A. 137, *R.*) Hence where a *shebait* appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management reverts to the representatives of the founder, even though the endowment has assumed a public character. (5 B.L.R. 181, 13 W.R. 396, 17 C. 3, 16 I.A. 137, 12 C. 375, 25 C. 354, 18 A. 227, 28 A. 689, 29 A. 663, 15 M. 44. *R*). The right of a person lawfully entitled to the office of a *shebait* may be extinguished by adverse possession (27 M. 192, 29 M. 283, 33 I.A. 139, 6 C.L.J. 621, 14 M. 153, 10 I.A. 90, 6 A. 1, 17 C. 3, 16 I.A. 137, *R.*) A plaintiff is not entitled to succeed on a case not to be found in the pleadings nor involved in or consistent with the case thereby made. (11 M.I.A. 7 at 20, 468, 9 W.R. 9, P.C. 12 M.I.A. 470, 11 W.R P.C 27, 2 B.L.R. 64 P.C., *R.*) On the other hand, even if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may afford him the relief to which he has a right under the prayer for general relief, provided it is such a relief as is conformable to the case made in the plaint. (6 B.L.R. 273, 9 B.L.R. 11, *R.*) The test in each case is, whether the relief sought may be granted upon the facts stated in the plaint and established by the evidence and whether the variance, if any, between the pleading and proof will take the defendant unfairly by surprise. *Quære.*—Whether any arrangement made by a *shebait* authorizing

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two persons to hold the office jointly is operative in law. SITAL DAS BABAJI v. PROTAP CHANDRA SARMA, **11 C.L.J. 2=3 Ind. Cas. 408.** [*R.*, 6 Ind. Cas. 26.]

(13)—*Son of a Hindu Mahant of a, whether entitled to succeed to the office of his father and the property of the institution.*—This was a suit by the son of a *Mahant* of a *dera* or *dharmasala*, for possession of property, alleging that he was entitled to succeed to the same as the rightful heir of his father, and, in the alternative, that, if the property be treated as the property of the religious endowment, he had a superior right of succession thereto. The main question for decision was whether, if the property be that of the religious endowment, plaintiff was entitled to claim possession on the ground of right (1) as son or (2) as the duly elected *Mahant* of the institution, according to the custom among *Udasi faqirs*, to whom the institution belonged. *Held*, among the *Udasis*, the married *Udasis* are called *Bindi* while those who remain celibate are called *Nadi* and among the former, the son succeeds and becomes the *Mahant*. Further, even assuming there was no precedent of a son's succession in the particular *dera*, the old rule should be held to prevail, that the election by the fraternity remove such defect, if it is one, in plaintiff's title. DASAUNDHI RAM v. KHAZAN DASS, **112 P.R. 1906=102 P.L.R. 1907.** (101 P.R. 1905 and 136 P.R. 1889, *R.*)

(14)—*Hindu Law*—Debutter — *Hereditary shebaitship—Shebaitship, validity of disposal by will—Usage—Family custom.—Held by Maclean, C.J. and Mitra, J.*—In the absence of any local usage or family custom, and where no case of necessity or clear benefit to the idol has been made out, a *shebait* of a private *debutter* is not entitled to dispose of his office of hereditary shebaitship by his will. (6 B. 298, *Diss.*) *Held by Woodroffe, J.*—That the question of usage did not affect the matter, and that the office of shebaitship could not be alienated by will. RAJESHWAR MULLICK v. GOPESWAR MULLICK, **12 C.W.N. 323=35 C. 226=7 C.L.J. 315.**

(15)—*Hindu Law*—Sangat Nanak Shahi—*Right of representative of founder of trust to nominate trustee.*—Where a *Nanak Shahi Sangat* was founded, but no trust was created, and it was not shown that any usage or course of dealing pointed to a different mode of devolution, *held*, that the right to nominate a trustee remained vested in the founder of the endowment and his heirs, and it is for the other claimants to show that the former had divested themselves, either at the foundation or afterwards, of the powers which naturally belonged to them. SHEO PRASAD v. AYA RAM, **4 A.L.J. 565=A.W.N. 1907, 210=29 A. 663.** [*R.*, 11 C.L.J. 2=3 Ind. Cas. 408.]

(16)—*Right to shebaitship— Acquisition by more than 12 years' adverse possession.*—A person may acquire a right to shebaitship by more than 12 years' adverse possession as *shebait*, even

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though his nomination to the office may be invalid. JAGAN NATH DAS v. BIR BHADRA DAS, **19 C. 776.** [*R.*, 18 M. 342; *Appr.*, 37 P.W.R. 1908=53 P.R. 1909.]

(17 & 18)—Debutter *property, ownership of.*—The ownership of the *debutter* property is vested in the idols, the shebaits being, strictly speaking, not trustees for the idols, but managers, though there is this peculiarity that all transactions, including even litigation, are carried on by the managers in their own names. JUGGODUMBA DOSSEE v. PUDDOMONEY DOSSEE, **15 B.L.R. 318.** [*R.*, 12 B. 247, 28 B. 215, 27 M. 435=14 M.L.J. 105, 2 C.L.J. 460; *D.*, 23 B. 22.]

(19)—*Hindu Law*— Debutter *private—Conversion into secular property — Consensus of family—Real or nominal* debutter—*Test—Dealings with property—Release by Government, effect of*—Shebait *right, alienation of, to* co-shebait—*Validity—Idol—Breakage of.*—Properties dedicated to a family idol may be converted into secular property by the consensus of the family. *Held*—that in this case the properties if originally *debutter* have been so converted with common consent. In dealing with a question as to whether properties alleged to be *debutter* are really *debutter* or only nominally so, the manner in which the dedicated properties have been held and enjoyed is the most important point for consideration. Release by Government is not conclusive evidence of property being *debutter*. (21 W.R. 365, *F.*) *Shebaite* right cannot be transferred even to a *co-shebait* or to one who is next in succession. (4 I.A. 69, 19 A. 428, 22 C. 989, *R.*, 6 B. 298, *Not F.*) *Quære*:—Whether an idol which has been broken is capable of holding property. GOBINDA KUMAR ROY CHOWDHURY v. DEBENDRA KUMAR ROY CHOWDHURY, **12 C.W.N. 98.**

(20)—*Shebaitship — Mohunth — Transfer, power of—Superior and subordinate Mutt, relation of—Election of Mohunth—Custom governing Mutt—Conditional decree giving possession till a Mohunth is duly installed, if to be passed.*—A *Mohunth* of a *mutt* cannot transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trust annexed thereto. (4 I.A. 76, 23 M. 271=27 I.A. 69, *R.*) Where one *mutt* is subordinate to another in the sense that the latter has the right of nomination of the *Mohunth* of the former, the *Mohunth* of the former *mutt* cannot by a deed of transfer alienate his rights in favour of the *Mohunth* of his superior *mutt*. There is no fixed rule which regulates the relation between a superior and a subordinate *mutt*, even if a *mutt* is subordinate to another, it must be governed by its own rules of management. (20 W.R. 217, P.C., 10 M. 375, *R.*) In the case of *mutts*, the custom governing the particular establishment has to be proved. (11 M.I.A. 405, 9 C. 766=10 I.A. 32=13 C.L.R. 30, 1 M.I.A. 209, *R.*) In the case of *mutts*, there is no uniform custom applicable to all *mutts* so far as the question of

succession to the office of *Mohunth* is concerned. (27 M. 435, *R.*) In cases in which a *Mohunth* is allowed by custom to nominate his successor by word of mouth or by a will, such nomination is subject to the confirmation of the entire body of *Sanyasis* of different *mutts*, who are invited to be present at the ceremony of installation when the new *Mohunth* is invested with *Chudder* or the robe of office. When no custom is proved and no authority in the outgoing *Mohunth* to make a nomination is established, the *Mohunth* should be elected by all the *Sanyasis* of the institution. (1 A. 539, 7 C.W.N. 145, *R.*) Where the plaintiff has not asked for declaration of his rights to nominate a *Mohunth* for another *mutt*, nor in the plaint stated precisely the nature of the relations between the two *mutts* but claimed title in himself on the basis of the *Suparadanama* (which created no valid title in him in the disputed properties), he cannot, at the appellate stage of the case, be permitted to turn round and say that he is entitled to have a decree for administration, to recover possession of the disputed properties and to keep such possession till a *Mohunth* has been appointed. PRAYAD DAS v. MOHUNTH KRIPARAM, **8 C.L.J. 499.** (14 M. 1, *D.*) [*F.*, 2 Ind. Cas. 385 =14 C.W.N. 191.]

(21)—*Absolute sale or gift in favour of temple —Power to appoint manager of land—Deed in donor's custody—Effect—Construction of deed —Subsequent conduct of parties.*—Where a deed is in terms an absolute sale or gift in favour of the temple, the fact that the donor is permitted to retain the instrument cannot be taken as sufficient to show that he also retained the ownership of the land. And where the deed is clear, the evidence of the subsequent conduct of the parties, many years after its execution, cannot assist in construing its language or terms. A person making over the land absolutely to the temple has no power to give any other person any right of management of it. KRISHNA PILLAI v. ARUNACHELLA CHETTIAR, **18 M.L.J. 304.**

(22)—*Temple—Manager of a temple—Trustee of the propety—Services of the temple performed by rotation.*—The Manager of the temple is by virtue of his office the administrator of the property attached to it. As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which, in course of time, has become vested by descent in more than one person. In such a case, in order to avoid confusion or an unseemly scramble, it is not unusual, and it is certainly not improper, for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence. There is no breach of trust in such an arrangement nor any improper

delegation of the duties of a trustee. RAMANATHAN v. MURUGAPPA, **8 Bom. R. 498= 16 M.L.J. 265=10 C.W.N. 825, P.C.=29 M. 283=1 M.L T. 327=3 A L.J. 707=4 C.L.J. 189 =33 I.A. 139.**

(23)—*Manager of pagoda—Reg.* VII *of* 1817 —*Admissibility in evidence of previous judgment against a stranger.*—A suit was brought by the trustees of a certain pagoda for the recovery of certain villages from the defendant, on behalf of the pagoda, and to declare a copper *Sannad*, purporting to be an ancient grant on which defendant based his title, a forgery. The Board of Revenue had placed the defendant in possession in 1858.—*Held*, by *Innes, J.*, that the title to manage must reside in the pagoda if it did not reside in the defendant, that the evidence abundantly negatived the title of the defendant and that the plaintiff was entitled to possess and manage the property as trustee of the temple; upon the question whether plaintiff was precluded from recovering during the life-time of the defendant by the order of 1858 placing defendant in possession held, that the Government could not create a valid title to more than they themselves possessed, that they had simply taken over the possession and management of the endowment and afterwards given it over to defendant, and that, by so doing, they relieved themselves of the trust they had undertaken under Reg. VII of 1817, but did not thereby appoint defendant a manager under Reg VII of 1817.—*Held* also that the judgment in a previous suit in 1819 in which the cousin of a former manager sued him for the partition of certain villages, some of which were included in this suit, and in which it was decided that the manager was manager and not owner, was a decision upon a question of public right and was receivable against the defendant. *Kindersley, J.*, agreed generally, but doubted if the judgment in 1819 was upon a matter of such general interest as to be good evidence against a stranger. NALLATHAMBI BATTAR v. NELLAKUMARA PILLAI, **7 M.H.C. 306.**

(24)—*Hindu Law—Religious endowment—Powers of manager — Relative position of Mohunts of Tirpuntal Mutt and of Benares Mutt.*—The mohunt of the mutt at Tirpuntal, Zillah Tanjore, in the Madras Presidency, sued the mohunt of the mutt at Benares in the Civil Court of that place for the right to manage and to superintend as proprietor the mutt and Chuttur affairs at Benares, and also to manage and superintend the temple of Sri Kedareshur, to recover certain moveable and immoveable property belonging to the said mutt, chuttur and temple, and to have an account of the receipts and disbursements relative to the said temple and chuttur, such relief being claimed by virtue of his proprietary right as mohunt and guddee-nasheen of the "headquarters mutt of Tirpuntal under whose jurisdiction and power the chuttur institution at Benares etc., had continued from time immemorial, by removal of the possession and

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superintendence of the defendant, who had been acting as agent." The defendent denied plaintiff's claim to the immoveable property, the estate situated in the chuttur and the endowed property, and alleged that those properties were acquired by and belonging to the mohunt's guddee-nasheens at Benares, the ancestors of the defendant, and the defendant himself, and he also denied that he was an agent, and he claimed to be the real proprietor and guddee-nasheen and in possession and occupation by right of succession to his ancestors. *Held* that, as the original foundation was admittedly at Benares, a holy place and as the object of the foundation was to afford to persons, either resident in the south of India or making pilgrimage to Benares, facilities for carrying on their worship, and performing their religious duties there, these facts raised a presumption that the establishment at Tirpuntal was subordinate to that at Benares. *Held, also*, that the nature of the transactions between the mutts was that the mutt at Tirpuntal fed, as it were, the establishmont at Benares, the object of which was to afford facilities to pilgrims and others who wished to pay their devotions at Benares for so doing, and that the result of the system was that the establishment at Tirpuntal collected the alms of the faithful in the south of India, and remitted from time to time considerable sums to Benares, producing complicated exchange transactions between the two establishments. *Held, further*, that the plaintiff had wholly failed to prove either that he was the proprietor of the property claimed at Benares or that the defendant was his mere agent. KASHI BASHI RAMALING SWAMEE v. CHITUMBER NATH KOOMAR SWAMEE, **20 W R. 217, P.C.=2 Suther. 886.** [*R.*, 10 M. 375, 8 C.L J. 499, 2 Ind. Cas. 385.]

(25)—*Right of management of* Dharmakartas, *suit for declaration and injunction regarding, by* Vadagalai Dharmakartas *against* Archakas *of* Thengalai *sect—Processions, ceremonies*, etc., *to which an idol in a shrine may be entitled, competency of Civil Courts to adjudicate on —Discontinuance by trustees of festivals established by usage, whether can form subject of prescription.*— The *Dharmakartas* of the Sri Devaraja Swami Temple at Conjeevaram who were *Vadagalais* instituted this suit praying for a declaration that, as *Dharmakartas* of the said temple and of the shrine of the *Manavala Mahamuni* situate within its precincts, the rights and duties connected with the management of the temple with its connected shrines and the conduct and celebration of ceremonies and festivals therein inclusive of the annual *Thirunakshatram othsavam* devolved on them alone, that they, as the *Dharmakarthas*, were entitled to make all arrangements for putting and taking down *pandals* in *Manavala Mahamuni's* shrine, that the defendants, who were *Tengalai Archakas* and *Paricharakas* of the above shrine, were not entitled to act independently of the plaintiffs in the matter of such *pandals*, not to carry the idol of *Manavala Mahamuni* in procession either in the *prakaram* of Sri Devaraja Swami or outside the *prakaram* during the *thirunakshatram othsavam* or at any other time. Plaintiffs further prayed for an injunction restraining the defendants from acting independently in the said matters in any way so as to interfere with plaintiffs' exercise of their right of management and the performance of their duties as *Dharmakartas*. *Held, per Moore, J.*, the plaintiffs were admittedly the *Dharmakartas* of the temple and as such the lower Court had rightly granted them the declaration as to their exclusive rights to make all arrangements in respect of *pandals* for the shrine independently of its *Archakas* and *Paricharakas*, the defendants. As to the further declaration prayed for in the plaint, which related to the carrying of the idol of *Manavala Mahamuni* in procession and which were disallowed by the District Judge, *held*, the District Judge was right in having refused to give any declaration as to the processions. It cannot be maintained for a moment that any Court can adjudicate as to the rights, processions, ceremonies, &c., to which any shrine or idol may be entitled. Further, the question as to the processions in which the idol should be carried and the manner in which such processions should be conducted is not one which can be decided in the present suit between the *Dharmakartas* and certain temple servants the question being one which does not in reality arise between them. The persons mainly interested in these ceremonials are the worshippers at the shrine of *Manavala Mahamuni* and the defendants do not in any way represent such worshippers and, whenever the latter feel aggrieved by the manner in which the processions are carried out by the *Dharmakartas*, they have their remedy under Act XX of 1863. On the contention of the defendants that, being *Vadagalai* themselves, the *Dharmakartas* have intentionally and in breach of their duty, failed to carry out the established worship of the *Thengalai Manavala Mahamuni* deity, in omitting to carry the idol in procession on specified occasions, *held, per Sankaran Nair, J.*, the proper persons to carry out the processions being the *Dharmakartas* themselves, it is very doubtful whether they could contend that, where the procession formed part of the public worship in the temple or was in accordance with established usage, a breach of trust on their part in not carrying out such procession for some time could justify them in really altering the worship. The question in such cases is what is the established usage in the temple, and, in the absence of any such usage, what is the worship described in the Shastras. Absence of any procession for a long period of time may be evidence against such usage or of its discontinuance or cessation if the usage had existed before. But no such discontinuance can be implied where, as in this case, the conduct of the *Dharmakartas* was challenged immediately and whether they can be allowed to set up their own breach of trust for a long time to justify its continuance may well be doubted.

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As to the decision of the lower Court that the question as to the procession was *res judicata* by reason of prior decisions between the *Dharmakartas* and *Archakas*, *held*, it was doubtful whether any decision between these two alone could be binding as between the *Vadagalais* or *Thengalais* or any other persons interested as to the form or mode of worship in the temple. *Held*, further, that the question whether certain processions had to be carried out in a temple as a part of the worship therein was not a question of a civil, but of a religious nature, and it has to be decided with reference to considerations and arguments with which our Civil Courts are ordinarily unfit to deal; and a decision, therefore, of such a question by a Civil Court for the purpose of granting any relief can hardly be said to be a decision of a competent Court so as to bind the parties in subsequent suits based on a different cause of action or for a different relief. VANAMAMALAI BHASHYAKAR v. KRISHNASWAMI THATHACHARIAR, **16 M.L J. 150**. [*F.*, 7 M.L.T. 311; *R.*, 30 M. 158=17 M L.J. 1=2 M.L.T. 69.]

(26)—*Civ. Pro. Code*, 1882, *s.* 539—*Leave to sue for appointment by Civil Court of committee for temple management—Court not to go beyond terms of sanction—Right to demand accounts from Mahant.*—A Collector simply "accorded permission" to the plaintiffs to sue for the appointment by the Civil Court of a committee for the management of a religious trust and for securing any other reliefs claimable under the section. It was held that the Court had no jurisdiction to widen the scope of the suit, so as to enable the plaintiffs to ask for any other reliefs not covered by the leave granted, as, for instance, the removal of the defendant from his office of Mahant. *Held*, further, that it was not incumbent on the Mahant, who must be presumed to be the manager of the institution, to render, in the absence of a custom to the contrary, accounts to the worshippers. Except in cases where satisfactory proof is adduced that a religious or charitable institution is mismanaged so as to necessitate judicial interference, Civil Courts are not warranted in thrusting a scheme of management on such institution. PREM SINGH v. LABH SINGH, **89 P.R. 1901**. [*R.*, 79 P.R. 1908, Note; *Cons.*, 127 P.R. 1908=123 P.W.R. 1908.]

(27)—*Religious endowments—Alienation by present trustee—Binding nature of alienation upon succeeding trustee—Bombay Act* II *of* 1863, *s.* 8, *cl.* (3)—Religious endowments in this country, whether they be Hindu (*devasthan*) or (*sevasthan*), or Mahomedan (*waqf*), are not alienable, though the annual revenues of such endowments, as distinguished from the *corpus*, may, for purposes essential to the temple or other institution endowed, be occasionally pledged *e.g.* "for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects, the power to incur such debts being, however, measured by the existing necessity for incurring them." Bombay Act II of 1863, in fact, contained no new law, and it was merely declaratory of the pre-existing common law of this country which does not ordinarily permit the alienation of religious or charitable endowments. Even if its provisions enacted a different and new law, yet, not having been made clearly retrospective, it cannot affect alienations made prior to it. NARAYAN v. CHINTAMAN AND MORESHVAR, **5 B. 393**. [*F.*, 27 M. 465, F.B.=14 M.L J. 81, 3 Ind. Cas. 353=11 C.L.J 317=14 C.W.N. 535=37 C. 179; *R.*, 6 B. 546, 8 B. 432, 15 B. 625, 20 B. 495, 22 B. 475, 27 M. 435=14 M.L.J. 105; *D.*, 25 A. 296=23 A.W.N. 50.]

(28)—*Heads of Mutt—Powers of alienation—Extravagant personal expenditure not binding on the Mutt property.*—The income of a Mutt was Rs. 20,000, of which Rs. 10,000 was required for the maintenance, properly so called, of the Mutt and the balance of Rs. 10,000 was at the disposal of the Pandarasannidhi for his personal expense. The Pandarasannidhi had to go on a journey of 50 miles to Madura for 10 or 14 days to give evidence in a certain suit. He took with him Rs. 300 and borrowed Rs. 1,500 at Madura, merely stating that it was required for the purposes of the Mutt. The plaintiff sued the Pandarasannidhi for the amount of Rs 1,500. He died during the hearing of the suit and the present head of the Mutt was brought in as second defendant. It was held that the debt could not be regarded as binding upon the property of the Mutt or its income in the hands of his successor, and that the decree against the second defendant should be restricted to the personal assets of the late Pandarasannidhi in his hands.—*Per Benson, J.*—Heads of Mutt cannot alienate or charge the corpus or income beyond their own life-time, except for the purposes necessary for the maintenance of the Mutt as such. (27 M. 435, *F.*; 2 M. 175, *Commented upon.*) It is true that a Pandarasannidhi has to maintain a certain amount of state, but such maintenance should be made out of the current income and should not be considered a sufficient reason for encumbering the Mutt property or binding the income in the hands of the borrower's successor.—*Per Wallis, J.*—Heads of Mutt cannot, in any view, exceed the powers of alienation of a limited owner, as defined in *Hanooman Persaud Panday* v. *Musumat Babooe Munraj Koonwer* (6 M.I.A. 393.) SRIMATH DAIVASIGAMONY PANDARA SANNIDHI *alias* NATARAJA DESIKA PANDARA SANNIDHI v. KUPPUSAWMI, **17 M.L.J. 40.**

(29)—*Suit by worshippers for declaring an alienation of temple property invalid—Nature of decree—Trustees can be placed in possession in the same suit, and need not be referred to a separate suit*—Suit by worshippers in a temple against the trustees thereof and their alienee, to declare an alienation of temple property invalid.—*Held* that, where the alienation is declared invalid, possession of the property

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may be awarded to such of the defendants as are trustees. The suit being one to enforce the claim of the temple, against the person who holds temple-property without title, there is no reason why the trustees should be referred to a separate suit to obtain possession on its behalf, when possession may be given to them in this suit. No injunction, as against the trustees, against the alienation, is necessary, as they will hold possession, not on their own behalf, but only as trustees. A. SUBRAMANIA IYER v. NAGARATHNA NAICKER, **20 M.L.J. 151=8 M.L.T. 114=5 Ind. Cas. 901.**

(30)—*Transfer of religious trusts—Malabar Law — Endowment.*— A transfer of religious trusts is void, no distinction can be drawn between one in perpetuity and one for ninety-six years. RAMA VARMA TAMBARAN v. RAMAN NAYAR, **5 M. 89.**

(31)— *Temple-lands — Power of trustee to grant permanent lease—Occupancy rights.*—The suit lands were ryotwari lands with patta in the name of the temple. The defendants set up occupancy rights, relying upon certain documents in which such words as "permanent," "you and your heirs" were used. *Held* that these terms did not confer a permanent right, having regard to the history of the Revenue Settlement of the district. *Held* also that it is not competent to the trustee of a temple, in the absence of special circumstances, to grant a permanent lease of temple property. MUTHUVELU PILLAI v. AIYASAMI NAIK, **7 M.L.T. 386=6 Ind. Cas. 7.** (27 M. 291 P.C., *Appl.*)

(32)—*Temple property—Permanent lease of, at unvarying rent — Invalidity — Power to alienate corpus of temple property—Necessity justifying such alienation—Instances—Powers of shebait, extent of.*—An alienation of temple property on a permanent lease at an unvarying rent or a fixed premium is not sustainable (13 M.I.A. 270, 27 M. 291, 36 C. 1003, *F.*; 19 M.L.J. 208, 28 M. 391, *R.*) The fact that the property leased is a building site does not appear to be any justification for leasing the property at an unvarying rent. There is no rule of Hindu law which absolutely prohibits the alienation of a corpus of the temple property, where there are sufficient circumstances of necessity requiring it. That such alienations ought only to be resorted to as extreme measures in the absence of other reasonable means of providing for the needs of the temple may well be accepted as the canon of the judgment in regard to the validity of particular alienations (27 M. 435, 27 M. 465, *Doubted*, 36 C. 1003, P.C., 4 I. A. 52, *Expl.*; 27 M. 466, 6 B. 346, 12 B. 247, 2 I. A. 145, 6 M I. A. 393, *R.*) The powers of the shebait of an idol are those of a manager of an infant heir. Necessity which may be sufficient for the charging of the rents and profits is not sufficient for the alienation of the *corpus.*—The physical and moral requirements of a human infant are different from the requirements of an idol or an object of public worship suited to the faith and rituals and religious traditions of the community for whose spiritual ministration it has been set up. The requirements of daily worship, of buildings suitable for the carrying on of such worship, and even of the essential festivals intended to cultivate the religious emotions of the public for whose benefit the temple is dedicated, may afford grounds for the alienation of part of the corpus of the property of the temple. SREEMUTH DEVASIKAMANI PANDARA SANNADHI *alias* NATARAJA DESIKAR v. PALANIAPPA CHETTI, **20 M.L.J. 969.**

(33)—*Charitable endowment—Trustee's competence to grant permanent tenure—Power of Collector under Reg.* VII *of* 1817—*Suit for ejectment—Nature of interest in holding—Lease new for confirmatory—Purakudi — Ulavadai Miras.*—The effect of Reg. VII of 1817 is to supersede the powers of managers to alienate charitable property and to sanction the revision of existing appropriations, if unduly made. The Collector who is an *ex officio* local agent of the Board of Revenue, in whom the general superintendence of all charitable endowments was vested by Mad. Reg. VII of 1817, must see that the endowment is not unduly appropriated. A permanent lease of temple land made by the manager of a temple in 1820 was *held* liable to objection in the absence of strong grounds justifying it. [*F.*, 28 M. 391, 5 M. L.T. 220=19 M.L.J. 208.] *Held* on the evidence in this case that the muchilika executed in 1832 evidenced the creation of a new lease and not the confirmation of a previous permanent grant of 1813. The word "*purakudis*" has a definite meaning, whilst the expression "*ulavadai mirasdars*" is of doubtful signification. The permanency of the tenure was held not proved, in the circumstances of the case, by the mere fact that in certain documents the tenants were described as "*ulavadai mirasdars*" when in other more important documents they were described as "*purakudis.*" SEENA PENA REENA SEENA MAYANDI CHETTIAR v. CHOKKALINGAM PILLAI, **27 M. 291, P.C.=8 C.W.N. 545=31 I.A. 83=14 M.L.J. 200=8 Sar. 587.** (6 M.H.C. 164, 11 M. 77, 5 M. 345, *R.*)

(34)—*Profits of* debuttur *property, extent of as ignability of—Actual possession to be looked to.*—The profits of a *deubttur mahal* may be assigned so long as the *Deb seba* is duly kept up; and, in this case, it was not shown that the *Deb seba* was not so kept up. Also, both the lower Courts had found on the evidence that the intervenor had neither title to nor possession of the lands in suit, while the evidence proved the plaintiff's possession, and as it was actual possession that has to be looked to in such a case, and the plaintiff's actual possession was proved, he was entitled, under s. 77 of Act X of 1859 to a decree in this suit for rent. MAHARANEE SHIBESSUREE DABIA v. MR. JOHN BECKWITH, **3 W.R. Act, X. 152.**

(35)—*Religious trust—Appointment of an agent by trustee, not an assignment of the trust.*—A

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person in possession of certain lands, subject to the performance of a religious trust from the income thereof, executed a document empowering the plaintiff to hold possession of the land for a certain number of years and to collect the income and apply it properly for the purposes of the trust. Though the document was headed a "trust-deed" and the plaintiff was therein styled as trustee, there was no assignment of the trust so as to render the deed inoperative. The relation created thereby was only that of principal and agent for a limited period, without impairing the original trustee's responsibility to carry on the trust. KRISHNAMACHARLU v. RANGACHARLU, **16 M. 73.**

(36)—*Religious institution—Power of manager to alienate property for necessity—Power to incur debts binding on institution.*—Though property devoted to religious purposes is, as a rule, inalienable, it is competent for a person like a Mohant holding the position of the manager of the property to incur debts and borrow money for the upkeep of the institution, and he can, in the capacity of such manager, alienate the property if that be absolutely necessary. The power to incur such debts, however, must be measured by the existing necessity for incurring them. In considering whether it was necessary to raise money for the purposes of the institution, the income as well as the necessary expenses for the institution must be taken into account. BISHEN DAS v. GHASITA, **39 P.R. 1882.** (95 P.R. 1879, *R.*) [*R.*, 127 P.R. 1908=123 P.W.R. 1908.]

(37)—*Debt incurred by deceased manager of mutt—Liability of successor to pay off amount from the income of the mutt property—Necessity for creation of a charge by the deceased manager.*—Where a debt was incurred by the defendant's predecessor in office as manager of *mutt*, for purposes necessary for the maintenance of the institution, a decree limiting the liability of the estate to the income of the *mutt* may be validly passed, although the debt was not made a charge on the estate by the deceased manager, in the same manner as the estate of an infant may be liable for a contract by the guardian without any express charge over the estate having been given. NATARAJA DESIKAR v. NOOR MAHOMED ROWTHEN, **17 M.L.J. 553=3 M.L.T. 95=31 M. 47.** (27 M. 435, 4 I.A. 32, P.C., 17 M. 106, 20 B. 61, *R.*)

(38)—*Suit for recovery of advances made to* debutter *estate*--Shebait *for the time being not ascertained—Court not asked to determine that question—Maintainability of suit*--Shebaits, *not personally liable—Debts due by debutter estate—Suit against* shebait *personally—Arts.* 36, 120, *sch.* II, *Act* XV *of* 1877.—Where, in the case of rotation *shebaits*, the *shebaits* for the time being had to advance money out of his own estate to meet the expenses of the debutter estate and the plaintiffs as his heirs and legal representatives, sued for the recovery of the said money, as also for monies realised by one of the defendants out of the *debutter* estate, and the plaint stated that, as it was not certain who amongst the defendants was entitled to be *shebaits*, all of them were made parties, but the Court was not asked to determine who was entitled to be *shebait*, it was *held* that the suit was not maintainable, inasmuch as it was not stated in the plaint who the person was that was entitled to represent the estate as *shebait* for the time being, and the plaintiffs had not asked for the determination of the question. Creditors of a *debutter* estate are not entitled to any relief against a person (not ascertained to be the shebait for the time being) personally, simply on the ground of his having realised money from the *debutter* estate. A suit by the sons of the deceased *shebait* of a *debutter* estate, for the recovery of advances made by the deceased on account of the *debutter* estate, at a time when he had been wrongfully kept out of office by the defendant, who had claimed the office as against the deceased and who had realised money from the *debutter* estate, would be governed by art. 36, sch. II of the Limitation Act, if the suit be framed as against the defendant personally; but if the suit be framed as one against the defendant as representing the debutter estate, it would be governed by art. 120, and limitation would begin to run, not from the time when the advances were made, but from the time when the plaintiff's father died. RAJAH PEARY MOHAN MUKERJEE v. NARENDRA KRISHNA MUKERJEE, **5 C W.N. 273.**

(39)—*Suit on a pro-note by Head of a* Mutt *—Execution of decree against successor*—Sishyas *or disciples, position of.*—The decree obtained against the *Pandarasannidhi* of a *Mutt*, for the money due on a pro-note executed by him, for necessary purposes binding on the *Mutt*, is enforceable against any person, who is the representative of the *Mutt*, at the time of the execution proceedings, subject to his right to set it aside, for adequate reasons, in a properly framed suit. The *Sishyas* or disciples of the *Mutt* are not co-owners with the Head; nor have they got such interest in the *Mutt* property, as would entitle them to be made defendants in a suit to recover money or property from a *Pandarasannidhi*. MANIKKA VASAKA DESIKAR v. BALAGOPALAKRISHNA CHETTY, **16 M.L.J. 415=29 M. 553.** (27 M. 435, 9 M. 80, 14 B.L.R. 450, *R.*)

(40)—*Temple trustee, whether public trustee —Personal liability for debt.*—The fact that a temple trustee borrowed for the purposes of the temple does not affect his liability to the person, who lent the money to him, such a trustee not being a public trustee. PASUPATHI PILLAI v. SUNDARAPPIER, **2 M.L.T. 268.**

(41)—Shebait, *trespass by — Mesne profits, liability of idol for*—Shebait's *position—Representation of idol.*—Where a decree from mesne profits, following a previous decree for recovery of possession of immoveable property, was passed against one P he was described therein as "shebait." *Held* that the decree should be

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taken as made against the idol, the suit having been defended on behalf of the idol and for its benefit. The position of a *shebait* as representing an idol discussed. RAJA PRAMADA NATH RAY v. SHEBAIT PURNO CHANDRA ROY, **12 C.W.N. 550=7 C.L.J. 514=35 C. 691.**

(42)—*Right to trusteeship barred—Right to recover endowment property also barred.*—Plaintiffs sued for possession of (*a*) certain rights in certain temples, (*b*) the consecrated idols of those temples, and (*c*) certain properties attached to the temples. On their suit being dismissed as time-barred, the plaintiffs appealed and specially limited their relief in appeal to (*c*). Thus their right to reliefs (*a*) and (*b*) was lost. *Held*, that the appeal must fail. If the right to recover the office of trustee is lost by the dismissal of the suit, the right to recover a portion of the endowments must fall to the ground along with the trusteeship. GOVINDASAMI PILLAI v. DAKSHINAMURTHI POOSARI, **8 Ind. Cas. 760=9 M.L T. 105.**

(43)—*Religious endowment for worship of household idol—Suit by trustee of endowment to recover property sold in execution.*—It was found by the lower Court that the lands in question had been assigned to plaintiff and his descendants as trustees for a religious purpose, and that the sale in execution of such property to the defendant was therefore void. Throwing out the contention for the defendant-appellant that the endowment in question was not a religious one to which the law will give effect, the object of it being the worship of a private family idol, and not the benefit of the general public, it was held that such a distinction which obtained in English Law with respect to charities did not obtain under any of Hindu Law texts. The gift created a religious endowment, and the present suit, as it had been throughout treated, was not one brought to set aside a sale by a party to the suit in which the sale was made ; but one by the trustee of an endowment to recover the property thereof to which the limitation of twelve years was to be applied. RUPA JAGSHET v. KRISHNAJI GOVIND, **9 B. 169.** [*R.*, 12 B. 247, 20 B. 495, 28 B. 215, 33 M. 75=19 M.L.J. 651=6 M.L.T. 199; *D.*, 12 M. 387.]

(44)—*Trust-deed not carried into effect—Property sold in execution against settlor—Heir of settlor, whether could proceed against the execution-purchasers.*— A Hindu executed and registered a trust-deed of certain property, but the trust was never carried into effect, and was once even disclaimed by the settlor, who, with his brother, treated the property as their own, available in the ordinary way for the payment of their debts. The property was sold in execution of decrees against the settlor and his brother. The widow of the latter claimed the property from the Court-purchaser in the capacity of heir to the settlor. Such interest as the judgment-debtors had was saleable and was sold, and the plaintiff, with her claim based on inheritance from them, could not say that she possessed any independent interest which did not pass by the sale. SUPPAMMAL v. THE COLLECTOR OF TANJORE, **12 M. 387.** (9 B. 169, *D.*) [*R.*, A.W.N. 1908, 34=5 A.L.J. 23 =30 A. 111 ; *D.*, 13 M. 402.]

(45)—*Succession Certificate Act (Acts* VII *of* 1889, *and* XXVII *of* 1860)—*Heirship, Certificate of—Manager of endowment.*—A trustee of a religious endowment succeeding another trustee need not take out a certificate to enable him to sue for a debt due to the institution. SRIMANT RAJA YARLAGADDA MALLAKARJUNA PRASADA NAYADU BAHADUR ZAMINDAR GARU v. MAKERLA SRIDEVAMMA, **1 C.W.N. 497, P.C.=20 M. 162=24 I.A. 73= 7 Sar 205.** [*R.*, 28 B. 215=5 Bom. L.R. 932.]

(46)—*Several co-sharers in an endowment, right of each to recover possession personal, not hereditary—Money spent towards endowment by one co-sharer—Widow of co-sharer competent to recover.*—One S had been appointed managing trustee to conduct the worship of certain idols with an annual allowance of a sum of money secured on the revenues of certain villages of which he was in possession. He brought the suit to recover possession of his rights on the ground that he had been ousted by his brothers, the other co-sharers in the endowment, and claimed *wasilat* for the time he had been kept out of possession and during which he had paid the expenses of the idols out of his own pocket. He obtained a decree for possession, and subsequently, on appeal, an order for the usufruct collected during his ouster. S died without executing his decree and, on the application of his widow, the principal Sudder Ameen allowed her to take out execution against the judgment-debtor on the ground that as the representative of her husband she was entitled to succeed to his property. There was no proof on the record that the services of the idols were kept up by S, out of his own resources and the decree had proceeded entirely on the right of S to recover possession which right was personal to the husband as trustee of the endowment and did not descend to his heir, and so the High Court, reversing the order of the Principal Sudder Ameen, *held* that the widow could execute the decree neither for possession nor for *wasilat*, as the usufruct of the land was the property of the endowment. The High Court was, however, of opinion that it was yet open to the widow to show in a regular suit that, during the time of her husband's dispossession, he, notwithstanding the failure of the trust fund, paid the expenses of the idol's services at his own cost. On giving such proof, she would be entitled to recover any sums so paid from the judgment-debtor. RADHA JEEBUN MOOSTOFEE v. TARA MONE DOSSEE, **3 W.R. Mis. 25.**

(47)—*Trustees—Power of one trustee to pass receipts—Withdrawal of power.*—In the case of religious or charitable endowments, it is permissible for one trustee to pass receipts for rents or dividends. If the other trustees withdraw the power of one of their numbers, and

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inform the person who has to make the payment, of such withdrawal of power, the receipt signed by that one may not be binding on the other trustees. RAMBABU v. COMMITTEE OF RAMESHWAR, **1 Bom. L.R. 667.**

(48)—Res judicata—*Endowment*—Samsthan—*Collection of rents.*—Defendant in the present case had sued the plaintiff herein to recover a share of certain property moveable and immoveable. The defence in that case was that the immoveable property had been set apart for the expenses of a *samsthan* or religious establishment. The suit was dismissed by the Sadar Court. Subsequently, the defendant herein brought another suit against the present plaintiff to recover possession of a half-share of 18 miras fields in the village of Daithan. That claim was rejected on the ground that the suit was on a cause of action which had been heard and determined by a Court of competent jurisdiction, (namely) the Sadar Court, in the suit above referred to. The plaintiff then brought the present action to recover certain sums collected by the defendant from the cultivators of the village of Daithan. *Held* that the defendant was not justified in making the collections which were the subject of the present suit, by reason of the previous decision above referred to and relating to the village of Daithan. He was accordingly ordered to hand over the collections to the plaintiff. DADO RAVJI v. DINANATH RAVJI, **2 B H C. 72.**

(49)—*Right of worshippers at a temple to subscribe for its festivals—No right in any one to subscribe solely to the exclusion of others.*—Any worshipper is entitled to take part in the worship in a temple at any time or at any festival (6 M. 151, 23 M. 298, *R.*) and to subscribe towards the funds necessary for the performance of the festival and, even though sufficient funds have already been subscribed for, to require that his subscription may also be utilized for that purpose; but, no one and no special body of worshippers can claim the right to subscribe the funds necessary for a particular festival to the exclusion of other worshippers or subscribers and the plaintiffs' present suit therefore has been rightly dismissed by the Lower Courts, for their claim is for a declaration that they alone are entitled to subscribe to the festival in question to the exclusion of all other worshippers, the trustees having no right to get funds for the festival from any one else. VAIDINATHA THAMBIRAN v. CHANDRASEKARA DIKSHITAR, **15 M.L.J. 458.** [*Expl.*, 19 M.L.J. 743=7 M.L.T. 248=5 Ind. Cas. 76.]

(50)—*Religious endowment—Suit for partition—Suit in religious endowments—Costs—Sanction of Advocate-General.*—In previous suits it was held that the purpose of a certain fund was the erection of a church for the use of the caste of Christian boatmen at Rayapuram in Madras, the performance of divine worship therein, and other religious observances connected with the church, and that the whole fund must be devoted to that purpose. It was also decided that it

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was for the majority of the caste to determine whether in spiritual matters, the church erected for the caste at Rayapuram should be placed under the Vicar Apostolic or under the Goanese Bishop of Mylapore. The question had also been raised whether the fund could be divided so as to endow two churches for the use of the two parties in the community, and it was decided that both on principle and authority no such division could be made, and that the fund and the church which was endowed with it could not be separated. In the year 1886, a concordat was come to between the Pope of Rome and the King of Portugal, the result of which was to place the said church under the territorial jurisdiction of the Vicar Apostolic. This concordat related only to questions of patronage and jurisdiction, and did not touch the validity of the orders of either party or the faith of the church The members of one party now sued for a division of the fund, on the ground that, having regard to the concordat above referred to, the election of a member of their party as priest was no longer possible, even if they should be in the majority. *Held* that, even if this should be the result of the concordat, the fund could not be divided. Where the plaintiffs in a suit with respect to a religious endowment fail, the circumstance that the suit had been filed with the sanction of the Advocate-General would not entitle them to costs out of the fund, for it is no part of the duty of that officer to decide the case as a Judge, his duty being simply to leave the applicants for sanction to bring a suit, if an apparently good and *bona fide* grievance is shown. CHINNASAMI MUDALI v. ADVOCATE-GENERAL, **17 M. 406.**

(51)—*Duties of Devastanam Committee—Error of judgment of member of Committee—Removal from office.*—It is not part of the duty of a Devastanam Committee to interfere with trustees in matters of ritual. The business of the Committee is primarily to see that the endowments are appropriated to their legitimate purposes and are not wasted. A mere error of judgment is not sufficient to disqualify a member of the Committee. To justify removal of the member it must be shown that the further holding by him of the office is incompatible with the interest of the temple under the charge of the Committee. TIRUVENGADATHAYYANGAR v. SRINIVASA THATHACHARIAR, **22 M. 361.**

(52)—*Temple committee—Dismissal of dharmakarta by some members—Absence of meeting—Illegality of the dismissal.*—A *dharmakarta* of a temple could only be removed from his office by the corporate act of the committee which must be performed, generally, only at a meeting convened after due notice to all the members of the body. So, where the plaintiff, a *dharmakarta*, was removed without any enquiry by the Committee as a body, and no meeting having been convened the plaintiff had no proper opportunity of defending himself, but, all that took place was that one

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member of the committee had initiated some enquiry against the plaintiff, and submitted its result to two other members of the same successively, and the three happened to sign a *yadast* to plaintiff requiring him to appear and answer certain charges and, on the plaintiff taking no notice of it, the same three members passed another order dismissing the plaintiff, such orders were held to be illegal and of no effect. THANDAVARAYA PILLAI v SUB BAYYAR, **23 M. 483=10 M.L.J. 117.** [*R.*, 15 M.L.J. 185.]

(53)—*Endowments affected by Reg.* XIX *of* 1810, *management of—Removal of trustee for misconduct—Act* XX *of* 1863, *ss.* 3, 7, 14 *and* 18.—The object of Act XX of 1863 was to relieve the Boards of Revenue and Local Agents from the duties imposed on them by Reg. XIX of 1810, and, in order that any action may be taken under this Act, s. 3 of the Act requires that the provisions of the Regulations specified in the preamble to that Act, should be applicable to the endowment which is the subject of the suit, and that the nomination of trustees, etc., should either be vested in or be exercisable by the Government at the time of the passing of the Act. Where the question was about the management of a certain religious endowment in Cuttack, and it was admitted that, in 1864, the Local Government appointed a Committee of three members, under s. 7 of the Act, *held* that such appointment was a clear indication of the fact that that endowment was under the management of the Board of Revenue before the passing of the Act of 1863, and that the fact that an endowment had come under the management of the Board of Revenue was sufficient to characterise it as a public endowment and as one falling within the operations of this Act. (8 W.R. 313, *F.*) It was also held that all endowments which were effected by Reg. XIX of 1810, whether they come under the Board of Revenue or not, fall within the purview of Act XX of 1863. (18 I. A. 227, 5 B.L.R. App. 55, 7 C. 767, *R.*; 26 M. 166, *F.*) For the operation of this Act, it is immaterial whether the office of the trustee or manager is hereditary or not, and, in either case, a trustee or manager, who misconducts himself and acts contrary to the object of the endowment, can be dealt with under the provisions of this Act. (2 M. 197, *F.*) Where the Court finds that a trustee was guilty of misconduct in the management of the endowment, an order by the Court directing him to execute a bond with sureties, in order to ensure better management for the future, is legal. MAHOMED ATHAR v. RAJMAN KHAN, **34 C. 587.** (14 M. 103, *F.*)

(54)—Archaka—*Nature of his office—Disciplinary power of Trustee over* Archaka—*Power of suspension* — Ad interim *suspension, pending enquiry into charge of misconduct—Absence of notice before issue of—Effect—Subsequent proof of charge—Mesne profits during period of* ad interim *suspension*—Archaka *not entitled to get.*—An *ad interim* order preventing an *Archaka* or a servant entitled to hold office during good behaviour or for life from performing the duties of his office pending the investigation of the charges of misconduct made against him is not invalid, merely because no notice was given to him to show cause against it before the order was passed. (21 M. 179, *D.*) A hereditary *archakar* could be dismissed by the trustee only for good reasons which are liable to examination by a Court of Justice. (4 M.H.C. 63, *F.*; 30 B 508, *R.*) The position of an *archaka*, though he may have a hereditary tenure in the office, is essentially that of a servant. The trustee is the representative of the temple and the *archakar* must be subject to his disciplinary authority. His position is not similar to the position of the trustee in relation to the temple committee. It cannot be laid down as a general rule that, in every case where the right to dismiss exists, the right of suspension must necessarily be incidental to it. Such might possibly be not the case where the right depends upon the construction of a statute, as, for example, when the right to deal with a Municipal Councillor depends upon the construction of the rules of a Corporation or a quasi-corporation like a club. Such analogies should not be applied to the case of servants subject to the discipline of a trustee. (7 M. 466, *R.*) Even if notice is essential before suspension, the Court should not set aside the order of suspension, where after enquiry it has been found that it was proper and justifiable. (100 P.R. 96, *R.*) Where the suspension was found at the subsequent enquiry to have been proper and justifiable, the servant is not entitled to claim mesne profits during the period he was under suspension without notice. K. SESHADRI IYENGAR v. RANGA PATTAR, **21 M.L.J. 580=10 M.L.T. 14=10 Ind. Cas 548=35 M. 631.**

(55)—*Immorality of* Mahant *of religious institution—Right of members to remove* Mahant.—The *mahant* of a *dera*, supported by some villagers, eloped with a young widow and carried away as much property as he could seize. The villagers then appointed another *Mahant*, with the approval of the *bhek*. The former, as the lawful *Mahant*, sued to recover possession of the *dera* and of the lands annexed to it. *Held* that the villagers, who maintained the *dera*, were competent, and had ample justification, to remove the miscreant *Mahant* and to appoint another in his stead. ASA RAM v. HARI SINGH, **53 P.R. 1904.** (122 P.R. 1890, 3 P.R. 1899, *R.*)

(56)—*Misconduct of* Mahant—*Court's power to remove* Mahant.—The Court can, on the ground of misconduct, immorality or breach of trust, remove from his office the *Mahant* of a religious institution, as being a trustee who is unfit for his office. BASANT DASS v. GANGA DAS, **2 O.C. 340.** [*R.*, 6 O.C. 355.]

(57)—*Suit for removal of* mahant *of a religious institution—Right of villagers to interfere—Proof of custom—Circumstances justifying* mahant's *removal.*—In a suit for the removal of the *mahant* of a religious institution, which

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was supported by village land, the villagers cannot, in the absence of any customary right to that effect, have any power as to the appointment or removal of the *mahant*. In such a suit where the allegation against a *mahant* was that he was of an undesirable character, that he stirred up false cases, that he misappropriated the proceeds from the land and that he allowed the buildings to fall into disrepair, &c., and the evidence failed to establish any such charge, and there was no charge against the *mahant* of gross immorality or even of waste by alienation of the land, *held*, under such circumstances, the *mahant* could not be removed. BHAGWAN DAS v. HARDIT SINGH, **7 P. R. 1908 (Footnote at p. 63)=21 P. W. R. 1908=108 P.L.R. 1908.**

(58)—Devasthan, *suit for removal of trustees and managers of—Assertion of claims by trustee inconsistent with his possession—Mistaken idea of trustee as to his true legal position—Laxity of management without fraud or dishonesty—Scheme appointing committee controlling management of endowment.*—Suit under s. 539 of the Civ. Pro. Code for the removal of the defendants from the trusteeship and management of the plaint mentioned *Devasthan* and for the appointment of trustees by the Court to manage it under proper directions to be given by the Court to regulate the future management. The District Court, in the exercise of its discretion, declined to remove the first defendant from its trusteeship but framed a scheme for the management of the endowment, appointing a committee for the purpose which virtually superseded him. Defendant appealed against this judgment while plaintiffs took cross-objections asking for the removal of the defendant from the management, and the High Court, on a consideration of the evidence, came to the conclusion that there was nothing to justify their interference with the discretion of the District Judge refusing to remove the first defendant from the trusteeship, although as found by that Judge, the defendant, under a mistaken impression as to his true legal position, had asserted claims in connection with the *Devasthan* inconsistent with such position. The District Judge had acquitted the defendants of any fraud or dishonesty in connection with the *Devasthan* funds. He had only found that the management by the first defendant had been lax and improvident, if not negligent, and the High Court agreed with him in that respect. It was desirable that efficient means of supervision and control over the defendants and the manager of the *Devasthan* for the time being, should be adopted, but that, at the same time, the actual management should rest with the manager. The High Court appointed a committee to supervise the management of the *Devasthan* and its property and to give general directions for their due administration and made the necessary modifications and amendments in the scheme drawn up by the District Judge. ANNAJI v. NARAYAN, **21 B. 556.** [*F.*, 28 M. 319=15 M.L.J. 133; *D.*, 2 C.L.J. 460.]

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(59)—*Suit by settlor's representative for removal of trustees—Religious Endowments Act, XX of 1863, s. 14—Absence of provision in endowment for nomination of trustees—Right of settlor's representative.*—On the institution of a suit under s. 14 of Act XX of 1863 for the removal of the defendants from the office of trustees of a temple, for getting certain assignments and incumbrances affecting lands of the temple endowment set aside and declared invalid, and for obtaining a new trustee or trustees appointed, the defendants pleaded that Act XX of 1863 did not apply since the temple in question was not one of those endowments, the nomination to which had been exercised by or had vested in the Board of Revenue under Reg. XIX of 1810. Overruling the plea, the Court *held* that the provisions of s. 14 of the act covered the case whether or not the Board of Revenue had, under Reg. XIX of 1810, exercised or had vested in it the right to nominate to the trusteeship or the managership of the temple, and that s. 539 of the Civ. Pro. Code would not govern the case. *Held* also, that when the founder of an endowment has not made any provision in the endowment itself for the nomination of a trustee or trustees being made by any person other than himself or his heirs, the right to so nominate would remain vested in the founder and continue to his heirs. SHEORATAN KUNWARI v. RAM PARGASH, **18 A. 227=A W.N. 1896, 37.** (5 B L.R. App. 55, 7 C. 767, 11 A. 18, *overruled*; 8 B. 365, 7 A. 178, 16 I.A. 137=17 C. 3, *R.*) [*Diss.*, 24 C 418; *F.*, 19 A. 104, 22 M. 223, 34 C. 587; *Appr.*, 28 A. 689=A.W.N. 1906, 173; *R.*, 2 C.L J. 431, 33 C. 789=10 C.W.N. 581, 29 A. 663=A.W.N. 1907, 210=4 A.L.J. 565, 31 M. 212=18 M.L.J. 205, 3 Ind. Cas. 403, 11 C.L.J. 2; *Com.*, 5 A.L.J. 191.]

(60)—*Civ. Pro. Code, s. 539—Suit for removal of trustee, direct interest necessary to maintain.*—A suit for removing the defendant from the management of certain religious and charitable trusts attached to an Agraharam temple, in which the plaintiffs set forth that, as the managers of the temple and as the Brahmin residents of the Agraharam, they had a direct interest in seeing to the performance of the trusts, was held not maintainable, the plaintiffs having no direct interest in the trust within the meaning of the Code of Civil Procedure. NARASIMHA v. AYYAN CHETTI, **12 M. 157.** [*F.*, 17 M. 462, F.B.; *R.*, 14 M. 186, 21 B. 48, 20 A. 46, 2 C.L.J. 460.]

(61)—*Religious institution—Suit for appointment of new jeer and ejectment of one illegally appointed—Election to office.*—Suit by the disciples of a mutt for a declaration that the defendant was not the duly appointed successor of the deceased *jeer* of the mutt and for the appointment by the Court or by election according to usage of a successor to office. *Held* that it was competent to the disciples to have elected a proper successor to the office according to the usage of the institution, so that the person elected might bring a suit for ejectment,

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if necessary. There was thus no necessity for the plaintiffs to come to Court to assist them in making the appointment. The suit in consequence was not maintainable. SRINIVASA SWAMI v. RAMANUJA CHARIAR, **22 M. 117.** [*D.*, 6 M.L.T. 193 ; *R.*, 19 M.L.J. 772.]

(62)—*Public endowment for religious uses—Act* XX *of* 1863, *s.* 18.—A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion ; a similar endowment for pious and charitable purposes generally would include all members of the community who choose to avail themselves of the means afforded them by the appropriator; every one could have an equal right to participate and that all times and at all seasons. S. 18, Act XX of 1863, applies only to such religious establishments as were under the control or superintendence of the Board of Revenue or of local agents under Reg. XIX of 1810, and were transferred to trustees or managers under s. 4 of the Act. A Mahomedan widow of the Shiah sect executed a *tauliatnama* purporting to dedicate the whole of the property for perpetuating certain ceremonies in commemoration of her mother's death in an *imambara* in her house, and for the expenses of the first ten days of the Mohurrum, and constituting herself and another as joint *mutwalis*, and caused the necessary alterations to be made in the Collector's Register. Subsequent to the death of the other *mutwali*, the widow, although the *wakfnamah* was registered publicly, dealt with the property as the absolute proprietress. The *wakf* property, although constituted as such long prior to the passing of Act XX of 1863, was never under the control of the Board of Revenue or of local agents. *Held* that the endowment was not of a public character coming under the provisions of Act XX of 1863, and therefore a District Judge was not competent to grant leave to sue under s. 18 of the Act. DELROOS BANOO BEGUM v. NAWAB SYUD ASHGUR ALLY KHAN, **15 B L.R. 167 = 23 W.R. 453.** [*F.*, 19 C. 275 ; *R.*, 3 C. 324, 6 B. 42, 11 B. 492, 13 M. 66, 18 M. 201, 2 C.L.J. 431.]

(63) – Mutwali, *whether infant can be appointed—Waiver—Civ. Pro. Code* (XIV *of* 1882), *s.* 44 (*a*), *leave under.*—The power to appoint a *mutwali* is a power in the nature of a trust. The power to appoint a new *mutwali* stands on the same ground as the power to appoint new trustees in England. A person who is below the age of puberty cannot be appointed *mutwali.* (19 C. 203, *F.*) In a suit by a purchaser for a declaratory decree where a *wakf* is set up by the defendant who claims the land as the *mutwali* but fails to establish his title, if the plaintiff has made out a *prima facie* title, he is entitled to a declaration of his title and an injunction. (20 C. 834, *F.*) S. 44 (*a*) of the Code of Civil Procedure substantially follows one of the rules (O. XVIII, r. 2) of the Supreme Court in England and was intended for the protection of the defendant. The defendant may by his conduct waive the benefit of that rule. SATISH CHANDRA MULLICK v. ASHRUFFUDIN AHMAD, **8 C.L.J. 196.**

(64)—*Pre emption under* wajib-ul-arz—*Transferee of proprietor's lands without mutation of names, right of, to pre-empt as a co-sharer—Parting of proprietary rights by dedication to public charity—Onus of proof.*—A person, who has purchased lands in the mahal, which were not merely the *sir* of a co-sharer and which were not grove-lands held by a licensee, but were lands belonging to the zamindar and in his occupation, becomes a proprietor in the *mahal* responsible for the revenue assessed thereupon, notwithstanding that he had never obtained mutation of names in his favour. The mere fact that such a person has built a temple and made a grove upon the land is not sufficient to raise the presumption that he has parted with the proprietary rights in the land. It is for those who allege that the owner has divested himself of his private proprietary rights by making the land endowed land to prove such a dedication. DAKHNI DIN v. RAHIM-UN-NISSA, **16 A. 412 = A.W.N. 1894, 134.** [*F.*, 28 A. 124 = A.W.N. 1905, 219 = 2 A.L.J. 612 ; *R.*, 28 A. 246 = A.W.N. 1905, 264 = 2 A.L.J. 788, 129 P.R. 1906 = 84 P.L.R. 1907, 10 O. C. 225, 3 Ind. Cas. 461.]

(65)—*Mahomedan Religious Endowment—Succession to Office of superior or manager—Joinder of actions—Suit for possession and mesne profits—Stamp-duty.*—In a Mahomedan religious endowment, where it is essential that the superior or manager should have certain qualifications which succession by descent would not always ensure, the theory of hereditary succession is most unlikely and out of place. A claim for possession and a claim for wassilat may be brought separately ; but it is quite an error to suppose that they cannot also be united. When united and tried as one suit, no extra stamp-fee for wassilat need be paid. BEBEE SYEDUN v. SYUD ALLAH AHMED, **W.R. 1864, 327.**

(66) — *Religious institution* — Mujawars *in Attock district—Appointment and dismissal of.*—*Held* that the rule *held* in 154 P.R. 1888 to be established, *viz.*, that *Mujawars* generally in the Peshawar district were servants liable to dismissal, was the rule generally governing *Mujawars* in the adjacent district of Attock. Long services and the fact that *Mujawars* had built houses in the neighbourhood of shrines did not deprive the heads of the institution of the power to dismiss and to eject them, though they might be entitled to compensation on ejectment. FAKIRA v. MEHR SHAH, **49 P.L.R. 1911 = 6 P.R. 1911 = 9 Ind. Cas. 680.**

(67)—*Hindu charities—Native religious institutions—Administration by Courts—Superstitious uses—Advocate General, if party to suit.*—The Courts in India will entertain suits for establishing or administering Native religious institutions. And the Statute of Edward VI, relating to superstitious uses does not apply to India. If property were left by a Hindu testator

Religious Endowments—*continued.*

with general directions to apply the same for the benefit of the Natives, the Courts would not build a Hindu temple or place of worship out of such property. But when the fund is not open, and it is already appropriated to Hindu religious purposes, the Court acts but ministerially in carrying out the wishes of the subscribers, donors, and testators. It cannot be said in such a case that the Court attempts to propagate the Hindu religion. On the other hand, disastrous consequences would ensue if the Court should do otherwise. No Native religious endowment would be safe from wrong doers. The Courts are bound by the Charter here to recognize the Hindu religion. [*R.*, 5 B. 151, 33 B. 122=10 Bom L.R 417] A suit to administer the funds of a Hindu charity is properly brought in the name of the Advocate General. The Stat. 53 Geo. III, c. 155, s. 3, confers powers on the Advocate General similar to those of the Attorney General in England, subject nevertheless to the qualification that he is to be guided "by the circumstances of the case and the practice of the Court." The Advocate-General finds himself in a different country and before a different Court, and must render his office as conformable to those new circumstances as he may. The Attorney-General, notwithstanding that the State religion is a different one, can undoubtedly inform the Court on behalf of a dissenting charity. And the corresponding officer of the Crown in another country in different circumstances is surely justified in interfering in cases of a different but lawful religion. And where there is a religion tolerated by the State, the Crown will see that that religion is enjoyed, though it may be strongly at variance with the State religion in doctrine, as in the case of Roman Catholic and Unitarian charities. The Hindu religion is more amply recognised in India than the religion of dissenters in England, and the argument founded upon the analogy is unanswerable. Then if these charities are fit objects for the interposition of the Court, the Advocate-General would be the best person to conduct a suit for that purpose. The degree in which the Advocate-General should interfere in the administration of such charities is altogether a different question. A general control of the suit would probably be considered sufficient, and any very minute interposition in the details of such charities should be avoided. THE ADVOCATE-GENERAL v VISHVANATH ATMARAM, **1 B.H.C. App. 9.** [*R*, 23 M. 28=7 M.L.J. 281.]

(68)—*Religious endowment, suit for management of a — Advocate-General if necessary party.*—Where the plaintiffs claimed to have the general management and control of the religious endowments belonging to the Degumbery Sect of Jains and to form the committee for the management of all the Jain charities in Calcutta and elsewhere in India, and where what they substantially sought was to have the trusts of a will, in which they were interested (not beneficially, but as the representatives of their sect), ascertained, and the performance of these trusts secured, the suit was *held* to have been properly framed. Such a suit is not brought under Act XX of 1863, but under the ordinary original jurisdiction of the High Court, inherited from the Supreme Court by its Charter—a jurisdiction similar, in its general features, to that of the Lord Chancellor in England. (*See* 4 M.I.A. 190.) [*F.*, 2 C.L.R 128, 24 M. 219, 6 M.L.J 239; *Appl.*, 8 B. 432.] The Advocate-General is not a necessary party, although it is desirable that such suits should be brought only with his consent or by the leave of the Court. (5 B.L R. App 55, *Diss.*) PANCHCOWRIE MULL v. CHUMROOLALL, **3 C. 563=2 C L R 121.** [*R.*, 8 B. 434, 23 M. 28=7 M L.J 281] **Note.**—*See* s. 539 of the Civ. Pro. Code of 1882.

(69)—*Suit relating to religious and charitable endowments - Advocate General whether necessary party.*—The Advocate General is not an indispensable party to a suit relating to religious and charitable endowments. The suit may be maintained by persons interested in the endowment concerned. The Advocate-General may be a party to the suit in the same manner as the Attorney General is in England. P. M. SRINIVASACHARY v. RANGACHARIAR, **7 M L. J. 281.**

(70)—*Religious endowment*—Shebaitship *of a temple Office—Hereditary.*—Where one A had acted as the spokesman of the community in collecting donations for building a public temple, looked after the purchase of the site and the construction of the building, and subsequently managed the temple funds up to the time of his death, without any control of the community:—*Held*, that it could not be said in such circumstances that the office of Manager was hereditary. SHOROLA BALA NUNDY v. HEERALALA, **11 Ind. Cas. 859.** (17 C 3, 16 I.A. 137, *R.*)

(71)—*Hindu Law — Temple*—Dharmarth—*Private or public place of worship—Criterion—Imperfect trust—Distinction between dedication of property subject to a charge and bequest of property subject to certain duties.*—S built a temple. The idol was kept upstairs, and the lower room was let for hire. So long as S lived the temple was largely resorted to by the public, but after his death the attendance fell off. S in his will spoke of the temple as *Dharmarth* and made the property chargeable with the maintenance of his widows. *Held*, that, although the phrase *Dharmarth* does not in all cases necessarily mean a dedication for public use, the terms of the Will and general circumstances of the case established that the temple was a public place of worship. The mere fact that the property was held chargeable with the maintenance of the testator's widows did not make the trust an imperfect one, the words of the Will clearly showing that it was only a case of dedication of property subject to a certain charge rather than bequest of property subject to certain duties LAL CHAND v. NAND LAL, **171 P L R. 1912=263 P.W.R. 1912=16 Ind. Cas. 838.**

Religious Endowments—*continued.*

(72)—*Mutt—Head of—Alienation — Permanent lease—How far binding—Ratification by successor—Effect Power to repudiate by successor—Nature of Matadhipati's position and his powers—Limitation Act, sch II, arts 12, 134 and 141—Mad. Act V of 1884 (Local Boards), ss. 3 (10), 64 (2), 66, 73 and 76—Arrears of cess — Default — Liability of inamdar—Revenue sale—Procedure—Failure to give notice to inamdar — Effect — Irregularity — Setting aside — Limitation — Mad. Act II of 1864 (Revenue Recovery), ss. 32, 42—Applicability—Civ. Pro. Code, 1908, s. 92 (1)—Applicability to Mutts.*— S, the head of a mutt, made in 1872 an alienation of an inam land belonging to the mutt by way of a permanent lease to one M. N, who was then managing the affairs of the mutt on behalf of S, leased in 1889 the inam to one A by cancelling the lease of 1872. A was unable to get possession of the property. In 1890, S died and N became his successor in office. From 1893 onwards rents were continued to be collected from M's transferees by N. N died in 1906 and was succeeded by the plaintiff in his office. A portion of the inam land was brought for sale by the Revenue authorities for default of payment of local cesses payable by the inamdar. B became the purchaser in such a sale. The sale took place without any notice to the head of the mutt which owned the inam. Plaintiff sued in 1908 to set aside the lease and recover possession of the inam land. *Held*, that the lease of 1872, though beyond the powers of the lessor, was one which he could not have avoided during his lifetime, and that the plaintiff was entitled to repudiate the lease as soon as he became the Matadhipati and to bring his suit for possession within 12 years of his becoming the Matadhipati. The lease is avoidable by the lessor's successors, in the very same way that an alienation by the Hindu widow in excess of her powers is avoidable by her successors. *Held*, also, that the Revenue sale was irregular owing to the absence of notice to the inamdar and liable to be set aside. But such a suit was barred, whether under s. 59, Act II of 1864, or under art. 12, sch. II, Limitation Act. *Held*, also, that the interest that passed to B, at the Revenue sale was that of the mutt and not merely that of the lessee in occupation. *Per Miller, J.*—The corpus of the mutt property is inalienable except in special circumstances, but the produce, subject to the upkeep of the mutt, is at the absolute disposal of the Matadhipati. There may be properties vested in him as a bare trustee (27 M. 435 33 M. 265, *R.*) If a Matadhipati has the management of the land and an absolute right to dispose of the income thereof, it seems difficult to withhold from him the right to make, for his own life or rather for the period during which he occupies the position of the head of the mutt, a lease of a portion of the property for any rent however small which he may deem sufficient. He may, subject to the reservation of a sufficient fund for the up-keep of the mutt, make gifts of the rents received to any one whom he chooses. An alienation by the head of a religious foundation is good for the lifetime of the alienor, and is not therefore void and of no effect. (36 C. 1003, *Rel. on.*) A Matadhipati has an estate very closely resembling that of certain corporations sole in England (27 M. 435, *R.*) Though, in a certain sense, they are owners of the fee simple, yet, in many respects, they (*i.e.*, corporation sole) had only the powers of a tenant for life. (34 C. 329, *R.*) Being 'owners of an inheritance,' Matadhipatis could, but for 'restrictions and qualifications in right' of their mutts, make leases so as to bind their successors. It need not be held that the restrictions and qualifications which attach to the estate are as regards their effect, different from those which prevent a Hindu widow from binding her successors by unjustifiable alienations, by way of lease. There are no doubt differences in respect of the purposes which will justify an alienation, but there seems to be no reason that the difference extends also to the duration of the lease as a valid transfer. The successor of the matadhipati will be unable to validate it for all time. In that respect he will be like a female succeeding to a widow, say, a daughter succeeding to her mother as her father's heir; he will be able to validate the transfer only for the period during which he holds the office, and will be unable to bind his successor, but will be able to avoid the lease altogether or affirm it for this period, and it will not be absolutely nullified by the death of the alienor. *Per Sadasiva Iyer, J.*—The position of a Matadhipati is neither that of an absolute owner, nor that of a mere tenant for life, and is therefore analogous to that of the estate of a Hindu female heir to a male's estate. It is clear from s. 3 (10), s 64 (2) and ss 66 and 73 of the Local Boards Act (V of 1884) that it is the inamdar (Mutt) that was liable for the road cess and not any tenant of the Mutt. Though the sale *procedure* was that prescribed by the Revenue Recovery Act, the substantive provisions in the Revenue Recovery Act (ss. 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases, do not apply to a sale under the Local Boards Act. (7 M 434, 25 M 572, *R.*) An irregularity committed by the Revenue officer in having the notices served on the tenant in possession treating him as the defaulter instead of on the real defaulter, cannot now be made the basis for attacking the sale, as the time fixed by law for the setting aside of the sale on the ground of irregularities had expired long before the present suit was brought. (25 B. 337, *R.*) It cannot be held that s. 92 (1), Civ. Pro. Code, 1908, does not apply to Mutts, and that the public and the Advocate-General and the Courts of Justice are powerless to stop the wholesale misuse of the income of a charitable and religious institution like a Mutt. MUTHUSAMIER (died) v. SREE SREEMEETHANITHI SWAMIYAR. **13 M.L T 498 = M W.N. 1913 581 = 19 Ind. Cas. 694 = 25 M L.J. 393.** (M.W.N. 1913, 181, 36 C. 100, 23 M.L.J. 260, *R.*)

Religious Endowments—*continued.*

(73)—*Endowment*—Waqf, *proof of—Question of law or fact—Appropriation of income, whether sufficient proof—Case to be made out by plaintiff—Question of law or fact.*—The mere appropriation of the rents and profits of a particular property to the up-keep of a religious foundation is not sufficient proof that such property is endowed property. (2 C. 341, *F*) The question whether a specified property is or is not *Waqf* property, is a question of law or, at any rate, a mixed question of law and fact. A plaintiff, who sues in ejectment for recovery of property alleged to have been appropriated by way of endowment for the up-keep of an endowed property, must make out just as strong a case as a plaintiff who seeks to set aside an alienation of endowed property. ABDUL GHAFUR v. SHIAM SUNDER DAS, **17 Ind. Cas. 303=16 O.C. 76.**

Liability to account—Administrator-General as executor of the surviving trustee of religious endowment—*See* ACCOUNTS — SUIT FOR ACCOUNTS, Cor. 68.

Endowment for religious and pious purposes—Applicability of s. 4 of Pensions Act — *See* ACT XXIII OF 1871, s. 4, 17 M L.J. 549=3 M. L.T. 104=31 M. 12.

Of zemindari village officers — Right of Collector to recover as arrears of Revenue—Suit for refund of amount so recovered, limitation for—*See* MAD. ACT II OF 1864, ss. 52, 59, 23 M. 571=10 M.L J. 261.

Grant by way of, to religious institution liable to resumption—*See* U.P. ACT XVII OF 1876, ss. 52, 53, 2 O.C. 295.

Suits of a civil nature—Cognizability by a Civil Court—Question of ritual, when cognizable by a Civil Court—Position of Dharmakartas—Introduction of new idols into temple—Change of namams in Vaishnava temple—*See* CIV. PRO. CODE, 1908, s. 9, 17 M.L.J. 1=2 M.L.T. 69=30 M. 158.

Decree directing performance of puja and giving of honors to a deity according to the usage of a religious institution—Nature and execution of decree *See* CIV. PRO. CODE, 1908, O. XXI, rr. 10 and 21, ss. 48, 92, 93, 2 M.L.T. 94.

Succession to, by chela—Election or nomination to the office of Mahant—*See* CUSTOMS—PUNJAB—INHERITANCE, 143 P.L.R. 1906.

See DECREE — DECREE, CONSTRUCTION OF, 17 M. 343=21 I.A. 71, P.C.

Construction of deed of — Principle—*See* EJECTMENT, SUIT FOR, 14 C.L.J. 175.

Office of dancing girl attached to temple, Courts bound to recognize—Connected with—Custom—*See* HINDU LAW—CUSTOM, 14 B. 90.

Succession to the management of a, as shebait—Usage of the institution—*See* HINDU LAW—INHERITANCE, 7 A.L.J. 430=6 Ind. Cas. 772=32 A. 461.

Religious Endowments—*continued.*

Whether destruction of image destroys the endowment—*See* HINDU LAW—INHERITANCE, 8 C.L.J. 369.

Right of management of, by members in rotation—*See* HINDU LAW—JOINT FAMILY, 4 M.L.T. 486=19 M.L.J. 59=32 M. 167=2 Ind. Cas. 341.

Mutt, definition of—Management of family charities—Succession—Natural heirs—Primogeniture — Right of members of undivided family to participate in management—*See* HINDU LAW—PARTITION, 6 M.L.T. 319=20 M.L J. 108=4 Ind. Cas. 76.

Temple trustee—Joint right of management—Partition of right—Civil Court—Jurisdiction—*See* HINDU LAW—PARTITION, 19 A. 428=A.W.N. 1897, 103.

Direction as to management of—*See* HINDU LAW—WILL, 29 C. 716, P.C.

Of specific property to idol not in existence or to no specific idol, validity of—*See* HINDU LAW—WILL, 9 C.W.N. 528=1 C.L.J. 605.

Custom of worship opposed to religious doctrine—Effect—*See* HINDU TEMPLE, 12 C.W.N. 946, P.C.=4 M.L.T. 101=8 C.L.J. 230=31 M. 236=10 Bom. L.R. 781.

Lease of temple lands—Lessee also to manage affairs of temple—Validity of lease—*See* LEASE—GENERAL, 6 M.L.T. 161=3 Ind. Cas. 104=19 M.L.J. 485.

Sale of immoveable property of a religious institution by its Mohant—Suit to recover it by his successor—Trustee—Limitation—*See* LIMITATION ACT, 1908, s. 10, arts. 134, 144, 123 P.W.R. 1908, F.B.

Suit for removal of a mutwali of a mosque—Power of congregation of the mosque as regards removal of mutwali—Change of religion—Sufficient cause—*See* LIMITATION ACT, 1908, s. 23, arts, 120, 142, 144, 37 P.W.R. 1908=53 P.R. 1909=2 Ind. Cas. 107.

See LIMITATION ACT, 1908, art. 120, 9 P.R. 1904.

See LIMITATION ACT, 1908, arts. 120, 142, 144, 8 P.R. 1899.

Manager's power to sell—*See* LIMITATION ACT, 1908, art. 124, 2 Bom. L.R. 597.

Alienation of property belonging to religious institution—Suit to recover possession of the property with mesne profits—Limitation—Joinder of causes of action—*See* LIMITATION ACT, 1908, arts. 134, 144, 35 P.W.R. 1908, F.B.=102 P.L.R. 1908=30 P.R. 1908.

Property belonging to idol—Adverse possession—*See* LIMITATION ACT, 1908, art. 144, 13 Bom. L.R. 1169.

See PARTIES TO SUIT—SUITS BY REPRESENTATIVES OF A CLASS, 7 A. 178, F.B.=A.W.N. 1884, 325.

Suit for share in property under waqf—*See* SMALL CAUSE COURT—MOFUSSIL, JURISDICTION OF—GENERAL, 14 A. 413=A.W.N. 1892, 79.

Religious Endowments—*concluded.*

Debt due to—Pro-note in favour of former manager—Suit by successor—Heirship certificate—*See* SUCCESSION CERTIFICATE ACT, 1860, 20 M. 162, P.C.=24 I.A. 78=1 C.W.N. 497.

Gift—Dedication of idol and land for public religious purpose—No gift to ascertained or ascertainable person or persons—*See* TRANSFER OF PROPERTY ACT, 1882, s. 122, 13 M.L.J. 364.

Grant for religious and charitable purposes—Inalienability—*See* TRUST, 15 B. 625.

What constitutes valid dedication for religious purposes—Test—*See* WILL—CONSTRUCTION, 6 A.L.J. 444=1 Ind. Cas. 666.

Religious Endowments Act.

See ACT XX OF 1863.

Religious Institution.

See RELIGIOUS ENDOWMENTS.

(1)—*Religious institution—Right of management—Custom.*—The plaintiff claimed an equal right with the defendant in the management of a religious institution. Defendant pleaded that he was the Mohunt, and that, according to the nature of the grant, the entire right of administration rested in him alone. *Held* that the general presumption in such cases was in favour of the defendant's plea; but the decision as regards any particular institution must be guided by the custom pertaining to that institution, and proof of such a custom in a special case would be sufficient to rebut the general presumption stated above. RAMSORK DOSS v. PERMESHREE DOSS, **76 P.R. 1867.**

(2)—*Religious institution—Right of succession.*—Plaintiff claimed to succeed to a religious institution as the *chela* of the previous Mohunt. Defendant however proved that he had obtained possession during the life-time of the previous Mohunt, either from him, or with his consent. Plaintiff failed to make out the title alleged. The suit was therefore dismissed. POORUN CHAND v. SUNDUR DOSS, **32 P.R. 1867.**

(3)—*Priests—Right to collect fees—Division of fees—Punjab Civil Code, s. 22.—Birt* or fees may be collected by any person who may be preferred as a *Purohit* by those who chose to pay it to him, and s. 22 of the Punjab Civil Code does not preclude Courts from giving effect to a contract between priests for division of profits. RAM KISHEN v. DOONEE CHUND, **62 P.R. 1867.** [*R.*, 7 P.R. 1877, F.B.]

(4)—*Priest's fees, if divisible among relatives*—Purohit—*Contract or custom.*—In a suit by a close relative of the defendant for a share of the fees paid to the latter as a *purohit*, the lower Courts held that *birt* or priest's fees paid to the *purohit* was not legally divisible among his relatives because the office was not hereditary. The Chief Court, holding that the true issue in this case must be whether any relation of ancestral right or of contract or of customary proceeding existed between the

Religious Institution—*continued.*

parties to this suit giving rise to a liability on the part of the defendant to pay a share of the *birt* to the plaintiff, remanded the suit. RAM RUTTUN v. GORI, **38 P.R. 1872.** [*R.*, 7 P.R. 1877. 45 P.R. 1878, F.B., 8 P.R. 1901=136 P.L.R. 1901.]

(5)—*Punjab Civil Code, s.* XXII, *para.* 6—*General rule of religious endowments—Necessity of inquiry into usages of particular institution not obviated.*—This was a suit claiming the right to succeed to the occupation of a *Dhurmsala* with the land and other property attached thereto, on the ground that the plaintiff was the *chela* or disciple of the deceased head of the institution. Defendant pleaded that he was elected in preference to the plaintiff by the *lumberdars* of the village and the neighbouring Fuqueers to succeed to the said office. There was nothing on the record to show which of the above circumstances regulated the succession to the *Dhurmsala* in question. The provisions of Chapter XXII, para 6 of the Punjab Civil Code, on endowments, only laid down the general rule; there was nothing in it obviating the necessity of enquiry into the usage of the particular institution or of acting on such usage when established. AJOODHIA DASS v. DEVI DASS, **73 P.R. 1869.**

(6)—*Sacred building—Protection.*—A Hindu purchased a piece of land from a Muhammadan proprietor and built a temple thereon. At settlement the priest was recorded mafidar for life. After the death of the priest the vendor's descendants took possession of the temple, while the vendee's descendants claimed proprietary rights. The lower Court found for the vendor's descendants. *Held* that the latter could not destroy the temple as long as there were worshippers at the shrine. ASA BUND v. RAJA SHUMSHER KHAN, **3 P.R. 1868, Rev.**

(7)—*Office of* mahunt—*Succession—Nomination—Election—Misconduct of* mahunt—*Dismissal—Brotherhood.*—Under the customary rule of succession among Nirmala Sadhs, a *mahunt* may nominate his successor but the nomination should be formally approved by the brotherhood. If there be no nomination, then, the brotherhood will appoint one. The brotherhood has power to dismiss a *mahunt* if he misconducts himself. The brotherhood are generally those connected by spiritual ties with the founder of the Institution though it may be held to include the whole sect also related to each other by spiritual ties. ARBEL SINGH v. BAJ SINGH, **105 P.R. 1892.**

(8)—*Mahomadanism—Succession—Collaterals to the fourth degree and sister's son—Powers of alienation.*—Collaterals in the fourth degree are entitled to inherit the share in the management and offerings in preference to a sister's son. The proprietor of a shrine could alienate its property for necessary purposes. The transfer of a share in the shrine and offerings is akin to the transfer of a religious office and invalid. NUR MUHAMMAD v. GHULAM HABIB, **106 P.R. 1892.** [*R.*, 94 P.R. 1909=130 P.L.R. 1909, 48 P.R. 1908.]

Religious Institution—*continued.*

(9)—*Rawalpindi—Succession to the office of* Mahant—Chelas—*Custom—Election and nomination.* — By the custom applicable to the Bhairagi shrine at Rawalpindi, a mahant may appoint his successor from among his *chelas* with the approval of an assembly of the religious brotherhood and some of the respectable Chowdris of the place. If one is not so appointed in the life time of the *Mahant*, one may be elected by the said brotherhood on his death. A mere nomination by the *Mahant* without the consent of the brotherhood is invalid. BABU RAM KAUR DAS v. GOPAL DAS, **175 P.R. 1889.**

(10)—*Office of* Mahant—*Succession — Election or nomination.*—A person elected as *Mahant* of a shrine by the brotherhood cannot be ousted by a nominee of the last *Mahant* unless he can show that he had a better title according to the rule of succession governing the shrine. GURDIT SINGH v. RANJIT SINGH, **87 P.R. 1889.**

(11)—*Nirmala Sadus — Succession — Nomination—Consent of Gurbhai.*—The nomination of a *chela* by a Mahant as his successor is not invalid among Nirmala Sadhs merely because it was made without the consent of Gourbhai. BHAI CHET SINGH v. BHAI NIHAL SINGH, **37 P.R 1891.** [*R.*, 105 P.R. 1892.]

(12) — *Mohuntship, Succession to — Female disciple, deceased mohunt's desire in favour of.*— When the deceased mohunt of a shrine had expressed a desire that a female disciple should succeed him, it was held that she was entitled to succeed as *guddinashien*, even when there were male disciples. MUSSUMAT MUNNIA v. JIWAN DAS, **76 P.R. 1874.**

(13)—*Golden Temple of Amritsar—Gaddanashins—Survivorship.*—The rule of succession in the case of Golden Temple at Amritsar is that gaddanashins nominated their successors who are installed without any objection. The doctrine of survivorship cannot be applied to the case of gaddanashins. BHAI BHAGAT SINGH v. HARNAM SINGH, **49 P.R. 1892.**

(14)—*Amritsar—Appointment and dismissal of mohant—Power of bhekh—Civil Court's powers of interference.*—When a mohant has been appointed by the *bhekh*, a Civil Court has no power to interfere with the appointment except for very cogent reasons. *Quære*: Whether a Civil Court after having held that *bhekh* has power to depose a *mohant* for misconduct and after such deposition by the *bhekh* can go into the question whether such *mohant's* conduct was or was not bad. GIYAN PARKASH v. HUZURA SINGH, **3 P.R 1899.** [*R.*, 53 P.R. 1904, 7 P.R. 1908, Note.]

(15)—*Act* XX *of* 1863, *s.* 22—*Imam, appointment of—Power of Court.*—Plaintiff claimed the right to appoint an Imam to a certain mosque. *Held* that Civil Courts could declare the right of parties to make such an appointment. They could not make the appointment. Act XX of 1863, s. 22, forbids any officer of Government in his official character to nominate or appoint any trustee of a mosque. BUDDERDIN v. MULLICK ATTAR **35 P.R. 1871.** [*R.*, 95 P. R. 1900=6 P.L.R. 1901.]

(16)—*Sadhs — Alienation — Proprietor with restricted powers of alienation.*—There is a custom among Sadhs (Bhairagis) contrary to the usual rule in the Punjab, that a proprietor with a restricted power of alienation can, even in the case of ancestral property deal with such property so as to bind the heirs during his lifetime. FATTEH SINGH v. HARI, **112 P. R. 1891.**

(17)— *Amritsar — Nirmala Sadhs* — Chelas *power to alienate property inherited from Guru.* —According to the custom of Nirmala Sadhs of Amritsar, a *chela* cannot alienate any portion of the estate inherited by him from his *Guru.* RAM SINGH v. NIHAL SINGH, **136 P.R. 1889.** [*R.*, 112 P.R. 1906.]

(18)—*Hereditary right to share in* birt—*Relation between* purshot *and* jujman.—A and B were members of a family of *purohits.* Under an arrangement between the ancestors of both it was settled that A's ancestor C should receive the fees paid by the *jujmans* during a certain month. The arrangement had been carried into effect by their successors and ratified: and under it C during his lifetime, and after his death his widow levied *birt*, but after the widow's death, certain *jujmans*, erroneously thinking that B was the heir of C, and that A had no pretensions to be such heir, paid their fees to B. *Held* by the *Full Bench* that under the arrangement in question, A could, as being the right heir of C, maintain a suit against B to recover the amount of the fees so paid. *Per Plowden, J. (in the Divisim Bench).* Though the relation between *jujman* and *purohit* is voluntary, and a *jujman* may employ whom he chooses as *purohit*, and a member of a priestly family employed as a *purohit* in his individual capacity may retain as his own the fees paid to him in that capacity, it does not follow that as among the descendants of a priest the office of the *purohit* cannot be hereditary or that a member is precluded from suing to share, by right of descent, in the emoluments of the priestly office, not being fees received by the members in their individual capacity. In what capacity a particular fee is received, is a matter of evidence in each instance. Per *Fitzpatrick, J. (in the Division Bench).* A contract between the heirs of a deceased *purohit*, as to the seasons in which they will officiate, and as to the manner in which they will share the fees, is enforcible like any other contract. So also, one member of a body of *purohits* can sue for his share of the fees received by another member, when it can be shown that the fees were intended by those who paid them, not for the receiver of them alone, but for the whole body. But the relation between *purohits* and *jujman* being purely voluntary, a suit to share in the emoluments of the office, by right of inheritance, is

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not maintainable. GOBIND v. SADDA, **7 P. R. 1877. F B** [*R.*, 45 P.R. 1878, 4 P.R. 1896, 8 P R. 1901=136 P.L.R. 1901; *D.*, 119 P.R. 1879.]

(19)—*Religious institution*—Suniassis *whether can acquire private property—Custom—Proper points for enquiry.*—Plaintiff, who succeeded to the Mohuntship of a certain religious institution sued the defendant, a member or Sunniasi belonging to the institution, to have his name recorded as proprietor in the suit land, he being *guddi nashin*, and representing the institution. The plaintiff alleged that the vendor of this land had sold it cheap and practically endowed the temple with the property. The defendant alleged that it was his own property purchased by him out of his own monies. It was urged that the position of *suniassis* belonging to religious institutions was in many cases such that such a person, being a member of a religious fraternity, could not acquire private property, and all that he acquired was acquired for the benefit of the religious institution to which he was attached. *Held*, that this point must have been inquired into as well as two other points involved in it. *i.e.*, what was the custom of *Suniassis* generally in regard to this point, and what was the practice of this particular Mandar and was that practice sufficiently in conformity with general custom so as to be enforceable. TOTA PURI v. PADAM PURI, **21 P.R. 1874.**

(20)—*Suit by plaintiff as mutwali—Death of plaintiff while appeal pending—Co mutwalis applying to be brought on record—Burden of proof.*—Where certain persons apply to be brought on record as legal representatives of a deceased plaintiff who was a mutwali and brought a suit in that capacity and had also mentioned the present applicants as co-mutwalis in his plaint, *held* before the application could be granted, they should prove their status as co-mutwalis. ABDUL HAMID v. AHMAD HUSSAIN, **28 P.R 1900.**

(21)—*Religious institution*—Bunga Nurmahliyan Walah, *Golden Temple, Amritsar—Imperfect trust—Right of founder*—*Held*, (*a*) that where there is no absolute dedication of property to religious uses, but an imperfect trust, the nature of the property remains unchanged, and its application at the discretion of the founder. Such imperfect trusts are common enough in the Punjab in the case of Serais and Dharmsalas; (*b*) that the *Bungahs*, are hostels which generally speaking, do not rank as religious institutions pure and simple; the *Bungahlis* are not equal to *mahunts*, and if they make appointments of successors, there is no *bhek* or college to control them: accordingly that the representative of the founder's family was entitled to control the *bungah* and the *bungahi* could not hold adversely to the rights of the founder's family or appoint a successor as an independent incumbent of the institution. KISHEN SINGH v. SARDARIN PARTAB KAUR, **81 P.R. 1902.**

Religious Institution—*concluded.*

Succession to occupancy rights belonging to—*See* PUN. ACT XVI OF 1887, s 6 2 P R 1907, Rev.=36 P.L.R. 1907=5 P.W.R. 1907, Rev.

Suit for removing mahant for misconduct and appointing another—Advocate-General's sanction—*See* CIV. PRO. CODE, 1908, ss. 92, 93, 78 P.R. 1907.

See DECREE—DECREE, FORM OF, 84 P R. 1866.

See HINDU LAW—JOINT FAMILY, 140 P.R. 1892.

See INHERITANCE, 67 P.R. 1868.

Meaning of 'Dharmakarta'—Power to fine Subordinates—*See* RES JUDICATA—COMPETENCY OF COURT, 10 M.L T. 133=21 M.L.J. 730.

See SERVICE TENURE, 70 P.R. 1868.

See SUCCESSION, 52 P.R. 1867.

Religious Mendicant.

Trust for religious purposes, what constitutes—Succession to property of Hindu—Who is not 'hermit' or 'ascetic'—*See* HINDU LAW—INHERITANCE, 3 O C. 281.

Religious Offerings.

Suit for Sacrificial goat—Right of *Shebait* of temple—Jurisdiction—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, ss. 23, 25, 15 C.W.N. 666=10 Ind. Cas. 8.

Religious Office.

See RIGHT OF SUIT—OFFICE OF EMOLUMENT, SUITS RELATING TO.

(1)—*Religious office—Trusteeship—Private trust—Relinquishment in favour of person next entitled—Absence of binding rule of succession—Effect*—Where there is no provision in the partition deed nor any rule of succession binding on the family, *held*, that the renunciation of a non-hereditary religious office, *e.g.*, the trusteeship of a private temple, which vested in the senior member of the family by virtue of a partition-deed, in favour of his next senior, is invalid. SENNAYAN CHETTY v. SINNAPPAN SERVAI, **20 M.L.J. 654=8 M.L.T. 326=1 Ind. Cas. 901.**

(2)—Archaka—*Resignation by office-holder—Mother entitled to* murai—*Death of mother—Right to succeed.*—Where A, an *archaka*, who had a two days' *murai* in the month, had resigned his office, and where subsequently his mother, who was entitled to two days' *murai*, died, *held*, that A was entitled to succeed to the office. Ordinary rules of inheritance apply to such cases, only in a modified form. All arguments based on the fiction that the person who resigns is civilly dead, so far as the particular office is concerned, are fallacious. MUTTEVI PATTABI RAMANUJACHARYULU v. PEDINTI ALAGASINGARACHARYULU, **9 M.L. T. 352=21 M.L J. 490=9 Ind Cas. 493.**

Powers of Manager of religious institution—Evidence and burden of proof of necessity for alienation—*See* ALIENATION, 13 O.C. 79=5 Ind. Cas. 1005.

Religious Office—*concluded.*

Alienation and partition of, when valid—Partition by performance of duties of office in rotation—Alienation to qualified person in line of succession—*See* HINDU LAW—PARTITION, 6 B. 298.

Religious Question.

See JURISDICTION OF CIVIL COURTS, 6 M.H.C. 449.

Religious Rites.

And ritual—Jurisdiction of Civil Courts—English and Indian Courts—*See* JURISDICTION OF CIVIL COURTS, 5 B. 80.

Religious Services.

Religious services may be performed by males only and not by females under the Mahomedan Law—*See* MAHOMEDAN LAW—MOSQUE, 3 Bom. L.R. 772.

Religious Trusts.

See TRUST.

Wrongful alienation by trustee—Suit to recover property—Limitation—Adverse possession—Limitation Act, art. 134—*See* TRUST, 6 M.L.J. 270.

See WILL—MISCELLANEOUS, 11 B. 441.

Religious Usage.

See JURISDICTION OF CIVIL COURTS, 15 M. 355=2 M.L.J. 29.

Relinquishment.

(1)—*Joint Hindu family—Son's interest in a tenants' holding of the father—Relinquishment by father without sons' consent, validity of.*—*Held*, that Hindu sons living jointly with their father are not the co-tenants of his holding. *Held*, further, that a relinquishment of his holding made by the father without the consent of his sons is perfectly valid. SARABJIT SINGH v. MOHAN SINGH, **11 O.C. 292.** (10 O.C. 235, *R.*)

See U.P. ACT XII OF 1881, s. 31, A.W.N. 1898, 31.

Of easement—*See* EASEMENTS ACT, 1882, s. 28, 6 Bom. L.R. 287.

See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 7 O.C. 265.

By putnidar—Adverse possession against putnidar—*See* LIMITATION ACT, 1908, art. 144, 26 C. 460.

See MAHOMEDAN LAW—INHERITANCE, 19 M. 176.

Of tenant right for consideration—*See* REGISTRATION ACT, 1908, s. 17, 20 M. 367=7 M.L.J. 59.

Relinquishment, Deed of.

See REGISTRATION ACT, 1908, s. 17 (*d*), 9 B.H.C. 246.

Relinquishment of portion of claim.

See CIV. PRO. CODE, 1908, O. II, r. 2.,

(1)—*Act* VIII *of* 1859, *s.* 7—*'Relinquish or omit to sue,' meaning of—Construction of statute—Test of distinct causes of action in the*

Relinquishment of portion of claim—*contd.*

suits.—The words in s. 7 of Act VIII of 1859, namely, 'if a plaintiff relinquish or omit to sue for any portion of his claims,' include accidental or involuntary omissions as well as acts of deliberate relinquishment, and where the words of law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. **Moonsshe Buzloor Ruheem v. Shumsoonnissa Begum, 8 W.R.P.C. 3=11 M.I.A. 551=Marsh 286=2 Suther 59=2 Sar. 259=2 Hay 190.** [*Appl.*, 15 W.R. 408; *F.*, 3 C.L.J. 490; *R.*, 9 W.R.F.B. 1=B.L.R. Sup. Vol. 774, 12 W.R. 79, 3 N.W.P. 27, 8 B.H.C. 205, 20 W.R. 450, 1 A. 543, 2 M. 352, 6 C. 142, 8 C. 483, 8 C. 819, 8 M. 520, 14 B. 31, 19 C. 372, 17 B. 573, 20 B. 469, 21 M. 133=8 M.L.J. 92, 23 B. 597, 25 M. 736 =12 M.L.J. 103, 29 C. 543, 26 M. 760.]

(1-a)—*Relinquishment of claim, inference of.*—No inference of a relinquishment of claim can be drawn from a mere request that certain issues need not be tried in the face of the denial by the plaintiff, in cross-examination, that he had ever consented to limit his claim. SUNDARA v. SUBBA, **10 M. 371.**

(2)—*Act* VIII *of* 1859, *s.* 7—*Debt due by person deceased—Several suits against several representatives of deceased—Frame of suit.*—S. 7 of Act VIII of 1859 which bars all future suits for any portion of a demand omitted or relinquished from a previous suit, has not the effect of prohibiting more than one suit to enforce satisfaction of a claim against the representative of a deceased person. The creditor has a right to make all the property of the deceased in the hands of the several persons who may have succeeded to it liable for payment of his debt, but he is not bound to bring his suit in such a form as to include the whole of the representatives and the whole of the property which they have inherited, at the risk (in case of omission) of being precluded from all future suit. PURUM SOOKH v. SOOBHAN, **2 Agra 323.**

(3)—*Rent—Suit for rent—Act* VIII *of* 1859, *s.* 7, *Applicability of.*—S. 7, Act VIII of 1859, intended to discourage a needless multiplicity of suits, is applicable to suits for rent instituted by a zemindar against the ryot. RANEE BHABOSOONDEREE v. BHUGWAN CHUNDER MUZOOMDAR, **W.R. 1864, Act X, 88.**

(4)—*Suit for alluvial land—Splitting claim.*—In a suit for alluvial land, the plea of splitting or abandonment of claim is maintainable. BABOO MEGHBARUM SINGH v. MAHARAJA MOHESSUR BUKSH SINGH BAHADOOR, **5 W.R 511.** [*Reversed*, 9 B.L.R. 150, P.C.=16 W.R.P.C. 5.]

(5)—*Act* VIII *of* 1859, *s.* 7—*Arbitration—Abandonment of excess of claim.*—It would not

Relinquishment of portion of claim —*contd.*

be going beyond the reasonable construction of the words of s 7, Act VIII of 1859, to hold that the privilege there given to a plaintiff in a suit to abandon the excess of a claim applies also to a case where the party comes in with an application to cause an arbitration award to be filed. GRISH CHUNDER CHOORAMONEE v. BROJONATH BHUTTACHARJEE, **20 W.R. 56.**]

(6)—*Cause of action—Title resting on different transactions—Separate evidence.*—The cause of action may be one although the title of the defendant rests upon different and distinct transactions, and is supported by distinct and separate evidence. RAM SOONDUR SHAHA v. DELANNEY, **20 W.R. 103.** [*F*, 6 A. 616=A.W. N. 1884, 185.]

(7)—*Decree in prior suit instituted by trustees of charity--Omission to ask for account—Right of Advocate General how effected—Civ. Pro Code,* 1882, *s.* 43.—The Advocate-General, as plaintiff, prayed for an account against the legal representatives of one T, who had been trustee under deed of 1868 from the date on which it was executed up to his death in 1889. In a previous suit which the trustees had instituted, they had received from T's estate the balance which in that suit they had claimed to be due from him to the charity. The trustees had omitted to ask for an account against him in that suit *Held* that, under s. 43 of the Civ. Pro. Code, 1882, the Advocate-General, as plaintiff in the present suit, could not sue for an account, as he represented the same interest as the trustees. Granting that there was no bar under s. 43, the Court, in the exercise of its discretion, would not grant the relief asking for the taking of accounts under the circumstances of the case. THE ADVOCATE-GENERAL OF BOMBAY v. BAI PUNJABAI, **18 B. 551.**

(8) —*Instalment bond—Act* VIII *of* 1859, *s.* 7 —*Relinquishment of claim—Mortgage—Money decree.*—Plaintiff sued on an instalment bond as each successive instalment fell due, and the whole of his claim on each instalment was included in the suit. He recovered the full amount of the first instalment under the first decree, and a portion of the second instalment in execution of his second decree. The present suit was for that portion of the second instalment which remained unpaid and for the whole of the third instalment including interest.—*Held* that such suit was not affected by s. 7, Act VIII of 1859. In a suit on an instalment bond, plaintiff having obtained a money decree, asked for and obtained the residue of the sale proceeds after all the judgment-creditors had been fully satisfied. It was held that by doing so he did not abandon his right as mortgagee. BOLAKEE LALL v. CHOWDHRY BUNG SEE SINGH, **7 W.R. 309.**

(9) —*Suits by heir to cancel alienations made at various times.*—A widow of a deceased Mahomedan alienated her husband's property by two deeds to different persons at different times. A suit was brought by the heirs of the deceased, first to set aside the second alienation, and then a second suit to cancel the first alienation.

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Held that s. 7, Act VIII of 1859, did not bar the second suit. The heir's cause of action against different alienees, who have acquired possession under alienations made at different times and under different circumstances, was not one and the same, the question of right of succession to the deceased and widow's competency to alienate arising equally in both the cases notwithstanding. It was not obligatory on the heirs to make all the alienees parties to the first suit upon pain of forfeiting all future right of suit against them by reason of such omission. JEHAN BEBEE v. SAIVUK RAM, **1 Agra F. B., 109=Ed., 1874, 82.**

(10)—*Act* VIII *of* 1859, *s.* 7—*Splitting of cause of action—Joinder.*—S. 7, Act VIII of 1859, prohibits the splitting of a single cause of action in order to make it the subject-matter of more than one suit. A plaintiff may give up part of his demand, either to bring the case within the Court's jurisdiction or for any other reason; but he loses all subsequent remedy by suit for that portion of his claim which he has thought fit not to include in his suit. It may be that this provision which seems to contemplate the relinquishment or omission of a sum of money (either part of a debt or pecuniary damages) from the suit, extends also to cases of omission to ask for any particular description of relief; and that its operation is to require a plaintiff to include within his suit every description of relief which he may intend to seek against the parties to the suit in respect of his cause of action. A suit to recover from co-sharers a share of the surplus proceeds of a sale in execution for arrears of rent, is not barred by a former suit instituted by the plaintiff on the requisition of the Collector for obtaining a declaration of his right to share in the fund then in the Collectorate. SABEER KHAN v. KALI DOSS DEY, **1 W.R. 199.** [*Appr.*, 19 A. 379, F.B; *D.*, 5 B.L.R. 184=13 W.R. 261.]

(11)—*Civ.Pro. Code, s.* 7—"*Cause of action,*" *meaning of.*—A suit was brought in 1860 by S against R to recover his share in the joint family property. The present claim, which was for a share in the rents of certain Inam lands, also joint property, was not included in the suit of 1860. At the date of the former suit, the land in respect to which the present suit was brought was subject to the provisions of Reg. IV of 1831, and the Civil Courts had no jurisdiction to try the suit in respect to such land without the permission of the Government. It did not appear that S had applied to the Government for permission to sue. *Held* that S was not precluded by s. 7, Civ. Pro. Code, from maintaining the present suit. PATTARAVY MUDALI v. ADIMULA MUDALI, **5 M.H. C. 499.** [*R*, 12 B.H.C. 148, 5 C.L.R. 263, 23 B. 597, 23 M. 216.]

(12)—*Suit for partition omitting lands in possession of mortgagee—Subsequent suit for partition—Civ. Pro. Code,* 1859, *s.* 7.—Where any portion of the joint property is not in the possession of any of the co-parceners, by reason of its being in mortgage with third parties, executed

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by the managing member of the family, such property, as it was not available for immediate partition, could be excluded from a suit for partition. A subsequent suit, after redemption of such property, would not be barred by s. 7 of the Civ.Pro.Code, 1859. BALKRISHNA VITHAL v. HARI SHANKAR, **8 B.H.C. A.C 64.** [*F.*, 12 B.H.C. 148; *R.*, 23 B. 597, 24 B. 128=1 Bom. L.R. 620.]

(13)—*Mortgage deed—Distinct covenant to pay interest each year—Decree for overdue interest—Subsequent suit for principal and interest whether barred by s. 43, Civ.Pro. Code.* The mortgage deed, in this case, contained a covenant to pay interest each year. The covenant was not confined to the fixed period of the mortgage. It was distinct from and independent of the claim to recover the principal sum and its performance was secured in a different manner. The present suit was brought for recovering from the defendants personally, or by sale of the mortgaged property, the principal of the mortgage bond with interest. Plaintiff had previously sued and obtained a decree for the interest in arrear till then. He did not then sue for possession nor for the principal. Such previous suit, however, was held not to bar the present suit under s. 43 of the Civ. Pro. Code. The lower Court had, however, decided, that the mortgage did not provide expressly for any remedy in respect of the principal sum and that, therefore "there was no reason to suppose that it was the intention of the parties that the property should be sold in payment of either principal or interest or that the mortgagor was personally liable for the debt." The High Court, however, *held* that the mortgage was a simple mortgage of the property for a period, securing an advance of the principal debt with a covenant by the mortgagor to pay interest thereon till the mortgage was redeemed. It was governed by the general law applicable to simple mortgages. Regulation V of 1827 gave the mortgagee a right to bring the property to sale, and s. 67 of the Transfer of Property Act conferred upon him the same privilege. YASHVANT v. VITHAL, **21 B 267.** [*R.*, 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907, 167 P.L.R. 1910=19 P.R. 1910=36 P.W.R. 1910; *D.*, L.B.R. 1893—1900, 618.]

(14)—*Suit for redemption — Mortgage not proved—Dismissal of suit—Subsequent suit in ejectment — Causes of action—Civ. Pro. Code,* 1882, *s.* 43.—Where, on the dismissal of his suit for redemption on the ground that the mortgage was not proved, the plaintiff instituted a subsequent suit in ejectment against the defendant, *held* that s. 43 of the Civ. Pro. Code, 1882 was no bar to the second suit, because the causes of action in the two suits were essentially different. NARO BALWANT v. RAMCHANDRA TUKDEV, **13 B. 326.** (11 B.H.C. 224, *F.*) [*D.*, 25 B. 189.]

(15)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 7—*Suit on hypothecation bond—Portion of decree passed infructuous for want of jurisdiction—Subsequent suit to enforce such portion—No bar of suit.*—Where a decree was passed for the whole claim in a suit brought on an hypothecation bond and a portion of the decree became infructuous for want of jurisdiction, a second suit to enforce the claim that became infructuous could be brought against a third person who derived his title to the property through the borrower subsequent to the date of the bond, and it was not barred by the provisions of s. 7 of Act VIII of 1859. GRISH CHUNDER MOOKERJEE v. RAMESSUREE DABEE, **22 W. R. 308.** [*F.*, 7 C. 739.]

(16)—*Rents for successive years, separate suits maintainable for—Presumption from proof of payment of subsequent years' rent, when cannot be made.*—This was a suit for the rents of 1257 and 1268. The defendant pleaded that the present suit was not admissible inasmuch as the plaintiff had sued for arrears of rent for the years 1269 and 1270 without any mention of the rents for 1267 and 1268 which had fallen into arrears. The Judge, on appeal, held that as there was no mention of the rents of 1268 in the decree for the arrears of 1269, the present suit was barred under s. 7 of Act VIII of 1859. But the High Court *held* that the arrears for successive years are *several and distinct causes of action*, in respect of which it is perfectly competent to the party entitled to institute separate suits. It cannot be the true meaning of s. 7 that if a plaintiff has several and distinct cause action against one defendant, he must comprise them all in one suit, subject to the hazard of forfeiting all those not included in the first suit. Also the ordinary and natural presumption which usually arises from proof of the payment of recovery of the rents of subsequent years can have no application where there is evidence that the rents in suit were in arrear and no distinct allegation or evidence of their having been paid. RAJA SUTTO CHURN GHOSAL v. OBHOY NUND DOSS, **2 W.R. Act X, 31.** [*Appr.*, 17 W R. 380; *R.*, 24 W.R. 526; *D.*, 6 C. 791=8 C.L.R. 29.]

(17)—*Act* VIII *of* 1859, *s.* 7—*Covenant in lease, breach of—Damages.*—Where, in a former suit, plaintiff, a *putneedar* sued his zemindar for abatement of rent, and for a refund of consideration money and rents paid by him for 3 years, it was *held* that a suit for a refund of rent for three subsequent years is not barred under s 7, Act VIII of 1859. RAJA NILMANI SINGH v. ANNADAPRASAD MOOKERJEE, **1 B. L.R F.B. 97=10 W.R. F.B. 41.**

(18)—*Act* VIII *of* 1859, *s.* 7 — *Splitting of cause of action—Lease.*—The cause of action in a suit in which a lessee, availing himself of the power contained in a lease to resume and reduce into possession on behalf and in place of his landlord the rent-free tenures, has not given the landlord the benefit of those resumptions and has injuriously retained the lands so resumed in his own possession, is entirely distinct from the cause of action in a subsequent suit in which the lessee has improperly retained in his possession portions of the

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land leased. Though the lessor's title to recover is the same in both the suits, the causes of action are entirely different. DOORGA NATH ROY CHOWDHRY v. ROY KALEE NARAIN ROY, **24 W.R. 212.**

(19) - *Civ. Pro. Code*, s. 43.—A suit by a landlord, to recover mesne profits from a tenant who holds over, and a suit to eject him, are not parts of a claim founded on the identical cause of action, within the meaning of s. 43, and if mesne profits are alone claimed as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land. TIRUPATI v NARASIMHA, **11 M. 210.** [*Not F.*, 5 M.L.T. 220 ; *Appl.*, 31 M. 405 =4 M.L.T. 192 ; *R.*, 78 P.R. 1902=137 P.L.R. 1902, 28 P.R. 1907=93 P.L.R. 1908=140 P. W.R. 1907, 5 M.L.T. 105, 32 M. 330.]

(20)—*Act* VIII *of* 1859, *s.* 7—*Suit by father—Relinquishment of a claim—Subsequent suit by heir—Same cause of action—Maintainability of suit.*—S. 7 of Act VIII of 1859 prohibits a suit by an heir on the same cause of action on which a suit was previously instituted by his father, though the property now sued for is not the same as that for which his father sued. Plaintiff, as heir to his father, can only do what his father could have done. His father could not have brought this suit after that which he brought was dismissed. SOORUJPERSHAD TEWARY v. SAHEB LAL TEWARY, **3 W.R. 25.** [*R.*, 5 W.R. 182.]

(21)—*Small cause suit—Damages—Cause of action—Revision.*—Plaintiff sued the defendant for damages laid at Rs. 400 for breach of contract, alleging that he had been engaged at a salary of Rs. 75 per mensem as manager of a factory for the entire season of 1879, but that, before the expiration of the season, he had been wrongfully dismissed by the defendant. The Judge decided that the full claim for damages could not be given in the suit, but gave a decree for Rs. 75 per mensem from the commencement of the period of service up to the filing of the plaint. He, further, directed that the plaintiff might sue month by month for further damages as they accrued due. Accordingly, the plaintiff subsequently instituted two suits and obtained decrees. The High Court on the application of the defendant, set aside those decrees on the ground that after the first suit no further suits could lie. SIMPSON v. CLEGHORN, **6 C.L.R. 91.**

(22)—Res judicata—*Contract of sale—Suit for specific performance—Second suit for recovery of earnest-money.* The defendant executed a deed of *bynanamah* whereby he contracted to convey to the plaintiff certain *Mourosse* tenures, and was paid a certain sum as earnest-money. It was agreed that the deed of conveyance was to be completed on a specified date, and that the value of the property was to be ascertained on a local inquiry. Pending such inquiry, a certain percentage on the profits per annum was to represent the consideration-money. If the inquiry showed that the value was less, the consideration was to be reduced

Relinquishment of portion of claim—*contd.*

in proportion ; if more, it was to be raised accordingly. The defendant failed to perform his part of the contract, and sold the property to a third party. The plaintiff then sued for specific performance of the contract, and obtained a decree, and, under that decree, obtained possession. Plaintiff then brought the present suit, alleging that, if defendant had carried out his contract, he (the plaintiff) would have been in a position to recover from the profits of the property 8 per cent. upon the consideration-money advanced by him to the defendant, and that, on the breach of the contract, he had been deprived of interest on his money together with the sum paid on account of rent due by the defendant, and claiming therefore to recover those amounts from the defendant. *Held* that the plaintiff not having, under the terms of s. 7 of Act VIII of 1859, included the whole of the claim arising out of the cause of action, *viz.*, the breach of contract, and the present cause of action being the same as the cause of action in the former suit, s. 7 clearly applied and the suit was therefore barred. SHIB KRISTO DAH v. ABDOOL SOBHAN CHOWDHRY, **15 W R. 408.** [*R.*, 11 Bom .L.R. 46=1 Ind. Cas. 319.]

(23)—*Suit for recovery of value of cattle taken away—Claim for all damages by wrongful act to be included—Fresh suit not maintainable for damages.*—In a suit to recover the value of cattle alleged to have been illegally taken away by defendant, whatever claim plaintiff desired to make in respect of damages caused to him by such wrongful act of the defendant should be included by him in his plaint. It is not competent to him to maintain a second suit for any such items of damages which he might have failed so to include in the former suit. MOHUBUT MUNDUL v. SHOORENDRO NATH ROY, **4 W.R. S.C.C. Ref. 20.**

(24) — *General Agent — Misappropriation—Cause of action.*—An action against a *general agent*, simply on the allegation that he has received money on account of the principal without remitting it to the latter, is not sustainable, because the facts stated do not constitute a cause of action, in the absence of an allegation that there are grounds for believing that the money so received has not been disbursed on the plaintiff's account, but misappropriated by the agent. Where the defendant is not a general agent, but employed only to receive payment on account of the principal and to remit it forthwith, to the plaintiff, an action will lie simply on the ground that the agent has not remitted the money received by him within a reasonable time. But where he is a general agent empowered, not only to receive, but also to disburse, money so received on account of the principal, a suit will not lie upon a bare allegation like that, without a further statement that the agent, being called upon, has failed to account for the sum of money for which he is sought to be made liable. MONOHUR DASS v. BABOO SEETUL PERSHAD, **23 W.R. 418.**

Relinquishment of portion of claim—*contd.*

(25)—Res judicata—*Act* VIII *of* 1859, *s.* 7. —Where plaintiffs had, in a former suit, claimed certain moneys alleged to have been misappropriated by defendant as manager for the joint family, the cause of action having been the latter's refusal to allow plaintiffs their share at the time of separation, their present suit for a share of certain paddy which defendant had refused to make over when the separation took place, was *held* to be barred by s. 7, Act VIII of 1859. GANES CHANDRA CHOWDHRY v. RAM KUMAR CHOWDHRY, **3 B.L.R.A.C. 265 =12 W.R. 79.** (8 W.R.P.C. 11, *R.*) [*R.*, 1 A. 543.]

(26)—*Suit for recovery of land — Duty of plaintiff to put forward whole case — Second suit—Cause of action.*—A plaintiff suing for the recovery of land is bound to put forward the whole of his case at once. He cannot maintain a second suit for the same cause of action merely by alleging that the Collectorate order sought to be set aside is an order of a different date and description from that which was sought to be set aside in the former suit. LUCHMAN DAS v. PRIAG DUTT, **2 Agra 305.**

(27)—*Act* VIII *of* 1859, *ss.* 7, 12 — *Identity of cause of action in previous and subsequent suit—Inclusion of whole claim in one suit—Cause of action, splitting of.* — The question was whether this suit did not fall within the provisions of s 7 of Act VIII of 1859 and whether consequently it could be entertained. The lower appellate Court had held that the case did not fall within s. 7 of Act VIII of 1859, inasmuch as distinct acts of dispossession were alleged and inasmuch as certain persons were defendants in the present suit, and might have some interest in its result, who were not parties to the former suit. The High Court held that this decision was wrong. Both the suits had been in fact, instituted by the plaintiff for the purpose of establishing her late husband's title under his father's Will, and of obtaining possession of the lands as her husband's widow and representative. There was but one cause of action, *viz.*, the denial of plaintiff's title under the Will of her husband's father; and it was her duty to have proceeded under s. 12 of Act VIII of 1859, and to have included her whole claim in the suit brought by her first in one of the districts in which the estates claimed were situate. JAMOONA DASSEE CHOWDHRANEE v. BHAMASOONDAREE DASSEE CHOWDHRANEE, **2 W.R. 148.** [*Diss.*, 10 M.L.J. 136; *R.*, 3 W.R. 25, 20 W. R. 77, 16 A. 359 = A.W.N. 1894, 120; *D.*, 5 W.R. 182.]

(28)—*Civ. Pro. Code*, 1859, *s.* 7—*Redemption suit—Surplus not claimed by mortgagor — Separate suit for surplus.*—Where in a former suit for redemption of land usufructuarily mortgaged, the plaintiff, though he believed that there was a surplus due to him from the mortgagee, abstained from making any claim for the sum which might be found due to him, *held*, that a second suit for the recovery of the surplus was barred by the provisions of s. 7, Civ. Pro. Code. BALOJI TAMAJI POTHAR v. TAMANGOUDA GHANASYAM GOUDA, **6 B.H.C. A.C. 97.** [*Appl.*, 25 B. 115; *R.*, 26 B. 661, 30 A. 225 = A.W.N. 1903, 96 = 5 A.L.J. 192.]

(29)—*Civ. Pro. Code*, 1859, *s.* 7—*Claim arising out of same cause of action.*—A *patni* talook belonging to B was sold for arrears of rent and purchased by T. B sued in the Civil Court for setting aside the sale on the ground of irregularities and obtained a decree as prayed for. In the meanwhile, T, the purchaser of the talook, having made default in payment of rent, the *patni* was again sold for the sum of Rs. 98,000. Out of this sum, the zemindar drew out from the Collectorate the sum of Rs. 38,000 due on account of rent, and the balance of Rs. 60,000 remained to the credit of T. In the interim, C had purchased the right, title, and interest of B, in the decree obtained by him for setting aside the sale of his *patni*, and, in virtue of his rights under that decree, sued T for the surplus sale-proceeds standing to his credit in the Collectorate, and obtained a decree. C again sued T for mesne profits for the period during which T was in possession of the talook. And the present suit was again brought by C against T for the amount drawn by the zemindar out of the sale-proceeds of the talook, on the ground that T had wrongfully failed to pay rent to the zemindar though he had himself collected rents from the under-tenants. *Held*, that the suit was barred by s. 7 of Act VIII of 1859. The plaintiff's claim in the present suit undoubtedly formed a part of the sum claimed which comprised the amount recovered in the first suit for surplus proceeds of sale. The plaintiff's first suit, as it were, admitted that the original proprietor of the *patni* could only be entitled to recover that portion of the proceeds of sale which remained over and above after payment of the zemindar's rent. There was either a just claim for the whole of the sale-proceeds or there was not. If there was, the plaintiff was bound to have claimed the whole of it in the first suit. Having omitted to claim a portion, he cannot now be allowed to claim it in the present suit. TARINI PRASAD GHOSE v. KHUDUMANI DEBI, **5 B.L.R. 184 = 13 W.R. 261.** (1 W.R. 199, *D.*)

(30)—*Act* VIII *of* 1859, *s.* 7—*Rents due in Azeemabad rupees sued for in Company's rupees —Abandonment.*—If rents due in Azeemabad rupees are sued for in Company's rupees, the former coinage more valuable than the latter, the omission to sue for the difference in value is an abandonment of claim under s. 7, Act VIII of 1859, and a fresh suit does not lie for the recovery of the same. MEER MAHOMED SOODUCK GOLESTAN v. FORBES, **5 W.R. Act X, Rul. 90.**

(31)—*Suit for possession—Plea in bar—Rent suit—Maintainability—Act* VIII *of* 1859, *s.* 7. —Where, in a suit for possession, the defendant would set up the plea in bar, the plaintiff cannot be allowed to bring a suit for rent in order to raise the question of title, because such a proceeding is opposed to the principle

Relinquishment of portion of claim—*contd.*

laid down in s. 7 of Act VIII of 1859. RAM TUNNO KOLOO v. SHORODA PERSHAD MULLICK, **19 W.R. 91.** [*R.*, 20 W.R. 270; *D.*, 23 W.R. 342.]

(32)—*Cause of action, splitting of.*—A *patni* having been sold for arrears of rent, one of the co-sharers brought a suit and eventually obtained a decree setting aside the sale. In the meantime, however, in consequence of the purchaser having defaulted in payment of rent, the *patni* had again been sold and the decree could not be executed for recovery of possession. On this, the decree-holder sued the purchaser at the first sale and others for the surplus proceeds of the second sale, and recovered a portion of the surplus proceeds. He then sued for and recovered mesne profits. Subsequently he brought a third suit for compensation. *Held*, that whatever the plaintiff was entitled to recover from the defendants under the decree already mentioned constituted one single cause of action and that he was bound to include in the suit which he brought upon that cause of action everything to which he was so entitled, and that the present suit was therefore barred. TARINI PRASAD GHOSE v. RAGHAB CHANDRA BANDOPADHYA, **5 B.L.R. 187, Note=13 W.R. 205.** [*R.*, 5 B.L.R. 184.]

(33)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 7—*Dispossession—Suit for mesne profits—Subsequent suit for profits arising out of same dispossession—Maintainability of suit.*—The plaintiffs, having been dispossessed of a tank and land on its bank, instituted proceedings under s. 15 of Act XIV of 1859 and recovered possession of the whole of the above premises. Then the defendants instituted a regular civil suit to establish their title, in which again the plaintiffs were successful. Thereupon, the plaintiffs brought a suit for the value of fish taken by the defendants on the day of dispossession, and the suit was compromised. Subsequently, the plaintiffs brought the present suit for mesne profits in respect of fish and grass appropriated by the defendants during a certain period they were in possession. *Held* that the present claim of the plaintiffs for the period preceding the institution of the previous suit was barred by s. 7 of Act VIII of 1859. The previous suit and the present were both suits for damages and the previous suit and compromise ought to have included all claims of the plaintiffs arising out of the dispossession from the tank. SAEM SIRDAR v. KAMALUDDY SIRDAR, **22 W.R. 424.**

(33-*a*)—*Civ. Pro. Code*, 1882, *s.* 43—*First suit for possession and mesne profits—Subsequent suit for mesne profits.*—The plaintiff sued for possession of immoveable property upon a forfeiture and for mesne profits in respect of the same property up to the date of the alleged forfeiture, and obtained a decree. Subsequently, he brought a separate suit for mesne profits including the period from the date of the forfeiture to the date of the institution of the former suit. *Held*, that the claim in the subsequent suit was barred by s. 43 of the Code.

Relinquishment of portion of claim—*contd.*

MEWA KUAR v. BANARSI PRASAD, **17 A. 533 =A.W.N. 1895, 121.** (3 A. 660, 11 M. 151, *R.*) [*Affirmed*, 23 A. 227, P.C; *Not F.*, 32 M. 330=5 M.L.T. 105; *Appr.*, U.B.R. 1904. 1st Qr., C.P.C. 42, 43; *R.*, 18 A. 131=16 A.W.N. 2, 3 L.B.R. 56, 9 O.C. 224, 322.]

(33-*b*)—*Ss.* 43, 44, *Civ. Pro. Code—Claims to recover possession and mesne profits, distinct claims—Cause of action different—Scope of s.* 44, *Civ. Pro. Code*—According to ss. 43 and 44, of the Code of Civil Procedure (1882), claims to recover possession of immoveable property and for mesne profits are distinct claims, and there has been no alteration of the law in this respect between s. 10, Act VIII of 1859, and the present Code, although, no doubt, the terms of the law of 1859 were more precise. The cause of action and the nature of the suit in each case are altogether different. S. 44, Civ. Pro. Code, merely permits joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property. LALESSOR BABEE v. JANKI BIBEE, **19 C. 615.** (8 C. 593, 12 C. 482, 17 C. 968, *R*; 11 M. 151, *Diss.*) [*F.*, 31 M. 405=1 M.L.T. 192, 1 L.B.R. 13; *Cited*, 78 P.R. 1902=137 P.L.R. 1902, 30 A. 225=5 A.L.J. 192=A.W.N. 1908, 96; *R.*, 17 A. 533, 5 M.L.T. 105=32 M 330, U.B.R. 1904, 1st Qr. Civil Procedure, 42, 9 O.C. 322; *Not F.*, 9 O.C. 224; *Diss.*, 3 L.B.R. 56; *D.*, 34 C. 223 =5 C.L.J. 192.]

(34)—*Act* VIII *of* 1859, *ss.* 7, 8, 9—*Mesne profits—Damages.*—Mesne profits, or rather damages for mesne profits are, no doubt, usually measured by the actual rents and profits of the land issuing during the period of dispossession; but they are essentially damages. The ground upon which the plaintiff in any case is entitled to ask for those damages is the wrongful conduct of the defendants in dispossessing and keeping him out of possession. Although no doubt, a claim for mesne profits is, for the special purposes of ss. 8 and 9 of the Civ. Pro. Code, deemed a separate cause of action from a claim for the land in respect of which it is made, yet it cannot itself be divided, and every suit brought to recover mesne profits must, by s. 7 of the Civ. Pro. Code, include the whole claim arising out of the cause of action which gives the ground for making it. MUSSAMUT ROOKMINEE KOOER v. RAM TOHUL ROY, **21 W.R. 223.** [*R.*, 9 C. 283.]

(35)—*Suit for possession of immoveable property—Suit for mesne profits—Relinquishment of part of claim—Civ. Pro. Code*, 1877, *ss.* 43, 44.—Mesne profits which can be claimed in a suit for possession of immoveable property up to the date of suit, but which were not so claimed, cannot be subsequently sued for in a separate suit LALJI MAL v. HULASI, **3 A. 660, F.B** [*Diss.*, 19 C. 615; *F.*, 17 A. 533, U.B.R. 1904, 43, p. 1, 3 L.B.R, 56.]

(36)—*Civ.8Pro. Code*, 1877, *s.* 43—*Relinquishment of part of claim — Mesne profits.*—Where a suit for possession of certain trees was

Relinquishment of portion of claim—*contd.*

based upon the interference by the defendant with the plaintiff's possession of such trees and the wrongful taking of the fruit of such trees, a subsequent suit for mesne profits, namely the value of such fruit, would be barred by the provisions of s. 43 of the Civ. Pro. Code. DEBI DIAL SINGH v. AJAIB SINGH, **3 A. 543.** [*R.*, 11 M. 210.]

(37)—*Suit for mesne profits—Cause of action—Civ Pro. Code.*—The plaintiff, having obtained a decree for possession of lands together with mesne profits from the date of suit, filed another suit for mesne profits for the time prior to the institution of the previous suit. *Held* that the present suit was barred under s. 7 of the Civ. Pro Code, and could not be sustainable. RAM RUTTUN ANDO v. RAM CHUNDER PAL, **25 W.R. 113.**

(37-*a*)—*S.* 43, *Act* XIV *of* 1882, *Civ. Pro. Code—Relinquishment or omission to sue for portion of claim—Succession of a Mahomedan widow by local custom to a life-interest in the estate of her husband—Cause of action in her suit for dower distinguished from that in her suit for such estate.*—A decree in a suit by a Mahomedan widow against the brother of her deceased husband, declaring her right to possess for life the estate of the latter in accordance with a proved local custom, with an order for possession, was affirmed. A decree in a suit previously brought by the widow against the same defendant for her dower, gave no occasion for the application of s. 43, Civ. Pro. Code, having been made upon a cause of action distinct from that on which the present suit was founded. MAHOMED RIASAT ALI v. HASIN BANU, **21 C. 157, P.C. =20 I.A. 155=6 Sar. 374.** (8 M. 520, P.C., *F.*) [*F.*, 26 M. 760=13 M.L.J. 448, 11 O.C. 69.]

(38)—*Butwara—Jurisdiction — Civil Court.*—A Civil Court has no authority to order the Collector to make a partition of the jummas payable to Government in respect of the several mehals which are intermixed in a portion common to all. JHABA LALL ROY v. THE COLLECTOR OF TIRHOOT, **21 W.R. 272.**

See ADMISSION — ADMISSION IN PLEADINGS, 6 A. 395=A.W.N. 1884, 136.

See ALLUVION—GENERAL, 9 B.L.R. 150=16 W.R. P.C. 5.

Court-fee—Revision—*See* CIV. PRO. CODE, 1908, O. VII, rr. 1, 2, 4, 5, 6, O. XXXIII, r. 1, s. 115, A.W.N. 1900, 214.

Effect of relinquishment by one co-sharer on shares of others—*See* CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS, 16 C.P.L.R. 28.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 12 W.R. 279.

See HINDU LAW—WIDOW, 3 B.L.R.A.C. 421=12 W.R. 336.

See INTEREST—SPECIAL CASES, 6 W.R. MIS. 121.

Relinquishment of portion of claim—*concld.*

See LEGAL PRACTITIONERS—PLEADER—AUTHORITY TO BIND CLIENT, 3 B.L.R. App. 15.

See MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 4 B.L.R. F.B. 113=13 W.R. F.B. 15=14 W.R. 151.

See MORTGAGE—MARSHALLING, 13 B. 45.

Of portion of claim—Effect—*See* PLAINT—GENERAL, 8 M.L.T. 436=8 Ind. Cas. 943.

See RES JUDICATA—MATTERS IN ISSUE, 18 B. 537.

Relinquishment of Tenure.

See LANDLORD AND TENANT.

(1)—*Act* X *of* 1859, *s* 19—*Lease for fixed term—Right to relinquish.*—A ryot, who has taken a lease in writing of certain lands for a specific term, is not entitled under s. 19, Act X of 1859, to throw up his lease during its currency. KASHEE SINGH v. P. ONRAET AND T. GRANT, **5 W.R. Act X, Rul., 81.** [*F.*, 1 Agra Rev. App. 22; *R.*, 7 W.R. 62; *D.*, 9 W.R. 89.]

(2)—*Act* X *of* 1859, *s.* 19—*Notice of relinquishment under.*—When the lessees have contracted for a definite specified interest in land, the contract or lease must regulate the whole relationship between the parties, not only in regard to the time of the commencement and continuance but also in regard to the termination of the holding, and the provisions of s. 19 of Act X of 1859 are not applicable in such cases. BABOO DWARKA DASS v. GOKUL DASS, **1 Agra Rev. 22.** (5 W.R. 81, *F.*)

(3)—*Act* X *of* 1859, *s.* 19—*Relinquishment of land by ryot—Application to Collector not necessary—Notice direct by tenant to landlord—Burden of proof.*—There is nothing in the provisions of s. 19 of Act X of 1859, imperatively requiring that an application for service of notice of relinquishment must necessarily be made by the ryot to the Collector. In the present case, however, the ryot had made such an application, and if the Collector failed to serve the notice contemplated by the law, his neglect of duty cannot affect the rights of the tenant; nor can the landlord have any substantial ground of complaint on account of the non-service of such notice by the Collector, if the tenant can prove that, previous to his application to that officer, he had given actual notice, of his intention to relinquish, directly to the landlord himself or to his authorized agent. Also, where the tenant is found to have taken all the steps required by the law in furtherance of his intended relinquishment, it is for the landlord to prove that he continued in possession of the land, and enjoyed the profits by holding it *khas* or by letting it to other parties. MR. JAMES ERSKINE v. RAM COOMAR ROY, **8 W.R. 220.**

(4)—Miras — Razinama — *Abandonment of* Miras *right—Ejectment.*— A *Mirasdar* who has given in a *razinama* has the right to recover

Relinquishment of Tenure—*continued.*

his land if he sues within the period of limitation unless in that document it is expressly stipulated that he has abondoned his *miras* right. JOTI BHIMRAV v. BALU *bin* BAPUJI, **1 B. 208.** [*R.*, 4 Bom. L.R. 801.]

(5)—*Act* X *of* 1859, *s.* 19—*Agreement not to relinquish jote—Relinquishment, validity of.*—In a suit for rent of the year 1271 B.S. on the specific terms of a *kabuliat* executed by defendant's father, in which the father set forth that the *kabuliat* should be binding on his heirs for ever, and that a relinquishment of the *jote* should never be permitted, the defendant's answer was that he relinquished the *jote* in 1270 B.S. and that the father's deed could not bind defendant never to relinquish a tenure, when the law clearly enacted (s. 19, Act X of 1859) that that power should be with a tenant under certain defined provisions. The lower appellate Court ruled that the general provisions of s. 19, Act X of 1859, could not prevail against such express stipulations as were set forth in the *kabuliat. Held* that the lower Court was wrong and that the defendant was entitled to relinquish the *jote* and that he was not liable for the rent sued for. GOPAL PAL CHOWDHRY v. TARINEE PERSHAD GHOSE, **9 W.R. 89.**

(6)—*Omission to take up* mal *land at survey —Another cultivator allowed to hold* mal *land paying assessment — Forfeiture of claim.*—A person who fails at the survey to take up *mal* land which he held without assessment before the survey, and allows it to be taken up by another cultivator who pays the assessment upon it, must be held to have forfeited his claim to such land. BALKIRSHNA GOBIND GADGIL v. NARAYAN SAKARAM, **8 B.H.C. A.C. 180.**

(7)—*Bombay Act* (I *of* 1865)—Miras *land—Hindu widow — Mortgage* — Razinamah — *Sale for arrears of revenue—Distinction.*— A mortgage of the *mirasi* estate by a duly executed mortgage-deed by the widow of a Hindu *mirasidar*, binds her estate in the lands as a Hindu widow ; and, on its execution, what is left to her is only the equity of redemption. A *razinamah* of the lands in question, given by her on a subsequent date, does not affect the previous mortgage by her, and transfers only the equity of redemption. (1 B. 91, *D.*) [*Appl.*, 14 B. 506.] There is a distinction between taking *miras* lands through a *razinamah*, and purchasing them at a sale for arrears of Government land revenue. In the latter case, inasmuch as the Government land-revenue is the paramount charge upon the land the purchaser takes the land discharged of all incumbrances. RAMACHANDRA MANKESHWAR v. BHIMRAU RANJI, **1 B. 577.** (10 B.H.C. 416, 11 B.H.C. 218, *R.*)

(8)—*Relinquishment by ryot of portion of land—Notice of relinquishment, form of.*—In order that a ryot, by relinquishing a portion out of a considerable quantity of land held by him, may relieve himself from liability to pay rent, it is not enough that he gives notice that he

Relinquishment of Tenure—*concluded.*

relinquishes a part of the land without specifying what that portion is. HABELA SIRCAR v. DOORGA KANT MOJOOMDAR, **11 W.R. 456.**

(9)—*Relinquishment of land — Service of notice to quit—Ootbundee ryot, s.* 19, *Act* X *of* 1859.—The service of a notice to quit by a landlord on an Ootbundee ryot unless an enhanced rent is paid, and the signification by the ryot of his intention to relinquish the land amount to a sufficient compliance with s. 19, Act X, 1859. MR. THOMAS, J. KENNY v. ISSUR CHUNDER PODDAR, **W.R. 1864, Act X, Rul. 9.**

(10)—*Reg.* XVII *of* 1827, *s.* 42— *Scope—Written notice of relinquishment to Collector—Notice of enhancement by Collector.*—S. 42, Reg. XVII of 1827, is of general application, and is not limited to lands in which a new survey settlement has been introduced. Not only holders of land under a survey settlement, but holders of all land who come within the scope of the Regulation and its supplemental Act IV of 1868 (Bom.) are bound to give written notice before they relinquish their holdings. Reading s. 42 with cl. 1 of s. 44, the true interpretation would seem to be that the restriction placed upon the exercise by the raiyat of his right to surrender, and the declaration of his continuance of liability for assessment, if his relinquishment was not notified by a particular date, imposed a corresponding obligation upon the Government to give him notice of enhancement within a period which would allow him to consider his position and leave him at liberty to exercise without obstacle or injury his right to resign the land. It would be most unjust to an occupant to hold that his assessment could be raised after he had lost his option of throwing up the land. GOVINDVINAYAK GADRE v. THE COLLECTOR OF RATNAGIRI, **6 B.H.C. A.C. 101.** [*Expl.*, 12 B.H.C. 225 ; *R.*, 12 B. H.C. App., 1.]

(11)—*Act* VIII *of* 1869 (*B.C.*), *s.* 20—*Relinquishment of lease—Notice*—Onus—*Parol evidence.*—A ryot is under no obligation to given any notice under s. 20, Act VIII of 1869, merely to entitle him to give up the land at the termination of a lease for a short term under which he holds. It lies upon the plaintiff who says that a ryot did not relinquish when the term of his lease expired, to prove that the tenant held on. The *onus* of proving relinquishment is not on the ryot. The fact of relinquishment of a lease after its expiry may be proved by parol evidence. TILAK PATAK v. MAHABIR PANDAY, **7 B.L.R. App. 11=15 W. R. 454.**

See RIGHT OF OCCUPANCY — LOSS OF RIGHT, 38 P.R. 1871.

Remainderman.

Doctrine of equity in England—Applicability to India— *See* EQUITY, 11 A. 57=A.W.N. 1888, 296.

Remand.

See CIV. PRO. CODE, 1908, O. XLI, rr. 23, 25 TO 29.

(1)—*Act* VIII *of* 1859, *s.* 354, *object of remand under—Determination of issue on fresh evidence taken.*—The object of a remand under s. 354 of Act VIII of 1859 is not that the Judge should try the issue on the evidence already taken and on the record, because, that is a matter which the Court sitting in regular appeal can do for itself without the assistance of the lower Court. Where a case has been remanded under s. 354, it is the duty of the lower Court to take such evidence as the parties may have to offer for the determination of the issue. ABDOOL KHYRAT v. JUMALOODDEEN HOSSEIN, **10 W.R. 244.**

(2)—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 566—*Remand—Findings arrived at before order of remand—Power of Appellate Court to re-consider those findings.*—In law there is no determination of the appeal when a remand is made under (s. 566) of the Civ. Pro. Code, and the findings of the Appellate Court are only opinions until the final judgment is passed. There is no legal objection to those opinions being re-considered by the Appellate Court, though, as a rule, this should be done only when the Court finds that its former view is obviously wrong. HARI SINGH v. LABHU SHAH, **80 P.L.R. 1902.** (10 A. 162, *F.*)

(3)—*Procedure in remanding a case.*—In remanding a case, the issues, which the lower Court is required to decide, must be specifically stated. It is not enough to direct the case to be decided in accordance with observations in the judgment. GRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY, **27 C. 951, P.C. = 27 I.A. 110 = 4 C.W.N. 631 = 10 M.L.J. 356 = 2 Bom. L.R. 709 = 7 Sar. 687.**

(4)—*Remand of suit of the Small Cause Court class—Appeal from order to High Court.*—An order by a Court, in the exercise of appellate jurisdiction, under s. 562 of the Civ. Pro. Code, remanding a case of the Small Cause Court class as described in s. 586, is appealable to the High Court. KIRTE MOHALDAR v. RAMJAN MOHALDAR, **10 C. 523.** [*D.*, 24 C. 774.]

(5)—*Remand by lower appellate Court, a second time — Appeal, if lies — Directions to be made by Lower Appellate Court when ordering a second remand.*—If an order of remand by a lower appellate Court is not carried out by the Court of first instance, and the case is remanded a second time, no appeal lies from the order. When a superior Court remands a case a second time, it should not confine itself to a vague general remark that its previous order had not been carried into effect, but should likewise state what the main requirements of such order were, and how the Lower Court's decision shows that they have not been carried out. RADHABULLUB SURMA v. ANUNDMOYEE DEBEA, **W.R. 1864, Mis. 39.**

(6)—*Remand by lower appellate Court--Appeal to High Court against order of remand—Duty of High Court.*—Where the first appellate Court

Remand—*continued.*

remands a suit to a Court of first instance, and an appeal is preferred to the High Court against the order of remand, all that the High Court can do is to take the facts as found by the lower appellate Court and to say whether, upon those facts, the Judge of the lower appellate Court was wrong in point of law in remanding the case. KHUSHAL PANACHAND v. BHIMABAI, **12 B. 589.** [*R.*, 14 B. 14.]

(7)—*Appeal—Revision—Civ. Pro. Code*, 1908, *O.* XLI, *r.* 23.—*Held*, that, where the order of remand under r. 23 of O. XLI is not appealable, it is not also subject to revision. RAMJI DAS v. SHANKER DAS, **10 P.W.R. 1912 = 140 P.L.R. 1912 = 13 Ind. Cas. 855.** (50 P.R. 1911, 101 P.R. 1910, 9 P.R. 94, P.R. 897 of 1910, *F.*)

(8)—*Appeal against an order of remand—Decision of first Court on remand order no bar to appeal—Court of appeal, power of—Settlement Circular No.* 63 *of* 1863, *legal force of—Groveholder of longstanding, position of.*—Where a Court of first appeal, setting aside the decision of the Court of first instance on a preliminary point, remanded the case for decision on the merits, and there was an appeal against the order of remand, *held*, that the fact of the case having been decided by the Court of first instance in accordance with the remand order before the appeal came on for hearing was no bar to the appeal being heard and disposed of. *Held*, further, that a Court hearing an appeal against an order of remand has power not only to decide whether the order of remand was in accordance with law or not, but also whether the decision was correct or not and to dispose of the suit accordingly. *Held* also that Settlement Circular No. 63 of 1863 has not the force of law, and that the position of a grove holder, who had been in possession of the trees of a grove for a long period, whether he be a mere tenant or one of the old proprietary body, is not, in respect of under-proprietary rights, in any way different from that of any other person who claims those rights GIRDHARI LAL v. JASWANT SINGH, **15 O.C. 33 = 15 Ind. Cas. 181.**

(9)—*Appeal against an order of remand—Order of remand carried out by first Court no bar to appeal—Civ. Pro. Code, O.* XLI, *r.* 23. — Where a suit had been remanded under O. XLI, r. 23, Civ. Pro. Code, *held* that the fact that, before the appeal against the order of remand was filed, the order of remand had already been carried out by the first Court, was no bar to the hearing of the appeal. HUB LAL v. GANGA, **15 O.C. 43 = 15 Ind. Cas. 191.** (5 A.L.J. 447, *F.*; 30 A. 191, 4 A.L.J. 562, *R.*)

(10)—*Interlocutory order of remand no appeal preferred against — Validity of remand order, objections to, may be raised during appeal against final decree.*—The omission, by a party, to appeal directly from a remand order, does not preclude him from objecting to it in his appeal from the final decree. There is nothing in any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he

Remand—*continued.*

may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. The party might have appealed directly as against such an order, but, merely because he has omitted to do so, he cannot be taken to have so submitted to the order as to be precluded from objecting to it on the subsequent appeal against the final decree. SAVITRI v. RAMJI, **14 B. 232.** [*F.*, 23 C. 335, 28 C. 324=5 C.W.N. 509, 32 P.L.R. 1906; *Appr.*, U.B.R. 1892—1896, 525, 20 M.L.J. 805=8 M.L.T. 72=6 Ind. Cas. 239; *R.*, 14 A. 348, 18 M. 421, 24 C. 725, 12 C.P.L.R. 119, 9 O.C. 80, 71 P.R. 1907=37 P.L.R. 1908, 7 M L.T. 93.]

(11)—*Ss.* 562, 566, 578, 588, *Civ. Pro. Code*, 1882—*Remand order — Appeal.*— Proceedings taken under a remand order under s. 564, instead of, as they ought to have been, under s. 562, are not illegal. (14 B. 232, *R.*) S. 578 is applicable in curing the defect, of an erroneous order of remand, if it does not affect the merits of the case. [*F.*, 28 M. 437=15 M.L.J. 236, 5 C.L.J. 71, 11 C.W.N. 380.] The validity of a remand order may, though not assailed in an appeal under s. 588 (28), Civ. Pro. Code, 1882, be contested in an appeal against the final decree. MOHESH CHANDRA DASS v. JAMURIDDIN MOLLAH, **28 C. 324=5 C.W.N. 509.** (7 M.I.A. 283, 14 B. 232, *F.*) [*R.*, 9 O.C. 80, 6 C.L.J. 547=12 C.W.N. 590.]

(12)—*Remand—Review praying for remand on different issue.*—The High Court having remanded a case (12 W.R. 229) for the trial of an issue under the specific provisions of cl. 1, s. 4, Reg. XI of 1825, the plaintiffs applied for review contending that it was requisite for the ends of justice to remand to it to be tried on another and a very different issue under cl. 3 of that section, as it was to that issue that they had directed all their evidence. *Held* that, as it was impossible to verify the statements contained in the review petition without going through the records once again and in fact giving the applicants for review a second special appeal, the application ought to be rejected. JUGGOBUNDHOO BOSE v. J. P. WISE, **12 W.R. 409.**

(13)—*Remanded case—Fresh vakalatnamah.*—Fresh vakalatnamah is not necessary in a remanded case. SREEMUTTEE NOBINMONEE DOSSEE v. JOY GOPAL GOSSUR, **1 W.R. 276.**

(14)—*Order remanding case—Civ. Pro. Code (Act X of 1877), s. 562—Decree—Court Fees Act (VII of 1870), sch. I, art. 1 and sch. II, art. 11.*—An appeal from an order remanding a case under s. 562, Civ. Pro. Code, 1877, ought to be stamped under art. 11 of sch. II of the Court Fees Act (VII of 1870) and not under art. 1 of sch. I of the Act. An order under s. 562, Civ. Pro. Code, 1877, is not a 'decree' nor 'an order having the force of a decree.' SADIQ MAHOMED v. GUR SAHAI RAM, **6 P.R. 1880.**

Remand—*continued.*

(15)—*Act X of 1862, sch. II, art. 11, Note 1—Stamp duty—Refund.*—*Held* by the majority of a Full Bench that when a suit is remanded in part, the appellant is entitled to only a proportionate refund of stamp-duty. (*Campbell and Loch, JJ., contra*). *In the matter of the petition of* DOORGA DAS DUTT, **B L.R. Sup. Vol. 511=6 W.R. Mis. 65, F.B.** [*F.*, 18 W.R. 434; *D.*, 20 W.R. 106.]

(16)—*Remand of suit—Date for re-hearing—Duty of Court—Parties to suits.*—When a case is remanded for re-trial, some date should be fixed for the re-hearing, thus giving the parties an opportunity to appear and take measures for carrying on the suit. The purchaser of the rights of a claimant, as next heir to the former owner, is a party to the suit. HARADHUN CHUCKERBUTTY v. PROTAP NARAIN CHOWDHRY, **11 W.R. 401.**

(17)—*Practice — Procedure — Remand by Judicial Commissioner — Retrial — Notice of date of—Not necessary—Case heard* ex parte *—Fixing of date for judgment—Application to set aside* ex parte *proceedings—When to be made —O. IX, r. 7, Civ. Pro. Code*, (1908).—When a case is remanded for retrial to the Court of First Instance by the Court of Judicial Commissioner, no notice of the date fixed for the subsequent hearing of the case will be issued to the parties. (2 C.P.L.R. 32, 4 N.L.R. 166, 17 W.R. 70, *R.*) But parties are entitled to a reasonable time. The rule applies as well to the Central Provinces as to Berar. Where a case, which was tried *ex parte*, was fixed for judgment on a certain date, *held* that there was no adjournment of the hearing, and that the defendant need not have applied before that date under O. IX, r. 7, to have the *ex parte* adjournment set aside. GOSAVI v. MALRAJ, **7 N.L.R. 172=12 Ind. Cas. 807.**

(18)—*Legal representative—Heir.*—It is not by any means a matter of course that the heir and legal representative of a deceased person should be one and the same individual. Such may or may not be the case. "Heir" and "legal representative" are not convertible terms. They are frequently wholly different parties. BAI VIJKOR v. FAKIRBHAI TULJARAM, **2 B.H.C. 317.**

(19)—*Materials for determination of result of remand.*—The only materials that should be placed before the Court to determine the result of the remand are the judgments and the decrees made in the case. FANI BHUSAN ROY CHOWDHURY v. BAMA SUNDARI DEBI, **4 C.W.N. 343.**

(20)—*Remand — Re-trial.*—Where the remand is for a "re-trial," the whole case is opened again *de novo* and the plaintiff may prove his case in any way he could. GUDADHUR DUTT v. SHUSHEE MONEE DOSSIA, **21 W.R. 7.**

(21)—*New trial, effect of.*—When a case is sent back for new trial on remand, the whole case is re-opened. TARINEE KANT LAHIREE v. KOONJ BEHAREE AWASTEE, **12 W.R. 112.**

Remand—*continued.*

(22)—*Remand of rent case to lower appellate Court—Finding additional to those directed—Act* VI *of* 1862, *s.* 3—*Competency of Judge to award damages without appeal on the point.*—By the order of remand in this rent suit, the Judge was required to ascertain whether the *amulnamah* produced by the plaintiff and the *pottah* filed by him in a survey case were one and the same. This was found to have been the case, but the Judge found that the *pottah* was a different one from that which the defendant had given to the plaintiff for filing in the survey case. The Judge reversed the decree for rent at the old rates that had been passed by his predecessor and also adjudged the plaintiff to pay damages under s. 3 of Act VI of 1862. It was objected that the above orders of the Judge were illegal, but it was held that the whole case was re-opened and that it was competent to the Judge to have awarded damages even in the absence of any appeal on the part of the defendant on that point. RAM CHUNDER SURMAH CHOWDHRY v. DAGOO KHAN, **10 W. R. 339.**

(23)—*Remand to first Court on point of limitation—Decision by first Court—Right of parties to subsequently appeal upon whole case.*—On this case having been remanded to the lower appellate Court, it decided the issue as to limitation, in respect of which the High Court had ordered the remand, without allowing the appellant to adduce evidence directed to meet that issue. The High Court thereon reversed the decision and remanded the case with directions to the lower appellate Court to send it to the Court of first instance for trial of the issue of limitation, ruling that, upon the decision of the case by the first Court upon such issue, it would be competent to the parties to appeal upon the whole case notwithstanding the appeal which had already been had. RUGHOONUNDUN PERSHAD SINGH v. CHUTTUR PAUL SINGH, **10 W.R. 335.**

(24)—*Remand for decision of a particular question—Going beyond order of remand—Jurisdiction.*—A Court to which a case has been remanded for decision of a particular question has no authority to re-open a matter which has already been adjudicated upon between the parties or to go beyond the order of remand. SAHEB TEWAREE v. KISHOREE SAHOY SINGH, **24 W.R. 330.**

(25)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 351—*Fresh issue—Remand—Powers of Appellate Court.*—Where a Subordinate Judge, in appeal, framed an issue and remanded the case for trial thereof, directing the first Court to pass a decree in accordance with the finding it might arrive at instead of directing it to submit the finding, and the first Court passed a decree as directed, and the case, thereupon, went up to the Additional Judge in appeal, *held* that the Additional Judge should confine himself to considering whether the decision of the Court below on the issue directed was correct or not and that he had no power to go behind the order of the Subordinate Judge on the previous occasion. BODUN BUROOH v. ABDOOL GUNNY, **19 W.R. 281.** [*R.*, 6 N.W.P. 114.]

(26)—*Civ. Pro. Code*, 1859, *s.* 73—*Scope—Order of remand, if final.*—It is incorrect to say that s. 73 of Act VIII of 1859, is restricted only to suit for title to land and other immoveable property and does not apply to moveable property. An order of remand made by a Judge cannot be set aside by his successor, such order being final so far as a purpose of the remand goes. LULEET PANDEY v. BYJNATH SINGH, **14 W.R. 285.** [*R.*, 32 M. 318=5 M.L.T. 75=2 Ind. Cas. 535.]

(27)—*Remand of suit by appellate Court—Its powers—Issues—Evidence—Civ. Pro. Code*, 1859, *s.* 354—*Remand only for defect of parties—Successor of remanding Judge may accept evidence recorded by predecessor.*—When a case is remanded by an appellate Court under s. 354 of Act VIII of 1859, it is not limited to the evidence then on the record, for, under the section, it is open to it to raise any issue for the trial which the lower Court might have omitted to raise or to try, keeping the case pending on its own file, until the return by the first Court of its finding thereon, together with the evidence recorded on the trial of such issue, or the appellate Court may itself try the issue so raised. [*Appr.*, 10 B. 398.] The successor of a Subordinate Judge who had accepted evidence as sufficient, but remanded the case only for a defect of parties, may, when the case is returned by the first Court, look upon the evidence as *prima facie* good. WISE v. ISHAN CHUNDER BANERJEE, **14 W.R. 380.**

(28)—*Procedure on remand—Absence of Judge who passed decree—Jurisdiction of his successor.*—Where a case is remanded to the lower Court to record reasons for its judgment, if the Judge who passed the decree is absent, the superior Court should be informed of it by his successor. Under such circumstances his successor has no jurisdiction. Application should be made to the Bench which granted the order of remand for an order for the present Judge to re-try the case *de novo*. MANICK SETT v. KHETTER MOHUN GOSSAMEE, **1 Ind. Jur. N.S. 101.**

(29)—*Remand to record reasons for judgment—Deciding Judge leaving district—Case re-heard by successor* de novo—*Jurisdiction—Procedure.*—When a case is remanded to the deciding Judge to record reasons for his finding, his successor, if the deciding Judge has left the district, ought to bring the fact of the departure of his predecessor to the notice of the appellate Court and ask for instructions. But if, instead of doing that, he decides the case *de novo*, he acts without jurisdiction. BAYRUP SHEET v. KHETTER MOHUN GOSSAIN, **5 W.R. 124.**

(30)—*Remand by a District Judge—Findings recorded—Appeal against decision after remand—Successor in office of District Judge reversing facts found by predecessor Legality—S.* 562, *Civ. Pro. Code*, 1882.—Where a District Judge found against the existence of an oral will and

Remand—*continued.*

in favour of an absolute division of properties between co-widows, and remanded the case with instructions to Munsif to try the question, as to the date of the partition, and where, in an appeal preferred against the decree passed in favour of the plaintiff by the Munsif after a trial on remand, the successor in office of the District Judge reversed the findings of his predecessor on the question of the existence of the oral will and that of absolute partition between the widows, *held*, that the findings of the predecessor in the office of the District Judge were binding on his successor and that the latter was not competent to reverse those findings. LACHUMAMMAL v. GENGAMMAL, **8 M. L.T. 233.**

(31)—*Disposal of on preliminary point—Reversal of decree on appeal, and irregular remand of case under s.* 562, *Civ. Pro. Code*, 1877, —*Power of succeeding Judge to re-try preliminary point.*—Where, on appeal in a suit dismissed on a preliminary point, the District Judge reverses the lower Court's decision on such point, and remands the case under s. 562 (though irregularly) for the trial of a certain issue, it is not competent for his successor, when the case comes up again in appeal, to re-try and decide such preliminary point. SURAJ DIN v. CHATTAR, **3 A. 755 = A.W.N. 1881, 55.** [*R.*, 32 M. 318; *Appr.*, 14 A. 348.]

(32)—*Civ. Pro. Code*, 1882, *s.* 562—*Appeal to High Court from order of remand – Competency of High Court to go into correctness of decision on preliminary point.*—On appeal from an order of remand by the lower appellate Court, under s. 562 of the Civ. Pro. Code, it is open to the High Court to do more than consider whether the order satisfies the requirements of s. 562, it being competent to the High Court to go into the merits and consider also the correctness of the decision of the lower Court on the preliminary point. In the case of such an appeal, the Code imposes no restriction as to the grounds on which the appeal lies, as is done in s. 629 of the Civ. Pro. Code, with respect to an appeal from an order for the admission of review of judgment, and, in the absence of such restriction, the main object of an appeal from an order of remand must be taken to have been to admit of a determination by the superior Appellate Court as to the correctness of the lower Appellate Court's adjudication on the preliminary point on which the Court of first instance disposed of the case before effect had been given to the order of remand. BHAU BALA v. BAPAJI BAPUJI, **14 B. 14, F.B.** [*Appr.*, 16 A. 252 = 14 A.W.N. 64, 20 M. 152; *R.*, 1 P.R. 1903, F.B. = 1 P.L.R. 1903; *D.*, 19 M. 422.]

(33)—*Civ. Pro. Code*, 1882, *ss.* 562 *and* 588 (28).—Orders of remand under s. 562 of the Civ. Pro. Code can only be made upon a preliminary point, when the lower Appellate Court reverses the decision of the first Court upon that preliminary point. S. 588 (28) of the Civ. Pro. Code gives a special right of appeal against orders of remand under s. 562,

Remand—*continued.*

but the fact that the lower Appellate Court has referred the case under s. 562 in respect of a preliminary point in respect to which it has differed from the first Court, does not create a right of appeal against a decision of the lower Appellate Court in regard to a separate point as to which the Courts are agreed. SAYAD MUHAMMAD ISHAQ v. MOHRU MAL, **185 P. L.R. 1901 = 28 P.R. 1902.**

(34)—*Civ. Pro. Code, s.* 562—*Remand—Effect of order of remand in limiting powers of the lower Court.*—When a decree is set aside on a preliminary point and an order of remand made under s. 562 of the Code of Civil Procedure, the only point which the Court below must accept as decided is the point which the Court of appeal actually decided and on the decision of which the Court of appeal set aside the decree of the Court below. All other points of law or fact are open, and it is competent to the Court below to consider them and to determine them. BENI PRASAD KUNWARI v. SAMPAT, **A.W.N. 1897, 108.** (24 W.R. 332, *Diss.*)

(35)—*Cases of appeal after remand—Remand for specific purpose—Statement on merits of whole case.* — Where the Appellate Court remands a case for a specific inquiry, it will not receive any statement on the part of the zillah Judge as to what he considers on the merits of the whole case. DONZELLE v. RAMNARAIN SINGH, **1 Ind. Jur N.S. 51.**

(36)—*Civ. Pro. Code, Act* VIII *of* 1859, *s* 354 —*Remand for finding on particular issue—No fresh trial on other issues.*—The result of sending down an issue to the first Court in pursuance of s. 354, Act VIII of 1859, was not to remand the suit for re-trial. The matter in dispute between the parties did not thereby become open for the consideration or determination of the first Court. The sole matter, which was placed before the first Court was the matter comprised in the issue which was remitted and in respect of other matters the Court was *functus officio*. Consequently it was not competent to the first Court to refer to arbitration such of the matters as had been already determined. GOSSAIN DOWLUT GEER v. BISSESSUR GEER, **22 W.R. 207.** [*F.*, 7 A. 523.]

(37)—*Civ. Pro. Code.*, *s.* 566—*Reference to arbitration by Lower Court.*—Where an Appellate Court remits issues to the Court of first instance under s. 566 of the Civ. Pro. Code;, the latter Court has jurisdiction only to try the issues remitted, and is *functus officio* in other respects. It cannot, therefore, refer the case to arbitration, which the Appellate Court alone has jurisdiction to do. NAND RAM v FAKIR CHAND, **7 A. 523 = A.W.N. 1885, 139.** (22 W.R. 207, *R.*)

(38)—*Remand—Issues—Duty of Court.*—The Court to which a suit is remanded for the purpose of trying certain specific issues ought not to allow the parties to litigate upon a question which was never put in issue, for instance, where the remand was for a finding as to the

Remand—*continued.*

lawfulness or unlawfulness of an alleged act in order to assess damages, the parties are not to be allowed to contest the question whether the alleged act was committed. NORENDRO COOMAR DUTT CHOWDHRY v. MR. G. FRENCH, **3 W.R. 198.**

(39)—*Suit for possession—Defendant holding as lessee from another —Lease found genuine—Remand—Duty of Court.*—Plaintiff sued the defendant to recover possession of certain property. The defendant claimed to hold under a lease from one L dated 1827. The lease from L was found to be a *bona fide* genuine document ; but the case was remanded by the High Court in order that the issue might be decided as to whether the plaintiff or L was the owner of the property in the year 1827 when the lease was given. The lower Court re-opened the question as to the authenticity of the defendant's lease and declared it to be invalid. *Held* that the Lower Court went beyond the order of remand. The lease having been found to be a genuine and valid document, the only question which remained to be adjudicated and for the decision of which the case was remanded related to the title of the plaintiff in 1827. It was for the plaintiff to satisfy the Court that in that year he was the proprietor of the disputed estate. CHINTA SAHOO v. SHAH FIAZADDOON AHMED, **3 W.R. 132.**

(40)—*Re-trial—Competency of Court to abandon issue.*—Where a case is remanded for re-trial, on a particular issue among others, the Court has no power to allow the plaintiff to abandon the issue, and proceed to try the case upon the other issue raised. SHIB CHUND LAHIRI v. JOYMALA DASI, **7 C.L.R. 103.**

(41)—*High Court—Remand order not obeyed twice by District Judge—Refusal of High Court to go behind remand order.*—Where the District Judge twice neglected to carry out an order of remand to calculate wasilat in a particular manner, the High Court declined, in special appeal, to go behind the remand order or hold that the Judge below had been wrong in carrying out that order. MUSSAMUT RAJEEBUN v. MULLICK AMANUT ALI, **22 W.R. 205.**

(42)—*Remand by Appellate Court for trial on merits —Competency of lower Court to adjudicate on other issues.*—It was contended in this special appeal that, as the High Court had remanded the suit for trial on the merits, the lower Court was wrong in having taken up the point of limitation and dismissed the case. It was however *held* that the case was remanded solely because the High Court was of opinion that the Collector had jurisdiction, and there was nothing in the order of remand to prevent an adjudication upon any other issue, such as that of limitation, which might arise in the case. RAJAH TEJ KISHEN ROY v. SHIB CHUNDER BOSE, **3 W.R. Act X, 158.**

(43)—*Remand for trial of issue not raised in the lower Court—Right of parties to offer evidence.*—Where the issue that has been directed

Remand—*continued.*

to be tried by the lower Court on remand to it happens to be one which had not been laid down by the Court that tried the case, the parties are in fairness entitled to have the opportunity of giving evidence upon it, although the order of remand contains no express direction to that effect. KISTO CHURN CHUCKERBUTTY v. MUGGUN CHUCKERBUTTY, **10 W. R. 491.**

(44)—*Decree of first Court confirmed in appeal —Special appeal—Remand—Appeal dismissed for default—Effect—Petition of compromise presented by vakil—Forgery—Evidence.*—On a decree passed by the first Court being affirmed in appeal, a special appeal was preferred to the High Court, which remanded the case to the lower Appellate Court for distinct findings on certain points, by an order which did not in any way affect the judgment of the first Court. The appellant having defaulted, the appeal was dismissed. *Held* that the decree of the first Court remained in force and was untouched and final. A petition of compromise presented by a Vakil in due course of business, and which operated to stay proceedings in execution, cannot be declared a forgery unless evidence is taken previously on that point. BAL KANAI CHOWDHRY v. TOREE MAHTOO, **17 W.R. 402.**

(45)—*Suit for enhancement remanded to lower Appellate Court—Further evidence—Presumption of uniform payment.*—This suit for enhancement of rent was remanded to the lower Appellate Court with the information to the Judge that the defendant (ryot) had produced sufficient evidence to raise the presumption that he had held his tenure at a fixed rate from the Permanent Settlement, and that it was for the Judge to consider the question as to the ability of the plaintiff to rebut such presumption The Judge directed the first Court to hear further evidence on the. It was objected that the Judge had no authority under the circumstances to allow further evidence to be given by the plaintiff, inasmuch as the order of remand by the High Court did not set forth that he was to give the plaintiff any opportunity of giving further evidence. *Held* considering the manner in which the case had been originally tried, that there was nothing objectionable in the course pursued by the Judge. RAKHAL CHUNDER TEWAREE v. KINOORAM HALDAR, **10 W. R. 442.**

(46)—*Attachment—Claim petition—Decision based on possession—Declaratory suit—Cause of action—No evidence recorded on issue—S. 354, Civ. Pro. Code, 1859—Duty of Appellate Court —Remand.*—Where the defendant's success in a summary proceeding under s. 246 of Act VIII of 1859 was grounded upon the fact that he was in possession of the disputed land as of his own right, that itself casts a slur on the plaintiff's title so as to give him a cause of action to come to Court to have his title declared. An Appellate Court finding no evidence on the record on an issue between the parties must, in remanding the case under s. 354, Act VIII of 1859, direct such evidence, with

Remand—*continued.*

the first Court's finding, to be sent up for decision. SHUMBOO CHUNDER SURNOKAR v. RUSSICK CHUNDER CHUNG, **15 W.R. 346.**

(47)--*Case remanded for legal judgment--Decision on merits by succeeding Judge—Judge to admit evidence of both parties.*—Although, by reason of the previous Judge having left the District when a case was remanded to him, it might be open to the succeeding Judge to enter into the merits and pass a fresh decision, yet, where such a Judge admits fresh evidence on the part of the defendant, he should not refuse to admit that offered by the plaintiff. If he gave the one party such advantage he should treat the other party also in a similar manner. BOOLA SINGH v. BIBEE REAZOONISSA, **6 W.R. Act X, 16.**

(48)—*Remand for re-consideration of whole evidence except one point—Conclusion on that one point found erroneous—Changing finding.*—Where a case is remanded with directions that the whole of the evidence in the case is to be re-considered with the exception of one particular point specified, and the Judge below, on a re-consideration of the whole evidence, comes to the conclusion that his finding on that point was erroneous, he cannot, without a serious miscarriage of justice, allow that finding to remain unchanged. HUREE NATH SHAHA v. ISSUR CHUNDER SHAHA, **24 W.R. 316.**

(49)—*Civ. Pro. Code*, 1882, *s.* 566— *Order of remand—Duty of lower Court.*—A remand order of the High Court in second appeal must be understood with reference to the circumstances of each case. In cases where issues are remanded, simply on the grounds that, although they were matters in issue in the first Court, and the parties had full opportunity of giving evidence, yet the lower appellate Court omitted to record findings, no fresh evidence need be taken. But when the issues were never tried by the Court of the first instance, the Court to which the case is remanded is bound to take such evidence on the new issues as the parties produce, such evidence being legally admissible. JAI v. RAM GHULAM, **A.W.N. 1887, 192.**

(50)—*Practice—Remand—Production of further evidence—Discretion of Court—Civ. Pro. Code, s.* 566.—It is not as a matter of right but with the sanction of the Court, that further evidence can be taken upon remand and, under ordinary circumstances, the Court should try the issues on remand, only upon the evidence on the record. RAMNATH v. SYED ALI AZIM, **A.W.N. 1888, 81.**

(51)—*Defendant heard for first time after remand, right of, to produce evidence.*—On remand of this case to the Assistant Collector, he allowed the defendant to appear and to be heard in answer to the suit, as if he had appeared on the day fixed for his attendance at the first trial. The High Court was of opinion that even if there had been any irregularity on the part of the Assistant Collector in admitting this defendant to be heard under such circumstances, it was not one which the Courts would be inclined to notice and declined to

Remand—*continued.*

interfere with the discretion of the Assistant Collector in having allowed the defendant to appear at that stage, and to be heard. If he was to be heard it would follow irresistibly that he was entitled to produce his evidence, and to ask the Court to consider that evidence. When a suit has been dismissed upon a preliminary point, and the decision on that preliminary point has been reversed by the appellate Court, and the case goes down with a view to trial on the merits, it is usual to allow the parties to produce any evidence which is in their hands, and consequently evidence might properly be received even from the defendants who had appeared, and *a fortiori* from a defendant who had not appeared. KOONJ BEHAREE AWUSTEE v. TARINEE KANT LAHOREE, **8 W.R. 285.** [*R.*, 12 W.R. 112.]

(52)—*Remand—No restriction to evidence on record—New evidence.*—Bona fides--*Finding on.*—Where the order of remand does not restrict the Judge to the evidence on the record, the Judge is at liberty to examine witnesses who are in Court. If the *bona fides* of the grantor is before the Court, or might have been if defendant's pleader had examined him, no special appeal will lie on the ground of the want of a finding on the point. RAM SUNKUR SEIN v. NILKANT BISWAS, **9 W.R. 392.**

(53)—*Suit remanded — Examination of parties.*—On the remand of a suit to the first Court at the instance of the defendants, for the examination of one of the plaintiffs and for allowing the defendants to have certain unstamped receipts, rejected by the first Court, to be stamped and then put in, *held*, that it was too late then for the defendants to insist on the attendance and examination of the other plaintiff also. BOLAKEE LOLL v. RADHA SINGH, **1 W.R. 357.**

(54)—*Attendance of plaintiff as witness—Remand.*—On a case being remanded for the attendance, and examination of the plaintiff, the lower Court may dispense, with his attendance, and accept the evidence of his agent, if the plaintiff be ill and unable to attend. RAJA SYUD AHMED REZA v. RAJAH ENAYET HOSSAIN, **1 W.R. 330.**

(55)—*Order of remand—On a point not arising from the pleadings—Counter allegation by defendant, Necessity to prove.*—Where an order of remand was mistakenly issued on an issue which did not really arise between the parties, but the lower appellate Court on remand came to a finding of facts which correctly disposed of the case, *held* that, although the Judge of the lower appellate Court had not dealt properly with the evidence on the record with reference to the precise issue which was sent down to him, his default in that respect ought not to govern the final result between the plaintiff and the defendant. Where the defendant, instead of merely denying the plaintiff's allegation, raises a counter-allegation in his written statement, he is bound to prove the counter-allegation. MAHOMED HASHIM v. KALLE CHARAN BANERJEE, **13 W.R. 91.**

Remand—*continued.*

(56)—*Remand of case for taking special evidence—Parties cannot produce additional evidence.*—The lower appellate Court is not at liberty, on receiving an order of remand of a case for the purposes of taking some special evidence, to go anew into the case, allowing both parties to produce any additional evidence that they pleased. RAM JEEWAN LALL v. ARJUN CHOWBEY, **10 W.R. 303.**

(57)—*Act* VIII *of* 1859, *s.* 148—*Remand—Evidence.*—Where an appellate Court remands a case under s. 148, Act VIII of 1859, the lower Court has no power to receive fresh evidence. PADMALOCHAN v. SIRDAR KHAN, **3 B.L.R. App. 91=12 W.R. 23.**

(58)—*Civ. Pro. Code,* 1859, *ss.* 354 *and* 355—*Scope of s.* 354—*Additional vidence, Admission of, by Lower Appellate Court—Record of reasons.*—S. 354 is a section applicable only to the Courts hearing regular appeals. On the remand of a case to a lower appellate Court under s. 354, Civ. Pro. Code, 1859, that Court has power to take fresh evidence, provided that it duly records, under s. 355, Civ. Pro. Code, 1859, the reasons for the admission. KALI KRISTO TAGORE v. JUDOO LALL MULLICK, **24 W.R. 20.**

(59)—*Act* VIII *of* 1859, *ss.* 351, 354, 355—*Special appeal—Secondary evidence.*—Although the powers conferred by ss. 351, 354 and 355 of Act VIII of 1859 on the Court of regular appeal are not directly given to the Court of special appeal, yet the Court, when it finds the order of a lower appellate Court is wrong, can point out the error and direct the lower appellate Court to make such order as would rectify the error. WUZEER ALI v. KALEECOOMAR CHUCKERBUTTY, **2 B L.R.A.C. 315=11 W.R. 228.**

(60)—*Act* VIII *of* 1859, *s.* 354—*Remand—Effect—Regular appeals.*—An order of remand to a lower appellate Court implies a reversal of the first judgment of that Court. S. 354, Civ. Pro.Code, 1859, relating to a trial of additional issues, is only applicable to regular appeals. KEBUL KISHEN MUZOOMDAR v. MUSSAMUT AMBALA, **7 W.R. 326.** [*R.*, 24 W.R. 20.]

(61)—*Retrial of case on remand—Court's duty to consider—Full Bench ruling brought to its notice.*—A Judge who re-tries a case on remand should not refuse to take into consideration a Full Bench ruling of the High Court which is brought to his notice; but should, whether the ruling has been published or not, either ask the pleader to produce the decision relied on, or take other means for satisfying himself as to the ruling so as to apply the correct law to the case. TUMEEZOODDEEN KHONDKAR v. MOHIMA CHUNDER MOOKERJEE, **11 W.R. 227.**

(62)—*Act* VIII *of* 1859, *s.* 354—*Remand—Memorandum of objections.*—A party, who has failed to file a memorandum of objections, within the time fixed by the appellate Court, under s. 354 of Act VIII of 1859, cannot afterwards claim, as a matter of right, to urge objections. But he can do so with the leave of the Court, which can also extend the time for filing objections. RATAN SINGH v. WAZIR, **1 A. 165, F.B.** [*F.*, 2 A. 908, 6 A. 391=A.W.N. 1884, 129; *R.*, 7 A. 79, F.B.]

(63)—*Objection of minority of plaintiff to suit—Taking objection on remand—Permissibility.*—Where the defendant in a suit did not take an objection to it on the ground of the plaintiff's minority, while it was pending in appeal, he was precluded from raising it on remand. BENI RAM BHUTT v. RAM LAL DHUKRI, **13 C. 189.** [*R.*, 19 M. 127, 1 L.B.R. 38, 11 O.C. 159.]

(64)—*Remand for finding — Memo. of objections to finding not put in — Objections taken at hearing—Practice.*—Where the issue referred to the lower Court for trial was tried and the Court returned its finding thereon together with the evidence, and no memorandum of objections to the finding was filed within the time fixed by the Court, the Court would not hear the objections to the finding at the final determination of the appeal. ASHRUFOONISSA BEGUM v. MR. STEWART, **9 W.R. 438.** [*Diss.*, 1 A. 165; *Expl.*, 15 W.R. 235.]

(65)—*Act* VIII *of* 1859, *s.* 354—*Objection.*—The terms of s. 354, Act VIII of 1859, were merely permissive, and so there was nothing in law to the effect that an objection taken after the time fixed shall not be listened to. MUNRAKHUN LALL v. RAHEEM BUKSH, **4 N.W.P. 72.** [*Appl.*, 1 A. 165; *R.*, 5 N.W.P. 114.]

(66)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 354—*Revised finding—Necessity for granting sufficient time for filing objections.*—Sufficient time must be allowed to the parties under s. 354, Act VIII of 1859, to file their objections to the revised finding of the lower Court. BUKHTOUREE v. MEHREN LALL, **3 Agra 96.**

(67)—*Civ. Pro Code,* 1859, *s.* 354—*Remand.*—Where a Judge, in remanding a case, had appointed a time within which the parties should bring forward their objections, to the findings on remand, he cannot alter the decree of the Court of first instance when no objection has been taken within the time by any party. MUSSUMAT NOORUN v. KHODA BUKSH, **1 Agra 50** [*Not F.*, 2 A. 908.]

(68)—*Act* XIV *of* 1863, *s.* 1, *cl.* 2—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 354—*Remand—Obejctions filed after time—Refusal of Court to admit whether illegal.*—A suit was remanded by a lower appellate Court, to the Court of first instance, for the trial of certain issues of fact. To the finding of the latter Court, on these issues, no objection was taken by either party, within the time fixed by the appellate Court. But when both parties presented memoranda of objections after the expiration of time, the Court refused to receive them. *Held*, on special appeal, that the Court was

Remand—*continued.*

not bound to receive upon the file and to consider, memoranda of objections presented after time. SHEO GHOLAM v. RAM JEAWUN SINGH, **5 N.W.P. 114.** [*Appr.*, 1 A. 165, F.B.]

(69)—*Remand for trial on merits—Limitation*—Res judicata—*Jurisdiction.*—Where the remand order sent back the case to the lower Court for a trial of the plaintiff's case *on the merits*, that shuts the defendant from putting forward objections regarding limitation or *res judicata*. SHEO SAHOY TEWAREE v. RAM PERSHAD NARAIN TEWAREE, **24 W.R. 333.**

(70)—*Review—Remand—Objections—Rights of parties.*—Where a review was granted for the purpose of seeing whether a certain chittah ought not to be used and the case was remanded for re-trial, the party cannot raise the objection that the chittah was improperly made use of. MAKHUN KOOER v TINCOWREE DUTT, **14 W.R. 22.** [*F.*, 23 W.R. 327.]

(71)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 226, 227—*Remand—Settlement chittahs—Ameen's investigation—Objection.*—By a remand order, a lower Court was directed to ascertain from the settlement-chittas the situation of certain lands decreed to a party. The chittas however did not show what were the exact lands settled with the party. *Held* that the lower appellate Court should have proceeded under ss. 226 and 227 of the Civ. Pro. Code, and have allowed both parties to adduce proofs of their various claim, when the investigation of the Ameen was objected to by a party who claimed the lands as his own. SHADHOO SURAN v. BHUGGOO LALL, **12 W.R. 98.**

(72)—*Local investigation, directions for, whether could be made on remand in second appeal—Omission to apply for local enquiry in lower Courts.*—The general principle is that local inquiries ought not to be directed at the extremely late stage of second appeal, where it does not appear from the record that any request was preferred at any time to the Courts below for a local investigation. Request for similar matters should be first preferred before the Court which can best judge of the necessity for granting them, and, if not so preferred, they should not be entertained by the High Court especially after a remand. JOY CHUNDER CHUCKERBUTTY v. TARAKANT CHUCKERBUTTY, **4 W.R. 47.**

(73)—*Remand order, appeal against—High Court bound by findings of fact of lower appellate Court.*—Whether an appeal is made against an order of remand by the Court of first appeal, or whether the propriety of such order is questioned only in a second appeal from the decree which might ultimately be made by that Court, in either case, the High Court cannot question the findings of fact of the lower Court, unless they are contrary to law, if partly of law and partly of fact, or unless there was no evidence to support them. TIKA RAM v SHAMA CHARAN, **20 A. 42=A.W.N. 1897, 195.** (15 A. 413, *Appr.*) [*R.*, 14 P.R. 1904=140 P.L.R. 1904.]

Remand—*continued.*

(74)—*Finding returned by lower appellate Court—Questions of fact—High Court's power to consider questions of fact—Remand.—Held* that, where there has been a remand from the High Court to the lower appellate Court, the High Court, in considering the finding returned by the lower appellate Court, has no power to go into questions of fact. RAM DULARE v. MISRI LAL, **13 O.C. 352=8 Ind. Cas. 878.** (24 C. 98, *R.*)

(75)—*Jurisdiction — Incorrect valuation of suit—Appeal—Remand — Judgment after remand whether operative.*—The plaintiff had estimated his suit at less than Rs. 5,000 but the items, if added up correctly, would have amounted to more than Rs. 5,000. The defendant did not contest the correctness of the addition and appealed to the Judge who remanded the case to the Principal Sudder Ameen, from whose decision the present appeal was made. *Held* that the plaintiff had a right to treat the decision of the Principal Sudder Ameen on the remand as a valid judgment and that the judgment of the Judge however erroneous was not a nullity, but operative until set aside either by him or a Court of Appeal. KALLY CHURN ROY v. JEETOO SOONDUREE DOSSEE, **5 W.R. 287.**

(76)—*Representative of deceased appellant—Jurisdiction of Court to which a case has been remanded to bring on record — Code of Civil Procedure, ss.* 365 *and* 566—*Jurisdiction—Remand.—Held*, that a Court to which a case has been remanded under s. 566, Civ. Pro. Code, has jurisdiction to act under s. 365 of the Code and to do any Act which may be necessary to carry out the order of remand. SALABAT SINGH v. RAM KISHAN, **7 O.C. 17.**

(77)—*Remand of suit—Confirmation of decision of first Court as to part of claim.—Held* that the lower appellate Court ought not to have affirmed the first Court's decision regarding one part of the claim when it had remanded the substantial part of the dispute between the parties for that trial on the merits which the first Court had refused. MADHUB CHUNDER DEY v. RAM DYAL GUHO, **8 W. R. 303.**

(78)—*Practice — Appeal —Cross appeals—Decree reversed and cause remanded on appeal first heard — Cross-appeal not to be heard.*—The plaintiff and the defendant preferred separate appeals from the same decree. On the appeal first heard, the decree was reversed and the cause remanded under consideration s. 562 of the Civ. Pro. Code. 1882 (=O. XII, r. 23). *Held* that the other appeal cannot be heard as the decree from which it was brought had disapproved. JAWAHAR LAL v. MOHAN LAL, **A.W.N. 1890, 68.**

(79)—*Appeal—All grounds urged at hearing—Some grounds not decided—Procedure.*— If a ground of appeal stated in the written memorandum of appeal is not alluded to when the appeal comes on for hearing, it is the fault of the parties, and not of the Judge, if no decision

Remand—*continued.*

is passed upon it. But if the Judge, having had his attention called to it, failed to decide the point, the proper course to pursue is to ask him to review his judgment, and add to it the decision which he has omitted. YUSOOF ALI CHOWDRY v. MUSSAMUT FYZOONISSA KHATOON CHOWDHRAIN, **15 W.R. 296.**

(80)—*Suit for share in ancestral property—Allegation of dispossession—Defendant's denial of plaintiff's possession—Limitation—Act* XIV *of* 1859, *s.* 1, *cl.* 13—*Remand, Nature of order of.*—In this suit for a share of joint ancestral property, plaintiff based her claim on the right of inheritance from her deceased father and alleged that she had been in quiet possession of the same, but was since ejected by the defendants. Defendants denied plaintiff's possession at any period and the Court of first instance dismissed the claim as barred by limitation on the ground that the plaintiff had never had possession since her father's death. The lower appellate Court, however, held that until the defendants proved the will under which they alleged themselves to hold the property, no question of limitation adverse to the plaintiff could be entertained. The High Court *held* that the lower appellate Court was wrong in its decision. The first Court having tried the point whether the plaintiff had ever had possession of the property and decided against her, before going any farther, the lower appellate Court should have tried the same issue and decided it with reference to the provisions of cl. 13, s. 1, Act XIV of 1859, which provides a limitation of 12 years. Also, as there was nowhere in the pleadings any allegation that the family was separate, or that the property in dispute was not ancestral, if the plaintiff had been able to prove possession, either personal or constructive, any time within 12 years of the institution of her suit, the question of the genuineness or otherwise of the Will propounded by the defendant could not have arisen. In such a case, if the lower appellate Court remands the case for trial on an issue, different from that of limitation, the order of remand will not be an interlocutory order, but a judgment. GOPAL CHUNDER CHATTERJEE v. RAJCOOMARI DEBIA, **4 W.R. 101.**

(81)—*Suit for declaration of right—Remand for enquiry—Act* VIII *of* 1859, *s.* 15.—The High Court remanded a suit for declaration of right and confirmation of possession to the lower appellate Court, for inquiry into the question whether the act complained of was so recent and of such a nature as, having regard to the terms of s. 15 of Act VIII of 1859, to entitle the plaintiff to a declaratory decree. *Held* that the order of remand did not preclude the lower appellate Court from entering into the question of plaintiff's title and possession. BYKUNT CHUNDER CHUCKERBUTTY v. PUREE JAN KHATOON, **11 W.R. 77.**

(82)—*Act* VIII *of* 1859, *s.* 230—*Possession—Title—Remand.*—The question of *bona fide* possession is only one part of s. 230 of Act VIII of 1859. But that proof of *bona fide* possession will enable the party making the allegation to claim to have his right investigated. Therefore when a cause is remanded to be determined with reference to s. 230, the object is that after seeing whether the objector could prove that he was *bona fide* in possession, the Court should determine, between the decree-holder and the party in possession, which of them had a better right to hold the property in dispute. WOOMESH CHUNDER ROY v. BEHAREE LALL PALLIT, **18 W.R. 395.**

(83)—*Appellate Court reversing first Court's judgment, duty of, to give reasons for the reversal on remand by High Court for the purpose.*—The Judge of the lower appellate Court to whom the High Court had remanded the case for the purpose of stating reasons for reversing the judgment of the Court of first instance, was held to be bound to make some endeavour to comply with the order of remand and justify his original decision with good and substantial reasons. In such a case, there is no warrant to suppose that the case has been sent back intending that the Judge should merely confirm the judgment. MOOLCHAND SHAH v. BABOO THAKOOR DOSS DUTT, **4 W.R. 33.**

(84)—*Grounds for remand—Defect in plaint—Civ. Pro. Code,* 1859, *s.* 354.—Where there is a defect in the allegations in a plaint and the subject-matter of the absent allegation has not been tried in the Court below, the proper course is for the Judge to frame an issue, and refer it to the lower Court for trial under Act VIII of 1859, s. 354. KASSEENAUTH MOOR v. BEBEE REEJOONISSA, **Marsh 198 =1 Hay 467.**

(85)—*Grounds for remand—Omission to consider evidence—Civ. Pro. Code,* 1859, *s.* 372.—When important evidence has not been carefully examined by the Judge in the lower Court, the appellate Court will, on special appeal, remand the suit under s. 372 of Act VIII of 1859. DEGUMBAR DOSSEE v. KISSEN DHUR NUNDY, **1 Ind. Jur. N.S. 35.**

(86)—*Appellate Court—Powers of remanding case.*—An appellate Court can remand a case on account of error, defect, or irregularity of procedure in passing a decree or order provided the error, defect or irregularity be such as to affect the merits of the case or the jurisdiction of the Court. But when a suit has been regularly heard and determined, and on appeal the decree is reversed, the appellate Court has the discretionary power to remand only if the decree should have been upon a preliminary point and have had the effect of excluding the consideration of evidence essential to the rights of the parties. In no other case can a remand be ordered because of a wrong decision as to the right claimed in the suit after a hearing in the regular course. MUNIAPPAH NAIDU v. M. IYASAMY MUDALY, **5 M.H.C. 313.**

(87)—*Civ. Pro. Code, ss.* 562, 566—*Remand—Duties of Court adding parties.*—The condition necessary to a remand under s. 562, Civ. Pro. Code, is the omission to determine

Remand—*continued.*

the merits. When an Appellate Court finds that certain persons, who had not been impleaded in the Court of first instance, should be made parties, the proper course is to join the persons whom it finds necessary as parties to the suit, to alter or amend the issues already framed, or frame fresh issues so as to raise all questions properly arising in the suit as it stands after the addition of the said persons as parties, and refer them for trial to the Court of first instance under s. 566, Civ. Pro. Code. KELU MULA CHERI NAYAR v. CHENDU, **19 M. 157.** [*F.*, 1 Bom. L.R. 29 ; *R.*, 12 C.P.L. R. 119, 23 A. 167]

(88)—*Disposal on an issue not strictly preliminary — Order of remand—Legality.*—The power of an Appellate Court to remand cases to the first Court for disposal is not confined to cases in which the first Court has disposed of a suit on a preliminary point properly so called. PILLAMKUTTIL NALLAPURAKKAL RAMAN'S SON KUPPAALAN v. KUNJUVALLI. **9 M.L.T. 373=9 Ind. Cas. 790.** (16 M. 207, *Cons.*)

(89)—*Civ. Pro. Code*, 1859, *s.* 372 —*Remand, Justification for.*—Case where it was ruled that before a remand is ordered, it must be proved that some error in law has been committed, or that the case comes in some other way within the terms of s. 372, Act VIII of 1859. HURISH CHUNDER SHAHA v. HURISH CHUNDER PAUL, **25 W.R. 325** ; *on appeal from* HURISH CHUNDER SHAHA v HURISH CHUNDER PAUL, **25 W.R. 325, Note.**

(90)—*Civ. Pro. Code*, 1882, *s.* 562—*Remand.*—Section 562 of the Code of Civil Procedure authorises a remand only where the entire suit and not merely a portion of it has been disposed of by the Court below on a preliminary point. KAMALUDDIN v. ATA HUSAIN, **A.W. N. 1892, 11.**

(91)—*No settlement of issues by first Court —Remand* —Where no issues were settled, the High Court must remand the case for re-trial. The lower Court ought not to have gone into evidence without having first settled and recorded the points or issues in the suit, in conformity with the provisions of Act VIII of 1859. JOGESHUR RAE v. DOOLUN RAE, **2 N.W.P. 183.**

(92)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 351, 354—*Remand.*—A remand is allowable only under the circumstances contemplated in s. 351, Civ. Pro. Code (Act VIII of 1859). If the Judge requires any further evidence and cannot decide the case himself as it stands, he should call for such evidence under s. 354 retaining the case on his own file. HURREENARAIN GOSSAIN v. SHUMBOONATH MUNDUL, **1 W.R. 6.**

(93) - *Of a case—Power of Appellate Court—Civ. Pro. Code*, 1882, *s.* 562.—A case can be remanded by an Appellate Court only under s. 562, Civ. Pro. Code. MUDUN MOHUN PODDAR v. BHOGGOMANTO PODDAR, **8 C. 923.** [*F.*, 10 B. 398.]

Remand—*continued.*

(94)—*Order in execution — Insufficient evidence of decree having been kept alive—Appellate Court not to summarily reverse order—Act* II *of* 1855, *s.* 4, *right of Court under, to refer to entries made by Nazir.*—Where the first Appellate Judge is of opinion that the Munsiff has improperly allowed the decree to be executed on insufficient evidence, the Judge observing that the decree-holder had probably been misled by the mistake of the Court below, he ought to remit the case in order that the decree-holder might give the necessary proof, and should not summarily reverse the order barring the plaintiff from all remedy upon his decree. Under s. 4, of Act II of 1855, the Court is entitled to look into the books kept under its orders by its own officer, the Nazir, and to refer to any entries made in such book for the purpose of finding whether any warrant had been issued in accordance with the application admitted to have been made. NILKANT CHUCKERBUTTY v. SHEO NARAIN KOONWAR, **8 W.R. 276.**

(95)— *S.* 4, *Act* X *of* 1859, *Presumption under—Rebutting of presumption—Remand.*—An appellate Court may remand a case to allow a plaintiff the opportunity of rebutting the presumption which arises under Act X of 1859, s. 4. BABOO BENI RAM v. IAAFA CHAND CHUTER, **W.R. 1864, Act X, 124.**

(96)—*Issue—Remand—Irregularity— Mahomedan married woman—Lease*—Jus mariti—*Co-sharers.*—Where a Judge of the lower Court referred to an original *sanad* under which a Muhammadan woman and her tenants in common claimed, but omitted to record it or any copy of it among the exhibits in the case, the High Court held it to be a great irregularity which left them quite in the dark as to the *sanad* and its contents and remanded the case for a fresh decision on the merits. If a Muhammadan married woman and her co-sharers have an absolute estate of inheritance in certain lands she can jointly with them make a valid lease, binding on her and their heirs. A Muhammadan does not on marriage, take any estate, *jure mariti*, in the property of his wife. She may either by gift or sale dispose of her property without her husband's consent. NICHHABHAI PRAGJI v. ISSE KHAN, **2 B.H.C. 297.**

(97)—*Remand—Second trial — Evidence* — Plaintiffs in 1858 sued to recover possession of some miras land, which they alleged they had let to the defendants to cultivate. The Munsiff decided in favour of the plaintiffs. Against that decision an appeal was made, and the Appellate Court dismissed the suit as not being laid at a proper amount, leaving the plaintiffs free to file a fresh suit at a proper valuation. The present suit was a fresh action instituted according to that decision, and the Munsiff this time also awarded in favour of the plaintiffs. The Munsiff did not take over again the evidence given on the former trial, but recorded as an exhibit his judgment, and the grounds of it, and the exhibits on which he passed it.

Remand—*continued.*

Against this decree an appeal was made to the District Judge who reversed the Munsiff's decree principally on the ground that he was not satisfied with the evidence recorded by the Munsiff at the last trial, and in the result dismissed the plaintiff's suit with costs. On appeal to the High Court, *held* that under the peculiar circumstances of this case, the District Judge, not being satisfied with the evidence recorded by the Munsiff at the present trial should have allowed the plaintiffs the opportunity of putting in afresh the evidence which was recorded in the former suit on the same subject between the parties; and in the result the decree of the District Judge was reversed and the case remanded to him in order that he may allow the evidence abovementioned to be recorded and pass a fresh decision on the merits. JOTI NIMBAJI v. SOMAJI BAPUJI, **1 B H.C. 166.**

(98)—*Remand to District Court to pass decree —Mistake of District Judge—Further remand.* — The District Judge having reversed the Munsiff's decree, failed to pass a decree in favour of the successful appellant, which his finding showed he intended to do. The High Court thereupon remanded the case to the District Judge for passing a decree. The District Judge who heard the case on remand, went into the merits and decided the case contrary to the view taken by his predecessor, and recorded judgment against the successful appellant. The High Court again reversed this decree, remanded the case back to the District Judge, to pass judgment in favour of the successful appellant, and in accordance with the judgment of the District Judge who pronounced the first appellate judgment reversing that of the Munsif. BABAJI v. KASIMBHAI, **3 B.H.C. A.C. 60.** [*R.*, 2 L.B.R. 280.]

(99)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 351, 354 — *Appeal — No sufficient evidence before Appellate Court—Remand.*—Where there was no sufficient evidence before the Appellate Court for the disposal of an issue which was material to the determination of the suit, the proper course to be followed was to remit the case under s. 354 and not under s. 351 of the Code. RAM PERSHAD v. MUSST. KISHNA, **3 Agra 146.**

(100)—*Evidence — Application to send for record of former suit—Remand.*—Where the lower Court, though requested to send for the records of a former suit the decree in which afforded important evidence in support of plaintiff's case, did not do so, the case was remanded with a view to the omission being supplied. RAM RUNJUN CHUCKERBUTTY v. GOPEE BULLUB CHUCKERBUTTY, **18 W.R. 127.**

(101)— *Issue — Positive finding—Remand—Merits.*—The issue in a case was whether the sale to plaintiff was or was not collusive and fraudulent. The District Judge not having come to any positive finding on the above issue, the High Court on appeal reversed his decree, and remanded the suit for retrial on the merits. RAMDAS SAKHARLAL v. GANGADHAR R. DONGRE, **2 B.H C. 178.**

(102)—*Act* VIII *of* 1859, *s.* 348—*Respondent's objection relating to jurisdiction not noticed by lower Court—Remand.*—Defendant, the present special appellant pleaded that his petition filed under s. 348 of Act VIII of 1859, objecting before the lower Appellate Court, that the Civil Court had no jurisdiction, was not noticed by that Court, and that, as the above was a point of law, it should be decided on the special appeal. The High Court, however, was of opinion that though, if the plea in law had not been taken before any of the lower Courts, the contention might hold good, yet as it had been formally taken in cross appeal *i.e.*, under s. 348, in writing, before the lower appellate Court, and the first Court had decided on it, the case must be remanded to the lower Appellate Court, for decision on the point. JOY KISHEN MOOKERJEE v. HUREEHUR MOOKERJEE, **6 W.R. 289.**

(103)—*Remand to first appellate Court for giving reasons for its judgment—Absence of Judge—Decision by successor* de novo *void as* ultra vires—*Remand for re-trial by first Court.* —When the order of remand passed by the High Court reached the Zillah Court, the Judge of that Court had left India and his successor, without any order from the High Court, proceeded to decide the case *de novo.* He went into the merits and decided in favour of the defendant. This decision was quashed by the High Court on the ground that all the proceedings of the succeeding Judge and the decision by him *de novo* were beyond jurisdiction and consequently null and void. Also, the judgment by the original Judge appeared to have been based on certain documents which the Court of first instance had not at all seen, and the High Court therefore remanded the case to that Court directing that it should consider the said documents and thereupon re-decide the case *de novo.* LALLA BHOYRO LAL v. LALLA MOKOOND LAL, **2 W.R. 275.** [*F.*, 5 W.R. 124.]

(104)—*Special appeal—Misconstruction of evidence—Remand.*—Where the main ground which the Judge of the lower appellate Court takes for suspecting the plaintiff's case and giving credence in preference to the evidence for the defendants, has no existence, and the High Court in special appeal is not satisfied that his estimate of the defendants' evidence is a proper one, the case ought to be remanded to him for a re-consideration of the evidence. BIBEE AMEERUN v. SAIKH CHERAG ALI, **24 W.R. 343.** [*R.*, 7 C. 263=8 C.L.R. 449; *Relied on*, 17 C.W.N. 37.]

(105)—*Suit for share of partitioned ancestral property—Partition not proved—Sale alleged by defendants not proved*—Ex parte *decree—Re-trial—Remand—Reservice of summons.*—In a suit for possession of land claimed by the plaintiff as his father's share of a partitioned ancestral estate, the plea was that the defendants first leased it and subsequently purchased

Remand—*continued.*

it from the plaintiff and his co-sharers. The Munsif found that the property had not been allotted to the plaintiff exclusively, that there had been no partition and finding all issues against the plaintiff and in favour of the defendants dismissed the suit. As regards defendants Nos. 2 and 3, the Munsif found as a fact that summons was not proved to have been served upon them. In appeal, the District Court came to two findings of fact to the effect that the execution of the kobala by the plaintiff on which the defendants relied had not been proved and that the defendants' allegation that they held this land before their purchase as tenants also had not been made out and upon them gave the plaintiff a decree. *Held* that the District Court was incompetent to decree the plaintiff's claim without a finding in his favour that the land in dispute by a partition between the several co-sharers fell to the share of the plaintiff's father and in the face of the finding of the first Court that no summons was served upon them. The case was accordingly remanded to the District Court for considering whether upon the evidence it could come to the conclusion that summons was actually served upon the two defendants, giving it entire discretion, if it found that summons was not served upon them, either to dismiss the suit upon that ground or to remand it to the Court of first instance, giving the plaintiff an opportunity of reserving the summons, in which case the whole case should be tried *de novo* in the presence of the parties. NOBO KRISTO DEY v. CHUNDER SIKHUR SIRCAR, **25 W.R. 495.**

(106)—*Special appeal—Remand—Jurisdiction of High Court—Procedure.*—The High Court being debarred in special appeal, from entering into the merits of a case in which the lower Courts mistook the only question of fact to be tried, remanded the case for a proper finding. LALLA RAM LALL v. MOHURPUT ROY, **21 W.R. 52.**

(107 & 108)—*Issues—Evidence* re, *not examined by lower appellate Court—Special appeal—Remand—Several defendants--Decision of first Court not proceeding on common ground—Appeal by one defendant—Reversal of whole decree—Legality.*—Where, in the judgment of a lower appellate Court, the real question to be determined in the case is not stated, nor was the evidence adduced by plaintiff examined with reference to the issues laid down by the Court of first instance, which were the right issues in the case, *held*, that the case should be remanded for trial *de novo*. A lower appellate Court, on an appeal by one of the defendants in a suit, is not competent to reverse the whole of a decree passed against several defendants by the first Court, the decision not having proceeded on a ground common to all the defendants. CHUNDER MONEE DOSSEE v. MODHOO DEY, **23 W.R. 166.**

(109)—*Special appeal—Evidence—Remand.*—Where a first Court, to which a lower appellate Court remanded a suit for trial of certain issues, returned the case to the latter Court without recording its finding on some of them, and the lower appellate Court gave judgment without any decision on the evidence, *held*, on special appeal to the High Court, that the High Court could not go into the evidence and that the case should be remanded to the lower appellate Court for trial of the issues on which there were no findings by the first Court, after taking the necessary evidence. SUTTOBHAMA BIBEE v. HURRUCK CHAND GOLECHA, **23 W.R. 322.**

(110) — *Appeal—Remand—Misapprehension or omission in treating evidence—Power of High Court in special appeal.*—Where the High Court was satisfied that there had been such misapprehension of the state of evidence between the parties and such omission to consider the testimony of the witnesses on the record, as had rendered the trial of the case in the lower Court imperfect and incomplete, it reversed the decree of the lower Court and remanded the suit for re trial. KOOLDEEP NARAIN SINGH v. RUMMON SINGH, **22 W.R. 278.**

(111)—*Decision of case—No opportunity given to plaintiff to meet defence—Remand.*—Where a case is decided against the plaintiff without giving him a fair opportunity to know the line of defence he had to meet, *held* that it is justifiable to remand the case for a fresh trial. SHIB PERSHAD PATTUCK v. NUBO KISHEN MOOKERJEE, **17 W.R. 446.**

(112)—*Special appeal—Remand—Insufficient inquiry.*—The High Court on special appeal set aside the judgment of the lower appellate Court and remanded the case for a complete enquiry as the previous hearing of the suit before the lower Court was inadequate. SHAGUR CHUNDER SHAHA v. SREEMUTY MOHAMAYA, **25 W.R. 25.**

(113)—*Special appeal—Suit for redemption—Mistake of appellate Court as to identity of land mortgaged—Material issues not decided—Remand.*—In a suit for redemption, the plaintiff alleged that he became the purchaser of the land in question at an auction sale, and subsequently mortgaged it to the defendants, who denied the mortgage. The Munsif passed a decree for redemption. This decision was reversed by the Judge on appeal, he being under a mistake as to what was necessary to be proved with reference to the dimensions of the land. As the mistake of the Judge was such a one as materially affected his finding, and as other important questions of fact were left undecided, the High Court framed issues in the case and remanded the suit for a decree to be passed upon the findings on those issues. AJURAM MANIRAM v. KUSAJI, **4 B.H.C.A. C. 43.**

(114)—*Special appeal—Remand—Issue.*—In a case where the first issue was whether the whole or any of the lands for the undivided share of which the plaintiff sued, had been partitioned by metes and bounds, the Court failed to find distinctly whether a partition was

Remand —*continued.*

proved, and if so its character, and how far effect was given to it by possession of the lands after partition. The High Court, on special appeal, remanded the case for retrial as to that issue in the manner stated above. GOLUCK CHUNDER DUTT v. ANUNT KISHORE GOSSAIN. **25 W.R. 38.**

(115)—*Civ. Pro. Code (Act* VIII *of* 1859), *ss.* 352, 354—*Remand of case to lower Court for decision.—Per Jackson, J., (Markby, J., dissenting)*, S. 352, Act VIII of 1859, expressly forbids a lower appellate Court from remanding a case to the Court of first instance for a second decision upon any of the issues. If, in the opinion of the lower appellate Court, further evidence is necessary for the decision of the case, such evidence may be taken in that Court or in the Court of first instance, but the decision based upon that evidence and the evidence already given in the case should be given by the appellate Court and not by the Court of first instance. *Per Markby, J.*—If a Judge of the lower appellate Court be of opinion that an issue has not been satisfactorily tried by the Court of first instance, and that the evidence on the record is not sufficient, in his opinion, to determine it, he has power under s. 354, Civ. Pro. Code, to send back the case to the first Court for trial upon that issue. UMBIKA CHURN MUNDLE v. RAMDHUN MOHURUR, **11 W.R. 35.** (10 W.R 77, *R.*; 8 W.R. 184, F.B., *F.*)

(116)—*Act* VIII *of* 1859, *ss.* 351, 352—*Failure of first Court to try issue as directed—Second remand.*—It was one of the grounds of appeal in this case "that the Judge below was not justified in remanding the case several times to the lower Court except under the provisions laid down in ss. 351 and 352 of Act VIII of 1859." But the High Court was of opinion that, from the terms of the order and the ground therein disclosed, it was clear that it was made with strict propriety and in conformity with the provisions of the above sections, *viz.*, for the trial of an issue the first Court was directed to try but did not. RAM CHAND MOOKERJEE v. KAMEENEE DABEA, **10 W.R. 236.**

(117)—*Additional evidence received by appellate Court—Record of special reasons—Preliminary point—Retrial—Act* VIII *of* 1859, *s.* 351—*Remand.*—It is not competent to an appellate Court to receive and take into consideration evidence which was not before the Court of first instance, without special reasons for so doing. And if a special reason does exist such as to induce the Court to take additional evidence, it is bound by the provisions of Act VIII of 1859 to record that reason. It is only when the lower Court has so disposed of a preliminary point as to exclude evidence which appears to the appellate Court essential to the rights of the parties, that the appellate Court has authority to send the case for re-trial under the provisions of s. 351 of Act VIII of 1859. JOOG MAYA DEBIA v. RAM CHUNDER CHATTERJEE, **10 W.R. 378.** [*Expl.*, 12 W.R. 223; *R.*, 13 W.R. 303, 14 W.R. 236, 11 C. 139, 18 M. 94, 1 O.C. 201.]

Remand —*continued.*

(118)—*Hindu law—Pleadings.*—Suit by A one of the heirs of H, against B, to recover the whole of H's real and personal estate in B's possession as the alleged adopted son of H. There were other persons entitled with A, to share in the succession to H's estate, who were not made parties to the suit. The Sudder Court at Agra *held*, that B had failed to establish his title as adopted son of H, but declared that A was entitled to succeed, as one of the heirs of H, to a share of the estate and decreed him the whole estate as sought by the plaint. Such decree, on appeal, so far as it declared that B had failed to establish his title as adopted son of H confirmed; but as the decree was manifestly wrong in decreeing to A the entire estate of H, and there were no materials to enable the Judicial Committee to vary the decree, so as to limit it to the share of the estate to which A had established his right by inheritance, the decree was reversed, and the case remitted to India for inquiries as to the amount of his share. CHOWDHRY PADAN SINGH v. KOER UDAYA SINGH, **2 B.L.R.P.C. 101 = 12 W.R.P.C. 1 = 12 M.I.A. 350 = 2 Suther. 219 = 2 Sar. 447.** [*D.*, 30 A. 197 = 5 A.L.J. 200 = A.W.N. 1908, 79.]

(119)—*Act* VIII *of* 1859, *s.* 354—*Remand—Reversal of decision on ground that essential issues were left undetermined.*—Where the lower appellate Court being of opinion that the Munsiff had, on the original trial, omitted to try certain issues, and determine certain questions of fact essential to the right determination of the suit upon the merits, reverses the decree of the Munsiff, the order of the lower appellate Court must be treated as an order sending the case back under s. 354, Act VIII of 1859, for trial of the issues indicated by it in its judgment. BONCHAREE GHOSE v. AINODDEN BISWAS, **24 W.R. 137.** [*R.*, 17 C.W.N. 462 = 15 Ind. Cas. 39.]

(120)—*Rent suit—Case not duly considered by Lower Appellate Court—Special appeal—Remand.*—Where, in a suit for rent, the lower appellate Court said that a certain Kubooleut had not been filed, and from that fact drew an inference against the truth of the plaintiff's case and it was found in special appeal that the kubooleut was on record, the case was remanded to the lower appellate Court in order that it might consider the whole case with the said kubooleut. MOHUNT HUR GOBIND DOSS v. JOYA ROY, **24 W.R. 146.**

(121)—*Evidence — Admission of secondary evidence—Objection in special appeal — Evidence Act, s.* 63—*Secondary evidence—Witnesses not properly questioned —Remand.*—An objection to the admission of secondary evidence, if not raised at the time it is admitted, cannot be allowed to be raised in special appeal. Where the plaintiff attempted to prove the contents of certain documents by oral evidence, but the evidence fell short of what is required under s. 63 of the Evidence Act, only because the witnesses were not properly questioned, it would be unjust to visit the plaintiff with the penalty of the dismissal of his claim, simply on

Remand—*continued.*

account of the inefficiency of the legal adviser who conducted his case. Under the circumstances, the High Court remanded the case for a fresh trial. LOCHUN SINGH v. HET NARAIN SINGH, **24 W.R. 232.**

(122) - *Misconception of evidence.*—Where, in a suit for a declaration of title and confirmation of possession, the lower Appellate Court stated in its judgment that not a single witness had been brought forward on behalf of the defendant to assert possession, but it was found that two witnesses at least had been examined who stated distinctly that they did hold the land from the defendant and cultivate it, the misconception of evidence was considered a sufficient reason for a remand. PRAN BANDHU CHATTERJEE v. MADHU SUDAN PATRA, **13 B.L.R. App. 12=21 W.R. 134.**

(123)—*Power to remand— Suit decided on what cannot strictly be called a preliminary point.*—There are cases in which an order of remand may be made even where the disposal has not gone on a point, which can strictly be called a preliminary point. (1911, M.W.N. 199, *Appr.*) Where the Munsif looked at some receipt not put in evidence and decided there was a settlement, and this course does not appear to have been adopted with the consent of parties, and the District Judge, on looking into the same receipt, came to the conclusion that it was only a partial settlement and remanded the case for disposal, *held* that the remand was proper. VEMULA JAMBALAYA v. ISKALA RAJAMMA, **M W.N. 1912, 1000=15 Ind. Cas. 859.**

(124)—*Suit against heirs—Transfer for consideration.*— R sued for arrears of rent from K, and subsequently K's sons, S.H, and M.S. K's son, died, leaving a widow A and her daughters. Five suits were filed, two by the sons of K, to set aside some decrees obtained by R, three by R, to establish his claim. Judgment was ultimately given against the representatives of K, on the ground that R. had established his claim, and that the sons of K had by their dealings with his assets made themselves personally liable for his debts. In execution of this decree, R attached certain property, part of K's estate; to this A, and those claiming under her, objected, contending that her husband, S, had acquired it from his brothers, and that he subsequently conveyed it to her in consideration of Rupees 49,000 and a diamond ring and the transfer of a m. kurraree tenure to his brothers and that she was still in undisturbed possession of such parts of it as she had not sold. The High Court were of opinion that there was sufficient consideration moving from A to support the transfer to her of K's estate. *Held*, that their Lordships would have been disposed to concur in this view if they had been satisfied that the defence to the suit, which it involved, had been clearly pleaded and regularly tried, but that it was extremely doubtful whether R had the means of meeting such a case; and that, under these

Remand—*continued.*

circumstances, R should have the option of having the case, as between him and A, remanded. MAHARANEE INDERJEET KOONWUR v. MUSSAMUT AMEEROONISSA BEGUM, **8 M.J. 21.**

(125)—*Special appeal—Refusal of first Court to summon witness—Interference by High Court.*—Where, before the case of a party was closed, an application was made by him for the issue of summons to witnesses, and the first Court refused to issue the summons, the High Court in special appeal remanded the suit, holding that the party should have been given an opportunity to produce his witnesses in time, when it appeared that he was really *bona fide* desirous of producing those witnesses. BROJO NATH MOOKHOPADHYA v. PROTAB CHUNDER THAKOOR, **22 W.R. 296.**

(126)—*Act* VIII *of* 1859, *s* 230—*Suit found by lower appellate Court to fall under s.* 230—*Court not to order summary dismissal of suit but to remand to first Court.*—Where an application, amounting substantially to a case under s. 230 of Act VIII of 1859, has been received by the Court and numbered as a suit under that section, it is the duty of the Court to try it according to the section; so, where that Court has dismissed the case on a point not properly arising under that section, the suit should be remanded to it for regular trial and decision under that section. SABIR KHAN v. RAM LUKHEE CHOWDHRAIN, **10 W.R. 438.**

(127) — *Procedure — Evidence — Refusal of Court to examine defendants' witnesses.*— A Munsif at the close of the plaintiff's case intimated to the defendants' pleader that he was going to dismiss the suit and that the defendants need not examine any witnesses, and the pleader accordingly, although witnesses had been summoned for the defendants and were present, refrained from examining them. The appellate Court, however, took a different view of the plaintiff's evidence, and decreed the claim, more particularly with regard to the fact that the defendants had not produced any evidence. *Held*, that, under the circumstances, the suit ought to be remanded to the lower appellate Court for re-trial and the defendants given an opportunity to produce their evidence. KALYANI PRASAD v. BISHNATH, **A W.N. 1905, 266.**

(128)—*Admission of inadmissible evidence.*—When the judgment and decree of the lower Appellate Court are vitiated by the admission of inadmissible evidence, they must be set aside and the case sent back to that Court, in order that it may dispose of the appeal before it, after excluding the improper evidence from its consideration. RAMANI PERSHAD NARAIN SINGH v. MAHANTH ADIYA GOSSAIN, **31 C. 380.** (7 C. 293, *Appr.*)

(129)— *Transfer of Property Act* (IV *of* 1882), *s.* 59—*Proof of mortgage bond— Remand.*—Where an objection was taken at a late stage that a mortgage-bond was not attested, as the

Remand—*continued.*

law required, by two witnesses, the suit, instead of being dismissed, was remanded to the lower Court to give the plaintiff an opportunity of adducing evidence to show that at least two witnesses whose names appeared on the face of the document were attesting witnesses. DINAMOYEE DEBI v. BON BEHARI KAPUR, **7 C.W. N. 160.**

(130)—*Civ. Pro. Code*, 1859, s. 354—*Evidence on fresh issue. Remand for—Fresh evidence on issue fully determined.*—In a case in which the first Court has gone into the merits after taking evidence fully, the apoellate Court has power under Act VIII of 1859, s. 354 to remand it for evidence on a fresh issue, but not for fresh evidence on an issue fully determined or for re-trial generally GOLACK CHUNDER SEN v. PURESH MAHOMED, **25 W R. 284.**

(131)—*Suit for rent—Jurisdiction—Act* VIII (*B C*) *of* 1869.—A suit for rent in kind is cognizable under Act VIII of 1869 (B C.). MULLICK AMANUT ALI v. UKLOO PASEE, **25 W.R. 140.**

(132)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s* 354—*Remand to lower Appellate Court.*—Where the decision of a Subordinate Judge in appeal, by reason of its being incapable of execution, is not a proper one, it is competent to the District Court, under s. 354, Act VIII of 1859, to send the case back, after fixing an issue for a finding. SHAIKH UMER ALI v. SHAIKH RUMZAN ALI, **23 W.R 347.**

(133)—*Practice—Destruction of lower Court's record pending appeal—Remand for trial as fresh suit.*—Where in a case, pending appeal, the lower Court's record was entirely destroyed, but the appellate Court decided after re-examining witnesses, without the pleadings or evidence as originally given, the High Court on second appeal set aside the proceedings of the lower appellate Court and remanded the case to the first Court to re-try as a fresh suit. GHUALMAN v. KARIMA, **A.W.N. 1888, 117.**

(134)—*Remand by appellate Court—Appellant dead at time of remand—Trial of issues by first Court without substituting legal representatives—Procedure of appellate Court—Fresh remand—Practice.*—Where, at the time of remand by an appellate Court of a certain suit to a Court of first instance for trial of certain issues, the appellant was dead, and the latter Court, without substituting the legal representatives of the deceased appellant, proceeds to try the issues and submits its findings to the appellate Court, the proper course for the latter Court to take is to further remand the case to the first Court for determination of the issues already settled after bringing all the necessary parties before it for any hearing it may think proper. MOHAN DAS v. RADHA BALLABH, **A.W.N. 1885, 164.**

(135)—*Act* II *of* 1901, *s.* 202—*Order under section not passed—Returning case with instructions*—If a Civil Appellate Court finds, in appeal, that the Court of original jurisdiction ought to have passed an order under s. 202 of

Remand—*continued.*

Act II of 1901, it ought, instead of simply remanding the suit, to send the case back with instructions to the Court of first instance to pass the order which it ought to have passed in the first instance. MARE v. GAURI SAHA, **A.W N. 1905, 46.**

(136)—*Civ. Pro. Code*, 1882, *ss.* 565, 566, 587—*Second appeal—Determination of questions of fact—Remand.*—It was not intended that the High Court, sitting as a Court of second appeal should determine questions of fact on the evidence. The only grounds, on which second appeals are cognisable, are those mentioned in s. 584, which relate to errors of law, or usage having the force of law or substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits. When an appeal has been admitted on those grounds, the whole case cannot be opened so as to enable the High Court to deal with it under s. 565. If the lower appellate Court has omitted to frame or try any issue or to determine any essential question of fact, the proper course for the High Court is to remit the issues for trial to that Court. GIRDHARI LAL v. W. CRAWFORD, **9 A. 147 = A.W.N. 1886, 325.** (7 A. 765, 8 A. 172, *Overruled.*)

(137)—*Defective investigation by lower Court—Remand.*—In this suit for custody of a wife, a divorce was set up by the wife as having been effected when the husband went to claim her. This may, no doubt, be highly improbable. But the evidence in the case was very meagre, and the case was accordingly remanded for further investigation and reference to a panchayat or assessors. MULLICK KHAN JEHAN v. FEROZE, **40 P R 1866.**

(138)—*Procedure—Defective investigation—Remand.*—In this case, the decisions of the lower Courts were based on the opinion of the arbitrators whose awards were conflicting. The summary Settlement papers in which, according to the plaintiffs, their names were recorded as joint proprietors with the defendants, were not referred to, nor was the putwaree of the village examined as a witness. There was further no explanation of how it happened that the plaintiff or his father were recorded as proprietors in some cases and not in others. There having thus been no proper investigation the case was remanded for further investigation and re-trial. AIMA v. NAMDAR, **79 P.R. 1866.**

(139)—*Defective enquiry—Material allegation of party not enquired into—Remand.*—In a dispute about the possession of a court-yard, the Tahsildar on personal inspection found that the defendant's portion of the court-yard was higher than that of the plaintiff This the plaintiff explained by saying that the portion was raised by the defendant during his absence The Tahsildar, however, did not take evidence on this point and dismissed the plaintiff's suit. *Held* that the enquiry was defective and the suit should be remanded. MOGUL v. MEER BAZ, **83 P. R. 1866.**

Remand—*continued.*

(140)—*Oaths Act (X of 1873), ss. 10, 11—Referee's deposition inadequate to decide question referred—Death of referee—Appeal.*—The parties to a suit agreed to be bound by the deposition of a referee in the manner contemplated by ss. 10 and 11 of the Oaths Act, and a decree was passed in favour of one of the parties on the strength of that deposition. The referee died afterwards, and it was found on appeal that the said deposition, did not fully cover the questions in issue between the parties. *Held* that the case was, therefore, to be remanded to the lower Court for disposal according to the usual procedure. MAHABIR PRASAD MISR v. DAT MISR, **13 A. 386 = A.W N. 1891, 143.**

(141)—*Remand—Wrong action of Munsif—Duty of lower appellate Court.*—Where the Munsif acting erroneously forced the plaintiffs to amend their plaint and, in consequence of that amendment, the Munsif also amended the issues and tried the suit on an entirely erroneous issue, the Judge of the lower appellate Court as a Court of Equity should, of his own motion, have sent the case back to the Munsif, directing him to try it on its merits and pointing out that he had taken a wrong view of the law. GURU PRASHAD ROY v. RAS MOHUN MUKHOPADHYA, **1 C.L.R. 431.**

(142)—*Civ. Pro. Code, 1882, ss. 44, r. A, and 562—Suit for recovery of immoveable property and also moveable property—Leave of Court.*—The plaintiffs claimed possession of immoveable property as well as of moveable property. The original Court dismissed the suit on the ground that leave of the Court had not been given for joining in the suit for the recovery of immoveable property the cause of action relating to the moveable property. On appeal to the High Court, *held* that it was a case in which the issue as to the moveable property would decide the claim to the immoveable property and that therefore leave ought to have been given. Their Lordships of the High Court said that, as they had the case before them in first appeal, they gave their leave then for the joining of the causes of action mentioned in the plaint, and remanded the suit under s. 562, Civ. Pro. Code, with direction to the lower Court to allow the defendants to put in a written statement or statements, and to the parties to file further evidence, if necessary, and to dispose of the case on its merits. NAZIRAN BIBI v. ABDUS SAMAD, **A.W.N. 1887, 263.**

(143)—*Conclusion from evidence not warranted by law or reason—Failure to try material issue—Remand.*—Where the lower appellate Court had drawn a conclusion from the evidence not warranted by law or reason and had failed to try a material issue in the case, the High Court remanded the case for re-trial. MAHARAM SHAIKH v. NAKOURI DAS MAHALDAR, **7 B.L.R. App. 17 = 14 W.R. 357.**

(144)—*Grounds for remand—Local inquiry, Order for—Civ. Pro. Code, 1859, ss. 351, 354—Further evidence.*—A Judge on appeal in

Remand—*continued.*

a suit to open roads leading to a *kotee*, expressing an opinion that the facts had not been sufficiently ascertained, directed a further local enquiry to be made, and remanded the case to the Lower Court to be again decided there after such local inquiry. *Held* that he had no authority upon such a ground to remand the case for re-decision, there being no suggestion, under Act VIII of 1859, s. 351, that the lower Court had erroneously decided a preliminary point excluding evidence, and the reference not being of an issue framed by the Appellate Court under s. 354 NUNDCOOMAR BANERJEE v. BARRY, **Marsh 121 = 1 Hay 260.**

(145)—*Civ. Pro. Code (Act VIII of 1859), ss. 351, 352—No wrong decision on preliminary point—No evidence excluded—Re-settlement of issues—Remand.*—An Appellate Court must not remand a case where no preliminary point is decided wrongly and no evidence excluded, and the Appellate Court still considers the issues defective or insufficient, but must re-settle the issues and determine the case itself. SHAIKH FUTTEHOOLLAH v. OOMDANISSA BIBEE, **14 W.R. 69.**

(146)—*Civ. Pro. Code (Act VIII of 1859), s. 354—Remand to frame new issues.*—A remand of a case cannot be ordered by an appellate Court with instructions to frame new issues, but issues may, under s. 354 of Act VIII of 1859, be remitted for trial by the lower Court, whose finding and evidence should be returned to the appellate Court, which must pronounce the final decision. CHUNDERNATH SURMA v. RAMANAUTH SURMA, **1 W.R. 69.**

(147)—*Act VIII of 1859, ss. 351, 352—Remand.*—It is not competent to the lower appellate Court to remand a case for a second decision by the Court of first instance except where the first Court has decided the case upon a preliminary issue in such a way as to cause an absence of material evidence bearing upon the issues on the merits between the parties. LALLA SHOOBH NARAIN v. NURSINGH NARAIN, **20 W. R. 148.**

(148)—*Remand — Grounds.*—An appellate Court should not remand a case when it is of opinion that the lower Court cannot properly come to a different dicision upon the evidence from that to which it has already come. BONOMALEE CHURN MYTEE v. SHOROOP HOOTAIL, **14 W. R. 60.**

(149)—*Civ. Pro. Code, ss. 351, 352, 354—Appellate Court—Remand when allowable.*—An appellate Court cannot remand a case, unless the Lower Court has disposed of it on a preliminary point so as to exclude any evidence of fact which appears to the appellate Court essential to the rights of the parties. If the Judge finds the evidence on the record insufficient to enable him to come to a right determination of any question, he should proceed under s. 354 of the Code. HERRIKOSAM v. STEPHENSON, **1 W.R. 298.**

Remand—*continued.*

(150 & 151)—*Burden of proof, misplacement of—Remand.*—Misplacement of the burden of proof is only a ground for remanding the case, if the circumstances had been such that, by placing the burden of proof on the wrong party, somebody has been misled or taken by surprise, or had no opportunity of adducing evidence. But, where all the parties have had full warning of the points at issue, and full opportunity of calling witnesses and adducing evidence, then, if the Judge, in his judgment, places the burden on the wrong side, that is no ground for a remand. HUBLAL SUKUL v. RAMGOTI DEY ROY, **11 C L.R. 581.**

(152)—*Civ. Pro. Code*, 1882, *ss.* 562, 566, 567—*Remand, when proper—Trial of fresh issue directed—Procedure.*—A suit was decreed by the Court of first instance on the merits as they appeared to the mind of the Court On appeal, the District Judge was of opinion that the determination of another issue of fact was essential to the right decision of the suit upon the merits, and so he reversed the decree of the first Court and remanded the suit for the trial of an issue framed by himself. *Held* that the procedure adopted by the Judge in this respect was clearly wrong and contrary to the provisions of ss. 562 564, inasmuch as the first Court had not disposed of the suit upon a preliminary point. The Judge ought to have proceeded under ss. 566, 567, not disposing of the appeal until he had received the first Court's finding on the new issue. MOKUND LAL v. HURBULLUBH NARAIN SINGH, **12 C.L.R. 136.**

(153)—*Civ. Pro. Code*, 1882, *s.* 562—*Remand—Decision on a preliminary point—Misjoinder of causes of action.*—In this case, the Divisional Judge on appeal held that the suit was bad for misjoinder and remanded the case to the Original Court for retrial under s. 562 of the Civ. Pro. Code. *Held*, that the order of the Divisional Judge was *ultra vires*, as the suit had not been disposed of by the original Court on a preliminary point, but the whole case had been gone into and disposed of MUHAMMAD ISHAQ v. MUHAMMAD SHAFFI, **139 P.L R 1901.**

(154)—*Civ Pro. Code*, 1859, *ss.* 351 *and* 354.—S. 351, Act VIII of 1859, is meant for those cases in which a lower Court has disposed of a case on a purely preliminary point, without going into any of the merits so as to exclude evidence of facts essential to the rights of parties Where abundant evidence had been taken, but the Lower Appellate Court thinks any further evidence or inquiry necessary, its proper course is not to get rid of the case by returning it to the lower Court, but to frame an issue, and to refer the same to the lower Court for trial strictly in accordance with the provisions of s. 354. RAM CHUNDER GOOPTA v. BHAGESSUR SURMA, **W R. 1864, 357.**

(155)—*Procedure—Lower appellate declining to exercise jurisdiction vested in it by law—Facts undisputed—Remand unnecessary.*—Where the lower appellate Court declined to exercise a jurisdiction vested in it by law, the High Court would have remitted the case to that Court for retrial, if there were any dispute as to the fact. In case of the facts being well established and practically admitted, the High Court, instead of remanding the case to the lower appellate Court would proceed to decide the question on those facts. RAM NARAIN SAHOO v. BANDI PERSHAD **31 C. 377.**

(156)—*Failure to carry out High Court's order of remand—Substantial trial on the merits by lower Court—No second remand necessary—Notice of enhancement informal—Objection raised for first time in special appeal—Cure of irregularity by omission to object—Acceptance of notice by ryot—Act X of* 1859, *s* 17, *cl.* 1.—It was argued for the appellant that the case ought to be again remanded upon the ground that the lower Court had not fully carried out the order of the High Court when the case was previously remanded. The High Court however decided, that, although the lower Court had not upon remand gone into all necessary points, yet, there should not, on that account, be a second remand; the case was substantially and fully tried on the merits and no further remand was necessary for the ends of justice. One of the grounds argued in this appeal was that the notice of enhancement was altogether informal and that the suit ought to have been dismissed in consequence; but, it was held that, although the notice was informal and indistinct, still it sufficiently showed that the plaintiff's intention in giving it was to inform the defendant, his ryot, that he meant to increase the rent to the rates paid for lands of similar description in places adjacent, under cl. 1, s. 17 of Act X of 1859. The defendant had accepted the notice as under cl. 1, s. 17, and under the circumstances the informality of the notice was not such as could be objected to and for the first time on special appeal. KASHEENATH DEB v. MAHARANEE SHIBESSUREE DEBIA, **8 W.R. 503.**

(157)—*Evidence completely before higher Court—No further evidence necessary to be taken by Court below—Remand improper.*—A remand should not be ordered for the trial of a case in a lower Court, when all the evidence for its disposal is before the higher Court whose duty it was to decide all questions arising between the parties on the pleadings and on the evidence which they had brought forward. BAMA CHURN DUTT v. PUDD MOOKHEE GOOPTA, **25 W.R 389.**

(158)—*Dismissal of suit—Under-valuation—Power of appellate Court—Pre-emption suit valued at sum less than consideration—Special appeal—Remand for making good stamp duty*—It is competent to a lower appellate Court to dismiss a suit for under-valuation, although the first Court admits the plaint and acts on it without objection by the parties. In a pre-emption suit valued at Rs 31 where the consideration was Rs. 2,000, the High Court in special appeal declined to remand the case to enable plaintiff to make up the deficient stamp duty. MEWA LALL v. BEHARI LALL, **14 W. R. 195.**

Remand—*continued.*

(159)—*Act* VIII *of* 1859, *s.* 354 — *Postponement for taking further evidence — Remand.*—The failure of a party to take advantage of a postponement to file his further evidence cannot afterwards give him a right to a remand for taking such further evidence, which, without such postponement, he might have had under s. 354. Act VIII of 1859. TEEN COWREE KHARAH v. LUCKHEE MONEE DOSSEE, **5 W.R. Act X. 8.** [*F.*, 8 W.R. 502]

(160)—*Illegal order of Court, not necessarily void as for want of jurisdiction.*—The only contention in this special appeal was, that a previous order of remand passed by the lower appellate Court, being contrary to the provisions of s. 351 of Act VIII of 1859, that order, together with all the proceedings subsequently held in furtherance thereof, ought to be set aside as null and void for want of jurisdiction. The High Court held that, although it had to be conceded in favour of the appellant that the Judge was wrong in law in having passed an order of remand where he should have followed the provisions of s. 355, yet the whole of the proceedings could not, on that account, be quashed as being null and void for want of jurisdiction. The case was legally before the Judge, and he had full and ample jurisdiction to try it Every order passed by a Court is not void for want of jurisdiction, simply because it is illegal, and there was no reason why the present case should be regarded as an exception to the general rule. MIRJA JOWAD ALI v. HOSSEIN BIBEE, **8 W R 207.**

(161)—*Act* VIII *of* 1859, *ss.* 351, 352—*Remand—Evidence--Substantial reason.*—It is extremely doubtful whether in accordance with the C.P.C. 1859, ss. 351 and 352, a Court is competent, when several cases are tried together, to remand for new trial, on the ground that the plaintiff's evidence had not been completely heard and that it was an error in the Court below to determine all the cases at once. Additional evidence cannot be admitted in appeal without some substantial reason being recorded in the proceedings. SHADDEN v. FINLAY AND CO., **7 W.R. 313.**

(162)—*Issues—Findings on—Remand—Question of fact—Special appeal.*—The High Court on special appeal has no power of remand on the ground that the Judge below has come to a wrong conclusion on a question of fact. It is immaterial if the Judge below has disposed of the case before him on only one of the two issues framed by the Munsiff, if the parties did not ask for a finding on the other issue. MOTI BHAGVAN v. HARJIVAN GIRDHARDAS, **2 B.H.C. 32.**

(163)—*Limitation — Remand — Duty of Appellate Court.*—Where the first Court has disposed of a suit on the preliminary issue of limitation, the appellate Court cannot remand the case to the first Court without itself deciding the question of limitation upon the evidence on the record. CHUNDER KISHORE CHUCKERBUTTY v. GOUR CHUNDER CHUCKERBUTTY, **23 W.R. 13.**

Remand—*continued.*

(164)—*Appeal—Reversal of first Court's decree on preliminary point— Remand.* — Where the first Court decided a case on two out of three issues in the case and the lower appellate Court reversed the decree of the first Court on the question of limitation and remanded the case for fresh trial. *Held* that, under the provisions of s. 352, Civ. Pro. Code, the lower appellate Court had no power to remand the case for trial, but should have decided the case itself on the evidence on the record. OBHOY CHURN DEO v. RAM DOOLLUB DEO, **25 W.R. 131.**

(165)—*Act* X *of* 1859 — *Plea as to jurisdiction of Court - Bastu lands.*—The question of jurisdiction cannot be raised for the first time in appeal, unless it appears, on the face of the pleadings, or the admission of the parties, or on the evidence, that the suit will not lie. Where there was no evidence whatever and it did not appear on the pleadings that the land was of such a nature that a suit for enhancement would not lie under Act X of 1859 and no plea as to the jurisdiction of the Court under Act X of 1859 had been taken in the Courts below, the High Court would not remand the case to enquire under which class of *bastu* land the subject-matter of suit fell, or entertain the point of jurisdiction in appeal. NAIMUDDA JEWARDAR v. R. SCOTT MONCRIEFF. **3 B.L.R.A.C. 283 = 12 W.R. 140.** [*R.*, 7 C.L.J. 152.]

(166)—*Appeal—Defective finding — Remand for re-trial.*—Where the ground of a regular appeal was that the first Court ought to have found that an ijara existed, it is the duty of the first appellate Court to determine whether it was proved that the defendant held under an ijara or not and not to remand the case for re-trial. MAHOMED ASHAN v. MAHOMED YASIN, **9 W.R. 106.**

(167)—*Rejection of evidence—Court's duty to pronounce distinct opinion as to value of evidence—Remand—Civ. Pro. Code* (*Act* VIII *of* 1859), *ss.* 354, 355.—In a suit for a certain sum of money, the defendant peaded the payment, and in support of the plea produced a letter alleged to have been written by the plaintiff acknowledging receipt of the money. The plaintiff denied the genuineness of the acknowledgment, and the Court rejected the testimony of two peadahs who deposed to the fact of payment, on the ground that they were the defendant's servants. On appeal, the lower appellate Court remanded the case under s. 354, Civ. Pro. Code, directing the first Court to give the defendant an opportunity of proving the acknowledgment and after recording a finding on the point, to return the case to the appellate Court. *Held* that, if the first Court was not willing to allow the defendant any opportunity to adduce further evidence, it was at least bound to pronounce a distinct opinion as to the value of the evidence adduced before it, and should not have rejected the evidence altogether. *Held* also that the lower appellate Court erred in remanding the case under s. 354, Civ. Pro. Code, that the case

Remand—*continued.*

really fell under s. 355, and the lower Court should have itself tried it after taking such additional evidence as might be found necessary. RUNPAL SINGH v. MAHARAJAH JOY MUNGUL SINGH, **11 W.R. 106.**

(168)—*Procedure--Appellate Court considering evidence not sufficient for satisfactory judgment—Remand—Act* VIII *of* 1859, *ss* 354 *to* 357 —Where the Court of first instance decides the case both on the general merits and on the plea of limitation, and the appellate Court considers that the evidence upon the record is not sufficient to enable it to pronounce a satisfactory judgment as contemplated in s. 353 of Act VIII of 1859, the appellate Court, if it considers itself to be in a position legally to require further evidence to be taken, ought to proceed in the manner provided for in ss. 354 to 357 of the Code, and has no right to set aside the decree of the first Court and remand the case for re-trial. GOOROO PERSHAD DUTT v. SREENATH BANERJEE, **15 W.R. 314.**

(169)—*Act* VIII *of* 1859, *s.* 351—*Limitation.* —Where the question of limitation is decided by an appellate Court after it has taken evidence and gone into the whole case, the decision is not one within terms of s. 351 of Act VIII of 1859, namely, a disposing of the case upon a preliminary point so as to exclude any evidence of fact essential to the rights of the parties. By s. 352, it is not competent to remand the case to the first Court SYUD HUSSUN ALI CHOWDHRY v. MANOOWAR ALI, **21 W.R. 413.**

(170)—*Decision of suit by lower Court on question of limitation and on merits—Remand.* —Where a lower Court, while holding that a suit was barred by limitation also went into the merits of the case and dismissed the claim, *held* that the appellate Court, although it held that the suit was not time barred, should not remand the suit for re-trial on the merits. KERTEENERAIN CHOWDHRY v. PERTHENARAIN CHOWDHRY, **1 W.R. 32.**

(171)—*Civ. Pro. Code*, 1859, *s.* 352—*Remand for additional evidence.*—Where a suit which had been tried by the lower Court on its merits, without the omission of any issue or question of fact essential to those merits, was remanded by the lower appellate Court with a view to additional evidence being taken, the order of remand was held to be not in accordance with any of the provisions of the Civ. Pro. Code, and in opposition to the terms of s. 352 of the Code. MAHESH CHANDRA DAS v. MADHAB CHANDRA SIRDAR, **2 B.L.R. S.N. 13** (b) = **10 W R. 388.** [*R.*, 12 A. 510, F.B. = A.W.N. 1890. 188, 14 B. 232; *D.*, 28 C. 324 = 5 C.W.N. 509.]

(172)—*Issue not raised in lower Courts—Suit whether could be remanded.*—A suit by mortgagees to make absolute a conditional sale, was dismissed by the first Court on the ground of the minority of one of the mortgagors, but was decreed by the lower appellate Court. On special appeal, the High Court refused to remand the case for enquiry as to the minority of one of the mortgagors, and as to the necessity for the loan under the mortgage, as no issue in respect of either of these questions had been raised. SUDUL v. BULDEO, **2 N.W. P. 23.**

(173)—*Decision on pure questions of fact—Lower Court concurring with reasons given by first Court, whether should repeat such reasons in its judgment.*—Where a suit has been decided on pure questions of fact, and no point is left undetermined, and the Judge, without giving detailed reasons, endorses the opinion of the Court of first instance, it would not be right to remand the case for the purpose of the Judge setting forth in his judgment the same reasons which influenced the Court of first instance in coming to the conclusions at which it arrived. IMRIT LALL THAKOOR v. NUCKSHED SUHAYE, **10 W R. 100.**

(174) — *Judgment— Meagreness—Remand.*— It is doubtful whether the meagreness of a judgment warrants the High Court in remanding a suit for re-trial. Even if it does so in any case, it can only be when there is nothing in the judgment of the lower appellate Court to show that it has considered the evidence. KRISHNENDRO ROY v. DIGUMBUREE DEBIA, **16 W.R. 15.**

(175)—*Appellate Court—Remand—Evidence.* —In a case where all the evidence that is necessary has not been recorded, the appellate Court has power either to require additional evidence to be taken or take it itself. But it should decide the appeal itself, and not remand it for retrial by the Munsiff MR. A. HILLS v. OSMAN BISWAS, **25 W.R. 35.**

(176)—*Appeal—Remand—Dismissal of suit as barred after taking evidence—Propriety of remand* —Where the first Court took all evidence which the parties offered upon the merits of a case and thereupon decided the suit on the preliminary question of limitation, it was not competent to the appellate Court to remand the case for re-trial, as it had sufficient evidence upon the record to enable it to pronounce a satisfactory judgment. MUSSAMUT RAMA KOOER v. LALLA BHUGWAN LALL, **22 W.R. 224.** [*R*, 31 C. 228.]

(177)—*Appellate Court—Framing of new issue—Remand for finding on that issue—Act* VIII *of* 1859.—If the appellate Court considers that any issue not raised in the Court below is material to be raised, and finds that there is no evidence on record sufficient for the determination of that issue, it cannot remand the whole suit for retrial; but the appellate Court may, under s. 354 of Act VIII of 1859, direct a finding on that issue to be returned by the Court below, the case being retained on its own file. BUNGO CHUNDER BANERJEE v. CHUNDER NATH CHUCKERBUTTY, **25 W.R. 47.**

Remand—*continued.*

(178)—*Pottahs—Attestation or registry not necessary—Decision of appellate Court on preliminary point—Evidence on all issues on record—Appellate Court not competent to remand.*—It is not usual to have subscribing witnesses to pottahs nor to register such documents. In this case, all the evidence which the parties wished to adduce had been taken and was before the lower appellate Court. But that Court, having decided on one of the issues relating to the genuineness of a pottah, remanded the case to the first Court for the determination of the other issues. *Held* that the decision of the lower Court, although it happened to be on a preliminary point, did not exclude evidence of facts on the other issues raised in the case. Having reference to ss 351, 352 and 353 of the Civ. Pro. Code, the Judge had no authority to remand the case for re-trial, but should have tried it himself. RAM JOY SEIN v. NUNDO MOYEE DEBIA, **10 W. R. 374.**

(179)—*Dismissal of suit by first Court on preliminary issue—Remand by appellate Court for trial on merits.*—A suit for rent in which the parties went to trial upon the issues, was dismissed by the first Court which found in favour of the defendant the first issue which went to the whole merits of the case. Evidence was, however, recorded on the other issue also. *Held*, under these circumstances, that the appellate Court was not competent to remand the case for trial on the merits, which it could do only when evidence on the merits had been excluded; and that the Judge must have entertained and disposed of the suit himself on the merits. GOPAL CHUNDER GOOHO v. JUGGODUMBA DOOSIA, **10 W.R. 411.**

(180)—*Points raised on appeal not taken in lower Court—Remand.*—A case will not be remanded for re-trial on a point not raised in the lower Court, if the recorded evidence is sufficient to enable the appellate Court to decide the point. But, if the appellants succeeded on a point raised by them for the first time in the Appellate Court, they should pay the respondents the costs of the appeal. HARIDAS PURSHOTAM v. HENRY GAMBLE, **12 B.H. C. 23.**

(181)—*Appeal — Argument before appellate Court—Remand—Procedure—Act* VIII *of* 1859, *s.* 354.—If the Appellate Court be of opinion that the plaintiff in argument before it, is endeavouring to obtain something other than what he claims in the plaint, the course which that Court is bound to take is to dismiss the suit; but if it thinks that the allegation contained in the plaint can be reconciled with the argument used on the appeal, and the case resulting from this is supported by the evidence produced by the plaintiff, it is its business to determine the appeal itself, and it is not a case for an order under s. 354, Act VIII of 1859. TILLUCK CHUNDER DUTT CHOWDHRY v. BROJO SOONDUR MITTER, **24 W.R. 121.**

(182)—*Remand after trial and decision on evidence.*—An Appellate Court has no authority to remand a case which comes before it for trial, excepting when the Court of first instance has disposed of a case on a preliminary point, so as to exclude any evidence of fact which shall appear to the appellate Court essential to the determination of the rights of the parties and the decree of the first Court on such preliminary point has been reversed by the appellate Court. BRINDABUN DEY v. PISONA BIBEE, **13 B.L.R. 200, Note=13 W.R. 107.**

(183)—*Appeal—Legality of order of remand questioned in special appeal—Civ. Pro. Code,* 1859, *ss.* 351, 352—*Case decided on merits.*—The omission of a party to prefer an appeal against an order of remand does not preclude him from questioning its legality, when the case comes up in special appeal from the subsequent decision passed after remand. [*F.*, 9 Ind. Cas. 173=9 M.L.T. 251=21 M.L.J. 263.] S. 352 of Act VIII of 1859 expressly limits the power of the appellate Court to remand, and says that it is not competent to remand a case for a second decision, except as provided by s. 351. Where, therefore, the lower Court went into evidence upon the whole case and did not dispose of it upon any preliminary point, but investigated the merits of the case and passed its judgment upon the evidence, the appellate Court was not competent to remand the case for a second decision. MAJORAM OGHA v RAJA NILMONEY SINGH DEO, **13 B.L.R. 198=21 W.R. 326.**

(184)—*Act* X *of* 1859, *s.* 77—*Application to intervene rejected—Appeal—Remand.*—In a suit for rent brought originally before the Deputy Collector, a third party applied to be allowed to intervene under s. 77 of Act X of 1859, but the application was rejected and the suit between the plaintiff and defendant was decided on a matter of fact. On this, the would-be intervenor appealed to the Judge and the case was remanded to the Deputy Collector with directions that he should make the intervenor a party, and try the case afresh. *Held* that the order of remand was made without jurisdiction and therefore void and that everything that had taken place since must fall with it. KHONDKAR KEFAETOOLLAH v. MAHOMED KABEL, **9 W.R. 345.**

(185)—*Suit for declaration of title—Illegal remand—Act* VIII *of* 1859, *s.* 354.—Where, in a suit for declaration of title, which was dismissed by the first Court on the ground that the purchase set up by the defendants was proved and the plaintiff's title not proved, the lower appellate Court, finding that the purchase of the defendants was not satisfactorily proved, remanded the case for a finding on that issue, *held* that, having regard to the terms of s. 354 Act VIII of 1859, the order of remand was illegal. HURO SOONDUREE DEBIA v. UNNOPOORNA DEBIA, **11 W.R. 550.**

(186)—*Issue erroneously framed by lower appellate Court—Judgment containing finding on proper point—Refusal of High Court to remand—Practice—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 127, *application of, to suits for partition.*—In this suit for partition, the

Remand—*continued.*

lower appellate Court had erroneously laid down the issue for its decision to be "Have plaintiffs enjoyed their share in the profits for twelve years?" whereas the issue ought to have been "Have the plaintiffs been excluded from (the suit inam land) No 200 and their share of its profits to their knowledge for twelve years?" In its judgment, however the Court had come to the conclusion that the defendants had been in adverse possession of the said No. 200 for twelve years, though there was no finding that such exclusion of the plaintiffs had been to their knowledge The High Court decided, on second appeal, that it would be too technical to hold that, under the circumstances, there has not been a substantial finding to the effect required by art. 127, and that it would be useless to send down an amended issue to have the same finding in the result again recorded, though in different words in pursuance of such correctly worded issue. It was also held that the contention was untenable that art. 127 of the Limitation Act could not afford a defence to the plaintiffs' claim in so far only as the particular No 200 was concerned. The fact that the plaintiffs were not excluded from their share in other fields could not prevent the statute from operating in respect of the field from which they had been excluded to their knowledge VISHNU RAMCHANDRA v. GANESH, **21 B 325.**

(187)—*Plaintiff given every opportunity to produce evidence—Failure of plaintiff to do so—Suit not to be remanded.*—A suit cannot be remanded where the plaintiff had every opportunity given to produce sufficient evidence but failed to do so. MT. HASANBIBI v. TALEWARKHAN, **4 C P.L.R. 103.**

(188)—*Remand order, when to be made.*—The Court will not remand a case in order to give a plaintiff a second opportunity of proving his case, except for special reasons. A remand order was refused in a case on the grounds that it was not a case in which the plaintiff was entitled to the relief claimed on a ground other than that stated in his plaint, that no evidence tendered by the plaintiff was wrongfully excluded, that there was no ground for admission of fresh evidence, and that, on the evidence on the record, the plaintiff's case failed. HAJI KHAN v. BALDEO DAS, **24 A. 90=A.W.N. 1901, 188.**

(189)—*S. 562, Civ. Pro. Code, 1882—Order of remand for joining necessary party by first Court of appeal - Not legal—Procedure to be followed.*—Where a Court of first appeal remanded a suit to the original Court for a retrial on the ground of non-joinder of party, the High Court reversed the order of remand and directed the appellate Court to dispose of the appeal in the legal manner indicated in *Kelu Mulacheri Nayar* v. *Chendu* (19 M. 157), *Ganesh Bhikaji* v. *Bhikaji* (10 B. 398) and *Hari* v. *Annapurnabi* (P J 1894, 187). KESHAV. v. PANDURANG, **1 Bom. L.R. 29.**

Remand—*continued.*

(190)—*Order of remand—Addition of necessary parties.*—A Court of Appeal is not competent, under s. 562 of the Code of Civil Procedure, to remand a suit to the original Court on the ground of defect of parties. BANDO v. BHASKER, **1 Bom. L.R 369.**

(191)—*Remand by appellate Court after local investigation.*—An appellate Court cannot remand a case for re-trial after a local investigation. An appeal lies from such an order. JEEBEN KISSEN ROY v. DWARKANATH ROY CHOWDHRY, **W.R. 1864, 363.**

(192)—*Adjournmsnt, Application for—Not granted—Decision ex parte - Remand—Practice —Civ. Pro Code, 1882, ss 562, 568, 569.*—On the day fixed for the first hearing of a suit, the defendant, pleading his inability to file a written statement applied for an adjournment which was granted and another day fixed for the hearing of the suit. On this latter day, also, a like application was made by the defendant pleading continued illness, and the Court, rejecting the application, heard the case and decreed in favour of the plaintiff. On appeal by the defendant, the appellate Court remanded the case holding that the application for adjournment ought to have been granted. The plaintiff appealed to the High Court against the order of remand. *Held* that, the suit having been decided by the Court of first instance on the merits, the appellate Court could not remand the case under s. 562, but ought to have proceeded as directed by ss 568 and 569, Civ. Pro. Code, 1882. PARVATISHANKAR DURGASHANKAR v. BAI NAREL, **17 B. 733.** [*Diss.*, 16 M.L.J 479=1 M.L.T. 268 =30 M. 54 ; *R.*, 12 O.C. 25=1 Ind. Cas. 329.]

(193)—*Evidence — Improper admission or rejection of evidence—Appeal— Decision on merits.*—Whenever a mistake is made by the lower Court in admitting or rejecting documentary evidence, the case cannot be sent back for a new trial unless the mistake has really or materially affected the decision of the case upon the merits. WATSON & CO. v. GOPEE SUNDUREE DOSSEE, **24 W.R. 392.** [*Diss*, 7 C. 293 ; *R*, 3 B. 30]

(194)—*Some portions of appellate judgment obscurely worded—Appellate Court confirming decision of first Court Remand.*—So long as the High Court sees that an Appellate Court has considered a case and has come to the same conclusion as the Court of first instance, the High Court will not remand the case, simply because there may be some portions of the judgment which are obscurely worded. BROJO NATH SEN v. SOORJA KANT SEN, **25 W.R. 276.**

(195)—*Dismissal of suit by first Court—Remand by the lower appellate Court - Validity.*—In appeal from an order of the Court of First Instance dismissing a suit on the ground that it was barred by the limitation, the lower appellate Court, where there is sufficient evidence, should try the case on the merits as

Remand—*continued.*

prescribed in s. 353 of Act VIII of 1859, (Civ. Pro. Code) instead of remanding it. But where further evidence is required, it must follow the procedure prescribed in s. 354 of the Act. LACHMUN LALL DOOBEY GOWALLY v. HURSOHAY LALL, **W.R. 1864, 361.**

(196)—*Civ. Pro. Code, Act* XIV *of* 1882, *s.* 562—*Admission of document in first Court without necessary proof—Remand of suit for disposal—Remand made without jurisdiction.*—In the course of the trial of a suit, copies of certain letters were admitted in evidence under the impression that they were originals. On appeal, the suit was remanded for fresh disposal on the ground that copies of the letters had been admitted without proof of the original letters. *Held* that the remand order was made without jurisdiction as the suit had not been disposed of on a preliminary point and all the proceedings subsequent to the order were invalid. KRISHNAMMA NAIDU v. AKHULA NAIDU, **5 M.L.J. 82.**

(197)—*Civ. Pro. Code, ss.* 562, 566—*Remand—Reference of issues—S.* 562 *permissive only, not obligatory.*—It does not follow that, because the circumstances of a case would justify an appellate Court in applying s. 562 of the Code of Civil Procedure and remanding the suit to the Court of first instance, the appellate Court must apply that section and is precluded from making an order under s. 566 of the Code. RAMYAD MISRA v. THAKUR MISRA, **A.W.N. 1899, 2**

(198)—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 562—*Preliminary point.*—Where the District Judge disposed of all the issues framed in the suit and rejected the claim and the Divisional Judge set aside the order of the District Judge and remanded the suit under s. 562 of the Civ. Pro. Code—*held*, that the suit not having been disposed of on a preliminary point, remand under s. 562, Civ. Pro. Code, was illegal. LOKU RAM v. SETH NIRSI DAS, **57 P.L R. 1904.**

(199)—*Civ. Pro. Code,* 1882, *ss.* 562 (=*O.* 41, *r.* 22, *new Code*), 564 (*omitted in new Code*)—*Only part of suit disposed of on preliminary point—Court cannot order remand*—Where only a part of a suit had been disposed of on a preliminary point, s. 562 does not apply and the Court below had no power to make a general order of remand. BANWARRI LAL v. SAMMAN LAL, **11 A. 488=A W N. 1889, 188.** [*Appr.*, 12 A. 510, F.B ; *Appl.*, 27 A. 163=1 A.L.J. 503=A.W.N. 1904, 202]

(200)—*Second appeal—Improper admission of evidence by lower Court.*—Though the High Court cannot, on second appeal, generally look at the evidence itself to decide the sufficiency of evidence in the case, other than that improperly admitted, to support the lower Court's finding, yet, in cases where it is clear from the judgment that the Court below has arrived at its findings independently of the improperly admitted evidence, there need be no remand. WOMES CHANDER CHATTERJEE v. CHUNDER

Remand—*continued.*

CHURN ROY CHOWDHRY, **7 C. 293.** (24 W. R. 392, *Diss.*) [*R.*, 23 C. 179, 31 C. 380, 35 C. 701=12 C.W.N. 657=7 C.L J. 563]

(201)—*Appeal—Decision on an issue upon which there is no finding.*—Where the Court of First Instance takes evidence, but does not find on the issues and decides the suit on a point of law, it is not necessary for the appellate Court to remand the suit under s. 562, but it may come to a decision upon the evidence recorded, if that is considered sufficient. BANDI SUBBAYYA v. MADALAPALLI SUBANNA, **3 M. 96.** [*R.*, 8 A. 576, F.B.]

(202)—*Points framed as issues, omission to let in evidence in respect of, not a ground for remand.*—Where a certain point has been framed as an issue by the Court below and brought to the attention of the parties, but they have failed at the trial to give any evidence with regard to it, the case should not be remanded as upon such point, because, such a practice would only give the parties a chance of procuring perjured evidence in trying their cases in so many different ways. RAM PRASAD v. ABDUL KARIM, **9 A. 513=A.W.N. 1887, 146.**

(203)—*Appeal on full Court-fee from decree dismissing suit in part—No cross appeal or objections preferred—Remand of whole case, validity of—Civ Pro. Code,* 1882, *s* 578 (=*S.* 99, *new Code*), *applicability of.*—A Court cannot make the payment of Court-fees a test of its jurisdiction. Where a plaintiff, in appealing only against a portion of the decree which was against him happened to stamp the memo. of appeal with stamps sufficient for an appeal against the whole decree, and the defendant did not appeal or file cross objections, it was held *ultra vires* of the Court to remand the *whole* case and that the plaintiff's appearance before the first Court in pursuance of the remand order could not validate the order, and that it was not a case covered by s. 578 of the Code. CHEDA LAL v. BADULLAH, **11 A. 35.** [*R.*, 13 A.W.N. 144.]

(204)—*Remand—Civ. Pro. Code, s.* 562—*Record of case complete—Evidence not excluded.*—When the record of a case is complete, and no evidence has been excluded, the appellate Court ought not to remand the case for a fresh decision, but must itself decide the case on the merits, with reference to the issues raised by the pleadings of the parties. DURGA v. HAIDAR ALI, **7 A. 167=A W.N. 1884, 315.**

(205)—*Dismissal of suit as brought—Remand for trial of new issues—Change of character of suit*—A plaintiff, coming into Court with a case and completely failing to prove it, should not be permitted to succeed upon another, and that directly in antogonism with his primary allegations. And where the appellate Court agrees with the Court of first instance that the suit, as brought, fails, it cannot remand it to the lower Court, for the trial of the new issues framed by it, which have the effect of making

Remand—*continued.*

a new and different case for the plaintiff. Therefore, where a suit by a Bank against its agent for recovery of money paid by him to a sub-agent appointed by him, on the ground, that such payment was unauthorised, was decreed on the ground, that the appointment in question was made without authority, *held*, that the first appellate Court, which found that the said appointment was made with authority acted wrongly, (1) in remanding the case for the trial of new issues, whether the defendant had or had not exercised proper discretion in the selection of the sub-agent, and whether the defendant had or had not co-operated or participated in the act by which the sub-agent had defrauded the Bank, and (2) in affirming the decree of the lower Court on grounds other than those, on which the plaintiff had sought relief. HAMILTON v. THE LAND MORTGAGE BANK OF INDIA, **5 A. 456 = A.W.N. 1883, 99.**

(206)—*Second appeal—Practice—Party refusing to produce evidence in lower Court—Case not to be remanded.*—Where a party had ample opportunities to produce his evidence, but refused to submit to the ruling of the first Court as to the *onus* of proof and declined to produce evidence, the High Court refused in second appeal to remand the case so as to give the party another opportunity of putting in his evidence. KANHIA LAL v. DEBI DAS, **22 A. 141 = A.W.N. 1900, 2.**

(207)—*Remand—Changing nature of suit.*—A sued to eject a ryot on the ground of his holding over after the term of his pattah had expired. The ryot denied that he had ever held under a patta from A, and alleged that the *jote* belonged to B. Plaintiff's allegations were found to be false and his suit was dismissed. The lower appellate Court directed B to be made a defendant and remanded the suit to have the question of ownership tried between A and B, at the same time agreeing with the Court of first instance that the allegations in the plaint were false. *Held* that the lower appellate Court should have dismissed the case and was wrong in so remanding it. BHOOBUN DASS MUNDUL v. SRIMUTTY BILASHMONY DASSEE, **1 C.L.R. 415.**

(208)—*Civ Pro. Code, Act* XIV *of* 1882, *ss.* 562—588, 591—*Evidence improperly taken.*—Where a Munsiff had decided all the issues in the suit, an order of remand by the District Judge on the ground that the Munsiff had based his decision on evidence improperly taken (a commission issued before defendant had notice of suit) is illegal. The District Judge ought to exclude such evidence or call for further evidence. [*F.*, 19 M. 479, 32 M. 83 = 4 M L.T. 479; *R.*, 12 C P.L.R. 119.] The question of the illegality of an order of remand can be raised in an appeal from the final decree. When the order of remand is *ultra vires*, all subsequent proceedings are void. SUBHA SASTRI v. BALACHANDRA SASTRI, **18 M. 421.** [*F.*, 19 M. 479, 32 M. 83 = 4 M L. T 479, 28 C. 324 = 5 C.W.N. 509; *R.*, 9 O C. 80, 12 C.P.L.R. 119; *D.*, 28 C. 324 = 5 C.W.N. 509.]

Remand—*continued.*

(209)—*Civ. Pro. Code*, 1882, *s.* 562—*Remand—Appeal from order of remand—Power of High Court to decide appeal in suit.*—After issues had been framed in a suit, the pleader for the plaintiff and the mukhtar for the defendant filed an application, praying that the case might be decided on a question of law, and stating that they did not wish the facts of the case to be gone into. The next day the defendant himself put in an application objecting to what his mukhtar had done, alleging that the mukhtar was not empowered to forego the decision of the case on the facts. That application was rejected, and the suit was tried with reference solely to the question of law raised therein, and was dismissed. The plaintiff appealed, and the defendant filed objections raising the question of the authority of his mukhtar to relinquish his right to have the case decided on the questions of fact therein involved. The appellate Court reversed the decision of the first Court on the point of law, and remanded the case under s. 562 of the Code of Civil Procedure for decision of the remaining issues, primarily for determination of the mukhtar's power to forego the decisions of the case on the facts. On appeal to the High Court against this order of remand, the Court *held* that the lower appellate Court ought to have decided the question of the mukhtar's authority instead of leaving it for the Court of first instance, which had already pronounced thereon, and itself exmined the mukhtar's power-of-attorney, and came to the conclusion that the mukhtar has authority to bind his client in that particular matter, and in consequence decreed the plaintiff's appeal PIRBHU DIAL v. YAKUB ALI KHAN, **A.W.N. 1901, 141.**

(210)—*Remand—Alteration of date of appeal without notice to appellant or his pleader.*—Where the date fixed for the hearing of an appeal was altered to an earlier date without notice to the appellant or his pleader, in consequence of which the appellant's pleader was unable to proceed with the case, *held* that the appellate Court was not competent to remand the appeal to the Court below for trial upon the merits, notwithstanding that neither the provisions of s. 562 nor those of s. 566 of the Code of Civil Procedure were strictly applicable. KANHAI LAL v. MANORATH RAM, **A.W.N. 1894, 19.** [*R.*, 17 A. 117.]

(211)—*Ss.* 562, 566, *Civ. Pro. Code*, 1882 (= *O.* XLI, *rr* 23, 25, *present Code*).—In a claim for mesne profits subsequent to the date of suit by plaintiff to recover possession, the first Court found that defendant was not in possession, and the Court of appeal, reversing the decision, remanded the case under s. 562, Civ. Pro. Code, 1882, for the determination of the amount of mesne profits. The High Court held that s. 562 was not applicable, and that the remand was improper, as the case had not been disposed of on a preliminary point. LALLA CHUNILAL v. MOHIJI SINGH, **1 C W N. 340.** [*R.*, 2 P.R. 1908, F. B. = 12 P.W.R. 1908 = 96 P.L.R. 1908.]

Remand—*continued.*

This Circular lays down rules for guidance in cases of remands by Lower Appellate Courts. Cir. No. 36, dated the 12th September 1866. **6 W.R. Civ. Cir. Order p. 8.**

See ACT XIV OF 1874, s. 6, 22 A. 405=A.W.N. 1900, 157.

See BEN. ACT X OF 1859, s. 77, 6 B.L.R. App. 106.

See BEN. ACT VIII OF 1895, s. 153, 4 C.W.N. 44.

Remand order by District Judge in appeal from Revenue Court, appealability of, to High Court—*See* U P. ACT XII OF 1881, s. 190, 16 A. 375=A.W.N. 1894, 121.

See U. P. ACT XII OF 1881, s. 208, 11 A. 31=A.W.N. 1888, 282.

See U. P. ACT XXII OF 1886, ss. 16, 124, 124 *D*, 4 O.C. 261.

Appellate Court, power of, to—Suit under N.W.P. Tenancy Act II of 1901—*See* U.P. ACT II OF 1901, ss. 196, 197, 2 A.L.J. 119.

Order of—Appeal—Revision—Jurisdiction—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*a*) (*b*), 147 P.L.R. 1911.

Appeal from order of—by Collector under s. 562, Civ. Pro. Code—*See* PUN. ACT XVI OF 1887, ss. 80 (*b*), 88, 1 P.R. 1905, Rev.=83 P.L.R. 1906,

By appellate Court without jurisdiction—Further enquiry by competent Court—Effect—*See* PUN ACT II OF 1905, ss. 11, 12, 1 Ind. Cas. 460=26 P.W.R. 1909.

See APPEAL—GENERAL, 86 P.R. 1898.

Appeal against remand, when to be presented—*See* APPEAL—GENERAL, 6 C.L.J. 547=12 C.W.N. 590.

See APPEAL—GROUNDS OF APPEAL, 54 P.R. 1883.

See APPEAL— OBJECTIONS BY RESPONDENTS, 3 A. 643.

Order of—On special point — Reversal of decree on appeal — *See* APPEAL—ORDERS, Marsh 600.

Suit for partition—Appellate Court deciding the shares and remanding the suit to lower Court to carry out partition—Erroneous description of the order as order of remand under s. 562, Civ. Pro. Code—Appeal—Court fee—*See* APPEAL—ORDERS, A.W.N. 1908, 40=5 A.L.J. 545.

Declaratory suit relating to two pieces of land dismissed *in toto* by first Court upon preliminary point—Appellate Court dismissing suit as to one piece, and remanding case as to the other piece—Inapplicability of Civ. Pro. Code, s. 562—Illegality of order—*See* APPEAL—ORDERS, 149 P.W.R. 1908.

See APPEAL— ORDERS, 3 A. 180 F.B., Marsh 469=2 Hay 591, 19 M. 167=6 M.L.J. 24, 17 C. 168, 7 B. 292, 126 P.R. 1886, 129 P.R. 1884, 7 C.W.N. 440.

Remand—*continued.*

Appeal from order of remand—*See* APPEAL—PRACTICE AND PROCEDURE, 7 A. 136=A.W.N. 1884, 294.

Appeal part-heard by District Judge and then transferred to Sub-Court — Sub Judge continuing hearing and disposing of appeal—Irregular procedure—Remand by High Court—*See* APPEAL—PRACTICE AND PROCEDURE, 9 M.L J. 297.

See APPEAL—MISCELLANEOUS, 19 M. 479.

See APPEAL TO PRIVY COUNCIL—GENERAL, 23 A. 220=28 I.A. 28=5 C.W.N. 153, P.C.

Order of High Court refusing certificate to appeal to Privy Council—Remand order by High Court, whether final order for purposes of admission of such appeal — *See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 17 A. 112=22 I.A. 1, P.C.

Remand order of High Court for trial on merits—Interlocutory decree not appealable to Privy Council without permission—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 8 B. 548.

Nature of remand order—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C.L.J. 336=4 Ind. Cas. 459.

See APPELLATE COURT — ADDITIONAL EVIDENCE ON APPEAL, W.R. 1864, Act X, 95.

Remand order not specifically appealed against High Court's power to question, in second appeal, validity of order — *See* APPELLATE COURT—POWERS OF APPELLATE COURT, 11 A. 35.

See APPELLATE COURT — POWERS OF APPELLATE COURT, 2 A. 908, A.W.N. 1884, 224, 46 P.R. 1885.

See APPELLATE COURT—MISCELLANEOUS, 22 M. 344.

Refusal by original Court to allow plaintiff to examine defendant as witness—Dismissal of suit—Duty of appellate Court—*See* CIV. PRO. CODE, 1859, ss. 148, 162, 6 M H C. 299.

Remand for adding fresh parties—*See* CIV. PRO. CODE, 1877, ss. 32, 562, 563, 569, A.W.N. 1881, 49.

See CIV. PRO CODE, 1882, ss. 542, 562, 564, A.W.N. 1891, 105.

Appeal—Order of remand directing addition of parties—Legality—*See* CIV. PRO. CODE, 1882, s. 564, 37 C. 171=5 Ind. Cas. 998.

Legality of—Where suit is not decided on a preliminary point—Consent of parties—Effect of setting aside—*See* CIV PRO. CODE, 1882, s. 564, 15 M L J. 236=28 M 437.

Order of—determining only part of case leaving other matters alone not final—*See* CIV. PRO. CODE, 1908, ss 2, 109, sch. I, O. 45, 6 A.L.J. 786=6 M.L.T. 94=31 A. 545=3 Ind. Cas. 967.

Ex parte decree set aside and suit remanded by appellate Court to Court of first instanc

Remand—*continued.*

—Right of successful appellant to restitution—*See* CIV. PRO CODE, 1908, s 2. O XLI, r. 23, ss. 144 (1) 104, O XLIII, r. 1, 3 C.L.J. 181.

Res judicata order of by first Appellate Court—Power of High Court on appeal from—*See* CIV. PRO CODE, 1908, s. 11, O. XLI, r. 23, 16 A. 252=A.W N. 1894, 64.

Power of Chief Court of Punjab to remand a case where judgment has been pronounced by the lower Court without hearing parties or pleaders—*See* CIV. PRO. CODE, 1908, s. 33, O. XX, r 1, s. 99, 5 P.L.R. 1905.

By appellate Court for amendment of plaint—*See* CIV. PRO. CODE, 1908, s. 99, A.W.N. 1881, 121.

See CIV. PRO. CODE, 1908, s. 104, O XLIII, r. 1, 26 M. 518.

Remand on questions of fact—High Court cannot interfere—*See* CIV. PRO. CODE, 1908, s. 104, O XLII, r. 1, 6 M.L.T. 198=3 Ind. Cas. 283.

Order of—Appeal whether lies—*See* CIV. PRO. CODE, 1908, s. 104 (2), O. XLIII, r. 1, 8 A.L.J 312=9 Ind. Cas. 666.

See CIV. PRO. CODE, 1908, s. 105, A.W.N. 1899, 136.

Decision by original Court on remand by Court of Appeal—Power of Court of Appeal to review its order of remand—*See* CIV. PRO. CODE, 1908, s. 105, 5 M.L.T. 75=32 M. 318=2 Ind. Cas 525.

Privy Council appeal—Order of—Decree or final order—*See* CIV. PRO. CODE, 1908, ss. 105, 108, 109, 8 A L.J. 192.

Remand order—Appeal if lies after suit is finally disposed of on appeal—*See* CIV. PRO. CODE, 1908, s 105, cl. (2), O. XLI, rr. 23, 25, 15 C.W.N. 830.

Appeal—Remand order—Second appeal when lies—Interference with remand orders in revision—*See* CIV. PRO. CODE, 1908, ss. 105, 115, O. XLI, r. 23, 50 P.R. 1911.

Order of, by appellate Court—if "final decree"—*See* CIV. PRO. CODE, 1908, s. 109, 12 C.W.N. 545=35 C. 618=8 C.L.J. 168.

Suit for winding up of partnership—Order for taking accounts—High Court's order on, for fresh taking of accounts—Effect—*See* CIV. PRO. CODE, 1908, s. 109, cl. (1), 7 Ind. Cas. 622.

Order of—Appealability to Privy Council—*See* CIV PRO. CODE, 1908, s 110, O. XLI, r. 23, A.W.N. 1907, 291=5 A.L.J. 57.

Fixation of limit of time for cross-examination Exclusion of evidence—Ground for—*See* CIV. PRO. CODE, 1908, s. 132, O. XVI & XXVI, 8 Ind. Cas. 418.

Preliminary point— Remand—Amendment of plaint in appeal—Power of appellate Court to amend plaint—Suit for rent converted into one of ejectment—*See* CIV. PRO. CODE, 1908, O. VI, r. 17, O. VII, r. 11, O. XLI, r. 23, s. 107 (2), O. XXII, r. 11, 19 B. 303.

Remand—*continued.*

See CIV. PRO. CODE, 1908. O. VII, r. 10, O. XLI, r. 23, O. XLIII, r. 1, A.W.N. 1882, 45.

Illegal order of remand—Appeal—*See* CIV. PRO. CODE, 1908, O. VII, r. 13, A. W. N. 1881, 174.

Order of, in a case in which no appeal lies—Effect—Finality of remand order passed without jurisdiction—*See* CIV. PRO. CODE, 1908, O. IX, r. 3, ss. 99, 105, 6 Ind. Cas. 464=7 A.L J. 675.

Irregular order of remand made by an appellate Court—Remedy—*See* CIV. PRO. CODE, 1908, O IX, r. 13, s. 47, O. XXI, r. 90, s. 99, 5 C L.J 328.

Power of Appellate Court to—on grounds other than those specified in s. 562, Civ. Pro. Code—*See* CIV. PRO CODE. O IX, r. 13, O. XLI, rr. 12, 23 s. 104, O XLIII. r. 1, 1 M. L. T. 268=16 M.L.J 479=30 M. 54.

See CIV. PRO. CODE, 1908. O XI, rr. 18 (1), 21, O. XLI, rr 23, 24, 25, A. W. N. 1881, 147.

See CIV. PRO. CODE, 1908, O. XIII, rr. 1 and 2. 9 W. R. 294.

See CIV. PRO. CODE. 1908. O XIV, rr. 1, 2, 3, 5, O. XLI, r. 23 2 B L R P.C. 72=12 M. I. A. 495=11 W.R P.C. 33.

New plea should not be allowed after—*See* CIV. PRO. CODE, 1908, O. XIV, r. 5, 10 Ind. Cas 230.

See CIV. PRO.CODE, 1908. O. XVII, r. 3, 13 W R. 464, 3 B L.R. App. 91.

Suit by wrong plaintiff—Appellate order to substitute new plaintiff—Defendant's rights to claim *de novo* trial after—*See* CIV. PRO. CODE, 1908 O. XVIII, r. 15, 9 Ind. Cas. 254=9 M.L. T. 324.

Dismissal of suit on some of the issues—Jurisdiction of Court to determine other issues—Practice—*See* CIV. PRO. CODE, 1908, O. XX, r. 5, O. XLI, rr. 23, 31, 9 C W.N. 60.

See CIV PRO. CODE. 1908, O XXXIX, r. 2, s. 104, O. XLIII, r. 1, 24 M. 417.

Remanded appeal—Duty of parties, to ascertain date of further hearing—Absence of parties on date fixed—Duty of Court to dismiss appeal—*See* CIV. PRO. CODE, 1908, O. XLI, r. 17, 2 C.P L.R 32.

See CIV. PRO. CODE, 1908, O. XLI, r. 22, 5 O C. 235.

See CIV PRO. CODE, 1908, O. XLI, rr. 24, 25 A.W N. 1882, 5.

Issue left untried by lower appellate Court, power of High Court to remand—*See* CIV. PRO CODE, 1908, O. XLI, r. 25, 17 A. 117=A. W N 1895, 121.

When an appeal is sent down to a lower Court on remand, and when the records have not been returned to the remanding Court, the latter ought not to dismiss the appeal for default of appearance of parties—*See* CIV. PRO. CODE, 1908, O. XLI, r. 25, 90 P.L.R. 1906.

Remand—*continued.*

See CIV. PRO CODE, 1908, O. XLI, r. 25, 17 M. 69=4 M.L.J. 15, 1 L.B.R. 143.

See CIV. PRO. CODE. 1908, O. XLI, r. 25, s. 100, A.W N. 1881, 12.

See CIV. PRO. CODE, 1908, O. XLI, rr. 26, 31, 6 A. 383=A.W.N. 1884, 127, 6 A. 391=A. W.N. 1884, 129.

Judgment in appeal not in conformity with s. 574, Civ. Pro. Code—Order of—In second appeal—*See* CIV. PRO. CODE, 1908, O. XLI, r. 31, 7 M.L.T. 120.

Remand, order of - Appeal against—*See* CIV. PRO. CODE, 1908, O. XLIII, r. 1, 101 P.R. 1910.

Remand—Order of—Right of appeal against —*See* CIV. PRO. CODE, 1908, O. XLIII, r. 1 (*a*), 8 N.L R. 42.

Whether such order can be impugned in appeal from final disposal—*See* CIV. PRO. CODE, 1908, O. XLIII, r. 23 and O. XLIII, r. 1 and s. 104, 9 C.W.N. 895=32 C. 1023.

Opportunity for evidence—*See* CIV. PRO. CODE, 1908, sch. II, rr. 15, 16, s. 107 (2) O. XXII, r. 11, s. 104, O. XLIII, r.1, 8 C.W.N. 390.

See CIV. PRO. CODE, 1908, sch, II, r. 16, O. XLI, r. 23, 22 M. 172.

Appeal against an order of—under s. 562 of the Civ. Pro Code, 1882—*See* COSTS—SPECIAL CASES, A.W.N. 1892, 215.

See COSTS—SPECIAL CASES, 4 C.W.N. 343.

Costs—Dismissal of appeal—Absence of respondent's pleader — *See* COSTS — SPECIAL CASES, A.W.N. 1887, 298.

Declaratory suit—Remand - Discretion of Appellate Court—*See* DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 4 C. 190, P.C.=3 C.L.R. 31=5 I.A. 149.

Reconsideration of evidence—New evidence —Question of limitation—*See* EJECTMENT, SUIT FOR, 11 Ind. Cas. 84.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 3 W.R. 191.

See EVIDENCE—SECONDARY EVIDENCE, 3 B.H C.A.C. 160.

See EVIDENCE ACT, 1872, s. 32, sub s. 5, 12 C. 219, P.C.=12 I A. 183.

Order of—Under s 562, Civ. Pro. Code—Order of appellate Court setting aside, is a decree—Limitation Act, sch. II, art. 179—*See* EXECUTION OF DECREE—GENERAL, 5 O.C. 301.

Remand illegal—No appeal against order of —Appeal treated as revision—*See* EX PARTE DECREE, 11 M.L.T 199.

See GUARDIAN— GENERAL, A.W.N. 1893, 104.

See HINDU LAW—WIDOW, 4 B.H.C.A.C. 25, 2 W.R. 39.

Of a case, by the lower appellate Court, where the plaintiff has not pressed an essential issue in the Court of first instance — *See* ISSUES—GENERAL, 3 Bom. L.R. 667.

Remand—*continued.*

See ISSUES— MISCELLANEOUS, 19 W.R. 267.

High Court remanding suit under wrong impression Irregularity — New Judge—*See* JUDGMENT—FORM AND CONTENTS, 5 M.H. C. 174.

Defective judgment of lower appellate Court —By High Court—*See* JUDGMENT — FORM AND CONTENTS, 10 C. 932.

See JUDGMENT—FORM AND CONTENTS, 20 M. 496.

Jurisdiction—Objection taken in appeal after —*See* JURISDICTION—QUESTION OF JURISDICTION, 6 B.L.R. 52=14 W.R. 288.

By appellate Court for further evidence, case tried by Court of higher grade than that ordinarily having jurisdiction—Court in which appeal should be brought—*See* JURISDICTION —MISCELLANEOUS, 2 L.B.R. 117.

See JURISDICTION OF CIVIL COURTS, 6 A. 378=A.W.N. 1884, 122, A.W.N. 1884, 74.

Jurisdiction of two Subordinate Judges in same place—Order under s. 562 of the Civ. Pro. Code, by one Subordinate Judge—Decree passed by the first Court—Appeal from decree to Second Subordinate Judge - *See* JURISDICTION OF SUBORDINATE JUDGE, 14 A. 348= A.W.N. 1892, 25.

See LANDLORD AND TENANT—HOLDING OVER, 22 W.R. 31.

See LANDLORD AND TENANT—PAYMENT OF RENT BY TENANT, 18 B. 250.

By District Judge—Appeal after remand heard by Sub-Judge—Sub Judge cannot go behind remand order—*See* LANDLORD AND TENANT—MISCELLANEOUS, 7 Ind. Cas. 846 =12 C.L.J. 428.

Case remanded with specific declaration—Jurisdiction of lower Court — *See* LEGAL PRACTITIONER—PLEADER—AUTHORITY TO BIND CLIENT, 3 B.L R. App. 15.

On appeal from Commissioner of insolvency —*See* LEGAL PRACTITIONERS—VAKIL, 18 M.L.J. 565.

Remand order—No judgment—No appeal—*See* LETTERS PATENT, HIGH COURT, 1865, CALCUTTA, s. 15. 2 Ind. Cas. 636.

See LETTERS PATENT, HIGH COURT, 1865, CALCUTTA, s. 15, 8 C. 147=9 C.L.R. 461.

See LETTERS PATENT HIGH COURT, 1865, MADRAS, s. 15, 19 M. 422=4 M.L.J. 263.

See LOCAL INVESTIGATION, 12 C. 45.

Appeal against order of, whether lies—*See* MESNE PROFITS—MISCELLANEOUS, 8 Ind. Cas. 162.

See MULTIFARIOUSNESS, 6 C.W.N. 585.

For fresh evidence when not to be allowed—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 80, 165 P.L.R. 1911.

By lower appellate Court—Inherent powers of Court to—*See* PARTIES TO SUIT—GENERAL, 11 Ind. Cas. 183.

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By appellate Court when suit not disposed on preliminary point - Inherent power of Court—*See* PARTIES TO SUIT—GENERAL, 7 Ind. Cas. 75=12 C.L.J. 368.

See PARTIES TO SUIT—ADDING PARTIES TO SUITS, 18 A. 332=A.W.N. 1896, 91.

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Practice as to taking evidence on— *See* PRACTICE AND PROCEDURE, 10 Bom. L R. 536=32 B. 441.

To Courts in India—*See* PRACTICE AND PROCEDURE, 13 W R. 36, P.C.=4 B.L.R. 31, P.C.=13 M.I.A. 365.

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Remand, order of—Not set aside—Binding nature—*See* PROVINCIAL INSOLVENCY ACT, 1907, s. 46, 10 M L.T. 78.

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Collusion—No distinct finding—*See* REGISTRATION, 4 B.L.R. A.C. 8=12 W.R. 456.

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See RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF, 5 B.L.R. App. 64=14 W.R. 81.

See RES JUDICATA—MATTERS IN ISSUE, 6 C.L.R. 121, P.C.

Remand—*concluded.*

To lower Court, when to be made—S. 562, Civ Pro. Code—*See* RES JUDICATA—MISCELLANEOUS, 30 M. 203.

Legality of order of—Entire suit not disposed of, by lower Court on preliminary point—*See* RES JUDICATA—MISCELLANEOUS, 27 A. 163=A.W N. 1904, 202=1 A.L.J. 503.

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Transfer of appeal by District Judge to Subordinate Judge after remand—Objection as to jurisdiction—*See* REVISION—GENERAL, P.L. R. 1900, p. 354.

Small Cause Judge not stating points for decision—High Courts' power in revision to—Suit—*See* REVISION—SMALL CAUSE COURT CASES, 6 M.L.J. 50.

See SPECIAL OR SECOND APPEAL—APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT, 29 C. 60.

Improper dealing with—Case—Re-hearing and decision of case on remand for particular purpose—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, Marsh, 603.

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Of suit for finding on issue framed—Objection by special appellant going to merits of case—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 1 M.H.C. 250.

Certificate of Collector that document is duly stamped—Production of certificate after dismissal of suit and when appeal is pending—Order of—*See* STAMP ACT, 1879, s. 37, A.W. N. 1887, 21.

See STAMP ACT, 1879, s. 39, Proviso 3, 13 B. 449, F.B.

Suit not properly valued to evade jurisdiction—Remand by appellate Court for findings—No final disposal by appellate Court—Validity of remand order—*See* SUITS VALUATION ACT, 1887, s. 11, 24 M. 427=11 M.L J. 315.

See SUPERINTENDENCE OF HIGH COURT, 6 W.R. 97, 13 B. 642.

Transfer of appeal remanded by the High Court — Jurisdiction of District Judge — *See* TRANSFER OF CIVIL CASES, 9 C.L.J. 572.

To District Judge, by High Court on appeal—Suit not transferable again, by District Judge to Subordinate Court—*See* TRANSFER OF CIVIL CASES, 21 A. 30= A.W.N.s 1899, 38.

Re-marriage.

See ACT XV OF 1856.

See HINDU LAW—MARRIAGE.

See HINDU LAW—WIDOW.

See MARRIAGE.

(1)—*Re-marriage by Hindu widow—Rights of inheritance.*—By a Hindu widow, rights to

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succeed to the property left by her first husband. HARU v. KASHI, **4 Bom. L R 73**; BASAPPA v. RAYAWA, **6 Bom. L.R. 779=26 B. 388.**

(2)—*Act* XV *of* 1856—*Applicability to all Hindu widows.*—The Hindu Widow Remarriage Act, XV of 1856 applied to all Hindu widows alike, whether permitted previously to the to re marry or not. SADHU GOUR enactment v. MT. PATANGO, **16 C.P.L.R. 99.** (22 B. 321, *F.*)

(3)—*Ghumman and Chimmah Jats of Sialkot—Re-marriage of divorced wife—Legitimacy of offspring.*—Found, that by the custom of the Ghumman and Chimmah Jats of Sialkot, a woman who has received a written divorce from her husband, is free to contract a valid marriage, and the issue of the second marriage will be considered the legitimate children of their father. SUNDAR v. NIHALA, **84 P.R 1889.**

Does not prevent Hindu widow from giving her son in adoption— *See* HINDU LAW—ADOPTION, 10 Bom. L.R. 1134=33 B. 107.

Alienation of property before—*See* HINDU LAW—ALIENATION, 1 Bom. L.R. 201.

Effect of—of Hindu mother on her position as guardian of her minor son— *See* HINDU LAW—GUARDIANSHIP, 4 N.L.R. 20.

See HINDU LAW—INHERITANCE, 11 P.R. 1870.

Hindu widow—Remarriage—*See* HINDU LAW—WIDOW, 2 B.L.R. A. C. 199=11 W.R. 82.

Hindu Law—Widow—Exclusion from inner shrine—Jurisdiction of Courts—Civ. Pro. Code, s. 11—Hindu Widow Remarriage Act (Act XV of 1856, s. 6)—*See* JURISDICTION OF CIVIL COURTS, 13 M. 293.

Re-marriage, Hindu widow's.

See ACT XV OF 1856.

Remission.

(1)—*Contract Act,* s. 63—*Remission—Consideration unnecessary for—Suit for remitted sum—Not maintainable.*—After a remission had been communicated to and accepted by the defendants, the plaintiff cannot maintain a suit to recover the amount remitted. Under s. 63, Contract Act, the plaintiff's remission need not be supported by consideration. GOPALAKRISHNA v. VENKATASUBBA NAIDU, **9 M. L. T. 270=9 Ind. Cas. 763.** (19 M. 398, *F.*)

Lease-deed providing for, in case of excess or failure of rains, whether implies remission during "middling" season—*See* LEASE—CONSTRUCTION OF LEASE, 7 M.L.T. 39=5 Ind. Cas. 510.

Remoteness.

(1)—*How to be decided.*—In deciding the question of remoteness the invariable principle of English Courts, is to have regard to possible and not to actual events, and the fact that a gift might include objects too remote or incapable of profiting directly by the testator's bounty is fatal to its validity. Such principle is also

Remoteness—*concluded.*

applicable to the interpretation of Hindu Wills. SOWDAMINEY DOSSEE v. JOGESH CHUNDER DUTT, **2 C. 262.** [*Cons.*, 9 C.W.N. 749=1 C. L.J 482=32 C. 992.]

Removal from Office.

(1)—*Evidence not sufficient for conviction—Dismissal from office.*—If a man is to be removed from office upon the ground of his having committed a particular offence, there is no mode of separating the evidence on which, or the means by which, he may be convicted of the offence for that purpose from the evidence on which or the means by which he may be convicted of that offence in a criminal trial. If he cannot be criminally convicted of the offence on the evidence in the case, he can neither be removed from the office unless there are other circumstances which make the removal from the office necessary. Such circumstances ought to be distinctly stated and clearly proved. GUNGADHUR ROY, *In re,* **13 W.R. 116.**

Remuneration.

Of a guardian—*See* GUARDIANS AND WARDS ACT, 1890, s. 22, 1 Bom. L.R. 547=24 B 95.

Remuneration of Amins effecting partitions.

See ACT XI OF 1838.

Rent.

See ABATEMENT OF RENT.

See BURDEN OF PROOF—LANDLORD AND TENANT.

See ENHANCEMENT OF RENT.

See JURISDICTION OF REVENUE COURTS.

See LANDLORD AND TENANT.

See LEASE.

See LIMITATION ACT, 1908, ART. 110.

See RENT, SUIT FOR.

See RES JUDICATA—COMPETENCY OF COURTS.

See RIGHT OF SUIT—LANDLORD AND TENANT, SUITS CONCERNING.

See SALE—SALE FOR ARREARS OF RENT.

(1)—*Rent suit—Intervention by partner—Act* X *of* 1859, *s.* 77.—Where N instituted a suit for rent against J, who pleaded that he was not in possession, having sold his jote to W, who contended that N was entitled to recover only a moiety of the rent, the other half being due to M (the joint-putneedar with plaintiff, from whom W had taken a farming lease, *held,* that the defendant should be allowed to prove that he was not in possession; and if M be not allowed to appear as an intervenor, there could be no objection to W's being allowed to do so, as deriving his title from M, and to show that plaintiff had not received the whole of the rent. JUMARAT MANDAL v. NILKANT SIRCAR, **1 B.L.R. A.C. 74=10 W.R. 110.**

(2)—*Act* X *of* 1859, *s.* 23, *cl.* 5, *ss.* 32, 78—*Ejectment—Stamp—Limitation.*—During the period that litigation is going on under cl. 5, s. 23, and s. 78, Act X of 1859, for ejectment and

Rent—*continued.*

arrears of rent, the defendant's tenancy and obligation to pay rent are in suspense But by payment of rent under the latter section, a continuance of the tenancy is effected, the obligation to pay rent again arises, and the limitation of the right to arrears under s 32 then begins to run. DINDAYAL PARAMANIK v. RADHAKISHORI DEBI, **8 B.L R. 536 = 17 W R. 415.** [*R*, 3 C. 817 = 2 C. L.R. 450 ; *D.*, 3 C. 6, 23 C. 605.]

(3)—*Putnee sale — Right of purchaser to higher rent — Ben Regulation* VIII *of* 1819, *s.* 11, *Act* X *of* 1859, *s.* 13—*Notice Opinion of Court.*—There is no provision in the *putnee* law which gives the purchaser at a *putnee* sale the power to collect rent at a higher rate than was demandable by his predecessor without establishing his right so to do by a regular suit. Where, in such a rent suit by the purchaser, the simple issue framed was "from whom and to what amount can the plaintiff recover rent," the first Court would be wrong in expressing an opinion that notice should have been issued under s. 13 of Act X of 1859 and the appellate Court should not in the order of remand, find that the tenure was a "Khiraji brahmuttur holding at a fixed rent," or declare that "this is not a case in which notice under s. 13 of Act X of 1859 could issue." MAJORAM OGHA v. RAJA NILMONEY SINGH DEO, **13 B. L.R 198 = 21 W R. 326.** [*Rel. on*, 14 C.W.N. 487 = 11 C.L.J. 209.]

(4)—*Bengal Act*, VIII *of* 1869, *s.* 29—*Scope —Act* X *of* 1859 *Zemindar becoming co-sharer in taluq—Liability for rent.*—The words of s. 29, Act VII of 1869 (B.C.) are identical with those of s. 32, Act X of 1859, and are intended to apply specially and exclusively of Act XIV of 1859, to the same class of cases as those which Act X of 1859 applies to, and the class is limited to suits for arrears of rent simply, as "arrears of rent" are defined in Act VIII of 1869, s. 21. [*Appr.*, 6 C.P.L.R. 85 ; *R*, 24 W.R 382.] The zemindar by becoming a co sharer in a taluk does not lose his right to the joint responsibility of all the other share holders for the due payment of the rent ; he only becomes bound to make in his claim for rent a just and equitable allowance for that portion of it, which he as a share holder in the taluq, ought to contribute towards the common burden GOBINDO COOMAR CHOWDHRY v MANSON *and* MANSON v. GOBINDO COOMAR CHOWDHRY, **15 B L.R 56 = 23 W R. 152.**

(5)—*Act* VIII *and* X *of* 1859—*Execution—Sale of right to rent—Moveable property.*—In execution of a decree for arrears of rent, under Act X of 1859, a Collector has power to sell the judgment-debtor's right to recover rent due from an under-tenant. For the purposes of Acts VIII and X of 1859, rent comes within the terms "property" and "moveable property." MAHESCHANDRA CHATTAPADHYA v. GURUPRASAD ROY, **5 B L.R. 155 = 13 W.R. 401.** (1 B.L.R.A.C. 177, *D.*)

(6)—*Decree barred by limitation—Evidence —Intervenor's receipt of rent*—Bona fides—

Rent—*continued.*

Ben. Act X *of* 1859.—When a decree declaring plaintiff's title in a suit for rent under Act X of 1859, wherein the defendant had appeared as an intervenor, is not executed within the period allowed by law for execution, its operation ceases and it no longer remains a decree and it is no evidence against the fact of the defendant having actually received the rents *bona fide.* RAM SUNDER TEWARI v SRIMUNT DEWASI, **14 B.L.R. 371, Note = 10 W.R. 215.**

(7)—*Rent of lodgings let to prostitute—Contracts* contra bonos mores.—A landlord cannot recover rent of lodgings knowingly let to a prostitute who also carried on her vocation there, the principles of English law being applicable to this country in such a case. GAURINATH MOOKERJEE v. MADHUMANI PESHAKAR, **9 B.L.R. App. 37 = 18 W.R. 445.**

(8)—*Landlord and tenant—Rent—Raiyatwari tenure—Alienation—Consent of Zemindar.* —Where the right to hold at a fixed rent is not established, the general right of the Zemindar or talookdar to receive the collections, subject to an account, till a valid claim to an intermediate tenure be established, must prevail, *ad interim*, at least, until the plaintiff, if he think it fit for his interest to rely on the *mouruse* title, at a variable rent, establishes it by a suit founded on that title, in which suit the true nature of the tenure and its freedom from the condition of the superior's assent to the transfer of the tenure may be ascertained. *Quære:*—Whether a ryotwari tenure could be transferred without the consent of the Zemindar or talookdar, as the case might be, to the immediate successor in estate. MAHARANEE SHIBESSUREE DEBIA v. MOTHOORANATH ACHARJO, **13 W R P.C. 18 = 13 M I.A. 270 = 2 Suther 300 = 2 Sar. 528.**

(9)—*Decree for rent—Decree barred by limitation—Evidence of rate of rent—Admissibility.* —A decree for rent which had not been executed for three years and had become barred under the law of limitation is admissible in evidence as to the rate of rent which the defendant was liable to pay. MAHARAJA BEERCHUNDER MANICK BAHADOOR v. RAMKISHEN SHAW, **14 B.L.R. 370, F.B. = 23 W.R. 128.** [*Expl.*, 3 C. 383.]

(10)—*Suit for—Judgment by default—Effect.* —*Held* that a judgment by default does not amount to a satisfaction of the rent embraced in the dismissed suit BABOO DHUNPUT SINGH v KAROO LOLL THAKOOR, **W.R. 1864, Act X, Rul, 85.**

(11)—*Payments made to Zemindar by occupiers of village abadi on marriages, whether ground rent or cess.*—Certain Gareriaas, who lived in the *abadi* of the plaintiff's village, used to pay her a certain amount on the occasion of their son's or daughter's marriages *Held*, that such payment was a ground-rent for the use and occupation of the site in the *abadi*, and not a cess SUGHRA BEGAM v. NAROTAM, **11 Ind. Cas. 217.** (A W.N. 1908, 295, 30 A. 235, 5 A.L.J. 361, 17 C. 726, *R.*)

Rent—*continued.*

(12)—Kabuliyat, *Construction of — Terms clear as to payment of rent partly in kind and partly in money—Fixed rent—Later documents not between the same parties—Evidentiary value.*—Where the terms of a *Kabuliyat* clearly point to the fact that the rent is to be as to part in money and as to part in kind, and this is further emphasized by express provisions relating to the delivery of paddy in a particular month, it cannot be held that fixed rent was in the contemplation of the parties. No canon of construction would allow the Court to construe an earlier document by reference to a later document which is not between the same parties. BANESWAR MUKHERJI v. UMESH CHANDRA CHAKRAVARTHI, **37 C. 626=7 Ind. Cas. 875.**

(13)—*Landlord and tenant*—Kabuliyat, *construction of—Rent, partly in money and partly in kind—Grant in perpetuity—Oral evidence, not admissible to vary terms of* kabuliyat—*Evidence Act* (I *of* 1872), *s.* 92.—A *quabuliyat* was granted in perpetuity, the rent was made payable partly in kind and partly in cash, and the parties expressly provided that, if the rent payable in kind was not duly delivered, the tenant would be liable for a specified fixed sum: *Held*, that oral evidence was not admissible to prove that the tenant had agreed to pay the price of the paddy at the current market rate, and not at the rate specified in the *kabuliyat*, upon failure to deliver it duly. AFAR *alias* GODAI MORAL v. SURJA KUMAR GHOSE, **7 Ind. Cas 842=12 C.L.J. 649.** (2 Ind. Cas. 160, 6 Ind. Cas. 577, *F.*; 3 C.W.N. 151, 14 C.W.N. 192, *D.*)

(14)—*Kabuliyat—Construction — Remission of rent on account of* Mondoloi—Mondoi's *services dispensed with—Rent of holding, what is to be considered as.*—The defendant executed a *kabuliyat* to the plaintiff in 1865 in the following terms:—"The rent, at the rate of 5 annas a *bigha*, has been settled at Rs. 2,434; on the prayer of the tenant and in consideration of his services as *mondol*, a sum of Rs. 811 is remitted and the tenant admits a rent of Rs. 1,623 and agrees to pay the same year by year in accordance with certain instalments." The plaintiff in 1909 removed the defendant from his position as *mondol* and brought this suit for rent at the higher amount. It appeared that, in certain *egrars* executed by the defendant, the rent actually fixed was declared to be the smaller amount, and in the rent receipts granted the rent payable as the *jama* was stated at the lower figure, and that, when on one occasion an attempt was made to state the *jama* at the higher figure and below this the remission, the tenant objected and the attempt was abandoned. *Held*, that, on a true construction of the *Kabuliat*, the lesser sum agreed to be paid was the rent of the holding, and that the remission granted was not contingent upon, or held in abeyance as payment for, services to be rendered, but represented a permanent and irrevocable abatement. RAHIM BAKSH v. SASI KANTA, **8 Ind. Cas. 18.**

Rent—*continued.*

(15)—*Rent, Suit for*—Kabuliat *not proved—Issue, as to existence of taluk raised and decided—Issue, subject of decision—Estoppel—Settlement of taluk with talukdar as estate, effect of—Use and occupation, decree for—Admission of payment of rent to talukdar, if evidence of sum payable to zemindar.*—Certain taluks including A within an estate were sold for arrears of Government Revenue and purchased by the Government, who continued to hold the estate as a *khas mahal*. For a good number of years, temporary settlements were made as regards A with the talukdars, and finally, in the year 1869, the taluk was separately assessed with Government revenue and formed into a separate estate with a separate *Touji* number and settled with the talukdars. *Held*, that the effect of settlement was to convert the taluk into a separate estate paying revenue to Government. That settlement having been made with, and accepted by, the talukdars, the talukdari interest ceased to exist. A suit for rent was based on a *kabuliat* said to have been executed by the defendant for certain land included in an estate A which the plaintiff purchased at a sale for arrears of revenue. The defendant denied the execution of the *kabuliat* and said that there was a *shikmi* taluk intermediate between his holding and the proprietary right which the plaintiff had acquired by his purchase, and that the rent was paid to the *shikmi* talukdars. The *kabuliat* was not proved. *Held*, that, though there was no admission that the amount of rent admitted to have been paid was payable to the plaintiff, the statement was evidence of what would be a fair sum to allow for use and occupation. When an issue was framed in the first Court as to whether the alleged *shikmi* taluk did or did not exist and both parties went into evidence on that question, and the issue was the subject of decision in both the Lower Courts: *Held* that it was too late for the plaintiff to raise an objection in the High Court that the Courts below should not have tried that issue. KALI CHANDRA HOM CHOWDHURY v. RAM HARI DEY, **14 C.L.J. 310=12 Ind. Cas. 462**

(16)—*Change of plea—Denial of* kabuliyat—*Suit for rent.*—Where, in a suit for rent, the tenant denied the execution of the *kabuliyat* propounded by the plaintiffs, pleaded that it was forged and denied payment of rent under it to the plaintiffs, and failed to establish his pleas, *held* that he could not afterwards be permitted to prove that the plaintiffs were not the true landlords, since he had not pleaded that he had executed the kabuliyat and paid rent to the plaintiffs on account of ignorance, mistake or misrepresentation. KELU DAS v. SURENDRA NATH SINHA, **7 C.W.N. 596.** (4 C.L.R. 168, *F.*; 11 C. 519, *Expl.*)

(17)—*Suit for arrears of rent—Rate of rent alleged by plaintiff not proved—Practice.*—In every suit brought for arrears of rent in which the plaintiff fails to prove his allegations regarding the rate of rent, it is not the duty of the Court to ascertain what is the fair rat

Rent—*continued.*

of rent unless it is asked to do so. RASH DHARY GOPE v. KHAKON SINGH, **24 C. 433.** (7 C. 298, *Cons.*)

(18)—*Rent received from person holding under pattah which is void—Effect.*—If a *pattah* is void as against a person and not voidable only, the mere receipt of rent by him, though of the same amount as that fixed by the *pattah* would not have the effect of confirming the *pattah* in its entirety. BENI PERSHAD KOERI v. DUDHANATH ROY, **27 C. 156. P.C.=26 I A. 216=4 C W.N. 274=7 Sar. 580.** [*R.*, 12 C.W.N. 1086=8 C.L.J. 261.]

(19)—*S. 4, Succession Certificate Act*, 1889—"*Debt.*"—Rent is not a debt. Therefore no succession certificate is necessary, to recover the same. NAGENDRA NATH BASU v. SATADAL BASINI BASU, **26 C 536=3 C.W.N. 294.**

(20)—*Suit for—by owner and* putnidar *of an estate against* putnidar *thereof, maintainability of—Misjoinder of causes of action—Non-joinder of parties—Creation of intermediate tenure between Zemindar and* putnidar—*Right of landlord, whose name is not registered, to sue for, against* putnidar—Two estates belonged to two persons, each of them owning one half of each estate. Both the owners granted a *putni* under each estate to defendants 1 and 2 in the present suit. Some time after, the present plaintiff became entitled to the whole of one of the two estates, one half thereof as purchaser in a sale for arrears of revenue and the other half as *putnidar* under the then owner thereof. A moiety of the other estate was transferred by sale to defendants 3 and 4 and with the other moiety, the suit was not concerned. The present suit by the plaintiff was for the recovery of his share of the arrears of rent due from defendants 1 and 2 to him as proprietor and *putnidar* of one of the estates. Defendants 3 and 4 were impleaded by the plaintiff as *pro forma* defendants, but on their application, they were made by the Court co-plaintiffs. The defendants contended that the suit was bad for non-joinder of parties, that it was barred as *res judicata* and that the plaintiff, as *putnidar*, was not entitled to demand rent from the defendants, who were also *putnidars*. The first contention was to the effect that, as the defendants held their *putni* under both estates by virtue of two leases, the owners of the other moiety in the second estate should have been joined, so as to have the whole body of landlords in both estates suing for the entire rental due under both leases. *Held*, this was not necessary, for, in the first place, the law does not require that the owners of two different estates should sue for their rent jointly, if the rent due to each estate is known; and, secondly, as a matter of fact, the owners of the other moiety in the second estate were collecting the rent due to them separately from the defendants. It was also found that an apportionment of the rent due to the different landlords had taken place with their consent. Consequently, the suit was not bad for non-joinder. Upon the second question, the defendants' contentions were two:—(1) that, if the plaintiffs had instituted this suit earlier for one year's rent, it would have lain in the Munsiff's Court and (2) that he could not sue jointly upon the two leases given to the defendants, for each lease constituted a separate cause of action, and if he had instituted separate suits on the two leases, the suits would have lain in the Munsiff's Court; in all of which events, his suits would have been barred as *res judicata* by virtue of a former decision passed in the Munsiff's Court; and that plaintiff ought not to have been permitted to frame his suit, so as to escape from such defect. *Held*, the contentions were not sustainable. A landlord has full liberty to decide when he will sue for arrears of rent. As the plaintiff was entitled to collect the entire rent due from the defendants in the first estate, there was no reason why he should not sue for the entire rent in one suit. The two shares in that estate were undivided and the two leases were alike. This suit was, therefore, rightly instituted in the Sub Judge's Court. As the present suit was not cognizable by the Munsiff's Court which tried the former suit, there was no bar by rule of *res judicata* under s. 13, Civ. Pro. Code. (10 C. 697) 11 C. 153. 25 C. 571, 24 M. 444. 28 C 78. *D.*) The third contention really was whether the relation of landlord and tenant subsisted between the plaintiff and defendants. When once a *putni* is granted, the grantor's successor cannot infringe the *putnidar's* rights. Hence the bestowal of a *putni* lease on the plaintiff did not convert the defendant's *putni* into a *dar-putni*. Nevertheless, the Zemindar still held, after the grant of the *putni* to the defendants, the power to grant a portion of his remaining rights and to create a tenure intermediate between his and the defendants'. That was what the Zemindar did by the *putni* lease to the plaintiff. Consequently, the plaintiff's *putni* lease constituted an intermediate tenure between the Zemindar's and the defendants, and, therefore, the plaintiff was entitled to demand the rent, which the defendants were bound to pay to their superior landlord. Plaintiff's claim was allowed. The claims of the co-plaintiffs were not allowed, since their names were not registered. RAJ KUMAR MAJUMDAR v. PROBAL CHANDRA GANGULI, **9 C W N 656.**

(21)—*Rent suit—Non-joinder of co-sharers—Evidence.*—An agreement for payment of the separate rent of a share would be presumed, from the fact of rent having been collected for some time by one of several co-sharers separately. It is a question in each case whether the facts are sufficient to warrant such a presumption. SHAIKH KAMALODDEEN v. ANOO MUNDUL, **1 C.L R. 564.**

(22)—*Rent, Assessment of—Tank—Adverse possession—Limitation.*—The mere fact of the defendant and his predecessors having been in possession without payment of rent for over 12 years, is not sufficient for basing a valid title

Rent—*continued.*

in bar of the plaintiff's suit. But where the settlement *khatian* shewed that the defendant claimed the land as rent free and the plaintiff's agent denied the claim, there was a claim of *niskar* (rent free) title unqualified by reference to any document and a denial of the same by the plaintiff's agent. A hostile right was thus claimed to the knowledge of the plaintiff, and a suit, brought more than 12 years after, would be barred. MAHARAJA BIRENDRA KISHORE v. ROSAN, **15 C.L.J. 203=13 Ind. Cas. 518=39 C. 453=16 C.W.N. 929, Note.**

(23)—*Party, Addition of—Rent suit—Suit against some of the tenants—Application by rest to be made parties—Dispossession—Rent decree against some of the tenants, whether causes dispossession of other joint tenants.*—After the death of the original tenant, the landlord obtained a rent decree against some only of the deceased tenant's representatives. A second rent suit was brought against the same persons, in which the petitioners applied to be added as parties defendants, on the allegation that they were co-sharers of the tenants defendants and were in possession of the holding in that character: *Held* that the Court ought to have determined summarily whether the petitioners were representatives of the original tenant and were in joint possession of the holding, and that, if it was proved that they were interested in the tenancy, they should have been added as defendants in order to avoid multiplicity of litigation:—*Held*, also, that the petitioners, who allege that they are in actual occupation of the lands of the tenancy, cannot be said to have been dispossessed in the eye of the law, simply because the landlord chose to obtain a decree for rent against some only of the representatives of the original tenant. BASLI BIBI v. HANIFUD DIN MANDAL, **6 Ind. Cas. 570=12 C.L.J. 267.**

(24)—*Suit for arrears of rent against occupancy tenants—Liability of a Zurpeshgidar of a portion of the holding for the rent of the whole holding—Practice.*—In execution of a decree for arrears of rent against the occupancy tenants, the landlord-decree-holder purchased the holding himself, but obtained delivery of possession some time after. The present suit was for recovery of arrears of rent against the old tenants for the *interim* period—from the date of purchase to the date the possession was obtained—and plaintiff impleaded a *Zurpeshgidar* of a portion of the holding, along with the tenants, claiming the rent of the entire holding even as against the said *Zurpeshgidar*. *Held*, that a landlord cannot sue tenants for the rent of the whole holding and at the same time sue the *Zurpeshgidar* also for the same, when that *Zurpeshgidar* is in occupation of only a small portion of the holding. Such a procedure would not be right and equitable, or in accordance with the practice of this Court. MOHANT RAM DAS v. TAKUR SINGH, **1 C L J. 136.**

(25)—*Enhancement of*—Kabuliyat, *Construction of—Bengal Tenancy Act* (VIII *of* 1885), s. 7, *liability to enhancement under—Fair and equitable rent.*—In a suit for enhancement of rent, the Court decreed an enhancement to the extent of 70 per cent. of the net assets. On appeal, it was contended that the tenants were not liable to pay at enhanced rates, under the provisions of s. 7 of the Bengal Tenancy Act, that their liability was restricted by the terms of the *Kabuliyat* and that the amount decreed was very excessive and not a fair and equitable rent; *held*, after disallowing the first two contentions, that the amount fixed was very excessive and it must be reduced so as to leave the tenants a profit of 40 per cent. RAM KUMAR SINGH v. MESSRS. ROBERT WASTON & CO., **9 C.W.N. 334.** [*R.*, 1 C.L.J 572.]

(26)—*S. 92, Evidence Act—Registered lease—Subsequent alteration of rent by oral agreement—Not valid—Acceptance of rent at lower rate Effect of*—Res judicata—*Rent suit—Bengal Tenancy Act* (VIII *of* 1885), *s.* 51—No oral agreement is admissible under s. 92 of the Evidence Act for the purpose of altering the rent fixed by a registered lease; and even if the landlord accepted rent at a rate lower than that mentioned in the registered lease, he is not precluded from subsequently claiming rent at the rate stated in the lease; for the mere acceptance of a reduced rent, though it may amount to a full acquittance cannot operate as a binding contract (6 C W N. 60, 22 M 261. 26 M. 195, *F.*; 24 C. 20. 6 C.W.N 242. *D.*) The general rule is that a decision in a previous rent suit, as to the amount of rent payable, does not operate as *res judicata* in a suit for rent of subsequent years, although it may give rise to a presumption under s. 51 of the Bengal Tenancy Act. BISHAMBAR ROY v. LAKHATULLAH SHEIKH, **2 Ind. Cas. 160.** (5 C.L.J. 92, *F.*)

(27)—*Suit for.*—In a suit to recover rent, the plaintiff must establish that the relationship of landlord and tenant existing between the parties rests either on contract or privity of estate. MANJAPPA v. VENKATESH, **8 Bom. L.R. 983=31 B. 159.**

(28)—*Payment of— Premises vacated under the Epidemic Diseases Act.*—When under the Epidemic Diseases Act, it becomes unlawful for a tenant to occupy the premises in the manner contemplated by the lease, there is no breach of the lessor's contract for quiet enjoyment and the tenant is liable to pay the rent and taxes for the whole period MERWANJI v. SYED SIRDAR ALI KHAN, **1 Bom. L.R. 267 =23 B. 510.**

(29)—*Epidemic Diseases Act*—Where a tenant, under a monthly tenancy, is obliged to vacate the premises under an order from the Plague authority appointed under the Rules framed under the Epidemic Diseases Act, 1897, he is not thereby absolved from the liability to pay the rent for the remaining portion of the month and to give the usual month's notice to quit. MAHOMEDALLY v. CAMPBELL, **1 Bom. L R. 739.**

(30)—*Enhancement of, by an Inamdar.*—A mirasdar on an *inam* estate is only a tenant at

Rent—*continued.*

a quit-rent or at a reasonable rent not subject to enhancement so long as he pays it. The permanency of his tenure is undisputable. He and his descendants from generation to generation enjoy the land so long as they pay the rent to the Inamdars. In the absence of any express contract limiting the rent in perpetuity, the mirasdar pays a fair and equitable rent such as according to the custom of the country is leviable on *miras* land of the description held by him. KHANDERAO v. RAMJI, **1 Bom. L.R. 373.**

(31)—*Inamdar — Usage.*—In cases where enhancement of rent by an Inamdar is sought to be sanctioned by usage, the test is, whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure. RAJYA v. BALKRISHNA, **7 Bom. L.R. 439=29 B 415.**

(32)—*Mirasdar.*—Where an Inamdar seeks to impose enhanced rent on a mirasdar it lies upon him to prove that the enhanced rent is fair and equitable and such as according to the custom of the country is leviable on land of the description held by the mirasdar. LAXUMAN v. KRISHNAJI, **9 Bom. L.R. 861.**

(33)—*Act* VIII *of* 1865—*Arrears of rent—Charge.*—The arrears of rent claimed by a Zamindar, is not a charge on the *maganam* or division, from which the rent is due. It is a debt due to the Zamindar and nothing more. THE ZAMINDAR OF RAMNAD v. RAMAMANY AMMAL, **2 M. 234.** [*R.*, 10 M. 266, 29 M. 29.]

(34)—*Kattubadi—Charge on land* —Kattubadi is rent and is not chargeable on the land concerned. GAJAPATHI RAJAH v. SURYANARAYANA, **22 M. 11.** [*F.*, 10 M.L.J. 256.]

(35)—*No contract as to rate—Local usage.*—Where there has been no contract as to the rate of rent which varied from time to time, the landlord is entitled to be paid rent according to local usage, *i.e.*, according to the established *varam* of the village. VENKATRAMAYA v. GANGANNA, **9 M.L.J. 26.**

(36)—*Landlord and tenant—Claim for* varam *rent—Absence of contract for rent — Madras Rent Recovery Act* (*Mad. Act* VIII *of* 1865), *s.* 11 (2).—In the absence of a contract for rent, express or implied, a landlord is entitled to demand *varam* from his tenant. To such a case cl. 2 of s. 11 of the Madras Rent Recovery Act has no application. SUPPAN SERVAI v. DORASINGAM, **8 Ind. Cas. 156 =8 M.L.T. 451.**

(37)—*Act* X *of* 1859, *s.* 23, *cl.* 3—*Demand of enhanced rent by landlord—Suit by ryot—* Kubooleut *whether genuine — Jurisdiction—Revenue Court.*—Under cl. 3, s. 23 of Act X of 1859, the Revenue Courts, have jurisdiction to adjudicate on complaints of excessive demand of rent. The fact that it would be necessary for those Courts to determine as to the genuine character of a *kubooleut* does not deprive them of their jurisdiction. KASHEE RAM v. GUNGA PERSHAD, **2 N W.P. 304.**

(38)—*Ex-proprietary tenancy—Agreement to pay rent at a stipulated rate—Rent not determined by Revenue Court—Fair rate* —A sold his zamindari property to B and covenanted that, if possession of the *sir* land was not delivered to B, A should pay rent for such land at the rate of Rs. 12, a *bigha.* Upon finding that this was a fair rate of rent for an ex-proprietary tenant to pay, *held*, that A was bound by his covenant, unless he could show that the covenant was obtained from him by fraud or that it was contrary to law. The mere fact that B had not applied to the Revenue Court for determination of A's rent did not disentitle B to get from A the rent which he had covenanted to pay. SHEO NANDAN v. THAKUR RAI, **6 A.L.J. 161=5 M.L.T. 347=3 Ind. Cas. 31.**

(39)—*Rent in kind before settlement—Cash rent after.*—The fact that the tenant paid rent in kind before settlement cannot be a ground for the landlord to demand the same rent in kind after settlement when cash rents have been fixed at settlement. GHULAM RASOOL v. EEDA, **6 P R. 1867, Rev.**

(40)—*Rate of rent—Hereditary cultivator.*—In fixing the rate of rent payable by a hereditary cultivator, the rates payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent, must be taken into consideration. BULDEO v. CHYNSOOK, **9 P.R. 1867, Rev.**

(41)—*Rent in cash—Change of, into rent in kind.*—When, for a long series of years, a landlord realized his rent in cash he cannot at his pleasure change that into rent in kind because grain rates are fixed at settlement. MULLIK SHER MAHOMED KHAN v. ILUM KHAN, **15 P.R. 1867, Rev.**

(42)—*Hereditary cultivators—Cultivation of* bunjur *land—Liability to be assessed with rent —Rent in kind—Rent in cash.*—Plaintiff was a landholder, and defendant a hereditary cultivator in occupation of certain land, which was not assessed at Settlement, not having been then brought into cultivation. The tenant brought it into cultivation afterwards and the proprietor demanded from him rent in kind and at a higher rate, though, in respect of other lands, the tenant paid only cash rent. The question was whether the proprietor can so enhance the rent. *Held* that though the *wajib-ul-arz* was silent on the point, there must be an implied contract that hereditary cultivators who break up *bunjur* land will pay something for it; otherwise, they would hold *lakhiraj*, that is, paying no revenue and no rent. But there was no reason for demanding from them more unfavourable rents for lands brought under cultivation after settlement than they had been paying for lands similarly brought under cultivation before settlement. KHYRUN SHAH v. MULIK SAHIB RAE, **90 P. R. 1867.**

Rent—*continued.*

(43)—*Jagirdar drawing his rent in cash—Assignee of Jagirdar drawing rent in kind—Recording of cash rates in the settlement of 1857—Assignee bound to draw in cash—Consent of proprietors unnecessary.*—Defendant derived his title as mafidar from the jagirdar who drew his rent in cash. The defendant drew his rent in kind up to the settlement of 1857 when the cash rates were recorded. *Held* that, without the consent of the proprietors, the defendant was bound, as the jagirdar would be, to draw the revenue in cash. BALRAM DASS v. GUNGA RAM, **1 P R. 1869, Rev.**

(44)—*Claim for water rent—Evidence of past receipt of rent—Right of defendant to dispute plaintiff's title to demand rent*—This was a suit for water rent. The defendant questioned the plaintiff's title to demand rent. The Commissioner, on appeal by defendant, refused to go into the question of title thus raised, and passed a decree for the plaintiff on the ground of his having produced evidence to prove the receipt of water rent by him up to the period for which it was claimed in this suit. *Held* that the Commissioner was wrong in having refused to decide in the present suit the question raised throughout the proceedings as to the title of the plaintiff to demand water rent from the defendant. Had this been a summary suit for rent heard by a Revenue Court under the old laws of procedure, the Commissioner might have been right in holding that, on the plaintiff's producing evidence that he had always received water rent up to the period for which the claim was preferred, he had afforded sufficient *prima facie* proof of his title to warrant the passing of a decree for rent without further enquiry, the defendant being referred to a regular suit in the Civil Court if he still disputed the plaintiff's title. But, according to the present procedure, this was an ordinary civil suit, in which the question of title raised was a good defence, and the Commissioner had jurisdiction and was bound to proceed to determine the point. The admitted facts of the case were as follows:—The wells in respect of which rent was claimed had been constructed by a person who had previously held the village in farm. He had agreed, by an entry in the *wajib ul-arz*, not to demand, at the expiry of the farming lease, anything from the proprietors of the village on account of the cost of the construction of the wells. The term of the farming lease had expired before the Fasli for which rent was claimed. Plaintiff had become by purchase proprietor of two-thirds of the village, and the defendant of one-third. *Held*, on these facts, that defendant was not liable for water rent. RAM SOOKH v. SHEO SUHAI, **16 P.R. 1869.**

(45)—*Hereditary cultivators, entry regarding—S. 2 of Tenancy Act, agreement within scope of—Void if uncertain*—An entry in a settlement record which, without affecting to deal definitely with the question of the status of the parties to the suit, declared that the tenants should go on paying rent as before, and referred the proprietors to a regular suit to correct

Rent—*continued.*

the record if the entry was incorrect, though an agreement within the scope of s. 2 of the Punjab Tenancy Act was held to be void for uncertainty under s. 29 of the Contract Act, as it was indefinite and no time for its continuance was fixed. SARBALAND v. GHASITU, **81 P R. 1876.** [*D.*, 3 P.R. 1880, Rev., 50 P.R. 1883.]

(46) *Occupancy tenant—Decree for arrears of rent—Satisfaction of decree after 15 days—Ejectment—Act* XXVIII *of* 1868, *s* 19.—An occupancy tenant who has not satisfied a decree for arrears of rent within 15 days, cannot be ejected under s 19 of the Tenancy Act, if he satisfies the decree for arrears at any time before a decree for ejectment is passed. RULDU v. MUTSADDI **29 P R 1877.** [*Appr.*, 13 P.R. 1880, 5 P.R. 1900, Rev.]

(47)—*Act* XI *of* 1865 *(Small Cause Courts Act), s.* 6—"*Rent*"—*Rent due on contract*—In s. 6 of the Small Cause Courts Act, 1865, the term "rent" is not limited in meaning to rent due on contract, but includes money claimable in respect of premises of the plaintiff used and occupied by the defendant without a contract. There is no reason for supposing that the term "rent" has the more limited meaning, and no violence is done to the term by holding that it is susceptible of the wider meaning. CHUNNILAL v MUSSAMUT SHAHZADA KHANAM, **158 P.R. 1884** [*R.*, 86 P.R. 1887.]

(48)—*Rent, Arrears of—Tenant admitted to holding of an occupancy tenant at enhanced rent—Enhancement of rent of tenant succeeding occupancy tenant—Rent Act (Oudh), 1886, s.* 47.—A tenant with a right of occupancy in a holding at a rent of Rs. 90-8-0 was ejected therefrom in due course of law. The defendant took part of the above holding at a rent of Rs. 20 and executed a *kabuliat* therefor. The plaintiff (landlord) sued the defendant for the recovery of his rent at the rate of Rs 20. The defendant contended that, as the rent payable by the out-going tenant averaged less than Rs. 2 per bigha and the rent payable by him under his *kabuliat* averaged over Rs. 9 per bigha, the enhancement was illegal. *Held*, that s. 47 of the Oudh Rent Act had no application to the case of an occupancy tenant being succeeded by a tenant not having right of occupancy, and that therefore the rent claimed by the plaintiff at the enhanced rate mentioned in the *kabuliat* was perfectly legal and he was entitled to recover it from the defendant. SUNDAR CHAUBE v. MAHANT HAR CHARAN DAS, **5 O.C 193.**

(49)—*Arrears of rent, Suit for—Decree of Settlement Court—Money charged upon immoveable property—Jurisdiction of Civil Court—Frame of suit—Relief—Indian Limitation Act, sch.* II, *arts.* 65, 120 *and* 132—"*Right to sue for arrears of money due under settlement decree without proving receipt of the money since the decree—Code of Civil Procedure, ss.* 13, 43 *and* 371.—At the first regular settlement the defendants obtained a decree against the Government for proprietary rights in a certain village. A suit was brought at the same settlement by the

Rent—*continued.*

plaintiff for superior proprietary rights in the same village and was dismissed, but the decree dismissing it decreed to him, 10 per cent. on the Government revenue. Subsequently the plaintiff sued to have this decree set aside, and to recover possession of the village or to obtain an increased amount of "malikana." This suit abated after which the plaintiff brought the suit for arrears of the 10 per cent. on the Government revenue decreed to him and he based his claim upon the settlement decree. The relief for which he asked was "that a decree for "malikana" dues in respect of the village with costs of the suit be passed in his favour against the defendants." *Held*, that the money claimed was not rent, and that the suit not being one for arrears of rent within the meaning of the Oudh Rent Act was cognizable by the Civil Courts. *Held* further, that the 10 per cent. on the Government revenue decreed to the plaintiff was a charge upon the village. Where a plaintiff is suing for money which as a matter of fact is charged upon immoveable property, the suit may be regarded as one to raise the money out of the property, unless it is quite clear that the plaintiff only intended to ask for relief against the person of the defendants and not for relief against the property. Having regard to the circumstances of the present case, it was held that this suit might properly be regarded as one for money charged upon immoveable property and that therefore it was governed by art. 132 and not by art. 120 or by art. 65, sch. II of the Indian Limitation Act. Upon the contention that the suit was barred by limitation because the plaintiff had not at any time received his share of the profit or any part thereof it was held that the plaintiff's right to receive the money having been established by the settlement decree, he could sue for arrears for twelve years next before the suit without proving that he had received the money since the decree. *Held* that the suit was not barred by ss. 13, 43 and 371 of the Code of Civil Procedure. RAJA MOHAMMAD MUMTAZ ALI KHAN v. WAZIR KHAN, **7 O.C. 108.**

(50)—*Arrears of rent, Suit for*—Kabuliat *executed on stamp payable for lease and registered—Transfer of Property Act*, s. 107, Res-judicata.—The plaintiff-appellant sued the respondent for arrears of rent alleging him to be a lessee of certain villages. The respondent admitted he had executed a *kabuliat* in favour of the appellant, that he had been placed in possession of the villages and had collected the rents. The claim however was resisted on the ground that the relation of landlord and tenant or thekadar, did not exist between the parties inasmuch as there had been no registered lease executed by the appellant in favour of respondent as required by law. In a previous suit for arrears of rent brought by the appellant against the respondent on the lease now in question the respondent never raised the defence that there was no valid lease and a decree was passed for an amount agreed upon by the parties. *Held*, that the *kabuliat* executed by the respondent was a lease within the meaning of s. 107 of the Transfer of Property Act and that the relation of landlord and tenant subsisted between the parties. S. 107 does not specifically lay down that the lease must be by a registered instrument executed by the lessor, and having regard to the prevailing practice in these provinces, and s. 2 (16) of the Stamp Act a duly stamped registered instrument executed by the lessee and accepted by the lessor either in writing or by his acts, constitutes a good lease and establishes the relation of landlord and tenant between the parties. *Held* further, that the defence raised in the case was barred by the principal of *res judicata*. HON'BLE MAHARAJA SIR PARTAB NARAIN SINGH v. RAGHO BEHARI, **7 O.C. 169.** [*Obs.* 8 O.C. 197.]

(51)—*Protected thekadar—Enhancement of rent.*—In the case of a protected thekadar the amount of rent shall be fixed by the Deputy Commissioner should there be a dispute between the parties about the same. LACHMAN TELI v. SETH DHANRUPMAL, **12 C.P L.R. 39.**

(52)—*Payment in advance—Effect thereof as loan to landlord.*—A payment of rent in advance is in effect a loan to the landlord to be applied thereafter in discharge of the tenant's obligation to pay rent as it accrues due. GOVIND RAO v. GOPAL RAO, **14 C.P.L.R. 65.**

(53)—*Liability to pay arrears on succession.* The condition to pay rent due and in arrear which is part of the right of occupancy follows the land and affects the person upon whom the right of occupancy devolves. But a daughter inheriting to her father cannot be made liable personally to the arrears of rent that accrued due during her father's lifetime. MT. JANKI BAI v. MT. BAYABAI, **16 C.P.L.R. 55.** (14 A. 381, *F*).

(54)—*Enhancement of by a* Palmpatdar—*Land Revenue Code (Berar), s.* 78 (8), *necessity of previous notice to tenant under.*—In the absence of any "express agreement" such as is referred to in sub s (8) of s. 78 of the Land Revenue Code (Berar) before a *Palampatdar* could enhance the rent payable by his tenant, he is bound to give notice to the latter according to the method laid down by the above sub section in the provisions of which are mandatory. In the present case which was a suit by such a Superior Holder to collect enhanced rent, admittedly, no such notice had been given to the tenant, and the plaintiff was therefore *held* not entitled to maintain the suit. DINAJI PARBHAJI v. DATTOBA *alias* SANTOSHRAO, **2 N.L.R. 145.**

(55)—*Agricultural lease—Burden of proof.*—Where the terms of a lease of agricultural land are in question and where both parties are agriculturists, the burden of proving that the plaint land was let to the defendant for less than a reasonable rent at the rate ordinary in the locality for similar land in the same season, is upon the defendant. The witnesses who say that a fair ordinary rent was stipulated are *prima*

Rent—*continued.*

facie more entitled to credit than those who assert the contrary. MAUNG SHANO v. MAUNG SAN BAW, **L.B.R. 1893—1900, 275.**

(56)—*Execution of sale of land held under usufructuary mortgage—Decree-holder's right to sell such land.*—Defendant was owner of certain land; he mortgaged it to plaintiff; plaintiff left him in possession as his tenant; defendant was dispossessed by a creditor in execution of a decree against him. Apparently defendant should not have been dispossessed, the land being in his possession on behalf of plaintiff as usufructuary mortgagee, and all that the decree-holder could do was to sell defendant's right or equity of redemption. Under such circumstances defendant would *prima facie* be responsible for the rent, his dispossession being due to his own fault and not to the plaintiff's. MAUNG CHIT PON v. MAUNG HMON, **U.B.R. 1892 1896, Vol. II, 613.**

(57)—*Tenancy—Presumption — Annual letting.*—Where, as in Burma, the practice of annual letting is customary, the presumptions of a relationship of landlord and tenant once proved continuing to subsist is not so strong, as it is the case in other parts of India. It must always be open to a tenant in Burma to show that he is no longer a tenant, or, in other words, that the relationship has ceased to exist. MAUNG KYAW v. MAUNG NI, **U.B.R. 1897—1901, Vol. II, 535.**

(58)—*Appeal, Second —Small Cause suit—Rent due to a landlord which tenant promised to pay to landlord's creditor—Whether such rent is rent for land—Civ. Pro. Code (Act XIV of 1882), s. 584—Lower Burma Courts Act (VI of 1900), ss. 2 (b), 38 - Revision—Erroneous order passed after consideration of facts and law · Sale in execution—Lien—Purchase with knowledge of lien.*—A, a tenant of B's mortgagor, executed in favour of B a bond undertaking to pay to B the rent due to the mortgagor and the mortgagor signed the bond as a witness only; beyond this there was nothing to show that he agreed to the rent due to him being paid direct to B and written off against his liabilities. B sued for paddy due on account of rent: *Held*, that the right to the rent vested in the landlord, and the tenant could not contract with a third party to divest his landlord of that right, and that what B was suing for was not the paddy *qua* rent of the land, but merely for the amount of the paddy due under the bond. *Held*, therefore, that the suit was not one for rent of land, nor was it a land suit, but that it was of a nature cognizable by a Court of Small Causes, and that consequently no second appeal lay under s. 584 of the Code of 1882, or under s. 30 of the Burma Courts Act. Where a person, who has a lien on property which is attached and proclaimed for sale, informs intending purchasers of such lien, and a purchaser bids in spite of the warning, the purchase is subject to the lien. (5 M. I. A. 271, *D.*) The decision of a lower Court which is arrived at after a due consideration of the facts and the law applicable thereto, even though erroneous, cannot be interfered with in revision. MAUNG LON GYI v. RAHMAN CHETTY, **12 Ind. Cas. 855.** (2 L.B.R. 333, *F.*)

Rent—*continued.*

This circular circulates letter to Judge of Bhaugulpore, informing him that a ryot has a right in a district like his to deposit in Court such portion of his produce as represents the rent admittedly due to the zemindar. Civ. Cis. Meemo, No. 4, **23 W.R. Rules and Ords. of the H.C. p. 8.**

Rent in kind—Bhaoli—*See* BEN. ACT X OF 1859, ss. 3 and 4, 1 A. 301, F.B.

Suit for—Of fishery or Jalkar tenure—*See* BEN. ACT X OF 1859, ss. 6, 23, 31 C. 937=8 C.W.N. 804.

Intervenor in—Suit—*See* BEN. ACT X OF 1859, s. 77, 2 B.L.R. App. 16.

See BEN. ACT X OF 1859, s. 77, 6 B.L.R. App. 106.

See BEN. ACT X OF 1859, s. 153, 1 N.W.P. 157.

See BEN. ACT VI OF 1862, 1 B.L.R.S.N. 7(*a*).

Right to pottah—Agreement fixing rent—*See* BEN. ACT VIII OF 1869, Marsh 325.

Damages for withholding receipts for rent—*See* BEN. ACT VIII OF 1869, 2 Hay 516.

Conversion of *nakdi* into *bhowli* rent before the submission of road cess return—*See* BEN. ACT IX OF 1880, s. 4, 11 C.W.N. 211.

Sums payable by stall-keepers if—*See* BEN. ACT IX OF 1880, ss. 4 and 41, 11 C.W.N. 1053, F.B.=6 C.L.J. 342=35 C. 82.

Meaning of—*See* BEN. ACT VIII OF 1885, s. 3, cls. (3) (5), s. 4 and s. 5, cls. (2) and (3), 17 C. 45.

Portion of rent kept in abeyance by contract and not by grace of landlord— Claim by landlord of that portion—Enhancement—*See* BEN. ACT VIII OF 1885, s. 29, 3 Ind. Cas. 430.

Enhancement suit—Reference to arbitration — Jurisdiction of arbitrators to settle equitable rent—*See* BEN. ACT VIII OF 1885, s. 30, 6 C.W.N. 614.

Additional rent for additional land, whether can be determined—*See* BEN. ACT VIII OF 1885, ss. 52, 158. cl. (*a*), 6 C.W.N. 592.

See BEN. ACT VIII OF 1885, s. 53, 21 C. 383.

Meaning of—*See* BEN. ACT VIII OF 1885, ss. 53 to 68 and ss. 72 to 75, 20 C. 254.

The word—In the Bengal Tenancy Act, whether includes interest—*See* BEN. ACT VIII OF 1885, ss. 58, 59 and 67, 11 C.W.N. 110=5 C.L.J. 69.

See BEN. ACT VIII OF 1885, s. 61, 21 C. 680.

First charge—*See* BEN. ACT VIII OF 1885, s. 65, 6 C.W.N. 834.

Receipt of—by landlord's gomastha from various tenants—Division of holding—*See* BEN. ACT VIII OF 1885, ss. 65, 88, 6 C.W.N. 823.

Rent—*continued.*

See BEN ACT VIII OF 1885, s. 88, 2 C.W. N. 378. Note.

See BEN ACT VIII OF 1885, s. 153, 25 C. 571, Note=1 C.W.N. 63, Note.

Rent as used in cl. (c), s. 169 of the Bengal Tenancy Act does not exclude interest—*See* BEN. ACT VIII OF 1885, s. 169, 11 C.W.N. 1106.

See BEN. ACT VIII OF 1885, ch. X, 6 C.W. N. 914.

Entry in the record-of-rights constituting *prima facie* evidence of—*See* BEN. ACT VIII OF 1885, ch. X, s. 103, 11 C.W.N. 153.

Notification of Chief Commissioner of Central Provinces fixing date for payment of rent—*See* C. P. ACT XVII OF 1889, s. 7, 8 C.P.L.R. 7.

Effect of forfeiture of holding on decree for arrears of—*See* C.P. ACT XVII OF 1889, s. 85, 16 C.P L.R. 88.

Inamdars paying fixed rent to Zemindar whether bound to accept patta—*See* MAD. ACT VIII OF 1865, s. 3, 21 M. 116=8 M.L.J. 43, F.B.

Pargana surrendered to and regrant by Government—Rates of rent—Terms of patta—*See* MAD. ACT VIII OF 1865, ss. 9 and 11, 18 M. 216.

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Suit after fasli for enforcing acceptance of patta—Amended patta ordered under s. 10, suit maintainable for—*See* MAD. ACT VIII OF 1865, s. 10, 23 M. 616.

Garden crops raised owing to improvement by tenant, landlord not entitled to enhanced, on account of—*See* MAD. ACT VIII OF 1865, s. 11, 21 M. 136.

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See PUN. ACT XXVIII OF 1868, s. 19, 87 P.R. 1881.

See U P. ACT XIV OF 1863, s. 1, cl. 3, 3 Agra 218.

See U.P. ACT XVIII OF 1873, ss. 148, 183, 189, 4 A. 237=A.W.N. 1882, 30.

Payment of—In kind—Cess—*See* U.P. ACT XIX OF 1873, s. 66, A.W.N. 1885, 320.

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See U. P. ACT XII OF 1881, s. 189, 21 A. 247=A.W.N. 1899, 47.

See U. P. ACT V OF 1894, ss. 7, 8, 14, 5 O.C 43.

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See CIV. PRO. CODE, 1908, O. XLI, r. 6, 25 C. 322.

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Suit to restrain collection of—Value of relief—*See* COURT FEES ACT, 1870, s. 7, 14 C. L.J. 47.

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Rate of Decree by a co-sharer-landlord—*See* EVIDENCE—MISCELLANEOUS, 10 C.W.N. 1034.

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Rate of rent, Evidence to contradict—Acceptance of the reduced rent—*See* EVIDENCE ACT, 1872, s. 92, 6 C.W.N. 242.

Acceptance of reduced rent—Effect—When it will operate as binding contract—Waiver—*See* EVIDENCE ACT, 1872, s. 92, 12 C.L.J. 439 =8 Ind. Cas. 790.

See EXECUTION OF DECREE—APPEAL, REVIEW, ETC., EXECUTION OF DECREE AFTER, 17 B. 547.

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Rent accrued due under lease of lands in Native State—Lessee resident in British India—Suit for arrears—British Indian Court—Jurisdiction — *See* JURISDICTION — CAUSES OF JURISDICTION, 19 A. 450=A.W.N. 1897, 98.

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Enhancement of assessment by Government Superior holder—Increased rent on account of—*See* LAND TENURE—IN KANARA, 4 B. 473.

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Mortgage — Receipt of —Not payment of interest—*See* LIMITATION ACT, 1906, s. 20, 2 M 165.

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See LIMITATION ACT, 1908, arts. 85, 89, 27 C. 663.

Act VI of 1862 (B.C.), s. 10—Proceedings of Collector under—Rent how to be assessed—*See* MEASUREMENT OF LANDS, 7 C. 69=8 C.L.R. 73.

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Hindu Law—Manager of joint Hindu family granting a lease as such—Right to sue for rent during life-time of manager—Death of manager—Suit for—*See* PARTIES TO SUIT—GENERAL, 18 B. 141.

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Gomashta employed to collect rents—Power to distrain—Ratification—*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, Marsh 282.

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For period between sale under *patni* regulation and reversal thereof, liability of *patnidar* to zemindar for—*See* BEN. REG. VIII OF 1819, 4 C.L.J. 547.

Mortgage of tenure in possession under s. 13 of Reg. VIII of 1819—Liability for rent—*See* BEN. REG. VIII OF 1819, s. 13, 12 C. 185.

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Non-payment of—Effect of—*See* RIGHT OF OCCUPANCY—LOSS OF RIGHT, 15 C. 17.

Decree for arrears of—Fractional co-sharer—Sale in execution—Occupancy holding not transferable by custom—*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 4 C.W.N. 571.

Suit against Secretary of Society for—Of premises let—Secretary when and how far liable as agent--Indian Contract Act, IX of 1872, s. 230—*See* RIGHT OF SUIT—GENERAL, 22 B. 754.

See SET-OFF, A.W.N. 1899, 143.

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Receipts for—Comparison of signatures—Credibility of evidence — *See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, Marsh 322=2 Hay 421.

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Apportionment of—Transfer of lessor's interest by operation of law—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 2 (*d*), 36, 33 C. 786.

Suit for pottah at fixed rate of—*See* VARIANCE BETWEEN PLEADING AND PROOF, Marsh 371=2 Hay 422.

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Rent note, stipulation in a, for payment of rent in case the tenant holds over, does not extend the period of lease—*See* Bom ACT III OF 1876, 1 Bom. L.R. 464.

Registration of, to hold as long as tenancy continues is compulsorily registrable *See* REGISTRATION ACT, 1908, s. 17, 2 Bom. L.R. 488.

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See U. P. ACT XIX OF 1868.

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Rent Recovery, Bengal (Under-tenures) Act.

See BEN. ACT VIII OF 1865.

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Presumption—*See* BEN. REG. VII OF 1822, s. 9, A.W.N. 1886, 26.

Rent, Sales in satisfaction of decrees for.

See ACT VIII OF 1835.

Rent Settlement, Bengal.

See BEN. ACT VIII OF 1879.

Rent, Suit for.

See ABATEMENT OF RENT.

See BURDEN OF PROOF—LANDLORD AND TENANT.

See ENHANCEMENT OF RENT.

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See RIGHT OF SUIT — LANDLORD AND TENANT, SUITS CONCERNING.

See SALE—SALE FOR ARREARS OF RENT.

(1)—*Reg. V of 1812 — Rent decreed at certain rate in previous suit—Suit for arrears of rent—Notice unnecessary.*—A decree in a former suit fixing the rate of rent is sufficient notice for a subsequent suit for arrears of the rent so decreed and no formal notice under Reg. V. of 1812 is necessary. RAMJEEBUN BOSE v. TRIPOORA DASEE, **W.R F.B 93.**

(2)—*Reg. XIX of 1814—Butwara—Suit for rent by co-sharer — Landlord and tenant — Cause of action.*—Proceedings were taken under Reg. XIX of 1814 for partition of an estate amongst the several proprietors. From the time when the proprietors of the estate came to an agreement by which they entered into separate possession of particular lands, the ryots continued to pay separately to the parties in whose share their lands fell the rents due on account of those lands, in anticipation of the completion and confirmation of the butwara. Subsequently, however, the Commissioner quashed the butwarra proceedings, on the ground that they included lands which had been separately resumed as a separate estate. One of the share-holders sued for a fractional share of the rent payable by each ryot in the estate. *Held*, that, in respect of the lands of the defendant which fell within the share of a proprietor other than the plaintiff, no relation of landlord and tenant existed between the plaintiff and the defendant, and as the plaintiff had not joined the other co-proprietors as parties to the suit, and had not asked the Court to determine the question of his rights as against those proprietors under the Commissioner's order, but had simply sued a tenant as if he had from previous years been receiving rent from him, there

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really was no cause of action. KHEDOO GOPEJOTEDAR v. BABOO KHOOB LALL SINGH, **18 W.R. 148.**

(3)—*Suit for rent — Government acquiring land for public purposes—No contract—Cause of action.*—The Government had taken in lease neighbouring lands of others and had at one time expressed a desire to lease the lands in dispute including the shares of the plaintiffs as well as their co-sharers; but claim being laid by another party under a *mokurruree* lease the property was abandoned and the lands taken under the powers possessed by the Government for acquiring land for public purposes. The plaintiff now sued the Government for rent. *Held* that there was no contract and accordingly no breach of contract, and the plaintiff had therefore no right to sue. RAMCHAND BUDRO v. THE COLLECTOR OF JESSORE, **3 W.R. 131.**

(4)—*Joint property—Butwara—Khas possession—Joint tenant, Rights of—Suit for rent and mesne profits—Cause of action.*—A joint tenant is not entitled to khas possession of any portion of a joint and undivided property without a *butwara.* The cause of action in a former unsuccessful suit for rent against the co-sharers of a joint tenant is not the same as that in a subsequent suit for mesne profits between the same parties. HUREE DYAL GOOHO MOJOOMDAR v. GOBIND CHUNDER PAUL, **17 W.R. 387.**

(5)—*Reg.* VIII *of* 1819, *s.* 13, *cl.* 4—*Dur-putneedar, duty of, to give notice of his title to ryots.*—This was a suit for rent by a dur-putneedar who had paid a deposit in order to stay the sale of the superior tenure under cl. 4, s. 13, of Regulation VIII of 1819. The defendant pleaded payment of his rent to the putneedar *bona fide* and without notice, and the High Court concurred in the finding of the lower Court that the payment had been made as alleged. Although the plaintiff, after having been put in possession of the tenure, was entitled to the profits of it, it was his business to see that effectual notice was given to the ryots, and if, in consequence of any neglect on his part, or that of the Nazir of the Court, they remained in ignorance of his title, they cannot be compelled to pay over again rents paid by them to the putneedar. NIL MONEE ROY v. MR. JAMES HILL, **4 W.R. Act X, Rul. 38.**

(6)—*Reg.* I *of* 1824—*Land taken possession of by Government officers for embankment without legal formalities—Government trespassers—Liability of Government for rents during wrongful use.*—Case where it was decided that the Government were liable for rents of land taken for the purposes of an embankment but not legally and formally taken possession of by its officers with reference to Reg. I of 1824. THE COLLECTOR OF 24 PERGUNNAHS v. JOYNARAIN BOSE, **W R.F B. 18=1 Hay 122.**

(7)—*Act* VIII *of* 1859, *s.* 97, *not applicable to rent suits.*—S. 97 of Act VIII of 1859 does not apply to suits instituted under Act X of 1859 and does not preclude a person who has instituted and withdrawn a suit for arrears of rent from bringing subsequently a fresh suit for the same arrears. BEER CHUNDER JOOBRAJ v. TARINEE CHURN ROY, **11 W.R. 46.** (Marsh, 148, *F.*)

(8)—*Suit for arrears of rent—What should the plaintiff prove.*—The plaintiff in a suit for arrears of rent under Act X of 1859, must establish the relationship of landlord and tenant before he can recover the arrears. MAHOMED ASSUM CHOWDHRY v. KRISTO SOONDER TALOOKDAR, **W.R, 1864, Act X, Rul. 39.**

(9)—*Suit for rent—Act* X *of* 1859—*Preliminary requisite.*—Until the relationship of landlord and tenant is established between the parties, a suit for rent will not lie under Act X of 1859. NAUTH TAGORE v. MUSSAMUT LUCHMEE KOOER, **W.R. 1864, Act X, Rul. 40.**

(10)—*Rent-suit—Relationship of landlord and tenant not proved—Special Appeal.*—In a suit for rent, no special appeal lies where the lower appellate Court dismisses the claim of the plaintiff solely on the ground that there is no proof that the relationship of landlord and tenant exists between the parties. KRIPA MOYEE DEBIA v. DROUPADEE CHOWDRAIN, **24 W.R. 213.**

(11)—*Decision of Revenue Court in ejectment proceedings that there was no valid lease—Effect.*—Plaintiff brought a suit in the Court of the Assistant Collector to recover from the defendant arrears of rent alleged to be due under a kabuliyat. The defendant denied that he held under the kabuliyat and pleaded that he was not liable to the plaintiff for rent. It appeared that a lease was executed for the year 1280 fasli, on the understanding that it might be extended, and, as a matter of fact, the plaintiff obtained a decree for one year's rent, and subsequently received rent for two years and a half. It appeared that in 1885 the plaintiff served a notice of ejectment on the defendant, and the defendant disputed it in the Revenue Court under s. 39 of the Rent Act, and the Revenue Court decided in favour of the defendant on the ground that there was no valid lease, *i. e.*, that there was no relation of landlord and tenant between the parties. *Held* that the existence of the relation of landlord and tenant was established by the decree of the Court and by payment of rent, and that as it continued until it had legally been put an end to, the failure of the plaintiff to eject the defendant did not affect the relation of the parties, but left the tenancy still subsisting, and that this relation of landlord and tenant was not affected by any remarks which the Revenue Court might have made in disposing of the application for ejectment to the effect that there had never been any valid lease; *held*, also, that if the defendant were in a position to get rid of the lease on the ground of fraud or other similar ground, it was for him to do so by action in the Civil Court, but that there was no authority for holding that the plaintiff could

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only succeed by first establishing his right to the land in a Civil Court. TIKA RAM v. UDAI SINGH, **A W.N 1887, 28.**

(12)—*Landlord and tenant—Suit for rent, when maintainable—Act* XVIII *of* 1873, *s.* 95. —No suit for arrears of rent can legally lie until the rent rate on the land has been judicially determined by a competent Court such as the Revenue Court. The plaintiff in this case, who had not yet been recorded as proprietor according to the *khewat*, and who had not filed an application under s. 95. N. W.P. Rent Act XVIII of 1873, had no *locus standi* to recover arrears of rent. JOKHU v. ALAM SINGH, **A W.N. 1882, 25.**

(13)—*Suit for arrears of rent—Land situated partly in the jurisdiction of one Court and partly in that of another—Right to sue in one Court for rent due on the whole—Civ Pro Code,* 1882, *ss.* 4 A *and* 43—*Act* XII *of* 1881 (*N. W.P. Rent*), *s.* 104.—Where a landlord had leased a quantity of land situated partly in Oudh and partly in the North-West Provinces at one lump amount of rent for the whole *held*, that he was entitled to sue the tenant in the appropriate Court of the North-West Provinces, within the jurisdiction of which part of such property was situated for the rent due on the whole of such property and he was not obliged to make any deduction from his claim on account of that portion of the property which was situated in Oudh. *Held*, also, that the fact of his having made such a deduction from his original claim did not disentitle him from suing for the balance. PARMESHAR DAT v. SRI NEWAS, **A.W.N. 1891, 47.**

(14)—*Act* X *of* 1859, *Suit under, to recover arrears of rent—Temporary dispossession.*—No act of temporary illegal dispossession by a third party can take away the right of the part owner of an estate to her share of the rent from the tenant. MUSST. WOOLAFUN v. JEETUN LALL, **1 W.R. 325.**

(15)—*Contract of lease in English form—Completion of contract—Suit for rent maintainable under Act* X *of* 1859—The parties to this suit bound themselves under an indenture drawn up in the English form, the one to lease certain lands, and the other to pay rent for the same. Such contract being complete in itself and undisputed, it was *held* that a suit for arrears of rent could be maintained under the contract although no separate *kuboolent* was executed. KISHEN DOSS v. HURRY JEEBUN DOSS, **10 W.R. 324.**

(16)—*Rent-suit—Non-registration of* kabuliat—*Evidence—Trial of suit—Act* X *of* 1859—*Procedure by Court.*—Where the only issue in a rent-suit is whether the rent has been paid or not, the case may be tried, although the *kabuliat* is inadmissible in evidence owing to its not having been registered. [*Rel. on*, 24 C. 20.] In a rent-suit instituted under Act X of 1859, the Court ought, in the first instance, to examine and cross-examine the agents of the parties; and having found that the parties are

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at issue on particular questions, it ought to declare those issues and fix a day for hearing the case on those issues. DINONATH MOOKERJEE v. DEBNATH MULLICK, **14 W.R. 429.**

(17)—*Suit for rent by one co-sharer against another—Agreement between co-sharers—Maintainability of suit.*—Under an agreement by joint proprietors to the effect that, if any of them should cultivate before partition, he should pay a certain rent, no suit would lie under Act X of 1859 against such share-holder by another share-holder for the latter's share of such rent. SYED HYDER ALI v. OMRIT CHOWDHRY, **W.R. 1864. Act X. Rul 42.** [*D.*, 20 W.R. 258; *R.*, 12 W.R. 418, 13 W.R. 59.]

(18)—*Co-sharers. Suit for respective shares of rent by—Necessity to join other co-sharers before suit.*—Where the plaintiffs, some of the co-sharers, whose shares were clearly ascertained, sued for their respective shares of the rent payable by the defendants under an *ikrarnama held* that there was no objection to their suing so, without waiting for the other parties who may be entitled to rent, to join, or adding them as parties. UMRIT CHOWDRY v. SYUD HYDER ALI, **W.R. 1864, Act X, Rul 63.**

(19)—*Plea of payment to third person—Adding of such third person as party to suit, Permissibility of.*—In a suit for arrears of rent, a third person, to whom the defendant alleged to have paid the rent, should not be made a party, as such a step would convert a simple suit for arrears of rent into a suit for the determination of a title to immoveable property. NAGO RAO JAIDEO BRAHMIN v. BALAJI JAGESHWAR BRAHMIN, **12 C P L.R. 1.** (8 C. 238, *App.*; 13 A. 64, 8 C. 712, *R.*)

(20)—*Apportionment of rent—Suit by* darpatnidar *for proportionate rent—Non-joinder of other* darpatnidars—*Pleas*—*Practice.*—Six villages were granted in a *patni* to R, and in thess six villages the defendant held lands at a certain annual rent. R sublet the villages in *darpatni*—four to the plaintiff and two to J. The amount payable on account of the last two villages was admitted to be a certain sum. In a suit by plaintiff for the rent payable in respect of the lands situated in the four villages comprised in his *darpatni*, the defendant claimed that the plaintiff should specify the separate rents of all the villages, with a view to showing that, owing to non-occupation of certain portions of the land in suit, he was entitled to abatement, but when the issues were framed, he did not insist on the plea that the plaintiff could not sue separately from J. On the contrary he admitted that the rent of his lands in the two villages held by J was a certain sum and the issue on which he went to trial was only whether he was responsible to the plaintiff for the whole of the balance. *Held* (*a*) that the defendant went to trial on the understanding that he was the tenant of the plaintiff, separately for the four villages which originally bore a certain rent; that the plea that

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the plaint failed to disclose a title in the plaintiff to sue separately from J, the holder of the other two villages, having been designedly abandoned in the first Court, should not be entertained in the lower appellate Court. BRAJA LAL ROY v SAYAMA CHARAN BHUTT, **6 B.L.R. 523=15 W.R. 20.**

(21)—*Mokurraree title—Decree for arrears of rent—Effect.*—A *mokurraree* title giving right to hold certain lands at certain rates, when once judicially established, cannot be set aside by a person, who subsequently obtained a decree for arrears of rent at different rates without reference to such title. RAJ ROOP ROY v. CHOWDHRY OOGRA NARAIN SING, **W.R. 1864, Act X, Rul. 85.**

(22)—*Suit for arrears of rent—Real lessees in possession—Ostensible holder of lease not denying liability*—In a suit for arrears of rent against a *dur-putneedar*, where the plaintiffs have elected to proceed against the real and not the ostensible holders of the tenure and the Court has found that the real lessees were in possession, *held* that the relation of landlord and tenant existed between the plaintiffs and the real lessees, and they were liable for the rents, unless there was a special contract to the contrary, that is to say, unless there was a special contract that the person whose name was used should alone be liable. JUDOONATH PAUL v. PROSUNNONATH DUTT, **9 W R. 71.** [R., 14 W.R 12.]

(23)—*Agreement between mortgagor and mortgagee as regards payment of rent—Rights of mortgagor to recover rent.*—As a general rule, a mortgagor and mortgagee do not stand in the relation of landlord and tenant, but their position depends altogether upon the terms of their contract. If the mortgagee executes a lease in favour of the mortgagor, stipulating to pay him a certain amount annually as rent, he is, as far as the payment of that sum is concerned, a tenant of the mortgagor, and any arrears of such rent must be sued for under Act X of 1859. BISSOROOP DUTT v. BINODE RAM SEIN, **W.R 1864 Act X, Rul. 93.**

(24)—*Attachment of land of tenant—Collection of rent by sezawal—Liability of tenant.*—As a general rule, a plaintiff who has attached the lands of a tenant, and has collected the rents due by a *sezawal*, would not be entitled to claim from the tenant the difference between the collections made by the *sezawal* and the actual rents. JHOOMUCK CHOWDHRY v. G. ANDERSON, **5 W.R. Act X, Rul. 40.**

(25)—*Act X of 1859, s. 4, presumption of occupancy under, not claimable by defendant with fictitious pottah*—In this suit for rent at an enhanced rate, it was objected in second appeal that the Judge ought to have taken into consideration the fact that the defendant had held for 20 years at a fixed *jumma* and that the presumption should have been made that he had so held at that rate since the time of the Permanent Settlement, under s. 4 of Act X of 1859. The High Court decided that

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the defendant, having set up an alleged *mouroosee* pottah, which was found, apparently on good grounds, to be fictitious, could not fall back upon the rights which he might have had under that section. PETUMBER SHAHA v. JEBUN SINGH BURMONEE, **2 W R. Act X, Rul. 6.**

(26)—*Rent in kind—Suit for money value.*—The Rent Act recognizes payment in kind as rent. Non-payment in kind therefore, must be an arrear of rent, and a suit for the money value of the grain, as it stood when it was ready for delivery, and ought to have been delivered, is sustainable as a suit for rent. KRISHTO BUNDHOO BHUTTACHARJEE v. ROTISH SHAIKH, **25 W.R. 307.**

(27)—*Right to rent—Disclaimer by petition.*—A simple petition is sufficient to enable a party to disclaim rights to rent duly conveyed to him. SHIBDYAL TEWARY CHOWDHRY v. BIDDYAMOYEE DEBIA CHOWDHRAIN, **18 W.R. 271.**

(28)—*Claim for rent—Set-off.*—A claim for rent cannot be pleaded as a set off in a suit for money paid by the plaintiff on account of revenue to protect a lease in the nature of a mortgage to him. HEERA LALL v. BISHEN SUHAYE, **1 W.R. 296.**

(29)—*Landlord and tenant—Suit for rent—Enforcement of condition in kabooleut—Plea of previous omission to enforce.*—Where a kabooleut contained a condition that the rent should be paid monthly, the fact that the landlord did not enforce the condition strictly is no defence to a suit to recover the arrears of rent due. PEAREE MOHUN MOOKERJEE v. BROJO MOHUN BOSE, **22 W.R. 428.**

(30)—*Purchaser of ijara put into possession—Liability for rent.*—A person who has purchased an *ijara* and who has been put formally in possession by the Revenue or Judicial authorities, after a contest in the most regular manner, is legally accountable to the zemindar for the rents of the *ijara*, whether he collects them from the ryots or not. RAJAH INDOO BHOOSUN DEB ROY v. CHUNDER COOMAR ROY, **5 W.R. Act X, Rul. 58.**

(31)—*Rent-suit—Plea of discharge.*—Where a defendant in a suit for rent alleged that the plaintiff had appointed a tehsildar to collect the rents direct from the tenants and that he had paid it to the tehsildar. *Held* that the lower Court was wrong in raising the only issue, *viz.*, "what amount, if any, was the plaintiff entitled to recover." It should also have decided whether the tehsildar was appointed or not. The defendant should not have been left to try the question in a separate suit. DARIMBA DEBIA v. NILMONEE SINGH DEO, **13 W.R. 266.**

(32)—*Suit to set aside mokuraree lease—Eviction.*—It is not competent to a zemindar to sue to set aside a tenant's mokuraree lease when once that mokuraree in a suit between them had been adjudged to be valid, and a

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claim for enhanced rate dismissed in consequence of that finding. But it is quite competent for a zemindar to sue to eject a party holding on an alleged mokurarree, he having never recognised him as a tenant at all, but treating him simply as a trespasser. SHAH ANWAR ALI v. NUND KISHORE PERSHAD, **1 W.R. 222** [*R.*, 5 W.R. Act X, 3]

(33)—*Rent or* kabuliat, *Suit for—When maintainable.*—A suit for rent or *kabuliat* is not maintainable where it is shown that the defendant has never held the position of a tenant, nor occupied the land in such a way as to render him heretofore liable for rent, but has for a long period held the land as rent-free. The *prima facie* rent-free holding must be set aside in some other suit before rent can be obtained. MAHOMED MYANOBOO HEK v. MAHOMED SYAD KHAN, **1 W.R. 15.** [*F.*, 5 W.R. 62 ; *R.*, 8 W.R. 188.]

(34)—*Rent, Suit for—Plea of dispossession—Title.*—In a suit for rent, where the lessee set up the plea of dispossession, but was unable to show that his lessors had no title and that the person who ousted him had title, *held* that the defence failed. RUNG LALL SINGH v. LALLA ROODAR PERSHAD, **17 W R 386.**

(35)—*Suit for rent and eviction—Waiver of trespass—Decree for use and occupation.*—Where the tenant, with whom land was settled for a term, held over, and two others claiming to be the representatives of a former tenant also entered into it and began to collect rent from the under-tenants, *held*, in a suit by the zemindar, against all the three as trespassers, for the amount of rent due and for eviction, that, though, if the tenant alone had remained in actual possession, he might be made liable as having held over, a decree for use and occupation might be given against all the three defendants, as the plaintiff had elected to waive the trespass. SURNOMOYEE v DENONATH GIR SUNNYASEE, **9 C. 908 = 13 C L R. 69.** (22 W.R 334, 21 W.R. 208, *F*) [*R.*, 25 C. 324, 9 O.C. 296.]

(36)—*Widow's estate—Sale for arrears of rent.*—Where a widow's estate is sold for arrear of rent it is not merely the widow's life interest that is transferred, and the reversionary heir cannot follow the estate after her death. TILUCK CHUNDER CHUKERBUTTY v. MUDDON MOHUN BRAHMIN JOOGEE, **15 B.L.R. 143. Note = 12 W.R. 504.** [*F.*, 15 W.R. 329; *Expl.*, 15 B.L.R. 142 = 23 W.R. 174; *R.*, 24 W.R. 306, 1 C. 133 = 2 I. A. 275, 26 C. 285]

(37)—*Suit to settle future rate of rent, if maintainable.*—Apart from special statutory provisions, Courts of justice have no power to settle the rate of rent for future years between the occupier and the owner of land. MUDHOO SOODUN ROY v. SREEPUTTY BHUTTACHARJEE, **25 W.R. 488.**

(38)—*Rate of rent for different ryots—Rent whether depends on size of holding or ryot's circumstances—Judge not to fix term in rent suit by landlord.*—*Held*, that the Court could

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not fix one rate of rent for a ryot who expends his own capital and another for a ryot who is compelled to borrow it. The rate of rent which a landlord has a right by law to demand does not depend upon the size of the holding or the circumstances of the ryot. What is a fair and equitable rate for one ryot for the lands of a similar description and with similar advantages in the same neighbourhood must also be fair and equitable for another so far as the landowner is concerned. No such distinctions were made when the Government assessed the land tax and received the revenue through the Zamindars and no such distinctions ought to be made now. In a suit by a ryot having a right of occupancy for the delivery of a pottah, if the parties do not agree as to the term, the Collector may fix such a term as he may think proper, not exceeding ten years, subject to the proviso contained in s. 76, Act X of 1859. But this does not extend to cases in which a landowner sues for a kabuliat. The difference between the two cases is this—that a right of occupancy is the right of the ryot. It does not also give the landlord a right to compel him to continue his occupation. The Judge, therefore, cannot fix the term, either in those cases in which the landlord sues for rent, or in those in which he sues for kabuliats. JAMES HILLS v. ISHORE GHOSE, **W R F.B. 131.**

(39)—*Different tenures — Jummas —Rent.*—Where the jummas of different tenures are distinct, the tenure must be treated as such, and the rent charged accordingly. DABEE CHURN DEY v. SREESHTEE DHUR CHUCKERBUTTY, **17 W.R. 346.**

(40)—*Tanks, assessment of fair rate of rent for.*—In this suit for assessment of the rent of certain tanks, plaintiff-appellant was *held* not to be bound by the rates which the Government may have thought proper to accept. The suit was therefore remanded to the Judge for finding what would be the fair and equitable rate for tanks independently of any acts of Government. RAMCHURN BANERJI v. KISTO DEEGAR, **3 W.R. Act X, Rul 132.**

(41)—*Suit for rent at enhanced rates—Notice—Declaratory decree*—Lakhiraj —In a suit to recover arrears of rent at enhanced rates, when the question of the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved. In a suit for enhancement, where the defence is that the land is *lakhiraj*, the plaintiff should prove that the defendant has paid rent. If the land has been in fact held rent-free, the validity or invalidity of the *lakhiraj*, tenure cannot be tried in such a suit. The question should be tried in a suit to resume or assess. GUMANI KAZI v. HARIHAR MOOKERJEE, **B L R. Sup. Vol. 15 = Marsh 523 = W R.F B 115** [*F.*, 11 W.R. 35, 14 W.R. 285 ; *D*, 3 W R 178.]

(42)—*Agreement to pay rent—Negligence—Diminution of rent—Ground for deduction of*

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rent.—An ijaradar contracted to pay a certain rent annually. The contract provided that if the rent-roll of the estate was diminished in consequence of the ryot running away or giving up their land, or of the lands being washed away or in any other manner, then a corresponding deduction should be made in the rents of the ijara. The ijaradar claimed a deduction for a certain amount which he had not collected. *Held* that the ijaradar was not entitled to claim a deduction, as the decrease in rents was solely owing to his own negligence to collect the rents. BISSOROOP DUTT v. BINODERAM SEIN, **3 W. R. Act X, Rul 10.**

(43)—*Suit to determine rent—Offer to execute pottah—Condition.*—In a suit to determine the rate of rent which the plaintiff is entitled to claim in respect of his land, by offering to execute a pottah at that rate, he is bound to make an unconditional offer to execute a pottah at the rate directed by the Court, without making it a condition to the execution of the pottah that all previous arrears should be paid at the rate so fixed. G.M REILY v. JUDOO NATH GHUTTUCK, **25 W. R. 175.**

(44)—*Suit for rent—Fee for testing coin—Variation of rent.*—Where the Judge decided that, although Rs. 30 6-6 had, for a great number of years, been paid by the tenant, Rs. 29-15-0 only was paid as rent, the remainder being a kind of cess or fee for testing the coin paid. *Held*, that this finding did not amount to a varying of the rent of the tenant. DWARKANATH SINGH ROY BAHADOOR v. NUB COOMAR BOSE, **20 W R. 270.**

(45)—*Variance between pleadingand proof—Suit for rent in kind under kabuliat—Dismissal of suit for failure to prove kabuliat—Decree at rate admitted by defendant.*—Where, in a suit to recover Rs. 185-7 3, being the value in money, of arrears of rent for two years which the plaintiff alleged to be payable in produce under a kabuliat executed by the defendants' father, the defendants denied that the rent was payable in produce and alleged that the kabuliat had been set aside, that, under a subsequent arrangement made between the parties, the annual rent payable by them was fixed at Rs. 20, and that the plaintiff had sued them on a previous occasion for rent in money and not in grain and had obtained a decree and that rate, and the Judge, finding the defendant's case proved, *held* that as the plaintiff had set up a false claim, he was not entitled to a decree and dismissed the suit; *held* that the plaintiff was entitled to a decree for arrears of rent at the full rate admitted by the defendants. KISHEN MOHUN MOOKERJEE v. RAJOO DEY, **13 B L R. 245, Note=19 W R. 233.**

(46)—*Maafee grant—Nuzzerana to Government through lambardar—Resumption of maafee—Confiscation for rebellion—Auction-sale—Payment of nuzzerana to lambardar—Suit to enforce payment — Jurisdiction—Act XIV of 1863, s. 1, cl. 4.*—A certain sum was during the existence of the *maafee* grant paid as *Nuzzerana* to Government through the *lambardar.* After the *maafee* was resumed and a Government *jumma* assessed upon it, this sum as *Nuzzerana* continued to be paid until the interests of the holder of the resumed *maafee* were confiscated for rebellion and sold at auction. After confiscation and before the auction-sale, the Government allowed the amount to the *lambardar* by deducting it from the amount of Government revenue paid by him. *Held* (*a*) that the Government, in arranging that the payment should be made of this *Nuzzerana* through the *lambardar* did, in effect, convey to him (the *lambardar*), as trustee on behalf of Government, such an interest in the estate as would enable him to sue for and enforce its payment: (*b*) that under the circumstances, the payment of *Nuzzerana* appeared to be present in acknowledgment of propriety title in the nature of a rent charge, and (*c*) that a suit to enforce such payment might be brought in the Revenue Court under cl. 4, s. 1, Act XIV of 1863. SYUD ZAHOOR HOSSEIN v. ASSUD ALI, **2 Agra 378.**

(47)—*Act X of 1859, s. 23—Landlord and tenant—Malgoozaree land—Rent.*—Where land has been held as a bagh, and no other right or interest therein is shown, it becomes ordinarily, on the removal of the trees, a portion of the *malgoozaree* land of the village; and the occupant who brings it under cultivation is liable to the payment of rent. If the landlord and himself cannot by agreement fix the rent, a suit for the determination of the rate is maintainable under cl. 1, s. 23 of Act X of 1859. But where the defendant sets up a right of a higher description, and one wholly inconsistent with the existence of the relation of landlord and tenant, and it appears that there is a contest between the parties as to their respective rights and positions, the clause is inapplicable. SHEOPAL SINGH v. RAI SEETARAM, **3 N.W.P. 18.**

(48)—*Suit for house-rent — Jurisdiction of Revenue Court.*—Where the land in respect of which the plaintiff seeks for a *kabuliat*, at an enhanced rate of rent, is not land held for agricultural purposes, but land on which a shop stands, the shop being the thing for which the rent is paid, and the land merely an adjunct to it, *held* that, under such circumstances, a suit cannot lie in the Collector's Court. MADAN SING v. MADAN RAM DEB, **1 B L R S N. 11 (a).**

(49)—*Lands with buildings—Suit for rent—Revenue Court—Jurisdiction.*—A suit for rent due not solely for land, but also for buildings, is not cognizable by the Revenue Courts. MAHARAJA DHIRAJ MAHTAB CHAND BAHADUR v. MAKUND BALLABH BOSE, **9 B L.R. App. 13=14 W R 246.** [*F.*, 9 B.L.R. App. 14=15 W.R. 464, Note; *Expl.*, 15 W R 241; *R.*, 9 B.L.R. 115, Note=15 W.R. 463.]

(50)—*Rent—Liquidated damages, Suit for—Jurisdiction.*—A suit to recover the amount due to the plaintiff from whom the defendant purchased a house formerly belonging to the plaintiff and standing on his own *lakhiraj*

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land under an oral agreement that, so long as the house was not removed, he would pay the plaintiff a certain sum per month, is not a suit for rent but one for liquidated damages, and is, therefore, cognizable in the Civil Court. DEB NATH ROY CHOWDHRY v. KALLY KISTO ROY CHOWDHRY, **1 W.R. 2.**

(51)—*Suit for rent — Intervenor claiming and - Jurisdiction.*—Where the defendant in a rent suit, while admitting having paid rents to the plaintiff for former years, refused to pay the rents now sued for on the ground that a third party claimed the land, *held* that the plaintiff was entitled to a decree, the question as to the right to rents depending on the receipt of the rent of former years, and that the intervenor should be referred to the Civil Court for the assertion of his rights. KASHEE NATH BISWAS v MUDDUN MOHUN CHATTERJEE, **1 W.R. 91.**

(51-*a*)—*Act* VIII *of* 1859, *s.* 73—*Act* X *of* 1859, *s* 77—*Intervenor.*—Where the defendant in a suit for arrears of rent at an enhanced rate pleaded that he had sold the holding to a third party, who thereupon asked to be added as a defendant, *held* that such intervenor could not be made a party to the suit. KALINATH ROY v. ISWAR CHANDRA GHOSAL, **2 B.L R. F.B. 89=11 W.R. F.B. 23.**

(52)—*Suit between* kutkeenadars—*Jurisdiction of Civil and Revenue Courts.*—The plaintiff, the *kutkeenadar* of a certain share, sued the defendant, the *kutkeenadar* of the remaining share, for rent in proportion to his alleged share, and the defendant, although admitting his relation of tenancy to a certain extent, disputed the extent of the plaintiff's share. *Held* that the question of the extent of the share could be decided only by the Civil Court, and that the Civil Court could decide and could give complete relief with reference not only to the extent of the shares, but also with reference to the question whether the defendant had paid the rent claimed or not. VERASUT HOSSEIN v. JHUGDHAREE SINGH, **13 W R. 59.**

(53)—*Auction-sale of crops—Terms of sale—Liability to pay rent—Removal of grain—Implied contract—Jurisdiction.*—The defendant, being aware of a notification that certain crop was subject to the landlord's claim for rent, and of the landlord's right by law to distrain the crop, and thereby to prevent its removal from the land, became the purchaser of the crop at auction and assented to the terms of the sale, one of which was that the crop bought was to be regarded as subject to the landlord's claim for rent. The landlord also, being aware of this condition of sale, allowed the removal of the grain (relinquishing his right to distrain) upon the understanding that the defendant assented to and became liable to pay the landlord's claim for rent. *Held* that, from these circumstances, a contract between them might be inferred whereby the defendant became liable to pay (on default of the tenant) the rent due. *Held* also that the defendant could not be sued in the Collector's Court to enforce this obligation, and any suit in the Revenue Court will not affect the landlord's right to enforce this obligation in the Civil Court which alone has jurisdiction to entertain such suits. ACHUL v. GUNGA PERSHAD, **2 Agra 73.** [*F.*, 3 A. 433.]

(54)—*Cesses over and above actual rent, suits for—Jurisdiction — Revenue Courts—Ex parte judgment—Evidence—Tenant ordered to pay cess or demand of particular year, not compellable to pay same on for ever.*—Suit in a Revenue Court for certain cesses over and above the rent due from the ryot The claim was dismissed, an *ex parte* judgment tendered in evidence by the plaintiff being rejected by the lower appellate Court. *Held* that, apart from any evidence, plaintiff could not recover the cesses in question. The suit was under Act X of 1859 which gave the Revenue Courts jurisdiction in suits for arrears of rent, but not in suits to recover additional cesses. *Held* further that, although the lower appellate Court was wrong in having impugned the judgment which the plaintiff had adduced, merely because it was an *ex parte* decision, the judgment could certainly be no conclusive evidence as to the liability of the defendant to pay the cess in question. Simply because the defendant had been adjudged to pay a particular cess or other demand in a particular year, it would not follow that he could be compelled to so pay it on for ever. ORJOON SAHOO v. ANUND SINGH, **10 W.R. 257.** [*R.*, 24 W.R. 4.]

(55)—*Suit for rent—Cause of action — Suit based on pottah admitted by defendant.* — A plaintiff basing his cause of action on a putnee pottah held and admitted by the defendants, is not entitled to maintain a suit for rent. DHUNENDRO CHUNDER MOOKERJEE v. JOHN WATSON LAIDLAY, **20 W.R 400.**

(56)—*Claim for arrears of rent joined to claim for recovery of possession—Civil Court.*—Where a claim for arrears of rent is joined to a claim for recovery of possession, the suit can only be entertained in the Civil Court. In such cases, a plaintiff is not to be forced into two Courts for the purpose of obtaining the full relief he requires. BISHEN DYAL SINGH v. SARUB NARAIN SINGH, **4 N W.P. 32.**

(57)—*Jurisdiction - Suit by lessee against sub-lessee—Rent of garden attached to house.*—A suit by a lessee of a zamindar to obtain from a sub-lessee who is not a cultivator the rent of a garden which is attached to a house and ancillary to the enjoyment of the house ought to be brought in the Civil and not in the Revenue Court. RAJAH SHYAM SINGH v. MUSST MAHARANEE PUNCHUM MAJEE, **2 Agra 243.**

(58)—*Default of payment of kist*—Kuruk Sezawul *appointed under terms in lease—Suit by landlord for loss sustained - Jurisdiction—Civil Court.*—Plaintiff gave certain lands in farm to the defendant on the understanding (provided for in the lease) that, if any of the

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kists remained unpaid, she should have the power of appointing a *kuruk sezawul* to make collections direct, and that, should any loss accrue, the tenants should be answerable for it. A default occurred, and the *kuruk sezawul* was appointed and the plaintiff now sued to recover the alleged loss. Agreeing with the lower appellate Court, the High Court *held* that the suit would lie only in the Civil Court and not in the Revenue Court. The claim in suit was not referable to the relationship of landlord and tenant as existing between the parties, but to a separate demand for loss consequent on the *sezawul's* misfeasance. ANUND MOYEE DEBIA v. KHIRODHUR HOLDAR, **2 W.R. Act X, Rul. 45.**

(59)—*Bond securing payment of debt by assignment of rents—Suit for refund of the collected rents not appropriated for, bond triable only by Civil Court.*—The defendant and his father had lent money to the plaintiff on bonds, payment of which was secured by assignment of the rents of the plaintiff's estate. But instead of liquidating their bonds according to the terms of the assignment from the collections of the estate assigned, they brought a suit on the bonds and obtained a decree. Plaintiff thereon instituted the present suit for a refund of the collections made from the estate but not appropriated to the payment of the bond debts. *Held* that such a suit was not a suit for rent but one triable by the Civil Court. SHAIKH ALI MAHOMED v. KENARAM GHOSE, **8 W.R. 128.**

(60)—*Sharer or representative of sharer—Suit involving right to collect rents—Jurisdiction of Civil Court.*—The main plea set up in this case was that the Civil Court had no jurisdiction in the matter, but this plea was held to be untenable. The Civil Court had jurisdiction in the case, the real contention in which was of a Civil nature, *i e.*, the right to collect rents as a sharer, or as representative of, or deriving from, a sharer. The decision of the case depended on proof of a certain alleged partition defining particular shares. HURRO CHUNDER ROY v. OBHOY CHUNDER SIRCAR, **2 W.R. Act X, Rul. 72.** [*R.*, 12 W.R. 418.]

(61)—*Suit for rent—Title—Jurisdiction of Revenue Court—Agency—Rights of plaintiff—Defendant, Liability of.*—In a suit for rent, the Revenue Court has no jurisdiction to go into the question of title between the parties and determine it. Where, in a suit for rent, a third party, as plaintiff's agent, had been receiving rent for him from the defendant, *held*, that it was sufficient to establish the liability of the defendant to pay his rent to the plaintiff. RAMGUTTY MUNDUL v. GOURISH CHUNDER PANRAY, **17 W.R. 14.**

(62)—*Suit for rent on* Zur-i-peshgee *lease land—Jurisdiction of Civil Court.*—In a suit to recover rent reserved on land let out on a *zur-i-peshgee* lease, where the remedy sought involves in its details different jurisdictions, *held* that the zamindar should bring this suit in the Civil Court as the suit was in itself one and as in

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the Civil Court only he could obtain substantial relief. SHEO GOLAM SINGH v. RAY DINKUR DYAL, **12 W.R. 215.**

(63)—*Suit against co-sharers — Sub-lease—Jurisdiction.*—A suit against co-sharers and *durijaradar* for rent and damages in respect of a *mehal*, of which a sub lease was granted by the defendant co-sharers, through whose misfeasance the plaintiff was kept out of his property, should be brought in the Civil Court. The *durijaradar*, who was proved to be in no way the plaintiff's tenant and to have in no way obstructed the plaintiff from obtaining possession of his share, must be exempted from liability, which must fall on the co-sharers alone. RADHAJEEBUN MUSTAFEE v. DENONATH BANERJEE, **W.R. 1864, Act X, Rul. 49.**

(64)—*Jurisdiction of Revenue Courts.*—Huq-i-zemindari, *cognizance of—Act* X *of* 1859.—A suit claiming *huq-i-zemindari* could not be brought in the Revenue Court as Act X of 1859 is not applicable to it. JOWAHUR LALL v. SUTTAN ALI, **12 W.R. 214.**

(65)—*Act* X *of* 1859, *jurisdiction under, respecting rent in kind—Distinct agreement apart from rent, not within Act.*—Defendant held from the plaintiff a putnee under lease reserving rent in money. He also entered into a separate agreement, by which he undertook to deliver to the plaintiff a certain number of goats, certain quantities of straw and other articles yearly. The present suit was brought to recover the value of the goats, straw, and other articles, of which delivery had not been made according to the terms of the separate agreement. The defendant contended that the separate agreement for the delivery of the goats, straw, etc., was an agreement for the payment of a portion of the rent, inasmuch as the articles were to be deemed as so much rent, and that, therefore, this suit was substantially one for rent, and ought to have been instituted under Act X of 1859. The High Court, however, held, that, although Act X applies to suits for rent reserved in kind, the straw and other articles, which the defendant undertook to deliver, were the subject of a separate and special agreement which was wholly unconnected with the question of rent; and the breach of contract with respect to their delivery could not, therefore, be made the subject of an Act X suit. BHUBOO SOONDUREE DEBIA v. NAWAB SYUD JYNUL ABDIN, **8 W.R. 393.**

(66)—*Money agreed to be paid in respect of Government jumma, Suit by Government to recover, not a suit for arrears of rent cognizable under Act X—Jurisdiction of Civil Court.*—The present suit was brought by Government as for money due. The resumed *lakheraj*, land, in respect of which the claim arose, was resumed so far back as the year 1839. The suit was not one for arrears of rent, but a suit by the Government to recover the sum which the defendants had agreed to pay in respect of the claim of Government to its *jumma* for a period prior to the Settlement of 1859. The case was

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not, therefore, within the Collector's jurisdiction, but was one properly cognizable in the Civil Courts and the lower Court should not, therefore, have rejected the plaint on the ground that the suit was one cognizable by the Collector's Court alone under Act X of 1859, as a suit for arrears of rent. THE GOVERNMENT v. HUSHUMTOONISSA BIBEE, **2 W.R. Act X, Rul. 106.**

(67)—*Ground rent included in house rent—Claim regarding ground rent, cognizable by Revenue Court under Act* X *of* 1859.—Act X of 1859 declares all suits for the rent of lands to be cognizable solely by the Collector of land revenue under that law, but it makes no mention of the rent of houses. House-rent may however include the rent of the ground upon which the house stands, and to that extent the claim to the ground-rent would perhaps be cognizable by the Revenue authorities, if it were possible to separate the items of ground-rent from the other items forming the aggregate of the house-rent. Such course not having been applicable in the present suit brought to obtain possession of the building occupied as a shop in the bazaar, the action, from its nature was held to be cognizable only by the Civil Court. RAM CHURN SINGH KETTREE v. MEADHUN DURJEE, **8 W.R. 90.** [*Cons.*, 17 W.R. 151.]

(68)—*Act* X *of* 1859—*Suit against lessees and sureties — Jurisdiction of Revenue Court.*—There is no provision in Act X of 1859, which confers on the Collector jurisdiction to take cognizance of a suit against sureties of a lessee. In a suit by a landlord against lessees and their sureties for arrears of rent under Act X of 1859, a Revenue Court is at liberty to hear and determine the suit as against lessees, over whom it has cognizance, though it cannot do so as regards sureties, who are outside the scope of the Act. The joinder of sureties in such suit does not necessarily put an end to the suit altogether on the ground that the causes of action are different. DOORGA PERSHAD v. RAJA SHEORAJ SINGH, **5 N.W.P. 222.**

(69)—*Act* X *of* 1859—*Act* XIV *of* 1863—*Rent in kind—Suit for maintenance of money rent.*—There is no provision in Act X of 1859 or Act XIV of 1863 for the cognizance by the Revenue Courts of a suit for maintenance of a money rent, on the allegation that the zemindar is attempting to substitute a rent in kind for the money rent previously paid. BAINEE v. MAHOMED ALI KHAN, **2 Agra 307.**

(70)—*Suit by farmer for refund of rent, not maintainable in the Collector's Court under Act* X *of* 1859.—There cannot be a suit in the Revenue Court for refund of rent paid by a farmer years ago, which he might have then refused to pay. MADHUB CHUNDER BIDYARATTON v. TARA SOONDAREE GOOPTANEE, **2 W. R. Act X, Rul. 91.** [*R.*, 3 C.L.J. 143.]

(71)—*Jurisdiction—Lease* benami—*Arrears of rent—Act* X *of* 1859.—In a suit for arrears of rent on a pottah which, though admitted to have been granted to C, was said to have been taken in his name by defendants, one of the defendants *P.N.* alleged that he and another (deceased) had taken the lease, and that the two remaining defendants, *J.T.* and *P.Q.*, had no interest therein, while *J.T.* and *P.Q.* claimed the right of paying rent for a share which they alleged was in their possession; *held* that *C* being the person to whom the land was leased, and who agreed to pay the rent, was by law the tenant, and the Collector, therefore, (under 8 W.R.F.B. 431) had no jurisdiction to try the suit. *Held* also that the Deputy Collector had no jurisdiction to determine the respective rights and liabilities of the several defendants, seeing that he could not do so without going into evidence extraneous to the lease. One person has no right to pay rent due from another, unless he can prove that he has a share of the land on lease. ROY PRIYANATH CHOWDHRY v. BIPINBEHARI CHUCKERBUTTY, **2 B.L.R.A.C. 237 = 11 W.R. 120.**

(72)—Benami *execution of lease — Suit for rent—Jurisdiction.*—A suit against A and B for arrears of rent under a lease alleged to have been granted to A and B's name, where B admits that he executed the lease but only as *benamidar* for A, while A denies the existence of any relation of landlord and tenant between himself and plaintiff, is not maintainable in a Revenue Court, such Court being incompetent to try the question whether A was the party beneficially interested in the lease. KISHEN BUTTEE MISRAIN v. MR. B. L. HICKEY, **11 W.R. 406.** (8 W.R. 429, F.B., *Rel. on.*) [*F.*, 9 C. 383 = 11 C.L.R. 577; *Cons.*, 18 W.R. 35.]

(73)—*Act* X *of* 1859—*Suit for rent*—Benami *tenants—Jurisdiction.*—A Revenue Court has no jurisdiction to try a suit under Act X of 1859 to recover rent from the defendant on the ground that he was the beneficial owner, and that the parties, who were the ostensible tenants, were benamidars. HURISH CHUNDER ROY v. PURNA SOONDAREE DEBIA, **18 W. R. 125.**

(74)—*Act* X *of* 1859—*Suit for rent of* arhats, ghats, *etc.—Revenue Court.—Jurisdiction.*—A suit for rent of lands where the rent comes from *arhats, ghats, hats,* and *bazaars* thereon, does not form the subject of Act X of 1859. It must be brought in a Civil Court. HARI MOHAN SIRKAR v. MONCRIEFF, **9 B.L R. App. 14 = 15 W. R. 464, Note.** (9 B.L R. App. 13, 2 B. L. R. App. 39, 8 W. R. 250, 3 B. L. R. A. C. 61, 9 W. R 552, *F.*) [*Appl.*, 27 C. 239; *Expl.*, 9 B.L.R. 115, Note = 15 W. R. 463.]

(75)—*Putneedar's liability for* dak *charges—Suit by zamindar against putneedar under Act* VIII *of* 1862, *B.C., not maintainable under Act* X *of* 1859.—Plaintiffs, zemindars, sued defendant, their putneedar, under his *kubooleut*, for the expense to which they had been put on account of *dak* charges under Act VIII of 1862 for which the putneedar was liable under his engagement. The lower Courts gave plaintiff a decree. Defendant appealed urging that the

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present suit was cognizable by the Revenue Court under Act X and not in the Civil Court, and the High Court held that the claim did not fall within the demands cognizable under Act X of 1859, the words of the provisions of which could not be legitimately construed so as to include them. RUTTAN MONEE DOSSEE v. BABOO JOTENDRO MOHAN TAGORE, **6 W. R. Act X, Rul. 31.**

(76)—*Written statement—Not verified—Dismissal of suit—Defendants held trespassers—Suit for possession by defendants—Jurisdiction.*—Where a written statement has been put in without the verification of the defendant and the same is allowed to be on the record, it is the business of the Court to take notice of the allegations which it contains and frame issues accordingly. Where a suit for rent has been dismissed on the ground of defendants having been trespassers, the latter cannot bring a suit for possession in a Revenue Court. RADHA CHURN ROY v. MORAN & CO., **13 W.R. 342.**

(77)—*Jurisdiction—Suit for arrears of rent—Suit on covenant in lease to recover arrears of rent of mine.*—A leased to B for 25 years, commencing from October 1855, certain *aurungs*, or pieces of ground, at certain rent payable monthly, B entering into a covenant to pay the rent. The property leased was a *loha mehal* or iron mine, and the lessee used it as such and erected smelting furnaces. *Held* that a suit by A against B, on the covenant in the lease to recover arrears of rent, was properly not brought under the Rent Act; that "land" as understood in reference to Act X of 1859, had a limited signification, and referred to such land as is made use of for the purposes of vegetable or animal reproduction. KHALUT CHUNDER GHOSE v. MINTO, **1 Ind. Jur. N.S. 426.**

(78)—*Jurisdiction—Suit by one putneedar against co-putneedars for rent.*—A suit by one of a body of putneedars against his co-putneedars for his share of the rents collected by the latter is cognizable in the Civil Court, and not under Act X of 1859. SOOBHUL SINGH v. MEETO SING, **W.R. 1864, Act X, Rul. 12.**

(79)—*Act* X *of* 1859, *s.* 23, *cl.* 4—*Jurisdiction—Suit for rent of stone-quarry.*—A suit for arrears of rent and cancellation of a lease where the land (part of a hill) had been leased for quarrying stone, with a small area required for the huts of the stone cutters, and looked upon by the parties as necessary and accessory to the main purpose of the lease, was held not to fall within the purview of cl. 4, s. 23, Act X of 1859. SHALGRAM v. MUSST. KUBIRUN, **8 B.L.R. A.C. 61=11 W.R. 400.** (1 I.J.N.S. 426, *Appr.*) [*F.*, 9 B.L.R. App. 14.]

(80)—*Act* X *of* 1859, *s.* 23, *cl.* 4—*Trees cut down by tenant—Suit for half their price—Jurisdiction.*—A suit for half the price of trees cut down by the tenant, and claimed by the landlord by right of usage, does not lie under cl. 4, s. 23, Act X of 1859 in the

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Revenue, but in the Civil Court. TOHUL ROY v. MOONSHEE MAHADEO DUTT, **W.R. 1864, 327.**

(81)—*Act* X *of* 1859, *ss.* 23, *cl.* 4 *and* 162—*Lease of several estates. Suit to recover rent under—Estate situate in territory to which Act not extended—Rent for such estate—Jurisdiction of Civil Courts when suits could not be brought in Revenue Courts.*—Where the rent reserved by a lease of several estates is a lump sum the claim cannot be split and apportioned, simply because one of the estates is situated in a place where Act X of 1859 does not apply. The provisions of s. 162 of Act X of 1859 can only be read as referring to suits brought to recover rent of estates, situated in districts in which the Courts constituted by the Act are established. In the commencement of the section, its provisions are confined to "suits brought under the Act," a suit brought to recover rent, partly due in respect of estates situate in a district in which the Act is not in force, cannot be held to be brought under the Act. *Semble.*—There is authority for holding that the Civil Courts may entertain suits which cannot be brought in the Revenue Courts, although a portion of the claim is of a nature of which the exclusive cognizance is given to the Revenue Courts. OOSMAN KHAN v. CHOWDHRY SHEORAJ SINGH, **5 N.W.P. 42.** [*R.*, 1 O C. Supt. 1.]

(82)—*Suit for tolls for use of a ferry—Beng. Act* X *of* 1859, *s.* 23, *cl.* 4—A suit for tolls for the use of a ferry belonging to the plaintiff was not maintainable under Act X of 1859, s. 23, cl. 4. FURLONG v. TREELOCHUN SINGH, **Marsh 504=2 Hay. 598.**

(83)—*Suit to enforce right to erect golahs at ghats and to collect duties—Beng. Act* X *of* 1859, *s.* 23.—A suit for enforcing an alleged right to erect *golahs* at certain ghats, and to collect duties from persons using them, was not a suit "on account of any right of pasturage, forest right, fisheries, or the like," within s. 23 of Act X of 1859, and the Collector had no jurisdiction to entertain it. FURLONG v. JOHURREE LOLL, **Marsh 194=1 Hay 453.**

(84)—*Suit for ground rent—Jurisdiction.*—A suit for ground-rent of a land on which a *golah* stands cannot be instituted in a Revenue Court. DELAWUR ALI v. DABEE PERSHAD, **11 W.R. 203.** (9 W.R. 52, *F.*)

(85)—*Suit by one co-sharer for moiety of rent of land in possession of another—Jurisdiction—Act* X *of* 1859, *s.* 23.—S. 23 of Act X of 1859 has no application to a suit in which the claim of the plaintiff is to a moiety of the rent of certain land in the possession of his co-sharer. MITTUNLAL SAHOO v. SHEIK NADUR, **1 W.R. 53.** [*R.*, 12 W.R. 418.]

(86)—*Act* X *of* 1859—*Co-sharers, legal position of—Liability to pay rent—Jurisdiction.*—A suit by one co-sharer against another is not cognizable by the Revenue Court under s. 23 of Act X of 1859. The legal position of co-sharers in an estate occupying separate portions of it for their own purposes is, that each possesses

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and holds in respect of his several right to enjoy that which is his own. If any one holds a portion of land larger than his share, either as being greater in extent or in value, the inequality may be rectified by a partition: or if a dispute arises on a division of the annual profits, it may be adjusted in a suit for an account in which the rights and equities of all the parties can be fully dealt with. But such a suit is not cognizable under Act X of 1859. If a co-sharer occupies a portion of an estate larger than that which he is entitled to hold, by renting it from one or the rest of his co-sharers, he migh be sued for the rent of such land under Act X of 1859, by the person or persons with whom he engaged. In the ordinary case of cultivating share-holders holding at a rent which is collected by a putwaree on behalf of the entire body, the liability of each cultivating co-sharer to pay rent for his holding, must, in the absence of usage, agreement, or evidence to the contrary, be deemed to be single and entire. But if there is an agreement, either express, or which can be implied from the conduct of the parties, that the occupying share-holder should pay separately to each of his co-proprietors a certain definite sum in respect of the share of such co-proprietor as its rent, there is no reason why such sum should not be recoverod by such co-proprietor by a rent suit before a Collector. KALEE PERSHAD v. SHAH LUTAFUT HOSSEIN, **12 W.R. 418.** [*Appl.*, 20 W.R 258; *R.*, 9 C.P.L.R. 133, 7 A.L.J. 90=1 Ind. Cas. 975.]

(87)—*Jurisdiction—Suit for rent—Rent from tolls—Act* VIII (*B.C.*) *of* 1869.—The provisions of Act VIII (B.C.) of 1869 do not permit an action for rent derivable, as far as the lessor is concerned, from tolls collected by the lessee from persons resorting to a certain *hat.* Such a suit is not cognizable under the provisions of the Rent Law. ROBERT SAVI v. ISSUR CHUNDER MUNDUL, **20 W.R. 146.**

(88)—*Act* VIII (*B.C.*) *of* 1869—*Agricultural holdings—Erection of building—Proprietor's consent—Right to hold land in perpetuity—Filing of plaint—Further statement by plaintiff after filing of defendant's written statement.*—Act VIII (B.C.) of 1869 applies only to agricultural holdings and does not apply to disputes regarding a street in a town. The mere fact that a building has been erected on a land with the consent of the proprietor of the estate, does not give to the occupant a right to hold the land perpetually at the same rate. If the proprietor with an ultimate view of raising the rent brings a suit for ejectment, he has a right to have his title to eject determined in that suit. [*Appl.*, 3 C.L.R. 543.] After written statement was filed in a suit for ejectment, the plaintiff, without leave of the Court, filed a further statement without the claim that he made in the plaint and substituting in its place a claim for enhancement of rent. *Held* that the supplemental statement of the plaintiff must be rejected. THE COLLECTOR OF MONGHYR v. HAKIM MADAR BUKSH, **25 W.R. 136.**

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(89)—*Act* VIII *of* 1869 (*B.C.*)—*Jurisdiction—Suit for dustoorut—Rent—Dismissal of suit—Fresh suit—Act* VIII *of* 1859—*Ground not taken in special appeal—Practice.*—Dustoorut is not rent. Therefore a suit for dustoorut is not cognizable under Act VIII of 1869. The contention at the hearing of the special appeal that, even supposing the suit for dustoorut was not really a suit for rent, it was not liable to be dismissed, in order that a fresh suit might be instituted under Act VIII of 1859, is not tenable when that was not taken as one of the grounds in the special appeal. RAM CHURN BANERJEE v. TORILA CHURN PAUL, **18 W.R 343.**

(90)—*Act* XIV *of* 1863—Lumbardaree *right, suit to recover—Commission on actual collection—Jurisdiction.*—Act XIV of 1863 has no clause applicable to a claim by a *lambardar* to recover a 10 per cent. allowance made payable to him by the terms of the administration paper, this *lambardaree* right not being strictly a commission on actual collections made by him, but being rather a payment stipulated for in his favour by the settlement papers. It is properly recoverable in the Civil Court. KHOOBEE v. AKBAR, **2 Agra 322.**

(91)—*Arrears of rent, Suit for—Jurisdiction—Oudh Rent Act,* XXII *of* 1886, *ss.* 124 *and* 124 *A—Civil Court — Appeal.*—Where the question is whether a suit ought to have been instituted in a Civil Court or in a Rent Court, *held*, that when such an objection to jurisdiction was taken in the first Court, and on appeal the appellate Court has before it "all the materials necessary for the determination of the suit" it shall decide the appeal without entering into the question of the jurisdiction of the Lower Court to entertain the suit. In the schedule attached to a tenant's lease, comprising both agricultural and non-agricultural lands, there was no division or specification of the amount of rent payable on each separately, but one lump sum of rent for both. Following the rule of law laid down in *Oosman Khan* v. *Chaudhari Sheoraj Singh*, (5 N.W.P. 42) *held*, that a suit for arrears of rent, based on the said lease, was cognizable in a Civil Court. ABDUL AZIZ v. NAWAB MALIKA MUKHADRA UZMA BADSHAH MAHAL SAHIBA, **1 O.C. Supp. 1.**

(92)—*Prospective rent, Determination of—Mokurari lease.*—A suit for the determination of the rate of rent, for the enhancement of which notice was sent and which the defendants are liable to pay plaintiff in the future, is a suit which will lie under the law. Though a pottah confers a contingent holding on the lessee and his posterity, it is therefore a mokurari pottah. ASGUR ALI v. WOOMAKANT MOOKERJEE, **25 W.R. 318.**

(93)—*Decree for rent, Condition for execution by means of endorsement of amount on bond given by plaintiff to defendant.* — Plaintiff let an estate in farm to defendant and there was a condition that the rent should go in discharge of a bond executed by the plaintiff in

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favour of the defendant. In a suit for rent by the plaintiff, the Deputy Collector passed a decree with a proviso that it should be executed by endorsing the amount on the above bond, and neither party objected to such a course. The first appellate Court, however, threw out the case on the ground of want of jurisdiction, but the High Court holding that it was wrong, remanded the case with the direction that any rent found due will be paid by endorsement on the bond as decided by the Deputy Collector. GOLUCKNATH ROY v. MR. K. BROODY, **6 W.R. Act X, Rul. 47.**

(94)—*Suit for rent, maintainable against tenants in possession — Registration not essential.*—This was a suit against several parties for rent and the lower Court had wrongly considered that, unless the defendants were registered tenants, the suit could not be maintained. This was a mistake. If the defendants or any of them were shown to be in possession as tenants, the suit can be maintained whether they are registered or not and those not in possession can be struck out. JERABUTOONISSA KHANUM v. RAM CHUNDER DOSS, **6 W.R. Act X, Rul. 36.**

(95)—*Farming lease—Rent—Arrears — Revenue Court—Jurisdiction.*— Where a person took a farming lease from another, agreeing to pay him a certain yearly rent and stipulating to pay him half of the enhanced rent (which he might succeed in realising from the ryots) *held* that a suit by the lessor for recovery of his moiety of enhanced rent would lie in the Revenue Court. SRIMATI BHABATARINI DASI v. J. GREY, **2 B.L R.A.C. 152=11 W. R. 7.** (5 W.R. Act X, 34, *Rel. on*; 1 B.L.R. F. B. 32, *D.*)

(96)—*Dwelling-house—Suit for enhancement of rent—Collector's jurisdiction.*—The Collector can take cognizance of a suit for enhancement of rent of a dwelling-house in a village. ABDUL HAMID v. DONGARAM DEY, **3 B.L.R. App. 133.** (2 B.L.R. App. 39, *D.*)

(96-*a*) —*Enhancement of rent—Act X of* 1859, s. 17.—A notice of enhancement does not come within s. 17 of Act X of 1859, where the ground alleged for the claim of higher rent is merely that the productive powers of the land have increased or that the rent paid is below the prevailing rate paid by neighbouring ryots. RAM SARAN SINGH v. BHAJAN DOBAY KARPARDAZ, **6 B L.R. App. 155, N (a)=11 W.R 515.** [*R.*, 6 B.L.R. App. 155, Note=12 W.R. 537.]

(96-*b*)—*Act* VIII (*B.C.*) *of* 1869—*Enhancement of rent—Jurisdiction.*—A suit for enhancement of rent, on the ground of increased value of the land by reason of the existence of a distillery, the said increase of value not being attributable to any of the causes specified in s. 17, Act X of 1859, will not lie under Act VIII (B.C.) of 1869. BRAJA NATH KUNDU CHOWDHIRY v. A. STEWART, **8 B.L R. App. 51=16 W.R. 216.** [*R.*, 3 C.L.R. 543.]

(97)—*Jurisdiction — Revenue Court—Rent suit—Question of title—Ijmali estate.*—It is competent for a Revenue Court in an Act X suit to go into matters connected with title and to decide whether property is joint or separate with the view to prove the relationship of landlord and tenant between a plaintiff and a defendant who alleges that the property, is the ijmalee of himself and plaintiff. MOHESH DUTT v. BABOO BEG NARAIN SINGH, **16 W.R. 82.** (8 W.R. 428, F.B., *R.*)

(98)—*Revenue Courts — Jurisdiction—Suit or rent—Plea of payment by* burrat—*Proof of execution of* burrat *by lanalord.*—Where in a suit for rent, payment by a *burrat* is pleaded by the tenant, and it is proved that the landlord had executed it, the Revenue Court has jurisdiction to try the question of *burrat.* PURNOO CHUNDER ROY v. NUND LALL GHOSE, **7 W.R. 25.**

(99)—*Suit by assignee of land for arrears of rent Revenue Court—Jurisdiction.*—A Revenue Court has jurisdiction in a suit for rent brought by the assignee of the land; and has also jurisdiction, so long as the nature of the plaintiff's claim is not changed, to enquire into matters which have subsequently taken place, and which may only affect the defendant's answer to the plaintiff's claim. ISHAN CHUNDER SEIN v. KENARAM GHOSE, **12 W.R. 381.**

(100) - *Revenue Court — Jurisdiction—Suit for rent for land enjoyed in excess.*—Where a tenant held land in excess of that for which he had been paying rent, the Revenue Court had jurisdiction to entertain a suit for rent for the excess land, provided there had been no lease or express contract limiting the lands of the tenancy, in which case the tenant becomes a trespasser in respect of the excess land and the jurisdiction of the Revenue Court becomes ousted. SHAM JHA v. DOORGA ROY, **7 W.R. 122.** [*R.*, 22 W.R. 246.]

(101)—*Jurisdiction—Revenue Court—Arrears of rent, Suit for - Practice—Rate of rent—Evidence.*—A suit for arrears of rent at an enhanced rate is cognizable by a Revenue Court, though it is not brought for determination of the rate of rent at which the defendant should be required to give a *kabooleut.* In ascertaining the prevailing rate of rent it would be an error to strike an average between the witnesses on both sides. The proper plan is to ascertain upon which evidence reliance could be placed. ROWSHUN BIBEE v. CHUNDER MADHUB KUR, **16 W R. 177.**

(102)—*Rent, Suit for—Landlord and tenant — Questions to be tried—Revenue Court—Estoppel.*—Plaintiff sued the defendant in the Court of the Mamlatdar for the balance of rent due for certain years, in respect of certain lands. The defendant pleaded that he was the owner of the lands, and that the suit being one of right to land, not to rent, could not be carried on in the Revenue Court. *Held* (i) that the proper questions in such a suit were whether the defendant had occupied the land as tenant to the plaintiff during the years in question, and what rent remained due; (ii)

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that the Court cannot frame any issue as to the title to the property, inasmuch as to record such an issue would have been, upon the mere allegation of the defendant, without any proof, entirely to alter the position of the plaintiff and to oblige him to prove a title to the land, when it might be that the defendant had actually received possession of it from the plaintiff and had agreed to pay him rent for it; (iii) that the suit was a dispute regarding rent, within s. 31, cl. 3, Reg. XVII of 1827, and (iv) that this was not a suit "in regard to tenure" or "in which the right to possession of land" was claimed, within the meaning of s. 1, cl. 1, Act XVI of 1838. In a suit for rent, what the plaintiff is obliged to show is that the defendant is his tenant, and has made a contract either expressly or impliedly with him to pay for the occupation of the land. In such a suit, the defendant is not at liberty to set up a title in himself, and thereby deprive the Revenue Courts of jurisdiction. A tenant is estopped from disputing the title of his landlord, during the tenancy; the real question in the suit being whether the defendant is the plaintiff's tenant and has made such a contract, either express or implied If the plaintiff failed to prove this, he would not be entitled to recover rent from the defendant; and if he proved it, it would be unjust to treat the suit as one to try the right to the land and thereby deprive him of the benefit of the estoppel which the defendant would then be under. *N.B.*—The above was the decision of *Couch, J*, when the question was referred to him in consequence of the difference of opinions expressed by *Newton* and *Tucker, JJ.* BAI MAHALAKSHMI v. ANDHARU KESHAVRAM NARSIA RAM, **2 B. H.C. 185.**

(103)—*Decree for rent—Jurisdiction of Collector—Court executing decree—Act* VIII *of* 1859, *s.* 288.—The Collector, in a decree for rent, is not competent to make a special direction as to payment such as that realization of the decree should be against the property of judgment-debtor. Under s. 288, Civ. Pro. Code, unless upon the face of the decree, it appears that the Court had no jurisdiction to make it, a Court in executing that decree is bound to execute it as it stands. If there is anything in the decree which is wrong, it may be set aside by appeal or by an application to the High Court under s. 15 of the Charter Act, if there is any question as to excess of jurisdiction on the part of the Court passing it. DALEE PERSHAD SING v. SYAD DELAWUR ALI, **13 W.R. 312.**

(104)—*Suit for rent in kind—Intervenor made party at his request.—Objection by intervenor as to jurisdiction.*—In a suit for rent paid in kind which the plaintiff alleged that the tenant (defendant) had appropriated, and for the value of which he brought the present suit in the Civil Court, the defendant did not deny the plaintiff's right to rent as landlord, but contended that plaintiff claimed more than his share. But intervenors appeared in the suit and objected that the suit being one for rent, the Civil Court had no jurisdiction, and they further pleaded that the defendant was their tenant, and paid rents to them. They were made defendants in the case at their own request. *Held* (*by Loch, J.*) that the Civil Court had no jurisdiction to try the case. Neither the defendant's appropriation of the rent, nor the fact that the defendant disputed the amount of the plaintiff's share, nor the Act of the intervenors when they interfered and were made defendants and raised the question of right, alter the nature of the suit between the plaintiff and the defendant, or take the case out of the cognizance of the Revenue Court. *Held* (*by Phear, J.*) that whatever might have been the case before the intervenors became parties to the suit, as soon as they were made defendants, and issues of right and title were raised by the Court, on their own allegations between themselves and the plaintiff, there was manifest matter in dispute between the parties which the Civil Court had ample jurisdiction to entertain and decide. GHOLAM MAHOMED AKBUR v. RADHA KISHEN MOHUNT, **9 W.R. 287.**

(105)—*Jurisdiction — Shikmi talukhdars—Permanent Settlement.*—Shikmi talukhs included at the time of the permanent Settlement within the Zemindar's estate made the talukdars subordinate to the zemindar, who was therefore entitled to sue them for their rents in the Revenue Courts. CHUNDER KANT CHUCKERBUTTY v. DUKHEEANEA ODEA, **1 Ind. Jur. N.S. 6=4 W.R. Act X, Rul. 41.**

(106)—*Suit for rent—Revenue Court—Jurisdiction.*—Where rent was claimed under an agreement that, if either party took up the land of the other without an actual demise of it, he would pay rent for it at a certain rate; *held* that such a suit was cognizable by a Revenue Court. JADOOBUR SINGH v. BEHAREE SINGH, **2 N.W.P. 437.**

(107)—*Claim to deduction of rent—Bond.*—In an action for rent before the Collector, the tenant set up that, by a *tamasook* entered into between himself and his landlord after his lease, it was stipulated that, in consideration of an advance of money by him to the landlord, a part only of the rent should be paid and the residue applied in satisfaction of the debt and he claimed to be entitled to the benefit of that stipulation. *Held* that the Collector had jurisdiction to inquire into the validity of the alleged *tamasook*, and to allow the deduction, if satisfied that it was genuine. EDUN v. BEECHUN, **Marsh 409.**

(108)—*Suit by assignee of right to recover rent.*—A claim to rent preferred by a person, to whom the zemindar had assigned the right to recover the rent, could be tried under the Rent Act. SHAMASOONDEREE DOSSEE v. BINDABUN CHUNDER MOZOOMDAR, **Marsh 199=1 Hay 574.**

(109)—*Suit for rent below Rs.* 100—*Appeal heard by the Judge without jurisdiction—Powers*

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of High Court under s. 35 of Act XXIII *of* 1861 —*Transfer of appeal to Collector.*—This suit for arrears of rent below Rs. 100 was tried by a Deputy Collector. This was a case in which, if tried by the Collector, his decision would have been final under s. 153, and consequently the Judge had no jurisdiction to hear the appeal, and under s. 155 the appeal lay to the Collector. The High Court acting under s. 35, Act XXIII of 1861, ordered that the decision of the Judge be set aside and the case be transferred to the Collector for hearing. KRISTO INDER ROY CHOWDHRY v. ROOPINEE BEBEE, **6 W.R. Act X, Rul. 56.** [*R.*, 15 W.R. 518, 15 W.R. 426.]

(110 & 111)—*Suit to recover rent wrongfully collected by unauthorised person.*—A suit would not lie, under Beng. Act X of 1859, to recover rent wrongfully collected by a person, not the agent of the landholder, and without his authority. SEETAL KISTO ROY v. GOSSEENATH SHAH, **Marsh 465.**

(112)—*Deposit of money by lessee—Suit by lessor—Jurisdiction.*—Where, in a transaction which was alleged to be one of *zur-i-peshgee* not partaking of the nature of a mortgage, the lessor upon its execution received a sum of money, not by way of an advance or loan, but merely as a deposit for the due payment of the rent reserved, it was *held* that a suit for rent on such transaction was within the jurisdiction of the Revenue Court, as Act X of 1859 was applicable to it. JOWAHURLALL v. SULTAN ALI, **12 W.R. 214.**

(113)—*Act* X *of* 1859 - *Suit for rent of* Zerait *lands—Jurisdiction.*—A suit for rent against a person who holds certain lands as *zerait* lands in his exclusive possession, is one for rent as between landlord and tenant, and it must be tried under Act X of 1859, in the Revenue Court, and not in the Civil Court. MR. W. S. CROWDY v. SREE MISSER, **12 W.R. 4.**

(114)—*Act* X *of* 1859—*Suit for arrears of rent—Suit by lessor—Jurisdiction.*—Where the principal matter demised under a lease is the land of a zemindari, the indigo factories on such land being merely adjuncts or appurtenances thereto, a suit for arrears of the rent of the land is triable by the Revenue Court under Act X of 1859. SHARODA PERSHAD MOOKERJEE v. SREENATH MOOKERJEE, **15 W.R. 520.**

(115)—*Act* X *of* 1859—*Jurisdiction—Suit by landlord for rent from under-tenant.*—Where a landlord took *khas* possession of the tenure of his tenant under the terms of a contract, *held* that he could sue under Act X of 1859 for realizing the rents due to his tenant from the under-tenants. MAHARAJAH JUGUT INDUR NARAIN v. RAMSOONDER GHOSE, **3 W.R. Act X, Rul. 24.**

(116)—*Arrears of rent—Suit against lessee's surety—Act* X *of* 1859, *s.* 23, *cl.* 4—*Jurisdiction of Collector.*—On this appeal from a decision not against the lessee who was one of the defendants, but against his surety to pay the rent sued for, the first point taken was that the action would not lie against the surety since any suit against him ought to be instituted in the Civil Court and not in that of the Collector. The High Court *held* that the objection was untenable. To all intents and purposes, the suit was one under cl. 4, s. 23 of Act X of 1859, being one for arrears due on account of rent, and, as such, it may be fairly entertained both against the lessee who was made originally liable, and against the surety who would be liable on the default of the lessee. BHCOHUN MOHUN v. BHUBO SOONDUREE DEBIA CHOWDHRAIN, **8 W.R. 452.**

(117)—*Rent of lands let for purposes of factory, maintainability of suit under Act* X *for recovery of—Purposes of demise immaterial*—In this suit for enhanced rent of certain land, it was argued for the defendant in support of the decision of the lower Court that the suit, being for lands let for the purpose of an indigo factory including the dwelling house of the proprietor of the factory, should not have been brought before the Collector under cl. 4, s. 23 of Act X of 1859, but the High Court decided that, in the present case, the rent issued out of, and was reserved in respect of, the land alone, and not the factory, and the suit was thus maintainable under Act X of 1859. TARRENEY PERSHAD GHOSE v. BENGAL INDIGO COMPANY, **2 W.R. Act X, Rul. 9.**

(118)—*Suit for rent*—Hat—*Jurisdiction.*—Under s. 23, Act X of 1859, a suit for recovery of arrears of rent due in respect of a *hat*, is cognizable by the Collector. GAETREE DABEA v. THAKOOR DOSS, **W. R. 1864, Act X, Rul. 78.** [*R.*, 35 C. 82, F.B.]

(119)—*Suit for rent whether on* kubooleut *or otherwise cognizable only by Collector—Act* X *of* 1859, *s.* 23, *cl.* 4.—Whether a suit, which has been instituted as for rent, purports to have been based on a *kubooleut* or agreement or neither, it is always cognizable by the Collector under cl. 4, s. 23 of Act X of 1859. BABOO DHUNPUT SINGH v. MRS. M. MILLS, **7 W.R. 473.**

(120)—*Act* X *of* 1859, *s.* 23, *cl.* 4—*Suit for rent of fisheries.*—Suits for the rents of fisheries are provided for by cl. 4, s. 23 of Act X of 1859. ALLUM CHUNDER SHAHA v. BHURUT BABOO, **5 W.R, Act X, Rul. 92.** [*R.*, 31 C. 937=8 C.W.N. 804.]

(121)—*Act* X *of* 1859, *s.* 23, *cl.* 4 - *Rent suit against* benami *and actual farmer—Jurisdiction of Revenue Courts—Decree against only one possible.*—Where two persons were sued for rent, one as *benami* farmer and the other as actual farmer, the suit for rent was held to have been properly brought, under cl. 4, s. 23, Act X of 1859, in the Revenue Court. In such a suit the plaintiff was bound to make his election and could not sue both for the same rent. He could only obtain a decree against one or other

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not both of the defendants. HEERALOLL BUKSHEE v. RAJ KISHORE MOZOOMDAR, **W R F.B. 58=1 Hay 449=Marsh 188=1 Ind. Jur. O.S. 81.**

(122)—*Suit by some lessors for share of rent—Nature of suit—Cognisability by Collector—Act X of* 1859, *s.* 23, *cl.* 4.—A suit brought by some of several lessors against the tenant and others of the lessors, claiming a right to recover a particular share of the rent, the whole of which had been credited to the defendant in account by the other lessors who were made defendants is not a suit which under Act X of 1859 ought to be brought before the Collector, as it is not a suit merely for rent, but is partly to try the right of the several landlords *inter se*. LALLA ISREE PERSHAD v. STUART, **W.R. 1864, Act X, Rul. 28.** [*R.*, 13 W.R. 59.]

(123)—*Act X of* 1859, *s.* 23, *cl.* 4—*Suit for arrears of rent—Assignment of rent—Jurisdiction.*—A suit to recover arrears due to the plaintiff under an assignment of rent tantamounts to a suit to recover arrears of rent, which is only cognizable under cl. 4, s. 23, Act X of 1859, by Revenue Courts. KISHEN KOOMAR MITTER v. MAHESH CHUNDER BANNERJEE, **W.R. 1864, Act X, Rul. 3.** [*D.*, 27 C. 827, F.B.]

(124)—*Act* VIII *of* 1869 (*B.C.*)—*Rent suits—Separate register of suits—Object—Jurisdiction.*—The Bengal Legislature, when it passed Act VIII of 1869, restoring the Civil Courts the jurisdiction of which they had been for a time deprived, and empowering them to try suits for rents and others of a kindred nature, thought fit to direct that the suits instituted under the provisions of the Act should be entered in a separate register This provision, however, was introduced obviously for statistical purposes and not for the purpose of separating into parts the jurisdiction exercised by one Court. JALLALOODEN v. J. BURNE, **15 B.L.R. 261, (Note)=18 W.R. 99.** [*R.*, 18 W.R. 343, 22 W.R. 478, 24 W.R. 154=15 B.L.R. 238.]

(125)—*Suit for rent—Jurisdiction—Act* VIII (*B.C.*) *of* 1869.—A suit for rent in kind is cognizable under Act VIII of 1869 (B.C.). MULLICK AMANUT ALI v. UKLOO PASEE, **25 W.R. 140.** [*R.*, 1 C.W.N. 55, 1 A. 217, F.B.]

(126)—*Jurisdiction—Suit for rent before Act* VIII (*B.C.*) *of* 1869—*Suit instituted in wrong Court which had jurisdiction at the time of decision.*—A Munsif had no jurisdiction to decide a suit for arrears of rent which was instituted before Act VIII (B.C.) of 1869 came into operation, although the suit was actually decided after the Act came into operation and thus after the jurisdiction of the Revenue Courts had ceased to exist. KULLYANESSUREE DOSSEE v. NARAIN KYBURTO, **15 W.R. 241.**

(127)—*Suit for rent of land occupied without consent of landlord—Question of title—Jurisdiction of Revenue Court as to question of title raised in a rent suit—Oudh Rent Act,* XXII *of* 1886, *s.* 127—*Entries in Government record not conclusive proof of title.*—It is the duty of a Revenue Court in Oudh to decide every question raised in a rent suit, which is necessary for the decision of the suit, although its decision may not be binding upon the parties in the Civil Court. SHEIKH TALIB ALI v. BASANT RAE, **7 O.C. 340.**

(128)—*Jurisdiction—Landlord and tenant—Benami contracts*—Pottah and kabuliat—*Sureties.*—Suit in a Deputy Collector's Court for arrears of rent on a *ganthi jumma*, for which four of the defendants were alleged to have taken a lease receiving a pottah and giving a *kabuliat* in the name of a third party C.P. on the security of two others who were sued as sureties. The liability of each defendant had been affirmed in previous decisions between the parties and the only dispute was between one of the defendants who claimed for himself and a co-defendant the exclusive liability and exclusive beneficial interest under the lease, and two female defendants, who alleged their liability to be limited and separate. The Deputy Collector found that the female defendants were liable for the rent of the share admitted by them and decreed the same accordingly, and awarded the balance of the amount against the other defendants. *Held*, (*Norman, J., dissentiente, and overruling* 11 W. R. p. 120 *so far as this point went*) that the Collector was fully competent to hear and determine the suit as one of a very large class which the Revenue Courts are trying daily, in which either landlord or tenant is a *benami* holder, the name used not being that of the real contracting party. The rule refusing to allow an agent, who appears in a written contract as principal to offer parol evidence for the purpose of exonerating himself, was held to bet, wholly inapplicable to this case. The parties sued, being held to be, within the knowledge of the sureties, the real contending parties, the sureties were held responsible for these parties and not for C.P. BIPINBEHARI CHOWDHRY v. RAM CHANDRA ROY, **5 B.L.R. 234=14 W.R. 12.** [*F.*, 9 C. 383=11 C L.R. 577; *Appr.*, 16 W.R. 186; *D.*, 18 W.R. 35.]

(129)—*Rent, summary suit for—Suit for execution of decree—Revenue Court—Satisfaction.*—A regular suit cannot be maintained to enforce a decree in a summary suit for rent which the Revenue Court has found to be satisfied, and therefore refused to execute (*Steer, J., contra.*) ANANDA MOYI DASI v. PATIT PABUNI DASI, **B.L.R. Sup. Vol. 18=W.R. F.B. 118.**

(130)—*Act X of* 1859, *s.* 24—*Advance for construction of bund and for payment of tehsildars—Jurisdiction.*—A suit by a manager under the Court of Wards against the sureties of a deceased naib or agent to recover money advanced to such naib for the construction of a bund and for payment of the salaries of the tehsildars and the peadahs (peons), is cognizable by the Revenue Court under s. 24 of Act X of 1859, as the construction of the bund is an Act of the naib, clearly, distinctly and directly coming

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within the section, with regard to the '*management of land*,' and as the tehsildars and peadahs are necessary and essential for the same purpose, their employment and payment also are directly in connection with the management of the lands. RAM DYAL BANERJEE v. THE COURT OF WARDS, **12 W.R. 269.**

(131)—"Bhikya," *meaning of—Suit by zemindar against agent for rent—Act* X *of* 1859, *s.* 24. —The word "Bhikya" means something of the same character as "abwab" or any other cess, and so long as the ryot continues to pay it in consideration of not being sued for enhancement of rent, it can hardly be said to be anything but rent. A sum of money paid by ryots to the zemindar under compromise instead of on suits for enhancement of rents can hardly be said not to come within the category of rent. A suit by a zemindar against an agent employed by him in the collection of rents, to recover such moneys, comes within the purview of s. 24, Act X of 1859. BHOLANATH MOOKERJEE v. BRIJO MOHUN GHOSE, **14 W.R. 351.**

(132)—*Act* X *of* 1859, *s.* 27—*Ryotee tenure, registration not necessary in the case of—Act* VI *of* 1862 (*B.C.*)—*Tender of rent followed by deposit.*—S. 27 of Act X of 1859 cannot apply where the tenure in dispute is not one intermediate between the Zemindar and the Collector, but a ryotee tenure. And, neither under s. 10 of Act X nor under any other law has the registration of a ryotee tenure been declared necessary. The tender of rent followed by a deposit of the money in Court under Act VI of 1862, B.C. is a legally valid and sufficient tender. WOOMA CHURN SETT v. HUREE PERSHAD MISSER, **10 W.R. 101.** [*R.*, 11 C. W.N. 983, F.B.=6 C.L.J. 273=35 C. 34.]

(133)—*Act* X *of* 1859, *ss.* 47, 56, 58—*Suit for rent—Service of summons on defendant residing outside district.*—The words in s. 56 of Act X of 1859 "upon proof that the summons or proclamation has been duly served according to the provisions of this Act," refer to the mode in which a summons is to be served. Where the defendant in a suit for rent resides in another district and the service of summons is effected by a peon of the Collector's office of the district in which the suit is brought, and not through the Collector of the district in which the defendant resides, as required by s. 47 of the Act, such procedure would not amount to such irregularity as to vitiate the proceedings. An irregularity of this kind by which the party is not injured does not vitiate the proceeding and render the *ex parte* decree passed against him void. MACKINTOSH v. KALLY DOSS MULLICK, **11 B.L.R. 1=19 W. R. 234.**

(134)—*Rent suit—Suing by agent—S.* 69, *Act* X *of* 1859—*Rent accruing before and after time—Tehsildar.*—No one can be plaintiff except the person or persons who have the right to recover. The only effect of s. 69 of Act X of 1859, is to enable the person who is employed in the collection of rents to do that, as agent, which would otherwise have to be done by the plaintiff in person. Where arrears of rent have accrued as well before as during a Tehsildar's time, he is at liberty to avail himself of s. 69, Act X of 1859, in respect of such arrears. MODHUSOODUN SINGH v. WILLIAM MORAN AND CO., **11 W.R. 43.**

(135)—*S.* 77, *Act* X *of* 1859—*Rent claimed by plaintiff alleging right and possession—Denial of plaintiff's possession by defendant—Plea of payment to third party—Party to suit—Question of receipt and enjoyment of rent to be tried.*—Where the plaintiff claimed rents from defendant, alleging both his right and possession, and the defendant denied that plaintiff was in possession, but pleaded that he (defendant) paid his rents to the third party as rightful heir and as in possession and the third party himself also pleaded to the above effect, *held*, that s. 77, Act X of 1859, was the law by which the Judge should try the case and that the question of the actual receipt and enjoyment of the rent by such third person should alone be enquired into and the suit decided according to the result of such enquiry. MIRZAH ZAHID ALLY v. MIRZAH HINGAM, **W R F B. 14.**

(136)—*Act* X *of* 1859, *s.* 77—*Suit for rent, intervention of third party in*—Onus *on intervenor of proving receipt and enjoyment of rent.*—According to s. 77 of Act X of 1859, where, in a suit against the ryot for rent, a third party intervenes, the question of the actual receipt and enjoyment of rent by that party is to be enquired into; in other words, where a person intervenes between landlord and tenant and claims the right to receive rents from the latter, the *onus* should be properly laid upon such person to prove his allegations and to show previous actual receipt and enjoyment of such rent by him. The High Court therefore held that the lower appellate Court was wrong in having upheld the decision of the Deputy Collector which threw out the plaintiff's claim on the grounds of his inability to prove receipt of rent from the tenant, and remanded the case so that the Deputy Collector may call upon the intervenor to prove his previous receipt and enjoyment of rent. KISHEN CHUNDER DOSS v. BURATEE SHEIKH, **2 W.R. Act X, Rul. 36.**

(137)—*Act* X *of* 1859, *s.* 77—*Intervention—Question of title—Appeal from order—Jurisdiction—Appeal—Power of Judge to hear whole case.*—Where, in a suit in which the amount of rent claimed did not exceed Rs. 100, the Deputy Collector decided a dispute between the plaintiff and the intervenor under s. 77 of Act X of 1859, not by enquiring as to which of the two parties had been in the receipt of the rent, but by enquiring into the titles set up respectively by each, *held* that an appeal would lie to the Judge. [*F.*, 6 W.R. Act X, Rul. 1, 10 W. R. 67; *Appr.*, 3 W.R. Act X, Rul. 154; *D.*, 7 W.R. 108.] Where an appeal has been properly preferred to the Judge, the procedure which should guide him in hearing that appeal is that laid down in Act VIII of 1859. Under that

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procedure, the Judge is bound finally to determine the whole case, if the evidence on the record is sufficient to enable him to pronounce a satisfactory judgment. It cannot therefore be said that the Judge cannot try the question as to which party was in receipt of the rent. BEEBEE JAMEERUN v. BHICHUK THAKOOR, **3 W.R. Act X, Rul. 27.**

(138)—*Act X of* 1859, *s.* 77—*Suit for rent—Intervention of third party—Decision on question of title—Appeal to Judge.*—The appellant in this suit for rent urged that, as it was for a sum below Rs. 100, there was no appeal to the Judge. But it was *held* that, as a third party had intervened under s. 77 of Act X of 1859, and the Deputy Collector did not confine himself to the mere question of fact as to the receipt and enjoyment of rent but went also into questions of title and disposed of them, an appeal was maintainable to the Judge. MOHA MOYA CHOWDHRAIN v. RAMNATH CHOWDHRY, **6 W.R. Act X. Rul. 1.** [*F.*, 6 W.R. Act X, Rul. 40 ; *R* , 10 W.R. 38.]

(139)—*Special appeal—Suit for rent less than Rs.* 100—*No decision on conflicting claims.*—Suit for rent less than Rs. 100. In a former suit brought against the plaintiff by a third party, a decree had been passed for recovery of a portion of the land for which rent was now claimed. The question of special appeal from the decree in the present suit depended upon whether a question relating to the title to land or to some interest in land as between parties having conflicting claims thereto had been determined by the judgment in the former case. *Held* that as in the present case neither the land nor the rent of the excluded plot was claimed by the defendant, there was no decision between the parties "having conflicting claims" so as to allow of a special appeal. The special appeal was therefore dismissed. REEDOYNATH DOORIPA v. PUDDO LOCHUN CHUCKERBUTTY, **22 W.R. 205.**

(140)—*Act X of* 1859, *s.* 77—*Suit for arrears of enhanced rent—Intervenor alleging possession in part—Possession of both not proved—Suit for rent—Rate not admitted*—Sharhanama *not proved.*—In a suit for arrears of rent, the plaintiff, alleging himself to be the proprietor of an 8 annas share, sued one of the ryots for rent, and a third party intervened and alleged that he had been in possession and enjoyment of the rents of 4 annas out of the 8 annas which the plaintiff had claimed, and the ryot supported the intervenor, the Judge on appeal finding that neither the plaintiff nor the intervenor had been in possession and enjoyment of the 4 annas of the rent in dispute, dismissed the plaintiff's suit. *Held* that, as between the claim of the plaintiff and that of the intervenor, the Judge having found against the intervenor, was bound to decree for the plaintiff in accordance with s. 77, Act X of 1859. Where a *sharhanama* under which the plaintiff claimed a higher rate of rent than the defendant admitted was not proved, the decree in favour of the

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plaintiff would be only to the extent and at the rate admitted by ryot. PHOOLABUTTEE KOOER v. GOPAL MUNDUR, **13 B.L.R. 244, Note=10 W.R. 81.**

(141)—*Intervenor in rent suit—Act X of* 1859, *s.* 77.—There is no other ground on which a person can claim to be made a party to a suit under s. 77, Act X of 1859, except one, *viz.*, that he has in good faith received and enjoyed rent up to the time of the commencement of the suit. Therefore, when a party applies under that section, quoting that section, it must be inferred that his plea is that he has been in receipt and enjoyment of the rent before and up to the commencement of the suit. His petition should not be rejected, because it does not contain the words "that he claimed to occupy and receive the rent." LACHMI NARAYAN PURI v. PUKHRAJ SINGH, **2 B.L.R. App. 16 =11 W R. 14.**

(142)—*Act X of* 1859, *s.* 77—*Parties, addition of—Intervention—Actual receipt and enjoyment of rent—Lands whether part of estate.*—Where, in a suit for arrears of rent of certain lands, the appellant intervened claiming to be heard under s. 77, Act X of 1859, alleging that his title to the lands in question had been declared by the decree of a Civil Court, *held* that the Deputy Collector was right in limiting his enquiry to the question whether the lands in dispute were covered by the decree. Where both the parties admit that the question of the actual receipt and enjoyment of the rents by the intervenor shall depend on the question whether the lands are part of his estate, the lower appellate Court should decide whether the finding of the first Court is right. BIR CHANDRA JUBARAJ GOSWAMI v. MADHAB KAIBARTA, **2 B.L.R.A.C. 160=11 W.R. 20.**

(143)—*Act X of* 1859, *s.* 77—*Intervention—Bona fide receipt of rent by intervenor not proved — Intervenor's right under previous decree.*—In a suit for rent of lands alleged by the plaintiff to be a certain share in a talook, held by him in a defined right, the defendant admitted the plaintiff's claim, but an intervenor appeared and contended that the lands were situated in a 7-anna share of the talook, that he purchased half of that share, and held a decree for the same, that he was a joint coparcener, and that the plaintiff was entitled to recover only one half of the rents he claimed. The intervenor having failed to prove actual receipt of rent *bona fide* as required by s. 77 of Act X of 1859, rested his case on the decree set up by him, contending that under it he was entitled to receive rent, and relied on two decisions (1 Wyman's Journal, 49 and 1 W.R. 331). *Held* that, as the decree did not state patently the subject matter to be that of this suit, *i.e.*, it did not say that the lands the rents of which were claimed were really joint property and clearly covered by the decree, the principle of the decision in 1 Wyman's Journal 49, did not apply ; nor was the principle of the case in 1 W.R. 331 applicable, as there was no adjudication at all in the decree against, the plaint-

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iff's right to receive the rents of these particular lands. GUGUN CHUNDER CHUCKERBUTTY v. SHAIKH AJMUL ALI, **11 W.R. 90.** (8 W.R. 493, *R.*)

(144)—*Act* X *of* 1859, *s.* 77—*Suit for rent—Improper intervention of third party.*—Intervention under s. 77 of Act X of 1859 refers to cases where in any suit two parties claim to receive the rent of the land from "the same ryot," and not to cases where the intervenor claims the rent of the land from a ryot other than the one sued for by the plaintiff. DHURM LALL CHOWDHRY v SHUMBHOO CHOWDHRY, **12 W. R. 81.** (1 W.R. 308, *F.*)

(145) — *Rent suit — Intervention by partner—Act* X *of* 1859, *s.* 77.—Where N instituted a suit for rent against J, who pleaded that he was not in possession, having sold his jote to W, who contended that N was entitled to recover only a moiety of the rent, the other half being due to M (the joint putnidar with plaintiff), from whom W had taken a farming lease, *held* that the defendant should be allowed to prove that he was not in possession ; and if M be not allowed to appear as an intervenor, there could be no objection to W's being allowed to do so, as deriving his title from M, and to show that plaintiff had not received the whole of the rent. JUMARAT MANDUL v. NILKANT SIRCAR, **1 B.L.R. A.C. 74=10 W. R. 110.**

(146)—*Act* X *of* 1859, *s.* 77—*Suit for rent—Zamindar and plaintiff claiming rent from same tenant—Point for decision.*—Where a plaintiff and the zemindar claim rent for the same land from the same tenant, the case comes under s. 77 of Act X of 1859 and the point to be decided is, who, up to the time of the commencement of the suit, was in *bona fide* receipt and enjoyment of the rent. The erroneous decision of questions of title not arising on the pleadings will give a right of appeal from it. SYUD JESHAM HOSSEIN v. NARAIN DOSS, **5 W. R. Act X, Rul. 56.**

(147)—*Act* X *of* 1859, *s.* 77—*Intervenor—Jurisdiction of Civil and Revenue Courts.*—The only question which an intervenor in a rent-suit under s. 77, Act X of 1859, is entitled to raise, either before the Collector or in appeal, is one relating to the fact of previous receipt and enjoyment of rent. If the Revenue Court decides this point against the party, whether intervenor or plaintiff, he can establish his legal title, if he has any to the rent or tenure of such land, by a suit in a Civil Court. The Revenue Court enquires merely into the fact of previous receipt and enjoyment of rent ; and the Civil Court by way of supplement, determines, if necessary, the legal rights of the parties. MARKOOND MYTEE v. UNUNT MOHOPATTUR, **12 W.R. 157.** (7 W.R. 25, 10 W.R 67, *D.*)

(148)—*Act* X *of* 1859, *s.* 77—*Rent-suit—Intervenor—Title—Jurisdiction—Rule of construction.*—An intervenor has no right to claim to be made a party to a suit for recovery of arrears of rent, unless, in the words of Act X of 1859, he found that such intervenor was "in the actual receipt and enjoyment of the rents of the land *bona fide* before and up to the time of the commencement of the suit." Where, in a suit to recover arrears of rent, a person intervened under s. 77, Act X of 1859, claiming a share of the rent, alleging that he had acquired a right under a decree of the Civil Court, and it was found that a predecessor of the intervenor, who died four years previously, had been in possession of a share of the property, and, after her death, no rent had been actually received and enjoyed by the intervenor, *held* that, under s. 77 of Act X of 1859, the claim of the intervenor could not be entertained, and that, under this section, the Court has no jurisdiction to decide the question of title. (9 W R 358, 3 B L.R. 204, Note, *Expl.*) The ordinary rule of construction is that, when the words to be interpreted are clear, that meaning should be attached to them which the words in their general acceptance bear. The Court should construe the law as its unambiguous words indicate in their ordinary meaning. *Per Bayley, J.* MADHUSUDAN BAGGHI v. RAJA MAHES CHANDRA SINGH. **3 B.L.R. A.C. 202=12 W.R. 62.**

(149)—*S.* 77, *Act* X *of* 1859—*Act* XXVII *of* 1860—*Scope—Payment of rent to intervenor.*—Act XXVII of 1860 merely provides for a certificate being given to the representatives of the deceased person to collect the debts due to the estate of the deceased. It does not provide for an adjudication of the rights of parties to succeed to property, or their actual title to it. The whole object of that law is to provide for the security of debts who pay the debts due to the estate of the deceased. Whatever may be the extent of the right which a certificate confers on a party, no one but the party who is in actual and *bona fide* receipt of the rent is entitled to remain in possession under s. 77 of Act X of 1859. SHEIKH MAHOMED ENNOOS v. LALLA JOMARAD LALL, **13 W.R. 356.**

(150)—*Act* X *of* 1859, *ss.* 77, 105, 110—*Suit by se-putnedar—Intervention of dur-putnedar—Question of right to land between parties—Appeal to Judge—Sale under s.* 105, *Effect of.*—Plaintiff, a *se-putnedar*, sued one of the ryots on his *putnee* estate. A third party intervened alleging that, as purchaser, he had obtained the *dur-putnee* estate free from all incumbrances and his title to collect the rent. Reversing the Deputy Collector's judgment, the first appellate Court dismissed the plaintiff's suit. On special appeal, it was urged that no appeal could lie to the Judge as the amount involved in the suit did not exceed Rs. 100. But, it was held that, as the judgment of the Deputy Collector had determined a question of right to land between parties having conflicting claims thereto, the appeal did lie to the Judge under s. 153, Act X of 1859. *Held*, also that, although the Act contains no express provision, for the admission, generally, of third persons as parties to a suit, it has always been the practice of the Court to admit third parties to intervene,

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otherwise than under s. 77 when their rights and interests were manifestly put in jeopardy. It was further contended that the sale of the *dur-putnee* did not void the *se-putnee*. But the High Court held that the sale having been held under s. 105 of Act X of 1859 for arrears of rent on the dur-putnee, the tenure itself was sold and not only the rights and interests of the defaulter as in s. 110. RAMJEEBUN CHOWDHRY v. PEARYLALL MUNDULL, **4 W. R. Act X, Rul. 30.**

(151)—*Act X of* 1859, *s.* 106—*Sale of under-tenure—Suit by auction purchaser for khas possession—Plea that suit for rent was fraudulent and against wrong party.*—The plaintiff, as purchaser at an auction sale of an under-tenure, under the provisions of Act VIII of 1865 (B.C.) sued for khas possession. The defendant pleaded that the rent suit had been brought fraudulently and against a wrong person and that these facts were known to the auction purchaser. It was found that the Zamindar wilfully brought the suit for rent against a person other than the person whom he knew to be the proprietor of the under-tenure, and from whom for a series of years he had been receiving rent. *Held*, that it was not proper for the Zamindar to have instituted the suit against a wrong person, knowing full well that he was not suing the person from whom he had been receiving rent. Consequently, s. 106 of Act X of 1859 could not be pleaded in justification of the Zamindar. NOBIN CHUNDER SEN CHOWDHRY v. NOBIN CHUNDER CHUCKERBUTTY, **22 W.R. 46.** [*R.*, 3 C.L.R. 146.]

(152)—*Act X of* 1859, *s.* 153—*Rent—Denial of tenancy—Appeal—Right of suit—Equitable title.*—When a landlord sues a person as tenant who repudiates the tenancy, without denying the landlord's title, no appeal is given by s. 153 of Act X of 1859. The mere fact that a tenure (which is written in the books of the zemindar in the name of a particular person) is shown to be in the possession of another person, is not enough to support an action for rent against the person said or shown to be in possession, without something more, something to show an express or implied contract to pay rent. An equitable title is not sufficient to give a right of suit under Act X of 1859. ESHAN CHUNDER GOSHAL v. BURNO MOYEE DOSSEE, **16 W.R. 233.** (6 W.R. Act X, Rul. 77, *R.*)

(153)—*Act X of* 1859, *s.* 162—"*Revenue office,*" *meaning of.*—S. 162 of Act X of 1859 prescribes that suits for rent shall be instituted in "the Revenue Office" of the district or sub-division in which the cause of action shall have arisen. The words "Revenue office" mean not the office where the revenue is paid, but the office of the Revenue officer of the district or sub division. KAZEE ABDUL HUQ v. AZEEMOONISSA, **3 W.R. Act X, Rul. 12.**

(154)—*Decree for arrears—Mere tender without deposit of payment — Discretion of Court with regard to interest and costs.*—In the law as enacted by Act VI of 1862, B.C., there is nothing forbidding the Court to give effect to a tender not followed by a deposit or payment of money into Court. The Court may, in considering whether the decree for arrears should also award costs or interest, bear in mind the fact (if that is established) that a previous tender was made. Nor do the provisions of the Act alter or affect the discretionary power of the Court to determine whether interest or costs should be awarded in the decree for arrears. BISSONATH DEB v. HURRO PERSHAD CHOWDHRY, **2 W.R. Act X, Rul. 88.** [*R.*, 35 C. 34.]

(155)—*Rent-suits—Jurisdiction—Act* VI (*B. C.*) *of* 1862, *s.* 20.—A suit for rent should be instituted in the sub-division in which the cause of action arose. The authority which a Collector has to transfer suits from one Court to another subordinate to him does not enable him to give authority to a Deputy Collector to try a suit which has been illegally instituted in his Court. PURNA CHANDRA CHATTERJEE v. C. MACARTHUR, **3 B L.R. A.C. 366 = 12 W. R. 310.** (5 W.R. Act X, 87, 7 W.R. 170, 10 W.R. 454, *R.*; 5 W.R. Act X, 29, *D.*) [*App.*, 21 W.R. 450.]

(156)—*Act* VIII *of* 1865 (*B.C.*), *s.* 16—*Act* X *of* 1859, *s.* 77—*Incumbrance—Rent—Tenure.*—In a suit by a *dur mokuraridar* against ryots for some portion of the rent of one year (1273) and the full rent of the next (1274), the defendants contested the claim for the year 1274, on the ground that the rights of the *mokuraridar* having been sold in execution under Act VIII (B.C.) of 1865, the right of the *dur mokuraridar* had been extinguished by the operation of s. 16, and that they had paid the rents for that year to one D, who intervened and was made a party. *Held* that the issue to be framed would be in the first instance between the plaintiff and the intervenor, whether the one or the other had been in the actual receipt and enjoyment of the rent before and up to the time of the commencement of the suit. *Quære:*—Would payment to the intervenor shortly before the commencement of the suit constitute the previous *bona fide* enjoyment which the intervenor is required to prove? *Quære:*—Could the purchaser determine for himself whether he acquired the tenure free from all encumbrances, or whether the encumbrances were of the kind excepted in s. 16, Act VIII (B.C.) of 1865, which would survive the sale? MUSST UMASUNDARI DASI v. BIRBUL MANDAL, **3 B.L.R. A.C. 183 = 11 W.R 563.**

(157 & 158)—*Act* VIII (*B.C.*) *of* 1869, *s.* 5—*Arrears of rent—Sale.*—In a suit for arrears of rent from a tenant having a right of occupancy, where the only dispute is as to the rate, the rate previously paid is fair and equitable within the meaning of Act VIII (B.C.) of 1869, s. 5, unless the contrary is shown. OOMAND ROY v. SREEKANT CHOWDHRY, **21 W R. 108.**

(159)—*Act* VIII *of* 1869, *s.* 23—*Suit for arrears of rent—Proof of right to claim under contract.*— In a suit for arrears of rent under s. 23 of Act VIII of 1869, the plaintiff can only succeed by proving that under a contract, either

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express or implied, he is entitled to recover the rent claimed. KASHEE RAM DOBEY v. DHEERA OORAON, **22 W.R. 528.**

(160)—*Act* VIII *of* 1869 (*B.C.*), *s.* 31—*Notice of deposit—Form of notice—Fatal defect.*—The law directs the notice of deposit under s. 31, Act VIII (B.C.) of 1869 to be framed in a particular manner; and if the defendant fails so to frame it, he must take the consequences of his own neglect. The omission from the notice of the words "you must institute a suit in Court for the establishment of such claim or demand within six calendar months from this date, otherwise your claim will befor ever barred," is fatal to the defendant's claim to the benefit of his payment of rent in the Collectorate. KANCHAN MALLA DOSSIA v. RAJENDRO CHUNDER ROY CHOWDHRY, **18 W.R. 126.**

(161)—*Act* VIII (*B.C.*) *of* 1869, *s.* 31.—*Deposit.*—A suit for rent for a period prior to a deposit being made under the provisions of Act VIII (B.C.) of 1869 is not barred by s. 31 where the contention of the defendants is that the tenure was the depositor's, and that the rent was due from him and not from them. RAMDIN SINGH v. CHUNDEE PERSHAD SINGH, **21 W.R. 278.**

(162)—*Act* VIII (*B.C.*) *of* 1869, *s.* 102—*Rent.*—A payment made by a co-sharer for the use and occupation of a certain quantity of the land of a joint estate, of which he, as a co-sharer landlord, received his portion by whatever name it be called, is substantially rent, and a suit for such rent comes properly under Act VIII (B.C.) of 1869. s. 102. SREEMUTHY ALLADINEE DOSSEE v. SREENATH CHUNDER BOSE, **20 W.R. 258.**

(163—*Act* VIII (*B.C.*) *of* 1869, *s.* 102—*Rent suit—Title.*—In a rent suit wherein defendant sets up the title of a third person, not made a party, the decision is not a binding one in respect of title, as between parties having conflicting claims to the land within the meaning of Act VIII (B.C.) of 1869, s. 102 SHAIK DILBUR v. ISSUR CHUNDER ROY, **21 W.R. 36.** [*F.*, 23 W.R. 227, 24 W.R. 213, 2 C.L.R. 558, 7 C. 330; *Appr.*, 8 C. 712; *R.*, 14 C. P. L.R. 31.]

(164)—*Act* VIII (*B.C.*) *of* 1869, *s.* 102—*Rent suit—Conflicting claims.*—Where in a suit for rent the plaintiff claims the rent of the land as Zemindar and the defendant claims the right to pay the amount of rent to himself on account of interest due to him as mortgagee, in other words, he admits that he is the tenant, but says that he is not bound to pay, there cannot be said to be any question relating to title to land or to some interest in land as between parties having conflicting claims within the meaning of s. 102, Act VIII of 1869 (B.C.). RAJ KISHEN MOOKERJEE v. PEAREE MOHUN MOOKERJEE, **24 W.R. 114.**

(165)—*Suit for rent—Question of payment in instalments or in lump sum—Appeal—Act* VIII *of* 1869 (*B.C.*), *s.* 102.—A suit for rent in which the only question is whether the amount is to be paid in instalments or in a lump sum (the parties agreeing amongst themselves as to the amount), cannot be said to involve a question of right to enhance or vary the rent, and so, no appeal would lie from the decision under s. 102, Act VIII of 1869 (B.C.) PEARI MOHUN MOOKHOPADHYA v. MADHUB CHUNDER BABOO, **23 W.R. 385.**

(166)—*Suit for arrears of rent—Special appeal—Act* VIII *of* 1869 (*B.C.*), *s.* 102.—Where plaintiff sued for arrears of rent, the claim being based on a *shironama*, and the defendant, while denying execution of the *shironama*, produced evidence to show that the rate mentioned therein was not a proper rate and also not correct, *held* that, there being no question of right to vary or enhance the rent, no special appeal would lie under s. 102, Act VIII of 1869 (B.C). MAHORAJ COOMAR MITRESSUR SINGH v. JHOTTE TELEE, **23 W.R. 343.**

(167)—*Act* VIII (*B.C.*) *of* 1869, *s.* 102—*Special appeal—Suit for rent.*—No special appeal lies from a Judge's decision remanding for re-trial a rent-suit in which plaintiff claims land under a deed of absolute sale, and defendant urges that he is the beneficia owner, plaintiff's vendor being his benamidar, and which suit the first Court had dismissed on the ground that neither plaintiff nor his vendor has been in possession. GOPAL SURAN NARAIN SINGH v. RAM TUHUL RAWUT, **21 W.R. 302.**

(168)—*Bengal Act*, VIII *of* 1869, *s.* 102—*Suit for rent.*—A suit for arrears of rent, decreed by the first Court, was dismissed by the lower appellate Court, on the ground that plaintiff, being only a sharer, could not sue separately for her portion of rent. A special appeal was preferred. *Held* that the judgment and not the decree was to be looked at in applying s. 102 of Act VIII of 1869 (B.C.). The judgment showed that a question of title was not even considered and the decree in general could not be considered to have determined it. No appeal therefore lay under that section. KARIM SHEIKH v. MUKHODA SOONDERY DASSEE, **15 B.L.R. 111=23 W.R. 268.** [*R.*, 25 W.R. 153.]

(169)—*Act* VIII (*B.C.*) *of* 1869, *s.* 102—*Suit for rent—Decision as to right and title to land avoided—Decision based on want of proof of relationship of landlord and tenant.*—In suits for rents below Rs. 100, whatever may be the judgment of the Court of first instance, if the Judge, in appeal, decides a claim to rent as between two parties, but does not decide parenthetically any question relating to title to land or to any interest in land, that judgment would not be open to special appeal in the High Court. Therefore, where the Judge in appeal specially avoided coming to any decision as to right and title to the land or as to any interest in land, but decided the case solely on the want of proof of relationship of landlord and tenant between the parties, the provisions of s. 102 of Act VIII (B.C.) of 1869 applied to the case and no special appeal lay to

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the High Court. HURRY MOHUN MOZOOMDAR v. DWARKANATH SEIN, **18 W.R. 42.** [*F.*, 24 W.R. 213; *Appl.*, 8 C. 712.]

(170)—*Assignment by landlord of portion of interest to mortgagee—Right of mortgagee, set up in defence—Bengal Tenancy Act, ss. 3, cl. (2)* 60.—In a suit for rent by a proprietor registered under the Land Registration Act (VII, B.C. of 1876), the defendants are precluded, by reason of s. 60 of the Bengal Tenancy Act, from pleading as a defence to the claim that the rent is due to a mortgagee to whom the landlord has assigned a part of his interest but whose name has not been registered under the Land Registration Act HEM CHUNDER MISRI v. RAJAH SIR SOURINDRA MOHAN TAGORE BAHADUR, **5 C.W.N. 482.** [*R.*, 8 C.W.N. 695.]

(171)—*Action for—Tenant holding over, rights of—Reduction of rent—Bengal Tenancy Act* (VIII *of* 1885), *s.* 148, *cl.* (*b*)—*Area of the tenancy, determination of, if necessary in a suit for rent.*—It is not possible to lay down any inflexible rule of universal application upon the question whether the precise area of the tenancy should or should not be determined in a suit for rent. The only general principle which can be formulated is that, where there is a substantial dispute as to the identity of the tenancy set up by the parties to the suit, the question in controversy must be decided. RAMDEV RAI v. NEWAJI PROSAD SINGH, **10 C.L.J. 196=1 Ind. Cas. 379.** (1 C.W.N. 152, *R.*)

(172)—*Rent, Suit for*—Res judicata—*Presumption—Bengal Tenancy Act* (VIII *of* 1885), *s.* 51—*Adjudication.*—A prior decision may be taken to determine the rent claimed in that suit, and to give rise, under s. 51 of the Bengal Tenancy Act, to the presumption that the rents for subsequent years remained the same. The weight to be attached to the presumption thus raised depends first on the conditions under which that decision was arrived at, that is to say, whether it was after an adjudication of the question of the amount of rent or the rate of rent or not. If in the prior suit there had been such an adjudication, it would be only open to the Judge in the subsequent suit to look to subsequent circumstances and events to enable him to determine whether there had been any change in the relations between the parties since. If there was no adjudication of the question, it would be for him to consider the circumstances and events both prior and subsequent to that former suit, in order to enable him to determine the relations existing between the parties and the rentals rightly due for the lands for the years in suit. SRI MAHARANI BENI PERSHAD KOERI v. RAJ KUMAR CHOWBEY, **16 C.L.J. 124=17 Ind. Cas. 111.**

(173)—*Reg.* VII *of* 1799, *summary suit for rent under—Act* X *of* 1859—*Reg.* VIII *of* 1831, *s.* 4.—Where a summary suit for rent under Reg. VII of 1799, was commenced before the passing of Act X of 1859, it was held that the unsuccessful party was not, by reason of the decision in that suit having been given after that Act came into operation, deprived of his right, under s. 4, Reg. VIII of 1831, to contest the justice of the summary decision by a regular suit. GOBIND CHUNDER MOOKERJEE v. KALLA CAJEE, **B.L.R. Sup. Vol. 626=2 Ind. Jur. N.S. 119=7 W.R. 185.**

(174)—*Arrears of rent, Suit for—Tenancy, denial of, by defendant—Burden of proof*—Res judicata—*Revenue Court.*—The plaintiff sued the defendant for arrears of rent and the suit was dismissed. Subsequently, the plaintiff brought another suit for arrears of rent against the defendant who denied his tenancy. *Held*, that when the plaintiff sets up a tenancy which the defendant denies, the burden of proof is on the plaintiff to prove the tenancy and the amount of rent payable by the defendant. *Held*, further, that the matter directly and substantially in issue in this case was directly and substantially in issue in the previous suit between the same parties, litigating under the same title in a Court of Jurisdiction competent to try the present suit and was, therefore, *res judicata* so far as the Revenue Court was concerned. PRAG v. RAM ADHIN, **3 O.C. 65.**

(175)—*Suit to recover balance of rent due on lease—Previous suit by lessee against lessor for damages for illegal dispossession, still pending—No bar—Discretion of Court*—Res judicata.—In a suit by a lessor to recover the balance of rent due under a lease, where it appeared that the defendant had brought a suit which was still pending in District Munsiff's Court against the plaintiff for damages consequent on his having been dispossessed of his land prior to the expiration of the term of his lease, and had credited against his claim for damages the balance of rent due under the lease, *held* that the pendency of the suit in the District Munsiff's Court was not a barto the present suit, but that it would be competent to the Court to postpone the hearing of the suit until the decision of the District Munsiff had been given, if that course appeared to be necessary for the proper hearing and determination of the claims of the parties. MUTTUKARUPPA KAUNDAN v. RAMA PILLAI, **3 M.H.C. 158.**

(176)—*Payment of rent—Title—Estoppel—Possession by Hindu widow.*—The admission of a man's representative character by payment of rent to him is not conclusive but *prima facie* evidence which the tenant is not estopped from rebutting if he cares. Thus if a widow, after her husband's death, has once or oftener received her husband's proportion of the rents, the tenant is not estopped, from afterwards proving that the husband had left a will by which he had devised his share of the estate to other persons in trust to apply a portion of the rents in a particular manner and to pay over the residue to the widow. Where, on the death of a member of a joint Hindu family, his interest in the joint estate passes to another as his representative, *e.g.*, where there is

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a joint family consisting of four brothers, one of whom dies leaving a son, or without issue leaving a widow—the son or the widow, as the case may be, is not entitled to sue separately for the deceased member's share of rent received jointly. In a suit for rent by a devisee under a Will, it is not necessary for him to obtain a certificate. BANEE MADHUB GHOSE v. THAKOOR DOSS MUNDUL, **B.L.R. Sup. Vol. 588 =6 W.R. Act X, Rul. 71.**

(177)—*Rent—Suit for arrears—Plea of title in third party—Determination of title of third party—Effect on said party*—Res judicata.—Where in a suit for rent the title of a third party is set up by the defendant, any question of title to land as between the plaintiff and the third party cannot be determined in the suit in such a manner as to bind the third party. NANKOO KOOEREE v. NUND COOMAR PAUREY, **22 W.R. 326.**

(178)—*Landlord and tenant—Suit for rent—Dismissal — Suit for use and occupation*—Res judicata —A landlord who has failed in a suit for rent under the Rent Recovery Act cannot bring a fresh suit for use and occupation. ALI KHAN v. APPADU, **7 M. 304.**

(179)—*Rent—Suit for arrears—Declaration of title—Suit for rent involving determination of plaintiff's title*—Ex parte *decree, effect of*—Res judicata *in case of decrees passed* ex parte—*Limitation.*—In a suit for recovery of rent, it is not necessary for the plaintiff to ask for a specific declaration of his title. In a sense, every suit for rent involves a declaration of the plaintiff's title to the property in respect of which he claims rent. A plaintiff may be entitled to claim rent, even if his prayer for a declaration of title were barred by limitation. The doctrine of *res judicata* applies to decrees passed *ex-parte*, provided it is possible to ascertain precisely what matter must be taken to have been decided by the Court, that is to say, what matters were involved in the *ex parte* decree passed by the Court. (5 O C. 181, *F.*) A decree for rent involves the decision of the question that the plaintiff is entitled to recover rent, since it always decides that rent is payable to the plaintiff by the defendant. (26 B. 25, 16 C. 300, *Rel. on.*) Where a decree for rent has been passed within 12 years before the institution of a subsequent suit for arrears of rent, the subsequent claim for rent is not barred by time, although the previous decree was not executed. BALMAKUND v. ABDUL BASIT, **12 Ind. Cas. 329.**

(180)—*Limitation — Suit for rent—Suit struck off—Revival—Procedure—Error of Court —Date of institution of suit.*—The plaintiff instituted this suit for rent in December 1861, when a former Deputy Collector struck the same off in February, 1862 on the ground that it could not be decided until a suit about a *kabooleut*, involving the rate of rent payable and pending between the same parties, had been decided by the High Court. The Deputy Collector added a proviso that the present suit might be revived when the other case had been finally decided. The suit was subsequently revived under the proviso in May 1864. The defendant contended that the suit was barred by limitation and that the latter date (May 1864) and not that of December 1861, should be considered the date of institution. *Held* that it would have been the more correct course for the former Deputy Collector to have retained the case on his file pending the ultimate decision of the High Court in the case of the *kabooleut.* But, however, the error was only more of form than of substance. Therefore, the Court could treat the case as if it had been simply in abeyance on the file of the Deputy Collector. The Court treated it so and held that the suit was quite legal and that no part of the claim was barred by limitation. MAHOMED KALEE SHIKDAR v. SHEIKH ALI HOSSEIN CHOWDHRY, **3 W.R. Act X, Rul. 5.**

(181)—*Rent—Enhancement — Limitation—Cause of action—Declaratory decree.*—A decree declaring a right to enhance does not constitute a "cause of action." A suit for arrears of rent at an enhanced rate after notice may be brought without first getting a decree in a merely declaratory suit establishing the plaintiff's right to enhance. DOYAMOYEE CHOWDRAINEE v. BHOLANATH GHOSE, **B. L. R. Sup. Vol. 592=6 W R. Act X, Rul. 77.** [*F.*, 16 W. R. 233, 4 C. 594, 17 C. 251; *R.*, **7** W.R. 405.]

(182)—*Suit for rent for stacking timber—Limitation — Custom.*—Where the defendant made use of plaintiff's land by stacking timber thereon, a suit to recover money due or for payment in kind for such use, was of the nature of one for 'rent' governed by the law of limitation applicable to money claims of that kind. Where there are well-known terms upon which the use of land for stacking timber is permitted by its owner, and a party, with the knowledge of this custom or practice, uses the land in this way, he is bound, as by an implied agreement, to pay accordingly for such use. MOHUNT JUMNA DOSS v. GAWSEE MEAH, **21 W R. 124.** [*R.*, 1 A. 217, 1 C.W.N. 55.]

(183)—*Limitation—Suit for rent—Deduction of time when litigation was pending—Rent—Tender when valid.*—In computing the period of limitation allowed for a suit for arrears of rent, the time during which the plaintiff was suing to eject defendants as trespassers must be deducted (11 W.R. P.C. 5, *F.*) [*R.*, 17 W. R. 415, 19 W.R. 18. 3 C. 817=2 C L R. 450, 23 C. 205; *D.*, 3 C. 6.] In order that a tender may be valid, it must be made at the proper place and to a person authorized either under the law or by the plaintiff to receive the money. ESHAN CHUNDER ROY v KHAJAH ASSANOOLLAH, **16 W R. 79=8 B.L R 537, Note.** [*R.*, 6 C.L.J. 273=35 C. 343=11 C.W.N. 983, F.B.]

(184)—*Limitation Act* (XIII *of* 1848)—*Suit for assessment—Boundary suit—Right to assessment.*—Act XIII of 1848 cannot be applied to bar a suit to assess land as rent-paying. A

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boundary case only decides the question of right to possession of the land. The right to hold the land rent-free cannot be affected by any such decision. MAHAMAD ALI KHAN CHOWDRY v. JADUB CHUNDER CHUCKERBUTTY, **W.R. 1864, 60.**

(185)—*Act* X *of* 1859, *s.* 32—*Act* XIV *of* 1859, *s.* 1, *cl.* 8, *s.* 4 *and s.* 18.—Suits for arrears of rent under Act X of 1859 are not affected by Act XIV of 1859. JOHN POULSON v. MADHUSUDAN PAL CHOWDHRY, **B.L R. Sup. Vol. 101=2 W.R. Act X. Rul. 21.** [*Disappr.*, 18 W.R. 8; *F.*, 2 W.R. Act X, Rul. 96, 4 C. 50, 18 M. 99; *Appr.*, 19 W.R. 5, 18 C. 368; *Appl.*, 5 W.R. Act X, 41; *R.*, 14 W.R. 456, 32 C. 654=1 C.L.J. 364; *D.*, 16 W.R 287, 5 C. 906.]

(186)—*Suit for rent—Limitation—Act* X *of* 1859.—The period of limitation within which an action must be brought for rent due at the time of the passing of Act X of 1859, is to be reckoned from the 29th of April 1859, the date of the passing of the Act, and not from the 1st August 1859, the date on which the Act was declared to commence and have effect. BABOO LACHIMPATSINGH v. MAHOMED MOONEER, **B.L.R. Sup. Vol. 32=W.R. F B. 32.**

(186-*a*)—*Suit for arrears of rent—Act* XIV *of* 1859—*Commencement of time.*—In a suit for arrears of rent, the three years' limitation was reckoned not from the dates of the instalments, but from the last day of the year (Bengal) in which the arrears became due. GOBIND KUMAR CHOWDHRY v. HARGOPAL NAG, **3 B. L.R. App. 72=11 W.R. 537.**

(187)—*Limitation—Execution in Civil Court—Rate of rent—Determination—Back rent.*—Under Act X of 1859, limitation will not be saved by the fact that an execution proceeding to determine the rate of rent was pending in the Civil Court. Where a suit is pending to determine the rate of rent, the back rent may be sued for any time within one year of the determination of the rate. NAWAB NAZIR SIDIJ NAZIR ALI KHAN v. JUGUT TARA CHOWDHRAIN, **3 W.R. Act X, Rul. 2.**

(188)—*Act* X *of* 1859, *not to be taken to authorize the recovery of only three years' rent—Limitation.*—It is an error to suppose that Act X of 1859 only authorizes the recovery of the rent of three years. The question in this case was, with regard to the rent of 1268, whether the suit was commenced within three years from the last date of that year. If it was, then the plaintiff would be entitled to recover the whole of that year's rent. It was found that the suit was brought on the 22nd of February 1865 corresponding with Falgoon, 1271, so that it had been brought within three years of the Bengal year 1268, and consequently no part of the rent of 1268 was barred by limitation. DOORGA DOSS CHATTERJEE v NOBIN MOHUN GHOSAL, **6 W.R. Act X, Rul. 63.**

(189)—*Suits for rent due at passing of Act* X *of* 1859—*Limitation—S.* 32, *Act* X *of* 1859.—Suits for rents due at the passing of Act X o

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1859, must be brought within 3 years from the 29th April 1859, on which date the Act received the Governor-General's assent. The words "passing of this Act" in s. 32, Act X of 1859, refer to the date on which that law received the sanction of the Governor-General, and for all rents then due, the limitation is three years from that date or before the 29th April 1862. MORAN v. BINDOBASHINEE DABEA, **W.R. 1844, Act X, Rul. 5.**

(190)—*S.* 32, *Act* X *of* 1859—*Suit to recover arrears of rent—Limitation.*—The plaintiff sued, within 3 years from the date on which Act X of 1859 was passed, for arrears of rent of 1266 to 1268 and of 3 months of 1269. *Held* that, under s. 32, Act X of 1859, the suit was not barred, and that the claim for arrears due in respect of 1266, which were not due till 1267, was in time, though that was a period prior to the passing of Act X of 1859. RANEE KASHISHUREE DOSSEE v. RAM SAGUR SINGH, **W.R. 1864, Act X, Rul. 69.**

(191)—*Act* X *of* 1859, *s.* 32—*Limitation.*—Act X of 1859 recognizes no deduction on any account whatsoever in computing the period of three years prescribed by s. 32. DAKHINA DABEA v. ROMESH CHUNDER DUTT, **1 W.R. 142.**

(192)—*Act* X *of* 1859, *s.* 32, *arrear of rent when becomes due within meaning of—Determination of rent—Limitation.*—It was urged on special appeal, in this case, that the rent payable by the ryot was not ascertained until the year 1270, that proceedings to fix the rent had been pending in the Courts from 1263 to 1270, and that, with reference to the previous rulings of the High Court on the point, the suit was within time. The High Court agreed with the above view of the law that there cannot be said to be an arrear of rent until the rent was ascertained, and that, consequently, an arrear of rent cannot, within the words of s. 32 of Act X of 1859, become due until the rent itself has been determined. KOMUL LOCHUN ROY v. MESSRS. MORAN AND CO., **2 W.R. Act X, Rul. 82.**

(193)—*Act* X *of* 1859, *s* 32—*Suit for recovery of rent—Limitation.*—S. 32, Act X of 1859, does not authorize the recovery of only 3 years' rent. Suits for the recovery of rents may be instituted within three years from the end of the Bengal year or the fasli year as the case may be. GOSSAIN UMAR NARAIN POOREE v. ARURUL LAL, **7 W.R. 301.**

(194)—*Suit for arrears of rent—Commencement of time—Act* X *of* 1859, *s.* 32—*Cause of action—Limitation.*—In a suit for arrears of rent, the time occupied by a previous suit by the landlord against the tenant for ejectment of the latter as a trespasser will be deducted. Where in a sale of a *putni* for arrears of rent under Reg. VIII of 1819 was set aside in a subsequent suit, by the putnidar on the ground of irregularity, and the *patnidar* was put in possession thereof, the cause of action for a suit by the Zamindar to recover the arrears of rent

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for which the putni was sold must be taken to have accrued when the possession was restored. [*F.*, 19 C. 267, 1 C.L J. 337, 35 C. 209=12 C. W.N. 326=7 C.L J. 59=3 M L.T. 90; *Rel. on*, 18 W.R. 59, 16 C P.L.R. 33, 5 C.L.J. 59; *Appl.*, 16 W.R. 79, 17 W.R. 415, 2 C.L.J. 490; *R.*, 18 W.R. 8, 27 M. 143, P.C.=14 M L. J. 1=6 Bom. L.R. 241=8 C.W.N. 162, 3 C. L.J. 182; *Expl.*, 24 W.R. 143, *D.*, 13 W R.313, 23 W.R. 280, 3 C. 6, 3 C. 817, 9 C. 255, P C., 13 C.L.R. 214, 12 C. 258, 17 C. 251, 23 C. 191, 23 C. 205, 5 N.L R. 47=2 Ind. Cas. 29.] The inadvertent omission by a Zamindar of the formalities prescribed by Reg. VIII of 1819 does not render all the proceedings taken by him inoperative or constitute his act of selling the tenure into an act of trespass. RANI SWARNOMAYI v. SHASHI MUKHI BARMANI, **2 B.L.R.P C. 10=11 W R.P.C. 5=12 M.I.A. 244=2 Suther. 173=2 Sar. 424.**

(195)—*Act* X *of* 1859, *s.* 32—*Suit for rent for portion of year—Limitation.*—As s. 32 of Act X of 1859 allows a suit for recovery of rent to be instituted within three years from the last day of the year in which the arrear claimed shall have become due, the rent of one year 1273, no matter for what portion of the year such rent is due, would be recoverable at any time up to the last day of the third year 1276. BYKUNT RAM ROY v. MUSSAMUT SHURFOONISSA BEGUM, **15 W.R. 523.**

(196)—*Suit for arrears of rent—Jurisdiction—Decision in respect of claim for one year—Limitation—Act* XIV *of* 1859—*Act* X *of* 1859, *s.* 32—*Act* VIII (*B.C.*) *of* 1869, *s.* 29.—Where the claim of the zemindar against the defendants in respect of rent for a year has been decided not to be a claim for arrears of rent within the meaning of cl. 4, s. 23 of Act X of 1859, and therefore not cognizable by the Revenue Court, but by the ordinary Civil Court, and consequently that the claim was governed, not by the special limitation of s. 32, Act X of 1859, but by the ordinary law of limitation, Act XIV of 1859, on the ground that a claim of that nature was not a claim for recovery of arrears of rent, a subsequent claim of a similar nature precisely against the same parties in respect of the subsequent year was held as not barred by s. 29, Act VIII (B.C.) of 1869. PROSUNNO COOMAR PAL CHOWDHRY v. RAMDHUN CHATTERJEE, **18 W.R. 8.**

(197)—*Act* X *of* 1859, *s.* 33—*Suit for money collected as rent by putwaree—Limitation.*—A person suing for recovery of a certain sum of money collected as rent by his agent (putwaree) is not entitled to get the benefit of s. 33 of Act X of 1859 without any allegation that the accounts on which his suit is based have been kept back from his knowledge by fraud. If a person chose, though his own negligence, to remain in ignorance for an indefinite period, of the state of his accounts with his putwaree, or even through some accident or misfortune such as his leaving the country, or such like, he can claim no benefit under that section. WILLIAM BIDDEL v. CHUTTERDHAREE LALL, **12 W.R. 116.** (3 W.R. 121, 6 W.R. 30, *D.*)

(198)—*Act* X *of* 1859, *s.* 54—*Rent suit—Dismissal for default of parties—Right to bring fresh suit—Limitation.*—Where in a suit for rent neither party appeared and the suit was dismissed in consequence by the Deputy Collector, the plaintiff was, under s. 54 of Act X of 1859, entitled to bring a fresh suit, unless barred by the Law of Limitation. SHETAB CHUND LAHA v. MAJUM ALI CHOWDHRY, **18 W R. 402.**

(199)—*Act* X *of* 1859, *s.* 77—*Suit for contesting decision under—Limitation—Starting-point.*—The time allowed to contest a decision under s. 77 of Act X of 1859 is one year from the date of the Collector's decision. It was contended in this case that the time should run, not from the date of the Collector's decision which was favourable to the plaintiff but from that of the Judge which was adverse to him. But the High Court *held* that the words of the law were precise in the matter, and that the plaintiff should have taken care after the appeal was adverse to him before the Judge to have sued within one year from the date, of the Collector's decision, which he might easily have done as he had more than two months left to him subsequent to the decision by the Judge. MEEMOYE JOOGY v. AFSUROODDEEN MAHOMED CHOWDHRY, **3 W.R. Act X, Rul. 155.** [*D.*, 7 W.R. 108.]

(200)—*Act* X *of* 1859, *s.* 77—*Suit on general title—Limitation.*—The limitation of one year, within which a person whose right to rent is refused under s. 77, Act X of 1859, must sue, applies only to civil suits where the rent is claimed; but a person suing on general title would not be bound to sue within one year. SHATTO RAM MAJOOMDAR v. ANUND CHUNDER CHATTERJEE, **5 W.R. Act X, Rul. 87.** [*Appr.*, 25 W.R. 550.]

(201)—*Act* VIII (*B.C*) *of* 1869, *s.* 29—*Object—Limitation.*—The object of the Legislature in enacting s. 29, Act VIII (B.C.) of 1869, is to fix the maximum period of time within which suits for arrears of rent at enhanced rates ought to be brought, and not to create a bar to the institution of such suits before the expiration of the year on account of which the arrears are claimed. TARAMONEE DEBIA v. JOYKISTO MOOKERJEE, **20 W.R. 329.**

(202)—*Possession—Right of person in possession—Proof of better title—Act* VIII *of* 1869, *s.* 102—*Suit for rent by person in possession—Intervention by third party—Determination of question of title—Appeal.*—A party who has obtained peaceable possession of property is entitled to the advantage of his possession. Any one who claims the property by a better title must establish his claim in due course of law. Plaintiff sued to recover rent. A third person intervened in the suit. It was found that the plaintiff was in possession. But the

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Court of first instance, however, treated the claim as one for establishment of title and dismissed the plaintiff's suit. On appeal by the plaintiff, the Judge declared that he would not go into the question of title and upheld the possession of the plaintiff, leaving the third party to a proper remedy in a suit brought for the purpose. *Held* that the determination of the question of title as incidental to the determination of the question of the plaintiff's right to receive rent was not a decision of a title to an interest in land within the meaning of s. 102, Act VIII of 1869 (B.C.) and consequently no appeal lay to the High Court. KALLY CHURN BANERJEE v. GOPAL CHUNDER BANERJEE, **26 W.R. 100.**

(203)—*Suit for rent, or, in default for possession of land under Settlement Court decree entitling landlord to demand any reasonable rent at his option—Landlord and tenant, Relation of Oudh Rent Act,* XXII *of* 1886—Res judicata —*Cause of action—Code of Civil Procedure,* s. 43--*Limitation.*--In 1866, the defendants sued the plaintiff for proprietary rights in certain plots of land. The Settlement Officer passed a decree, which, the Court of the Judicial Commissioner, in a suit instituted by the plaintiff in a Civil Court to have rent assessed on the land and finally dismissed on the point of jurisdiction in July 1898, decided, conferred on the defendants under-proprietary rights in the trees on the plots only, and not in the plots themselves, and under which the defendants could not be maintained in possession without paying rent, should rent be demanded from them. In 1898, the plaintiff served a notice upon the defendants to pay Rs. 191-4-0 as rent for the land and having received no reply to this notice he sued in the Revenue Court for the ejectment of the defendants, but his suit was dismissed. In July 1900, the plaintiff sued the defendants on the allegations that, under the terms of the Settlement Court decree, they had no right whatever against his will to remain in possession of the plots without payment of rent and that he was entitled to take possession of the same in case they refused to pay a reasonable amount of rent. He also alleged that his cause of action arose on certain dates, and among them, in August 1898. He prayed that the defendants be ordered to pay him Rs. 191-4-0 as rent and that, in case of default, a decree for possession of the land be passed in his favour. *Held*, that having regard to the definitions of the terms "landlord" and "tenant" as given in the Oudh Rent Act, the relation of landlord and tenant did not exist between the parties and the Civil Courts were not debarred from taking cognizance of the suit. *Held*, further, that the question as to whether the defendants were tenants was not *res judicata*. *Held*, that the suit was not affected by the provisions of s. 43, Civ. Pro. Code, the notice which the plaintiff had served upon the defendants after the disposal of the former civil suit being a part of the cause of action. *Held*, further, that the plaintiff was entitled under the decree of the Settlement Court to call upon the defendants to pay any rent which he might demand, or to vacate the land, and that the rent not having been demanded till August 1898, the suit was not barred by limitation. MOHAMMAD ALI RAZA KHAN v. MUSAMMAT MENDA, **6 O.C. 341.**

(204)—*Suit for arrears of rent—Relief—Admission of defendant.*—If, in a suit for arrears of rent, the plaintiff cannot satisfactorily prove his case, he must either have his suit dismissed or take a decree at the rate admitted by the defendant. RADHA SINGH v. SUNKER DUTT SINGH, **1 W.R. 288.**

(205)—*Suit for rent under kubooleut—Failure to prove kubooleut—Decree to extent of defendant's admission--Discretion of Court--High Court whether should interfere.*—Where, in a suit brought under a kubooleut the kabooleut was itself not proved, the Court should ordinarily dismiss the suit instead of decreeing the claim at the rate admitted by the tenants. The High Court doubted whether in such cases it should interfere with the discretion which the lower Court might have exercised in decreeing the claim for rent as far as the defendant admitted he was in arrears. SHEIK ABDOOLA v. NIM CHAND DUTT, **2 W.R. Act X, Rul. 16.**

(206)—*Suit for rent and damages—Onus on plaintiff to prove payment in past years - Nature of evidence required.*—Where the amount of rent payable is itself in issue in a suit for rent, it is incumbent on the Judge to require the plaintiff to show that in past years defendant has paid what he, plaintiff, is now demanding, and, for the purpose of proving these past payments, the best evidence both documentary and oral, is requisite, and secondary evidence is not admissible until the absence of primary evidence is satisfactorily explained. RAM JEEBUN LOLL v. NOND LOLL, **2 W.R. Act X, Rul. 43.**

(207)—*Suit for rent based on instrument—Denial of liability under instrument—Admission of defendant as to portion of amount—Effect*—Where the plaintiff sued to recover rent under an instrument called jummabundee which, he said, was signed by all the ryots on the estate when he came into possession, and the defendant denied the jummabundee, but admitted that he held some land of the plaintiff with a small rent and that only a small amount was due by him to the plaintiff. *Held* that as the plaintiff relied entirely upon the admission of the defendant both as to the amount due and for proof of his cause of action, he must accept this admission as a whole and could only have a decree upon it for the balance admitted to be due. BONOMALEE CHURN MYTEE v. SHEIKH HAFIZUDDEEN, **13 B.L.R. 247, Note=12 W.R. 317.** [*R.*, **17** W.R. 509.]

(208)—*Suit for rent—Defendant's own accounts—Evidence—Admission.*—In a suit for rent in which plaintiff relied on an entry in defendant's own account as Naib of the village as to the rate of rent payable by him, *held* that

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unless defendant's signature was forged, and the leaf not genuine, the entry was an admission that the rent therein mentioned was the rent paid. SURBESWAR GHOSE v. CHOTO ARIZOLLAH MANDAL, **8 B.L.R. App. 78=17 W.R. 213.**

(209)—*Variance between pleading and proof —Suit for rent—Kabuliat not proved—Right to decree on admission of defendant.*—In a suit for rent, the plaintiffs failed to prove the *kabuliat* which fixed the amount of rent and there was no evidence on the part of the plaintiffs to show that they were entitled to the amount at the rate they had estimated it at. *Held* that they were entitled to recover the amount admitted by the defendants to be due as rent. It would be unreasonable to hold that, because the plaintiffs have been guilty of setting up a forged kabuliat, they should be obliged to bring a fresh suit to recover an admitted balance of rent. ROOKHINI KANT ROY v. SHARIKATUNISSA BIBEE, **13 B.L.R. 246, Note=20 W.R. 64.** [*R.*, 21 W.R. 208=13 B.L.R. 243.]

(210)—*Rent—Suit for arrears—No proof of rate of rent — Plea of tenancy at particular rate—Right of landlord to get decree at rate admitted.*—Suit by landlord to recover arrears of rent at a specified rate for certain specified years. The defendant in his written statement admitted that he was a tenant of the plaintiff and liable to pay rent at a particular rate for a specified period, but pleaded payment thereof. The plaintiff produced certain jummabundee papers of a former putwarree in proof of the rate at which he claimed the rent. The former putwarree was not examined at a witness. *Held*, that, if the former putwarree had given evidence that he had collected rent from the defendant at the rate shown in the Jumabundee and that the Jumabundee was his own record of the fact, those papers could be admitted in evidence. In the absence of the personal testimony of the putwarree, they were worthless. Though the plaintiff had failed to prove the rate of rent claimed by him yet, inasmuch as the defendant admitted the tenancy and his liability to pay rent at a certain rate, the plaintiff was entitled to get a decree to the extent admitted by the defendant, unless the latter established his plea of payment. PUNDIT BHUGWAN DUTT JHA v. SHEO MUNGUL SINGH, **22 W.R. 256.** [*R.*, 8 C. 465, 3 O.C. 205; *D.*, 2 C.L.J. 125.]

(211)—*Suit for rent due on muchilka—Defendant admitting occupation of land under terms of muchilka—Proof.*—In a suit for rent due upon a muchilka executed by the defendant, though the defendant may admit that he occupied the land under the express contract contained in the muchilka, the plaintiff cannot establish his case without putting the muchilka in evidence, and so, if the muchilka is an unregistered and compulsorily registrable document, the plaintiff cannot succeed in his suit as the muchilka is inadmissible in evidence. G. LEE MORRIS v. SAPAMTHEETHA PILLAY, **6 M.H.C. 45.** [*R.*, 7 M. 226, 13 M. 281, 119 P.L.R. 1906.]

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(212)—*Rents for successive years—Separate suits maintainable for—Presumption from proof of payment of subsequent years' rent, when cannot be made.*—This was a suit for the rents of 1267 and 1268. The defendant pleaded that the present suit was not admissible inasmuch as the plaintiff had sued for arrears of rent for the years 1269 and 1270 without any mention of the rents for 1267 and 1268 which had fallen into arrears. The Judge, on appeal, held that as there was no mention of the rents of 1268 in the decree for the arrears of 1269, the present suit was barred under s. 7 of Act VIII of 1859. But the High Court *held* that the *arrears* for successive years are *several and distinct causes of action*, in respect of which it is perfectly competent to the party entitled to institute separate suits. It cannot be the true meaning of s. 7 that if a plaintiff has several and distinct cause of action against one defendant, he must comprise them all in one suit, subject to the hazard of forfeiting all those not included in the first suit. Also the ordinary and natural presumption which usually arises from proof of the payment or recovery of the rents of subsequent years can have no application where there is evidence that the rents in suit were in arrear and no distinct allegation or evidence of their having been paid. RAJA SUTTO CHURN GHOSAL v. OBHOY NUND DOSS **2 W.R. Act X. Rul. 31.** [*Appr.*, 17 W.R. 380; *R.*, 24 W. R. 526; *D.*, 6 C. 791=8 C.L.R. 297.]

(213)—*Holding at unchanged rent for twenty years — Evidence necessary to prove.*—The evidence necessary to establish a holding of 20 years at an unchanged rent must cover, at least, the whole of the period commencing with the institution of the suit, and go backwards to the distance of 20 years at least. There need not be evidence of the payment of rent in each one of the successive years, but there must be such evidence as will reasonably support the conclusion that the land has, in fact, been held for the whole of the 20 years at a uniform rate of rent. BUNGO CHUNDER CHUCKERBUTTY v. RAM KANYE BHAWAL, **10 W. R. 256.**

(214)—*Suit for arrears of rent—Landlord's rights transferred to third party—Tenant's liability.*—Where the plaintiff's right in an estate has been decreed to a third party, the plaintiff is bound to the third party to make good all mesne profits, but the defendant, tenant, must pay his rent to the plaintiff according to his lease. JAMES SMYTH v. SHEO PERSHAD SINGH, **1 W.R. 251.**

(215)—*Collector's decree in summary suit for rent—Enhancement.*—A decree of a Collector in a summary suit brought in 1857 for rent, *held* insufficient to enable the landlord to sue for the enhanced rate given by the decree, when the decree had not been enforced or acted on. INDER SINGH v. MITTERJEET SINGH, **1 W.R. 276.** [*D.*, 3 Agra 277.]

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(216)—*Decree fixing rent for previous year—Claims on ekrar for higher rent.*—A decree of a competent Court fixing the rent for a previous year according to a *solenamah*, cannot neutralize a claim passed upon an ekrar for higher rent for the following year. NICHOLEN PEDROSE POGOSE v. AZERUDDEEN SIKDAR, **1 W.R. 275.**

(217)—Solenamah *distinct from patta—Rent, separate suits for.*—Where the *solenamah* is a transaction distinct from the patta, separate suits should be brought for rent as regards the tenures held under those documents. OOMA CHURN CHOWDHRY v. RAM KANT CHOWDHRY, **17 W.R. 488.**

(218)—*Claim for balance of rent—Putwarry's papers relied on by plaintiff, failure to prove genuineness of — Rejection of claim.* — The balance of the *thaolee* rents claimed by the plaintiff in this case was alleged to be ascertained and stated in the *likhitas*, and the plaintiff came into Court founding his suit on those documents. The lower appellate Court, finding the *likhitas* were not genuine, disbelieved the plaintiff's case and dismissed his suit. On appeal, it was objected that, as the defendant admitted the tenancy, the *onus* of proving payment rested on him; but it was held that the defendant having denied the genuineness of the plaintiff's documents and pleaded that, if the genuine *likhitas* were brought into Court, they would show that he had paid all that was due from him, the lower Court was right in having dismissed the suit on finding against the genuineness of the documents relied on and produced by the plaintiff. SYUD MUKSOOD ALI v. BYJNATH SINGH, **2 W.R. Act X, Rul. 28.**

(219)—*Procedure—Duty of appellate Court—Defect in judgment.*—The lower appellate Court simply affirmed the judgment of the first Court in a suit for rent without sifting the evidence in the case. *Held* that the Court should proceed upon the evidence adduced and find what the tenure was or what was its area and *jumma* or what was the contract between the plaintiff as landlord and the defendant as tenant and to what arrears, if any, the plaintiff was entitled in the suit. It cannot proceed merely upon a kind of rule of proportion having reference to a former decision. KAROONA MOYEE DEBIA v. KRIPANATH DOSS, **18 W.R. 398.**

(220)—*Lease—Tenant entitled to set up plea of lessor being only* benamidar—*Deeds—Estoppel—English and Indian Law*—Benami *transactions.*—Where, in a suit for arrears of rent on the basis of a *kabuliat*, the defendant admitted its execution, but alleged that it was *benami* for a third party, *held* that the defendant was entitled to prove that the lessor, to whom he had executed the *kabuliat*, was not the real owner, and, for that purpose, he could adduce parol evidence. [*Diss.*, 141 P.R. 1906=13 P.W.R. 1907; *R.*, 7 N.L.R. 161.] In England where the usage denoted by *benami* transactions is wholly unknown, it is supposed, and therefore assumed, that all deeds and conveyances truly represented the titles of parties set forth in them. Deeds are called solemn transactions and they are executed after considerable deliberation, and under the guidance, and with the advice of able legal advisers. Under such circumstances, it is right to suppose that what is stated in deeds and other similar documents represents the true state of things, and consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. But, in this country, it being well-known that documents are neither so drawn nor executed as in England, and it being equally well known that persons make statements wholly regardless of the truth, for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents, and to apply the technical doctrine of estoppel in the manner in which the doctrine is applied in cases governed by English law. The tendency of the Privy Council decisions has been to make the law harmonize with justice in each case, and it would be departing from this wholesome and beneficial rule to apply the doctrine of estoppel to cases which are not governed in this country by English law. B. DONZELLE v. KEDARANATH CHUCKERBUTTY, **7 B.L.R. 720=16 W.R. 186.** [*R.*, 3 C.L.R. 9.]

(221)—Bhouli *rent—Valuation of crop.*—In a suit to recover *bhouli* rent of the value of crops which defendant ought to have made over to plaintiff, *held* that the damage to the plaintiff was the value of the crops at the time they were due, and not subsequently. LACHMAN PRASAD v. HOLAS MAHTOON, **2 B.L.R. App. 27=11 W.R. 151.** [*R.*, 25 W.R. 307, 1 C.W.N. 55]

(222)—*Landlord and tenant — Decree for ejectment—Award of damages.*—In the spirit of the rent law a decree for ejectment operates in some decree as an award of damages *Quære*—Whether a Court would be exercising a wise discretion in making a decree for damages in addition to a decree for arrears of rent, at the same time that it also gave a decree for ejectment? HEERAMUN ROY v. JHUBOO SINGH, **22 W.R. 511.**

(223)—*Court can award damages for use and occupation, when—Rent-law in Bengal, whether applicable to ferry tolls.*—If a landlord sues for rent, a Court cannot award damages for use and occupation, unless an alternative claim for the same is made in the plaint. (21 W.R. 208, 22 C. 752, *F.*) [*R.*, 10 C.L.J. 538=6 M.L.T. 255=3 Ind. Cas. 346.] The provisions of the rent-law in Bengal are not applicable to suits relating to ferry tolls. RACHHEA SINGH v. UPENDRA CHANDRA SINGH, **27 C. 239.** (W.R. 1864, Act X, Rul. 82, 22 W.R. 334, *D.*; 9 B.L.R. App. 14, *Appl.*)

(224)—*Arrears of rent—Suit for by superior proprietor against under-proprietor—Interest—Oudh Rent Act,* XXII *of* 1886, *s.* 141—*Interest Act* (XXXII *of* 1839).—Although s. 141, Oudh

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Rent Act, does not entitle a superior proprietor to recover interest upon arrears of rent due by an under-proprietor, interest on such arrears was to be awarded under the Interest Act (XXXII of 1839), if the requirements of that Act are satisfied. MOHAMMAD ALI KHAN v. MOHAMMAD YASIN KHAN, **1 O.C 257.** [*Affirm.*, 3 O.C. 22.]

(225)—*Arrears of rent, Suit for—Interest—Breach of contract—Damages.*—The defendants, who were under-proprietors, had executed an *iqrarnama* in favour of the plaintiff, the superior proprietor, in which they promised to pay him as rent the Government Revenue, plus 10 p. c., in a suit by the superior proprietor for arrears of rent:—*Held*, that on proof of a breach of their contract by the defendants, the plaintiff was entitled to interest by way of damage. GANESH BAKHSH v. HARIHAR BAKHSH, **1 O.C. 270.** (1 O C 94, *R.*)

(226)—*Suit for unpaid instalments of rent—Interest, to be determined in accordance with Government rules for payment of kists of revenue.*—In this suit brought by the Court of Wards against one of the relations of the ward alleging that a certain amount of rent which was due from the defendant had not been paid interest was also said to be obtained according, to the custom in the part of the country amongst ordinary tenants. The High Court modified the words of the lower Courts as regards interest and directed that, in execution, the interest on the instalments shall be calculated only according to the Government rule for the payment of revenue in the Collectorate. The agreement under which the defendant held his zemindari was that he should pay his Government revenue through the ward into the Collectorate. He was thus only liable to pay the Government revenue as it fell due, and the rule for the payment of instalments of rent by ordinary tenants in the country was not at all applicable to the case of this particular defendant. GRIDHAREE SINGH v. THE COURT OF WARDS, **10 W.R. 368.**

(227)—*Suit for amount of rent paid by under-proprietor on behalf of other under-proprietors—Liability of one party to reimburse other when latter is compelled to pay any sum payable by former—Obligations resembling those created by contract—Contract Act* (IX *of* 1872), *Ch.* V., *s.* 73—*Interests — Rent fixed by Settlement Officer, Liability to pay.*—In 1872, J, who was under-proprietor of an entire village, sold 137 bighas to the mother of the first five defendants. In 1892, he mortgaged all his interest in the village to the mother of the plaintiff by a deed, which provided that the mortgagor would always pay the revenue then payable and any amount by which it might be enhanced at any future settlement, and that the mortgagee should be entitled to receive from any of his (the mortgagor's) relation in whose favour he had executed a perpetual lease or a sale-deed only the *jama* mentioned in those documents, or, in case of enhancement at future settlement, the *parta sarkari*, but that the mortgagee should not otherwise interfere with them. It was said that, in the sale-deed of 1873, it was provided that the *jama* of the vendee should be Rs. 37-8-6 only, but the deed was not produced in evidence. After the mortgage to the plaintiff's mother, the village came under settlement and in February 1896, the Settlement Officer determined that the amount of rent payable to the superior proprietor by the holders of the 137 bighas was Rs. 242-14-0. In January 1896, J had asked the Settlement Officer to fix the amount payable in respect of the 137 bighas at Rs 57-12-0, but the Settlement Officer declined to do so. The plaintiff having been compelled to pay the whole of the under-proprietary rent of the village to the superior proprietor, claimed against the first five defendants and their mortgagees, the remaining defendants, a decree for the amount due in respect of the 137 bighas according to the Settlement Officer's decision of February 5th, 1896, with interest on that amount. *Held*, that the defendants were bound to pay rent for the 137 bighas at the rate fixed by the Settlement Officer. Where all the under-proprietors in the village are jointly and severally responsible for the rent and one of them is compelled to pay sums which are payable by the others, he is entitled not only to the sums paid, but also to interest upon those sums from the date of payment. LAL RAM KINKER SINGH v. FATEH BAHADUR SINGH, **6 O.C. 346.**

(228)—*Arrears of rent, Suit for — Under-proprietor—Lease, permanent hereditary farming —Transferable lease—Transfer of Property Act, s.* 6 —The respondent sued the appellant for arrears of rent. In the decree of the Financial Commissioner of Oudh, dated 27th April 1869, the appellant had obtained by consent of the talukdar a decree for a permanent hereditary farming lease. *Held*, that the appellant was an under-proprietor and was not liable to pay interest on arrears of rent. Under the provisions of s 6 of the Transfer of Property Act, a permanent hereditary farming lease is transferable. KESHO SINGH v. CHOWDRI MOHAMMAD AZIM, **3 O.C. 108.** [*R.*, 5 O.C. 187; *Diss.*, 6 O.C. 94.]

(229)—*Excess rent—Damages—Appeal—Act* XI *of* 1865, *s.* 6—*Act* XXIII *of* 1861, *s.* 27.—Where a tenant sued his landlord to recover a sum paid over and above what was due on account of rent, *held* that the case was not one of contribution for shares of rent as against co-parceners, although originally the transaction may have been connected with payment of rent for co-parceners, but that it was a suit for damages for the non-refund of the over-payment. The suit being cognizable by the Court of Small Causes under s. 6, Act XI of 1865, no special appeal lies to the High Court. SIB SAHAYA SUKUL v. BIR CHANDRA JUBARAJ GOSWAMI, **2 B.L.R.A.C. 172=11 W. R. 30.** [*F.*, 1 A. 388.]

(230)— *Refusal to execute decree of Small Causes Court—Appeal.*—The order of a Judge

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declining to execute a Small Causes Court decree can be appealed from. DELAWUR ALI v. DABEE PERSHAD, **11 W.R. 203.**

(231)—*Suits for rent—Cognizability by Small Cause Courts.*—Suits for rent, when there is a contract between the parties, or even when such a patta has been tendered as the defendant was bound to accept, are maintainable in Court of Small Causes; and the mere denial of the plaintiff's title is not sufficient to oust the jurisdiction of the Court. BODI RAMAYYA v. PERMA JANAKIRAMUDU, **5 M.H.C. 172.**

(232)—*Mofussil Small Cause Courts Act,* XI *of* 1865.—A suit for rent is cognizable by a Small Cause Court only when the claim is founded on contract. A claim by a landlord against a sub-tenant is not cognizable as on an implied contract. MANISA ERADI v. SIYALI KOYA, **11 M. 220, F.B.** [*D.*, 22 M. 149.]

(233)—*Release of joint debtors, effect of Contract Act* (IX *of* 1872), *s.* 44.—Where, in a suit for rent, the purchaser of certain property which had been hypothecated by some of the lessees as security for the rent are first made parties but subsequently released, their release has not the effect of releasing the liability of the other defendants. SREEMATTY JOGEMAYA DASSI v. GIRINDRA NATH MUKHERJEE, **4 C.W.N. 590.** (21 W.R. 347, *D.*)

(234)—*Prostitute, House let to—Suit against her for rent—Immoral contract—Contract Act,* 1872, *s.* 23.—A landlord is not entitled to claim the rent of a house knowingly let to a prostitute for use by her as a brothel. BRINKMAN v. ABDUL GHAFUR, **65 P.R. 1904 = 102 P.L.R. 1904** (18 W.R. 445, 10 P.R. 1872, *R.*; 2 P.R. 1898, *Expl.*)

(235)—*Rent, Suit for—Rent accruing due between institution of suit and confirmation of sale—Tenant dying testate—Personal decree—Executor, personal liability of.*—The plaintiff brought a suit for rent of a putni taluk for the period from Falgoon 1310 to Baisak 1312 (corresponding to February 1904 to May 1906). A decree for rent was obtained in respect of the said property for the period ending with Magh 1310. In execution of that decree the property was sold on the 10th April, 1905, and the sale was confirmed on the 12th May following (Baisak 1312). One of the tenants died in 1897. He had made testamentary disposition of his property by which he had appointed executors to hold possession of his estate till the termination of the minority of his youngest grandson. At the time of institution of the suit, the minor had not attained majority. The estate was sometimes in the hands of a Receiver appointed by another Court in the course of a partition suit: *Held*, that, as the property was sold, the landlord could obtain only a personal decree against the tenant entitled to possession of the property during the period for which the rent was claimed; that the Receiver was not a necessary party, as the plaintiff did not seek to sell any property in the hands of the Receiver. *Held* also, that the executor was personally liable, and the beneficiaries, who would ultimately be entitled to the property if anything remained to be distributed, were not personally liable for the rent. MAHARAJA OF BURDWAN v. PARBUTTY CHARAN, **15 C.L.J. 458.**

(236)—*House let to prostitute—Suit for rent, when maintainable.*—In a suit for rent of a house hired by a man and woman together, the former of whom carried on the trade of a tailor and the latter carried on the profession of a prostitute on the premises; *Held by Boulnois, J.*, that it could not be assumed that the owner of the house knew that the man and the woman sharing in the profits of the prostitution hired the house for the purpose of using it for the resort of men in the way of the woman's trade and for that purpose alone, and that the suit was maintainable. *Held by Linasay, J.*, that if at the time of the contract the plaintiff certainly knew that the house was taken and was used by the female defendant, for the purpose of her profession, *viz.*, that of a prostitute, the contract was an immoral one and the plaintiff could not recover the rent, but as the fact was not conclusively proved, he was entitled to recover. *Held by Campbell, J.*, that the landlord had knowledge that the woman would carry on her trade, but as the profession of public prostitution is a profession openly acknowledged in this country, and as public opinion would not brand a house owner as immoral in his act of accepting a prostitute as his tenant, plaintiff's action in letting his premises was not such an immoral one as to render his agreement with the woman immoral so as to debar him from his right. SULTAN v. NANU, **22 P.R. 1877.**

This circular deals with the Rules for disposal of rent-suits. **15 W.R. H.C. Rules, p. 4.**

See BEN. ACT X OF 1859, s. 23, cl. 4, 28 C. 485 = 5 C.W.N. 840.

See BEN. ACT X OF 1859, s. 77, 3 B.L.R. A.C. 204, Note.

Suit for rent—Limitation—*See* BEN. ACT VIII OF 1869, s. 29, 6 C. 325 = 7 C.L.R. 342, 5 C. 713 = 6 C.L.R. 49.

Suit for—*See* BEN. ACT VII OF 1876, ss. 42, 78, 8 C.W.N. 196.

Suit for arrears of—Suspension of the law of limitation—*See* BEN. ACT IX OF 1880, s. 95, art. 2, sch. III, 30 C. 1033, P.C. = 80 I.A. 177 = 8 C.W.N. 1.

Suit by co-sharer landlord alone for additional rent, if sustainable—*See* BEN. ACT VIII OF 1885, ss. 52, 178, 188, 7 C.W.N. 670.

Unregistered proprietor's suit for rent—*See* BEN. ACT VIII OF 1885, s. 60, 26 C. 712.

Rate of—Determined in a rent suit—Subsequent suit at enhanced rate—*Res judicata*, effect of entry of rate of rent in settlement record on question of—*See* BEN. ACT VIII OF 1885, ss. 107, 109, 32 C. 336, 9 C.W.N. 610 = 1 C.L.J. 134.

Suit to recover arrears of—Provisions and phraseology of s. 193 of the Bengal Tenancy

Advocate High Court Jammu & Kashmir Srinagar.

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Act—Applicability to suits to recover sums that are not rent—*See* BEN. ACT VIII OF 1885, ss. 144, 184, 193, sch. III, art. 2, 7 C.L. J. 152.

Suit—Plaint whether to contain exact extent and boundaries of lands—*See* BEN. ACT VIII OF 1885, s. 148, cl. (*b*), 5 C.W.N. 121.

Suit for—On ground of possession—Maintainability—*See* BEN. ACT VIII OF 1885, s. 149, 8 C.W.N. 248.

Value of rent suit, under Bengal Tenancy Act, for purposes of appeal—*See* BEN. ACT VIII OF 1885, s. 153, 12 C.W.N. 448=35 C. 547.

Suit for rent by co-sharer landlord—*See* BEN. ACT VIII OF 1885, s. 153, 7 C.W.N. 908.

Jotedar—No assignment of right to collect rent-suit for—*See* BEN. ACT VIII OF 1885, s. 153, 8 C.W.N. 438.

Suit for rent in kind—*See* BEN. ACT VIII OF 1885, ss. 153, 67, 68, 9 C.W.N. 122.

See BOM. ACT V OF 1879, ss. 85, 86, 87, 16 B. 586.

Suit for—*See* BOM. ACT XVII OF 1879, 5 B. 180.

Suit for—Decision of question of title—Appeal—*See* Bom. ACT XVII OF 1879, s. 3 (3), cl. (X), 16 B. 128.

Suit to enforce acceptance of puttahs proper—How determined—*See* MAD. ACT VIII OF 1865, 5 M.H.C. 425.

Tender of Patta—Suit for rent—*See* MAD. ACT VIII OF 1865, ss. 7, 9, 72, 27 M. 4, F.B.

Limitation Act, sch. II, art. 110—Suit for—*See* MAD. ACT VIII OF 1865, s. 10, 17 M. 225=4 M.L.J. 5.

Suit for rent—Cause of action—*See* MAD. ACT VIII OF 1865, s. 10, 22 M. 250, Note.

House rent due on contract—Jurisdiction of village Court to take—Cognizance of suit to recover such rent—*See* MAD. ACT I OF 1889, s. 13, cl. 3, 5 M.L.J. 57.

Tenant at fixed rates, suit against for rent—Diluvion—Local custom—*See* U.P. ACT XII OF 1881, ss. 18, 19, A.W.N. 1893, 29.

Suit for arrears of—Determination of rent—*See* U.P. ACT XII OF 1881, s. 93, cl. (*a*), A.W. N. 1887, 155.

Suit for arrears of—By landlord against agricultural tenant—Right of suit—Conditions, for maintenance of suit—*See* U.P. ACT XII OF 1881, s. 93 (*a*), 2 A.L.J. 1.

Suit for arrears of—*See* U.P. ACT XII OF 1881, s. 93 (*a*), 23 A. 270=A. W.N. 1901, 69, 23 A. 277.

Suit for rent—Dismissal of suit—Subsequent suit in Civil Court to establish title and for possession—Limitation—*See* U. P. ACT XII OF 1881, s. 148, A.W.N. 1885, 261.

Suit for, appeal when admissible—*See* U. P. ACT XII OF 1881, s. 189, 23 A. 283=A.W. N. 1901, 75.

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Interest on arrears of rent—Tenant, suit for arrears of rent and interest against—Settlement Court, decree of—*See* U.P. ACT XXII OF 1886, ss. 3 and 14, 5 O.C. 187.

Suit for—*See* U. P. ACT XXII OF 1886, s. 33, and s. 108, cl. (2), 2 O.C. 269.

Suit for—Rent of grove-land left by grove-holder for cultivation—Landlord's consent, land held without—*See* U.P. ACT XXII OF 1886, ss. 108, cl. (2), 127, 5 O.C. 162.

Suit for—*See* U. P. ACT XXII OF 1886, s. 127, 4 O. C. 24.

Arrears of—Suit for—*See* U.P. ACT XXII OF 1886, s. 138, 2 O.C. 135-6.

Arrears of—, suit for—Under-proprietor—Liability to pay rent when out of possession—Interest—*See* U.P. ACT XXII OF 1886, s. 141, 2 O.C. 288.

See APPEAL—FORM OF APPEAL, 3 W.R. Act X, Rul. 154.

See APPEAL—MISCELLANEOUS, 5 W.R. Act X, Rul. 67.

Waste and Lakhiraj land—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 2 W.R. Act X, Rul. 44.

Suit for arrears of rent—Onus—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 3 B.L. R.A.C. 304.

Suit for arrears of rent—Second appeal—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 7 C.L.R. 369.

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First suit for cancellation of patni and for mesne profits, whether bars second suit to recover arrears of rent for same period—*See* CIV. PRO. CODE, 1908, s. 10, 7 C.W.N. 720.

Suit for rent—*See* CIV. PRO. CODE, 1908, O. II, r. 1, A.W.N. 1882, 208.

Suit for—Policy of law—*See* CIV. PRO. CODE, 1908, O. II, r. 1, 13 C.L.R. 214.

Suit for enhanced rent—Subsequent suit at original rate—*See* CIV. PRO. CODE, 1908, O. II, rr. 1, 2, 9 C. 919=12 C.L.R. 919.

Suit for rent—Failure to include arrears due in former suit—*See* CIV. PRO. CODE, 1908, O. II, r. 2, A.W.N. 1883, 142.

Lease of mortgaged property by usufructuary mortgagee to mortgagor—Hypothecation of same property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 4 A. 318=A.W.N. 1882, 46.

Suit for possession—Subsequent suit for—Not barred—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 8 Ind. Cas. 445.

Suit for arrears of—Not claimed for the whole period up to the date of the institution of suit—Inclusion of the period omitted not allowable in a subsequent suit for rent—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 1 C.L.J. 114.

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Suit for rent of a field in a holding—Necessity for including claim in respect of another field comprised in same holding—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 8 C.P.L.R. 9.

Suit for rent converted into one of ejectment—*See* CIV. PRO. CODE, 1908, O. VI, s. 17, O VII, r. 11, O. XLI, r. 23, s. 107 (2), O. XXII, r. 11, 19 B. 303.

Suit—When set-off allowed—*See* CIV. PRO. CODE, 1908, O. VIII, r. 6, 30 C. 1066=8 C.W. N. 118.

Public policy—Landlord and tenant—House let to prostitute—Suit for—*See* CONTRACT —ILLEGAL CONTRACTS, 102 P.L.R. 1904.

Letting house for prostitute—Suit for—When recoverable—*See* CONTRACT ACT, 1872, s. 23, 2 P.R. 1898.

Payment of rent under a mistake—Right to recover—*See* CONTRACT ACT, s. 72, 7 C. 573 =9 C.L.R. 182.

Right of co-sharer to collect rent in the absence of partition—*See* CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS, 11 C.P.L.R. 1.

Claim for—In suit for redemption—Distinct causes of action—Court-fee on appeal—*See* COURT FEES ACT, 1870, s. 17, 16 M. 415.

Suit for rent—Damages for breach of clause in lease, assessment of—Substantial damages —Rent payable to superior landlord—*See* DAMAGES—MEASURE AND ASSESSMENT, 11 C. 221.

See DECREE—DECREE, FORM OF, Marsh 48=1 Hay 113, 26 C. 639=3 C.W.N. 628.

Suit for land and compensation for trespass —Decree for compensation by way of rent—Whether proper decree—*See* DECREE—MISCELLANEOUS, A.W.N. 1892, 57.

Revisional powers of District Judge—*See* DISTRICT JUDGE, JURISDICTION OF, 15 C. 327.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 29 C. 126=6 C.W.N. 132.

Suit for rent—Prior ex parte decree, evidentiary value of—*See* EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, 8 C. 275=10 C.L.R. 159.

Rent suit—Rate of—Effect of ex-parte decree —*See* EVIDENCE — DECREE, JUDGMENTS AND PROCEEDINGS IN SUITS, 16 C. 300.

See EVIDENCE — DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, 13 M. 361.

Presumption as to rate of—*See* EVIDENCE ACT, 1872, s 91, 2 Ind. Cas. 636.

See EXECUTION OF DECREE—MODE OF EXECUTION, 3 C.L.R 504.

See EXECUTION OF DECREE — MISCELLANEOUS, 3 W.R. Act X, Rul. 131.

See INTEREST—SPECIAL CASES, 9 W.R. 272.

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Issues—Suit for—Based on settlement—Admission by defendant as to rate of rent—Relief —*See* ISSUES—GENERAL, 6 C.L.R. 208.

Joinder of persons interested in property charged with rent—*See* JOINDER OF PARTIES, 14 C.P.L.R. 17.

Suit for arrears of—Letters Patent, cl. 12—*See* JURISDICTION—SUITS FOR LAND, 1 Ind. Jur. N.S. 426.

Mortgagor and mortgagee—Lease of mortgaged property by mortgagee—Suit for arrears of rent—Civil Courts—Jurisdiction — *See* JURISDICTION OF CIVIL COURTS, 19 A. 496= A.W.N. 1897, 128.

See JURISDICTION OF CIVIL COURTS, 11 B.L.R. 31, Note=13 W.R 390.

See LACHES, 2 C.L.R. 5.

Co sharer—Payment of to lambardar—*Bona fide* payment—Suit for recovery of rent—*See* LAMBARDAR, A.W.N. 1888, 45.

Rent, arrears of, for more than three years, can be recovered where there is a fiduciary relationship—*See* LIMITATION ACT, 1908, s. 10, 3 Bom. L.R. 45=25 B. 429.

Claim for recovering—*See* LIMITATION ACT, 1908, s. 28, 18 B. 507.

Suit for—Limitation—*See* LIMITATION ACT, 1908, art. 110, 5 C.L.R. 62.

Does not lose its character by assignment—Suit by assignee of—Limitation—*See* LIMITATION ACT, 1908, art. 110, 2 Ind. Cas. 989.

Arrears of, limitation for a suit to recover—*See* LIMITATION ACT, 1908, art. 110, 6 Bom. L.R. 241.

Suit for arrears of customary dues to chatram, not a suit for—*See* LIMITATION ACT, 1908, arts. 110, 120, 16 M. 305.

Suit to recover arrears of—*See* LIMITATION ACT, 1908, arts. 120 and 110, 3 Bom. L. R. 135=25 B. 556.

Suit for possession with alternative relief for —Misjoinder of parties and causes of action —*See* MULTIFARIOUSNESS 4 C. 949.

See PARTIES TO SUIT—GENERAL, 11 W.R. 43, 21 W.R. 88.

Suit for rent—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23, 35 P.L.R. 1902=43 P.R. 1902.

A suit on bond undertaking to pay debt due from landlord not a suit for—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, art. 8, sch. II, 4 C.L.J. 402.

Suit for—for one fasli—Objection by defendant as to extent—Suit for—for subsequent fasli—Principle—Certainty — *See* RES JUDICATA — GENERAL, 14 M.L.J. 379.

See RES JUDICATA—ADJUDICATIONS, 6 C. W.N. 575.

Adjudication of title of intervenor in rent suit—*See* RES JUDICATA—ADJUDICATIONS, 8 C. 470=10 C.L.R. 416.

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Suit for measurement—Previous suit for rent—*Res judicata* — *See* RES JUDICATA—CAUSE OF ACTION, 7 C. 214=8 C.L.R. 393.

Second suit for same—Upon a different basis —*See* RES JUDICATA—CAUSE OF ACTION, 3 C. 6.

Suits for—Cause of action—*Res judicata*—*See* RES JUDICATA—CAUSE OF ACTION, 21 C. 236.

Prior suit for—Determination of question of title—Subsequent suit for possession—*See* RES JUDICATA—CAUSE OF ACTION, 12 C.L.R. 38.

Jurisdiction of Collector—*See* RES JUDICATA —COMPETENCY OF COURT, 15 B.L.R. 242, Note=19 W.R. 217.

Rent suit—Subsequent title suit—*See* RES JUDICATA—COMPETENCY OF COURT, 8 Ind. Cas. 715.

Suit—Rate of rent—Decree for rent of previous years—Decree for amount admitted by defendant—*See* RES JUDICATA—ESTOPPEL BY JUDGMENT, 11 C.L.R. 483.

Decree for—in previous suit—*Res judicata*—Landlord and tenant—*See* RES JUDICATA—ESTOPPEL BY JUDGMENT, 4 C.W.N. 161.

Decree in rent suit—Question of annual rent payable—*Res judicata*—*See* RES JUDICATA—MATTERS IN ISSUE, 2 Ind. Cas. 11.

Rent suit—Incidental finding—*Res judicata* —*See* RES JUDICATA—MATTERS IN ISSUE, 9 C.L.J. 493=4 Ind. Cas. 175.

See RES JUDICATA—MATTERS IN ISSUE, 3 O.C. 22.

Effect of decision against intervenor in a—*See* RES JUDICATA—PARTIES, 3 C. 145=1 C. L.R. 35, F.B.

See RES JUDICATA—PARTIES, 8 W.R. 428.

See RES JUDICATA—MISCELLANEOUS, 6 C. W.N. 589.

Decision in rent suit—*Ex parte* decree—*Res judicata*—*See* RES JUDICATA—MISCELLANEOUS, 6 Ind. Cas. 860.

See SALE—SALE FOR ARREARS OF RENT —MISCELLANEOUS, 6 W.R. 112.

See SET-OFF, 2 Agra 377.

Suit for refund of rent voluntarily paid to a wrong person—Mofussil Small Cause Court, jurisdiction of—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF— GENERAL, 11 C. 738.

Suit for damages on account of—Proper remedy—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 B. 572.

Suit for Jarib rent—Jurisdiction — *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 7 M.L.T. 350=6 Ind. Cas. 702.

Suit for—No ascertained contract between parties—Suit not cognizable by Small Cause Court—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 4 M.H.C. 393.

Rent, Suit for—*concluded.*

Suit for—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 M. H.C. 64.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 166 P.R. 1883.

Suits for recovery of—of nature cognisable by Courts of small causes—Second appeal not maintainable—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 23 M. 547=10 M.L.J. 329. F.B.

Suit for rights to collect—Suit for immovable property—Maintainability of suit—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 5 M.L.J. 95

Suit by zamindar on bond executed to his father the late zamindar for arrears of rent—No suit for rent—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, sub-s. 2, 1 M.L.J. 680.

Land taken by Government without formality prescribed by Ben. Reg. I of 1825—Right of owner to maintain suit against Government for—*See* TRESPASS, Marsh 56=W.R. F.B. 18 =1 Hay 122.

Renunciation.

See WAIVER.

See HINDU LAW—JOINT FAMILY, 1 M. 312 =5 I.A. 61=2 C.L.R. 81, P.C.

Nature and effect of—Mutual mistake, relief against—*See* WAIVER, 5 M.H.C. 444.

Repealing Act.

See ACT XII OF 1876.

Repealing Enactments relating to Civil Procedure.

See ACT X OF 1861.

Repeal of Act, Effect of.

See STATUTES, CONSTRUCTION OF.

See APPEAL—RIGHT OF APPEAL, EFFECT OF, REPEAL ON.

(1)—*Limitation Act,* IX *of* 1871—*Act* XIV *of* 1859—*Suit on bond barred under old Act—No new period.*—The Limitation Act (IX of 1871), does not give a new period of limitation to a suit on a bond which was barred by the old Limitation Act (XIV of 1859) before the new Limitation Act came into force. VENKATACHELLA MUDALI v. T. SASHAGHERRY RAU, **7 M H.C. 283.** [*R.*, 1 B. 295, 1 C. 328, 88 P. L.R. 1904, F.B.; *D.*, 1 M. 228.]

(2)—*Barred claims—Change in the law of limitation, effect of.*— A claim, whether for arrears of maintenance, possession of land or anything else, once barred, cannot be revived by a change in the law of limitation. KRISHNA MOHUN BOSE v. OKHILMONI DOSEE, **3 C. 331.** [*Disc.*, 3 C L R 336; *Overruled*, 6 C' 340=7 C.L.R. 121; *R.* 4 C. 665, 53 P.L R., 1901.]

(3)—*Act* VIII *of* 1859, *s.* 387—*'Pending,' meaning of.*—A suit must be held to be pending under s. 387 of Act VIII of 1859 if anything remained to be done which might have been done under the old law; and a party in such a

Repeal of Act, Effect of—*concluded.*

case is entitled to ask the Court to proceed under the old law, inasmuch as the application of the new code would deprive him of a right, in reference to a procedure of the case, which, but for the passing of the code, would have belonged to him. CAPTAIN PARROTT v. RAM SUHAY SINGH, **W.R. 1864, 35.**

(4)—Ex parte *decree—Re-hearing—Suit instituted before Act* VIII *of* 1859.—A defendant in a suit instituted before the passing of Act VIII of 1859, is entitled, under s. 387, to any advantage which he might have possessed under the old procedure; but this does not bar him from availing himself of any advantages which he may obtain from the new procedure, *e.g.*, a re-hearing under s. 119, in the case of an *ex parte* decree. MUSST. RUSSOOLUN v. MUSST. FUZEELUT-OON-NISSA, **W.R. 1864, Mis. 36.**

See ACT I OF 1868, s. 6, 9 C. 163=11 C. L.R. 409.

See CIV. PRO. CODE, 1908, O. XXI, r. 92, O. XLIII, r. 1, 3 C.L.R. 205.

See ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 6 N.W.P. 373.

Repeal—Of one statute by another by implication—What amounts to—*See* LEASE—GENERAL, Ind. Cas. 685=12 C.L.J. 126.

See LIMITATION—GENERAL, 7 M.H.C. 298.

See LIMITATION ACT, 1908, s. 28, 4 C. 285=3 C.L.R. 336.

See LIMITATION ACT, 1908, art. 73, 7 M. H.C. 288.

See STATUTES, CONSTRUCTION OF, 1 B. 295, 1 C. 328.

Repeal of part of Madras Regulation IV of 1821.

See ACT XXIII OF 1838.

Repeal, Usury Laws Act.

See ACT XXVIII OF 1855.

Repetition.

Defamation—Malice—Copy by one newspaper of libellous matter in another, whether amounts to libel—*See* LIBEL, 14 B. 532.

Reply to Notice.

Whether action for libel or slander will lie against accused persons defending themselves—Whether and when reply to notices of action are privileged—*See* TORT, 18 M.L.J. 353=4 M.L.T. 222=31 M. 400.

Report.

(1)—*Commissioner for taking accounts—Power to grant certificate—Nature of.*—The general nature of a certificate or report, whether general or separate, is that it should, in the case of a general certificate, comprise the *result* of all the proceedings under the decree or order of reference, or, in the case of a separate certificate or report, that it should comprise the result of some or one of such proceedings. The Court is not bound either to uphold or

Report—*concluded.*

reverse the Commissioner's decision or to consider it in any way till he has arrived at and certified something that can be called a result, either of the whole enquiry before him or of some part or branch of it. RUSTOMJI BURJORJI v. KESSOWJI NAIK, **3 B. 161.**

Reports by Select Committee.

See STATUTES, CONSTRUCTION OF, 14 A. 145=A.W.N. 1892, 6.

Reports, Indian Law, Act.

See ACT XVIII OF 1875.

Reports of Cases.

See UNREPORTED JUDGMENT.

(1)—*Proper use to be made of Law Reports by Court.*—A Court is entitled to refer to reports of cases as precedents. But, because a judgment, order or decree finds a place in the reports of cases, the Court should not take cognizance of such judgment, order, etc. The party relying on it should be asked to produce a copy of the same and file it in the record of the case. SOWINDRA MOHUN TAGORE v. SIROMONI DEBI, **28 C. 171=5 C.W.N. 307.** (27 C. 1, P.C., *R.*)

Representation.

Right of succession by representation among Muhammadan Kasmiris of Bengal — *See* CUSTOMS (PUNJAB—INHERITANCE.) 8 P.R. 1907=47 P.W.R. 1907=121 P.L.R. 1907.

Right of, in cases of collateral succession—*See* CUSTOMS (PUNJAB — INHERITANCE), 140 P.R. 1908.

Estate of deceased—Decree when estate not properly represented—Effect—*See* DECREE—MISCELLANEOUS, 6 Ind. Cas. 627=14 C.W.N. 1041=12 C.L.J. 561.

Representative.

See CIV. PRO. CODE, 1908, S. 47.

See LEGAL REPRESENTATIVE

See REPRESENTATIVE OF DECEASED PERSON.

(1)—*Decision against party not properly represented—Effect.*—A party is not bound by the decision in a case by reason of his mother having been present during the hearing, if she was not present in a representative capacity. RAM LALL ROY v. LALL BUNGSHEE LALL, **11 W. R. 199.**

Rights of, of assignee—*See* EXECUTION OF DECREE—MISCELLANEOUS, 10 C.L.J. 396=3 Ind. Cas. 324=14 C.W.N. 752.

Person attaching decree is representative of decree-holder—*See* LIMITATION ACT, 1908, s. 19, art. 179, 6 C.L.J. 141.

Representative Capacity.

Plaintiff *shebait* of idol—Plaintiff's name in heading of plaint — Suit in representative character — Maintainability — *See* CIV. PRO. CODE, 1908, s. 115, O. XXXI, r. 1, 9 Ind. Cas. 132.

Representative of deceased person.

See CIV. PRO. CODE, 1908, S. 47.

See LEGAL REPRESENTATIVE.

(1)—*Heirs—Liability — Payment of debt to extent of assets—Delivery of papers—Accounts—Examination of accounts before decree—Secondary evidence to establish claim.*—Where it is proved that the heir of a deceased debtor has received assets from him, such heir is bound to pay the debts of the deceased to the extent of such assets. Similarly, the heir is bound to deliver the papers in his hands in respect of which a third party has established his claim against the deceased. In a suit for accounts it is not sufficient to decree that an account should be taken. The accounts should be ordered to be produced; a decree should be passed only after their examination. If no written papers of account are brought forward by the defendant, the plaintiff should have an opportunity of giving evidence in support of his claim for compensation or damages. LUCHMEEPUT SINGH BAHADOOR v. NUND COOMAR GOOPTO, **22 W.R. 388.** [*Expl.*, 7 C. 169.]

(2)—*Suit by—Hindu estate, Person taking possession of—Liability for debt— Executor de son tort.*—Where a Hindu died leaving a widow and brother, and the brother took possession of the deceased's estate during the widow's life-time,—*Held* that the brother was liable to pay a debt of the deceased out of the estate come into his hands. *Held* also that he was liable as legal representative of deceased, the widow having relinquished her rights as heiress. *Quære*—Is any stranger who takes a deceased's estate liable, under Hindu law, to pay his debts as executor *de son tort*? JOGENDER NARAIN DEB ROYKUT v. TEMPLE, **2 Ind. Jur. N. S. 234.**

(3)—*Hindu law—Joint family—Separation of interest among brothers—Legal representative.*—Where a Hindu, during the lifetime of his deceased brother (debtor), lived separate from him in a separate dwelling-house, their transactions being also separate, *held* that the former was not the latter's legal representative. TEKAIT CHURAMUN SINGH v. KULLYAN SAHY, **23 W.R. 231.**

(4)—*Person in possession of deceased Hindu's estate, decree against—Executor under a will, probate whereof granted subsequently.*—Indian Courts have been liberal in recognizing the acts of a *de facto* manager of a deceased's estate as valid. The person in possession of the estate of a deceased Hindu must, till some other claimant (*e.g.* under a will, of which no probate has been granted) comes forward, be treated for some purposes as his representative. (4 C. 142=2 C.L.R. 223, *R.*) A judgment obtained against such a representative is not a mere nullity and, though it might not be executed against the estate, in the hands of an executor, when he has taken out probate, it is sufficient for a suit being brought against the executor, to have the decree satisfied. PROSUNNO CHUNDER BHUTTACHARJEE v. KRISTO

Representative of deceased person—*contd.*

CHYTUNNO PAL, **4 C. 342=3 C.L.R. 154.** [*R.*, 11 C.W.N. 1078=6 C.L.J. 719, 27 C. 242, 8 C.W.N. 843, 30 C. 1044, 10 C.W.N. 566, 2 C.L.J. 484; *D.*, 9 B. 86; *Appl.*, 14 M. 454.]

(5)—*Debts due to Hindu deceased, payment of, to actual heir of deceased—Subsequent grant of certificate of heirship to another — Debtor, rights and liabilities of.*—The question referred to the Full Bench was, whether a debtor of a deceased person who has paid his debt to the widow of the deceased, holding her to be the heir, is entitled, in a suit brought for the recovery of the same debt by a person holding a certificate of heirship, obtained subsequently to the payment, to show that the widow, and not the holder of the certificate is the legal heir. The question was answered in the affirmative and the defendant was held to be at liberty to show, notwithstanding the certificate held by the plaintiff, that the widow of the deceased was, at the time of the alleged payment by the defendant to her, the legal heir to the deceased. It would, however, not be sufficient for the defendant to show that he *bona fide* believed the widow to be the heir, or to be the manager of the estate of the deceased; he is bound to show that she then was the actual heir-at-law of the deceased. PURSHOTAM MANSUKH v. RANCHHOD PURSHOTAM, **8 B.H.C. A.C. 152, F.B.** [*R.*, 8 B.H.C.O.C. 140, 7 B. 341.]

(6)— *Succession Certificate Act* (XXVII *of* 1860)—*Certificate of administration—Childless widows of brother and nephew—Illegitimate sons.*—The illegitimate sons of a deceased Hindu, whom the latter had acknowledged as his sons and to whom he had assigned all his property, are entitled to a certificate of administration under Act XXVII of 1860, in preference to the childless widows of the brother and nephew of the deceased, the latter not being legal representatives under the Hindu law. PRODHAN RAM v. MUSST. JERIA KOOER, **17 W.R. 189.**

(7)—*Suit against heir for debts of ancestor—Assets—Burden of proof as to.*—In a suit against an heir for the debts of his ancestor, it ordinarily lies upon the plaintiff in the first instance to give such evidence as would *prima facie* afford reasonable ground for an inference that assets had or ought to have come to the hands of the defendant. If plaintiff has laid this foundation for his case, it then lies upon the defendant to show that the amount of such assets was not sufficient to satisfy the plaintiff's claim, or that they were of such a nature that the plaintiff was not entitled to be satisfied out of them, or that there were never any assets, or that they have been duly administered and disposed of in satisfaction of other claims. KOTTALA UPPI v. SHANGARA VARMA RAJAH, **3 M.H.C. 161.** [*Expl.*, 26 M. 792.]

(8)—*Execution — Judgment-debtor's representative—Liability to account for property of judgment-debtor — Mesne profits.*— When a party is proceeded against as being the representative of a deceased judgment-debtor, and it is proved that property which belonged to the deceased has come into his hands, it

Representative of deceased person—*contd.*

lies upon such party to account for all the property of the deceased judgment-debtor which has come into his hands. And in so accounting, mesne profits—whether they have accrued in the shape of rents collected, or interest on moneys which may have come to him from the deceased's estate—must be brought into the account. ASSEEMOONISSA v. AMEEROONISSA KHATOON, **15 W.R. 285**.

(9)—*Suit against representatives of Mahomedan—Decree, form of.*—Where a suit was brought on a bond given by a Nawab, against his widow-mother and minor son as his representatives and also as in possession of the estate, *held* that the Court should adjudicate upon the plaintiff's claim without dismissing the suit on the ground that the defendants were not proved to be in possession of any portion of the estate left by him. The decree in such a case should be for payment out of the property of the deceased, and ordinarily the Court should not direct the payment of the costs by the defendants personally but out of the estate. MADHO RAM v. DILBUR MAHUL, **2 N.W.P 449**. [*R.*, 7 A. 822, F.B.]

(10)—*Suit against legal representatives of deceased—Decree—Issues.—Act* VIII *of* 1859, *s.* 203—Where, in a suit against the legal representatives of a deceased executant of a bond, the plaintiff founds his case on the possession by the defendants of property belonging to the deceased, *held* that the defendants have a right to join issue thereon, and, if successful, are entitled to a decree dismissing them from all responsibility. But where the foundation of the suit against the defendants is as heirs or personal representatives of the deceased, without any question of assets, the plaintiff is entitled to a decree on evidence being adduced as to the execution of the bond. HEERA LALL MOOKERJEE v. DEGUMBUREE KULOONEE, **14 W.R. 431**.

(11)—*Suit against representatives—Decree.*—In a suit against representatives as such, there cannot be a decree against them for anything beyond the amount of the assets of the deceased debtor. KARUPPAN CHETTI v. VERIYAL, **4 M.H.C**. [*R.* 14 M. 1, F.B.]

(12)—*Execution against heirs of deceased defendant—Liability of heir to extent of assets received.*—On the death of one N.G., against whom the decree had been obtained, execution thereof had been taken against his widows. Subsequently, one M. S., came in and, alleging that the deceased N G. was merely a benami-holder for her, applied to be substituted as defendant in the case in lieu of the widows. It was held that the lower Court should not, on the application of M S., have exempted from liability the heirs of the deceased N.G., to the extent of any assets which might have come into their hands. The lower Court's order was therefore amended so far as it struck out the widows of the deceased defendant N. G., from the category of defendants. DOORGA SOONDUREE DEBIA v. SOORJEE MONEE DEBIA, **8 W.R. 101**.

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(13)—*Judgment-debtor, representative of—Extent of liability for decree-debt.*—When a person against whom a decree has been passed in his representative capacity, has made payments in satisfaction of that decree to the full extent of the property of the deceased which has come, or, but for the representative's default, might have come to his hands, the decree can no longer be executed, even although the decree-holder may be able to prove that the representative still has in his possession property which originally belonged to the deceased. If the heirs of the deceased Hindu or Mahomadan has disposed, to a *bona fide* purchaser, of property which he has inherited from a deceased person, a creditor cannot follow the property in the hands of the purchaser, but can only sue the heir who is responsible to him for the assets he receives. RAM GOLAM DOBEY v. AYMA BEGUM, **12 W.R. 177**. (10 W. R. 126, 2 W. R. 296, 1 Agra F.B., 72, 8 W.R. 161, *R.*) [*F.*, 26 M. 792=13 M.L.J. 258.]

(14)—*Decree—Execution—Receipt of assets—Burden of proof.*—Where execution of a decree against a deceased person is applied for against the latter's representatives, it is for the decree-holder to show that they are in receipt of assets, belonging to the deceased judgment debtor But when the receipt of such assets is admitted, the burden of proving that the assets so received are not sufficient to pay the whole judgment-debt, or were already properly paid in satisfaction of the other debts of the deceased judgment-debtor, is upon the representatives. JOOGUL KISHORE SINGH v. KALEE CHURN SINGH, **25 W.R. 224**. [*R.*, 13 M.L.J. 258=26 M 792.]

(15)—*Minor sons of deceased judgment-debtor, not made parties to proceedings in execution of the decree—Judgment debtor's widow brought on record—Natural guardian of minor sons—Suit by sons against purchaser—Sons how far bound by sale—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 210.—A decree for money had been passed against the father of the plaintiffs. After the death of the father, the decree-holder presented an application for execution of the decree, bringing on to the record, the mother of the plaintiffs as the widow and heir of the judgment-debtor. Plaintiffs, the sons and heirs of the judgment-debtor, not having been made parties to the execution proceedings, filed the present suit to recover possession of the property sold in execution and purchased by the defendant, the decree-holder. Agreeing with the Court of first instance, the High Court held that the sale was binding on the plaintiffs and dismissed their suit. The sale having taken place under the old law, its validity had to be determined by the provisions of that law. Under s. 210 of Act VIII of 1859, execution could be taken out, either against the estate of the deceased judgment-debtor or against his legal representatives, and a sale of the property of a deceased judgment debtor would be binding if the estate

Representative of deceased person—*contd.*

was sufficiently represented *quoad* such property. In this case, the widow, as the natural guardian of his infant sons, in possession of the property, was upon the record, and it was beyond doubt that it was the interest of the judgment-debtor, and not that of the widow, which was intended to be and was sold. The estate of the father of the plaintiffs having been sold in execution, they could claim to set aside the sale only by establishing that the decree was not binding on the estate in their hands, by reason of the debt covered by it not being one for which the estate could be held liable. ACHUT v. MANJU NATH, **21 B 539.** [*R.*, 24 B. 135=1 Bom. L.R. 627, 2 S.L.R. 55.]

(16)—*Contract—Breach—Liability of heirs to pay damages.*—The heirs and representatives are liable, according to equity and good conscience, to pay not merely the actual debts of the deceased, but to pay the damages which arise from breaches of contract by the deceased. DELANNEY v. MUSSUMAT BIBEE JAN, **22 W. R. 494.**

See CIV. PRO. CODE, 1908, ss. 50, 47, A.W. N. 1893, 106.

Right of, to continue proceedings initiated by defendant to set aside ex parte decree - *See* CIV. PRO. CODE, 1908, O. IX, r. 13, A.W.N. 1907, 176=4 A.L.J. 480=29 A. 574.

See CIV. PRO. CODE, 1908, O. XXI, r. 16, s. 47, 27 C. 670.

Auction purchaser is representative of judgment-debtor, not of decree-holder—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, ss. 47, 104, O. XLIII, r. 1, A.W.N. 1908, 157=5 A.L.J. 557=30 A. 379.

Deceased defendant — Substitution of — Practice—*See* DECREE — MISCELLANEOUS, 13 C.W.N. 787=3 Ind. Cas. 999.

Meaning of—Test—Who can be a—Position of infant son in joint Hindu family - *See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, 9 C.L. J. 485=1 Ind. Cas. 213.

Interest—Dispute as to succession on death of obligee—Willingness of obligor to pay sum due to person having lawful authority—Non-liability of obligor to pay further interest—*See* INTEREST—SPECIAL CASES, 1 M H.C. 124.

See JURISDICTION — QUESTION OF JURISDICTION, 8 B H C.A.C. 245.

Limitation for bringing—of a deceased person on record—*See* LIMITATION ACT, 1908, arts. 181, 175, 16 M.L.J. 475=1 M.L.T. 348=29 M. 529.

Wrong person sued as heir of a deceased person—True heir not taking steps for a long time—Effect—*See* NON-JOINDER OF PARTIES, 10 Ind. Cas. 344.

Suit for foreclosure against assignee of mortgaged property—Representatives of mortgagor —*See* PARTIES TO SUIT—GENERAL, Bourke O.C. 319.

Representative of deceased person—*concld.*

See PARTIES TO SUIT—GENERAL, Cor. 90.

Representative of deceased appellant, jurisdiction of Court to which a case has been remanded, to bring on record—Code of Civil Procedure, ss. 365 and 566—*See* REMAND, 7 O.C. 17.

Test to find out a—*Mulgani* tenure—*See* RES JUDICATA—MISCELLANEOUS, 5 M.L.T. 37.

Representative Order.

Power of the Court to make—*See* CIV. PRO. CODE, 1908, O. I, r. 8 (1), 5 Bom. L.R. 937=28 B. 209.

Representatives' Suits, Legal, Act.

See ACT XII OF 1855.

Reprieves and Pardons.

See ACT XVIII OF 1855.

Repudiation.

Deed of—executed by husband transferring wife to another subsequently revoked, effect of —*See* MARRIAGE, 31 P.R. 1908=76 P.W.R. 1908=152 P.L.R. 1908.

Reputation.

See EVIDENCE—ACCOUNTS, 9 M. 285.

Suit for damages for injury to reputation and pain of body—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 4 B.L.R. A.C. 33, N.

Re-purchase.

Pre-emption is not a right of—*See* PRE-EMPTION—MISCELLANEOUS, 5 A L.J. 112=A.W.N. 1908, 42=3 M.L.T. 223=30 A. 130.

Requests, Military Courts of, Act.

See ACT XI OF 1841.

Re-sale.

(1)—*Power of re-purchase on condition—Enforcement of said right.*—If a power to re-purchase be given upon a condition the right cannot be enforced unless the condition has been complied with. PANDIT GANGADHAR RAO v. SAMLEY, **14 C.P.L R. 166.** (14 C.P. L.R. 67, *R.*)

See ATTACHMENT — GENERAL, A.W.N. 1881, 5.

Ordered in an auction held by Court—*See* AUCTION SALE, 1 Bom. L.R. 446.

See CIV. PRO. CODE, 1908, O. XXI, r. 72, s. 73, 11 M. 356.

Indent for goods, operation of provision in, for loss arising from re-sale—*See* CONTRACT—MISCELLANEOUS, 23 M. 18.

Contract of sale—Default by purchaser in payment of price—Right of re-sale under s. 107, duty vendor exercising—Measure of damages awardable to vendor—*See* DAMAGES —MEASURE AND ASSESSMENT, 19 A. 535=A.W.N. 1897, 150.

Rescinding Circulars.

This circular rescinds certain previous Circular Orders. Civ. Cir. Or. No. 9, **24 W.R. Rules and Ors. of the H.C. p. 5.**

Recission.

Of contract—Non-completion of contract for ten months—Return of deposit—Presumption of—*See* CONTRACT ACT, 1872, s. 56, 4 A.L.J. 778=A.W.N. 1908, 5=3 M.L.T. 177.

Remedy by, when obtainable—*See* LEASE—GENERAL, 3 Ind. Cas. 316=37 C. 81=14 C.W.N. 101.

Rescission of Conveyance.

See CONVEYANCE, 5 Bom. L.R. 392.

Reservation.

(1)—*Reservation in decree.*—Where sons suing their father for declaration of right to hold their separate shares in joint-family property, third parties intervene on the strength of a mortgage over some of the property from the father, a reservation in the decree in favour of parties neither plaintiffs nor defendants is irregular. JUDOONATH SINGH v. KALEE PERSHAD, **14 W.R. 358=6 B.L.R. App. 55.**

Reserved Forest.

Constituting a—*See* ACT VII OF 1878, s. 4, 7 Bom. L.R. 496.

Residence.

See JURISDICTION — CAUSES OF JURISDICTION.

(1)—*Act* IV *of* 1872, *s.* 23—*Insolvency rules—Jurisdiction of insolvency Courts—Residence, what constitutes.*—A debtor seeking or sought to be adjudged bankrupt in pursuance of a petition under s. 23 of Act IV of 1872, must, at the time of the petition being presented, reside or carry on business within the local limits of the jurisdiction of the Insolvency Court to which the application is made, and a debtor coming to reside temporarily within those limits for the express and sole purpose of being adjudicated insolvent does not by such residence become subject to the insolvency jurisdiction of the Court. R. PARKER v. THE SIMLA BANK CORPORATION, LIMITED, **34 P.R. 1878, F.B.** (64 P.R. 1867, *R.*) [*F.*, 62 P.R 1886.]

(2)—*Insolvent Court—Residence.*—Where the insolvent is not an European British subject, he must, in order to come within the Act, either be a *bona fide* resident in Calcutta at the time he presents his petition, or a trader carrying on business in Calcutta. *In the matter of* TARINEY CHURN GOHO, **11 B.L.R. App. 26.**

(3)—*Jurisdiction—Defendant's change of residence after filing of plaint—Plaint, return of, after registration.*—If, by reason of the residence of the defendant beyond the local limits of the jurisdiction of the Court of Small Causes, the jurisdiction of the District Court attached upon him at the time of the institution of the

Residence—*continued.*

suit, such jurisdiction cannot be deemed to be altered by his change of residence after that time. A plaint becomes unreturnable to the plaintiff merely because of its having been registered. RAM GOPAL v. ASA RAM, **88 P.R. 1869.** [*R.*, 39 P.R. 1872.]

(4)—*Incorporated Company—Residence and domicile—Principal place of business.*—The residence and domicile of an incorporated trading company is its principal place of business, *i.e.*, the place where the Administrative business of the Company is conducted. TUTIKA BASAVARAJU v. PARRY AND CO., **27 M. 315.**

(5)—*Custom—Daughter's right of residence in house left by deceased father.*—By custom among the Awans of (Mouzah Daiwal), Tahsil Khushab, Shahpur district, daughters, even though married, of a deceased proprietor have a right of residence for their life-time in the house left by him. MUHAMMAD YAR v. MUSSAMUT PANAH BIBI, **72 P.R. 1880.**

(6)—*Wadhwan Cantonment in Kathiawar, plaintiff resident of, cannot be required to furnish security for costs under* s. 380, *Civ. Pro. Code.*—The plaintiff, in this case, admittedly resided at Wadhwan in Kathiawar, and happened also to own certain immoveable properties within the limits of the Cantonment of Wadhwan. The summons requiring him to give security for costs under s. 380 of the Civ. Pro. Code, was discharged on the ground that the said Cantonment must be taken to be included in "British India" and to be within the limits of British India. TRICCAM PANACHAND v. THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY, **9 B. 244.** [*Diss.*, **21 C.** 177.]

Place of—*See* CIV. PRO. CODE, 1908, s. 20, 2 Bom. L.R. 605.

Meaning of the term—*See* CIV. PRO. CODE, 1908, O. V, rr. 9, 12, 17, O. IX, r. 13, 9 Ind. Cas. 189=15 C.W.N. 399.

See FOREIGN COURT, JUDGMENT OF, **20 M.** 112=7 M.L.J. 76.

Hypothecation of house by father and son—Joint Hindu family—Decree on bond after father's death and sale in execution—Widow's right of—*See* HINDU LAW—DEBTS, A.W.N. 1887, 279.

Direction in husband's will regarding residence of widow in family house, how far binding—*See* HINDU LAW—MAINTENANCE, **14 B.** 490.

Hindu Law—Widow directed by husband to reside in family—Residence elsewhere—Right to maintenance when affected—*See* HINDU LAW—MAINTENANCE, 15 B. 236.

See HINDU LAW—MAINTENANCE, **29 C.** 557=6 C.W.N. 530, 4 B. 261.

Hindu widow—Right of residence in house belonging to husband's family—*See* HINDU LAW—WIDOW, A.W.N. 1893, 198.

Residence—*concluded.*

Hindu widow—Right of widow to reside in a house once the property of her husband—Limitation of such right—*See* HINDU LAW—WIDOW, A.W.N. 1893, 199.

Hindu widow—Right of residence in joint family house—*See* HINDU LAW—WIDOW, A.W.N. 1894, 160.

Suit against Government—Or place of business of Government—*See* JURISDICTION—CAUSES OF JURISDICTION, 1 Hyde 37.

See JURISDICTION—CAUSES OF JURISDICTION, 1 Ind. Jur. O.S. 85, Marsh 64=1 Hay 132, 29 C. 509=6 C.W.N. 829.

Right to sell right of—*See* LANDLORD AND TENANT—GENERAL, 11 Ind. Cas. 285.

Temporary, is enough to give jurisdiction to a Court—*See* LETTERS PATENT, HIGH COURT, 1865—BOMBAY, cl. 12, 3 Bom. L.R. 291=25 B. 176.

See LUNATIC, 2 B.L.R. A.C. 246=11 W.R. 109.

Suit for restitution of conjugal rights—Stipulation as to—*See* RESTITUTION OF CONJUGAL RIGHTS, 17 C. 670.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 M.H C. 304.

See ST. 11 AND 12 VIC. C. 21, s. 5, 1 B.L. R.O.C. 84.

See WILL—CONSTRUCTION, 20 C. 15.

Resistance to civil process.

See PENAL CODE, s. 186, 2 B.L.R.F.B. 21 =10 W.R. Cr. 43.

Of Small Cause Court—Jurisdiction to punish—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 2 B.L.R. A.C. 188=11 W.R. 62.

Resistance to execution of decree.

See CIV. PRO. CODE, 1908, O. XXI, rr. 97, 103.

(1)—*Act* VIII *of* 1859, *ss.* 224, 225, 227—*Lands comprised in decree, obstruction to decree-holders getting possession—Procedure.*—In course of execution of a decree, the decree-holder alleged that he was obstructed in getting possession of certain villages comprised in his decree, *held*, that it was the duty of the Court to make an enquiry under s. 227 of Act VIII of 1859 and, after such enquiry, to itself pass such order as it might deem proper under the circumstances. Where order has thus been passed for delivery over the property to the decree-holder either wholly or to any extent, possession should be given to the decree-holder under s. 224 or 225 as the case may be. The present case was consequently remanded to the Principal Sudder Ameen who was first to consider and determine whether possession was to be given under s. 224 or 225; if under the latter he must refer the decree-holder to the Collector; if, under the

Resistance to execution of decree—*continued.*

former, he should decide whether proclamation and affixing of notice were to be made in each village or otherwise, and, if necessary, he should then make the enquiry prescribed in s. 227. BROJO MOHUN SUTPUTTY v. SHOODI MONEE DABEE, **8 W R. 79.**

(2)—*Act of* VIII 1859, *s.* 229—*Resisting execution of decree—Jurisdiction.*—An application, complaining that the defendants having obtained a decree against a third party, were attempting unlawfully to interfere with plaintiff's possession was rejected by the Court of first instance. On appeal, the Judge decided that the application was entertainable under s. 229, Act VIII of 1859 and remanded the case for trial. The first Court then gave the plaintiff a decree, which the Subordinate Judge reversed on appeal. It was objected in special appeal that the proceedings were illegal. *Held* by *Jackson, J.*, that the objection was not taken too late; that the plaintiff's claim could not be made under s. 229; and that the error was one which affected the jurisdiction of the Court of first instance to take summary cognizance of the case. *Per Mitter, J.*—The objection taken for the first time on special appeal did not affect the merits of the case or the jurisdiction of the Court. BUHAL SINGH CHOWDRY v. BEHARI LAL, **1 B.L R.A.C. 206=10 W.R. 318.** [*R*, 14 A. 417=A.W.N. 1892, 51.]

(3)—*Act* VIII *of* 1859, *s.* 229—*Claimant questioning legality of decree.*—There is nothing to prevent a claimant from questioning the legality of the decree obtained by the decree holder against a judgment-debtor. MAHOMED ALI KHAN v. KALUNDAR ALI KHAN, **4 N.W.P. 81.**

(4)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *ss.* 229, 230—*Suit under s.* 230, *Nature of.*—The principle of the Full Bench Ruling reported in 13 W.R. 80 that a suit under s. 230, Act VIII of 1859, must be treated as an ordinary suit for recovery of property, and that the whole question of title between the parties ought to be gone into before it can be disposed of satisfactorily, is equally applicable to cases under s 229. MEER ABDOOR SOBHAN v. BRAHMA DEO NARAIN, **14 W.R. 140.**

(5)—*Act* VIII *of* 1859, *s.* 229—*Lakhiraj—Relinquishment by Zamindar—Possession.*—Where the right, title and interest in a decree obtained by L, the purchaser of land described as lakheraj, against F who refuses to give possession, is purchased by T, and the land is intermediately relinquished to the zamindar by F, as if it was *mal* land, and the claim is investigated under s. 229 of Act VIII of 1859, *held* that the plaintiff is entitled to be put in possession of the land, and any question as to the nature of the tenure, or as to the terms on which he should hold it, or as to whether the land is *mal* or *lakhiraj*, and whether the tenant has any permanent transferable interest therein, must be decided in a suit brought by the zamindar. TALAB HOSSEIN KHAN v. GOOROO PERSHAD ROY, **20 W.R. 57.**

Resistance to execution of decree—*continued.*

(6)—*Sale of tenure for arrears of rent—Execution of decree against tenure Limitation pleaded by purchaser not party to decree—Act* VIII *of* 1859, *ss.* 229, 230.—A purchaser of an under-tenure sold for arrears of rent is not entitled to contend, against a decree-holder seeking to execute his decree against the under-tenure, that execution of the decree was barred by limitation, as he is not a party to the suit. He can only be heard as provided by s. 229 or s. 230 of Act VIII of 1859. If the case comes within s. 229, a very wide discretion is allowed to the Court by the concluding words of that section which enable the Court to investigate the claim as if a suit for the property had been instituted by the decree-holder against the claimant, and to pass such order for *staying execution* of the decree, or *executing* the same, as it may deem proper. MOHESH CHUNDER BANERJEE v. CHUNDER MONEE DEBIA, **9 W.R. 486.** [*F.*, 16 W.R. 29.]

(7)—*Act* VIII *of* 1859, *s.* 229, *if applicable to execution taken after Act on decree passed before it.*—Where a decree has been passed before the enactment of Act VIII of 1859, but the execution of it taken out after the Act came into operation, the procedure to be followed is that prescribed by s. 229 of the Act. Under the provisions of s. 229, the objector could not be deemed to be only an intervenor but should be regarded as a substantial party to the suit maintainable under that section and therefore, from any order passed by the executing Court in favour of such person an appeal can be preferred. MAHARAJAH DHIRAJ MAHTAB CHAND BAHADOOR v. NADUROONISSA BEEBEE, **4 W.R. 82.**

(8)—*Civ. Pro. Code*, 1882, *s.* 331, *power of Court to go into questions of title on investigation under—Enquiry not limited to questions regarding possession—*Forum *of appeal from order under section.*—The intention of the Legislature in having altered s. 331 of the Code of 1877, into its form in the corresponding section as enacted in the Code of 1882 was clearly to enlarge the powers of the Courts in the investigation of claims under the section. In such an investigation it is competent to the Court, under the Code of 1882, to finally determine any question of title arising between the contending parties in connection with their right of possession, and the enquiry is not to be confined to mere possession. The order made under the section, whether for executing or staying execution, has the force of a decree determining the title as well as the right to possession, and it is not intended that the plaintiff should be driven to a fresh suit, or should have the right to bring a fresh suit if the decree is against him; since it would be vexatious to require two suits to be brought between the same parties when the real questions at issue between them might be determinable at one trial. MOULAKHAN v. GORIKHAN, **14 B. 627.** [*F.*, 27 A. 453=2 A.L.J. 132=A.W.N. 1905, 50; *R.*, 22 B. 967, 25 B. 478, 11 C.L.J. 478=5 Ind. Cas. 573; *Expl. & D.*, 27 B. 302.]

Resistance to execution of decree—*continued.*

(9)—*Decree under Act* XIV *of* 1859, *s.* 15—*Application under s.* 230, *Act* VIII *of* 1859—*Stamp.*—The defendants had obtained a decree against one U, in a suit under s. 15, Act XIV of 1859, in execution of which they dispossessed the plaintiffs of certain land. The plaintiffs who were no parties to that suit made an application under s. 230 of Act VIII of 1859 to recover possession of the land. The application did not bear the stamp necessary for the institution of the suit. It was numbered and registered as a suit between the applicants as plaintiffs and the decree-holders as defendants. *Held* that the plaintiffs were entitled to apply under s. 230 of Act VIII of 1859, the order passed by the Court in a suit under s. 15, Act XIV of 1859, being a decree, and that the application need not be stamped as for a regular suit. It is most reasonable that when a man is turned out of rightful possession under a decree of Court against another person, he should not have to pay stamp duty in order to get back his land again. BHAHMA MAYI DEBI v. BARKAT SIRDAR, **4 B.L.R. F.B. 94=12 W.R. F.B. 25.**

(10)—*Act* XIV *of* 1859, *s.* 15—*Decrees in possessory actions, s.* 230 *of Act* VIII *of* 1859 *not applicable to—Executions in regular suits.*—S. 230 of Act VIII of 1859 does not refer to decrees obtained in possessory actions but to executions in regular suits where judgments have been pronounced on the merits, and it cannot be introduced into a case determined under s. 15 of Act XIV of 1859. GOBIND CHUNDER BAGDEE v. GOBIND GHOSE MUNDUL, **7 W.R. 171.**

(11)—*Act* VIII *of* 1859, *s.* 230—*Objection of party dispossessed in execution of decree, not to be registered as suit.*—S. 230 of Act VIII of 1859 does not authorise the registry of objections of defendants, but only of persons other than defendants. The objector in the present case was however a purchaser from the defendant after the passing of the decree in favour of the special appellant, and such objector was in no better position than the defendant himself and was not therefore entitled to the benefit of the said section as a third party. HURO PERSHAD ROY CANOONGOE v. RAM LOCHUN MUNDUL, **6 W.R. 148.**

(12)—*Land taken in execution of decree, person claiming right of way over, not competent to intervene under s.* 230 *of Act* VIII *of* 1859—*Right to be established only by regular suit.*—In this suit, plaintiff sought for a declaration of his right of way over the land of the defendant who had obtained possession of it in execution of a decree. The plaintiff intervened in a previous execution case to prevent the defendant from taking possession, and the case as between them, had been tried under s. 230 of Act VIII of 1859. The High Court *held* that the plaintiff could not intervene under the section, and the proceedings in the execution case were therefore null and void. The plaintiff, if he desired to establish a right of

Resistance to execution of decree—*continued.*

way, should bring a regular suit for the purpose. NOBIN CHUNDER MOJOOMDAR v. JATADHAREE HOLDAR, **2 W.R. 289.**

(13)—*Month—British Calendar Month—Act* VIII *of* 1859, *s.* 230.—The word "month" has not been defined in the Civ. Pro. Code, but, in the Regulations which were superseded by that Code, it had always been interpreted to mean a calendar month. There is no indication that the Indian Legislature, when it passed Act VIII of 1859, intended to use the word in any other sense than that which had been generally applied to it in India, previous to the passing of the Act. The words in s. 230, "he may apply to the Court within one month from the date of such dispossession," give to the applicant a clear month, computed according to the British Calendar, exclusive of the day on which he was dispossessed, in which to make his application. DADU *Valad* ANSAR SAHEB v. BALGOUDA *Bin* SHANKARAPPA, **5 B.H.C. A.C. 39.** [*R.*, 2 B. 673.]

(14)—*Decree—Execution—Claim—Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 226, 230.—Where a decree-holder took out execution of his decree by proceeding against certain property as belonging to his judgment-debtor, and a third party presented a petition to the Court, alleging that he was in possession of that property, and that the judgment-debtor had no title thereto, an order passed by the Court that the application must remain in the Serishta, the decree-holder having given a receipt for possession, was held to amount to no order at all. *Held* further, that it was only on an application from the decree-holder under s. 226 of the Civ. Pro. Code (Act VIII of 1859) that the Court could be put in motion under that section, and that the High Court could not interfere as the third party had made no application under s. 230, although the lower Court ought to have proceeded to investigate the matter in dispute if he had made such application. *In the matter of* BIBEE MAHTAB KOOMAREE, **19 W.R. 62.**

(15)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 224, 229—*Land in occupancy of ryot—Person put in possession of such land—Interference with his proprietary acts—Whether his claim giving him new cause of action is barred by limitation.*—The provisions of s. 229, Civ. Pro. Code, Act VIII of 1859, are not applicable to the case of a person put in possession of land under a decree in the manner prescribed by s. 224, nor do those provisions bar his suit against those persons who have interfered with his proprietary acts, as such interference would constitute a new cause of action. GUNESH PERSHAD v. JYKISHUN, **1 N.W.P. 218.**

(16)—*Ameen giving possession of disputed land in execution of decree—Objection.*—Where, in execution of a decree, an Ameen was ordered to deliver possession, objections under s. 230, Act VIII of 1859, should be made within one month from the date on which the Ameen measured the lands and delivered possession to the party. KASHEENATH DOSS v. BHOWANEE DOSSEE, **W.R. 1864, Mis. 18.**

(17)—*Act* VIII *of* 1859, *s.* 230—*Personal occupation—Possession by receipt of rent.*—Possession by receipt and enjoyment of rent is as good in law as actual occupation, and there is no reason for holding that the provisions of s. 230, Act VIII of 1859, apply to those cases only in which the party seeking for relief under that section is in personal occupation. BHYRUB SIRCAR v. SHAM MANJEE, **15 W.R. 70.** [*F.*, 33 C. 487=3 C.L.J. 295; *Expl.*, 3 Bom. L.R. 58=25 B. 178; *R.*, 22 B. 967.]

(18)—*Objection under s.* 230, *Act* VIII *of* 1859.—An objector, not in possession either "on his own account" or "on account of some person other than the defendant," who intervenes as holding a *bona fide* title derived from the defendant cannot be heard under s. 230, Act VIII, of 1859. EUSUF ALI KHAN v. SHIB SHUNKUR SUHAYE, **W.R. 1864, 384.**

(19)—*Mortgage—Adverse possession—Act* VIII *of* 1859, *s.* 230.—A mortgagee's possession is not adverse to the mortgagor, and possession through a mortgagee is sufficient possession for the purpose of bringing a claim under Act VIII of 1859, s. 230. ASGUR ALI v. ASGUR ALI, **20 W.R. 373.** [*F.*, 3 C.L.J. 293=33 C. 487; *R.*, 24 W.R. 447, 3 Bom. L.R. 58=25 B. 478.]

(20)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 230—*Nature of proceedings—Right of party dispossessed to take advantage.*—A cause under s. 230 Act VIII of 1859 had to be treated in all respects as a regular suit. It could not be laid down as an absolute rule, without restriction, that a person who parted with the actual occupation of land to another might not take advantage of the section. BANEE MADHUB DUTT v. NUND LALL MOOJOOMDAR, **22 W.R. 123.** [*F.*, 33 C. 487=3 C.L.J. 293; *R.*, 25 B. 478.]

(21)—*Act* VIII *of* 1859, *s.* 230—*Dispossession—Petition for possession—Stamp—Regular plaint.*—The terms of s. 230 of Act VIII of 1859 provide that a party who shall have proved himself to have been in possession of the lands in suit, and to have been dispossessed by another party, alleging that the land formed part of land decreed to him, can come in by means of a petition, and have his case tried in like manner as if he had paid full stamp duty on a regular plaint. NEEL MADHUB DUTT v. RADHA MOHUN, **3 W.R. 205.**

(22)—*Act* VIII *of* 1859, *s.* 230, *application under—Dispossession—Cause of action—Jurisdiction.*—The conditions precedent to the success of any application or to the exercise of jurisdiction under the provisions of s. 230 of the Civ. Pro. Code are, firstly, as the law declares, that the applicant shall have been dispossessed; secondly, that he shall dispute the right to dispossess him; and, thirdly, that, on examination held, he can

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show probable cause for making the application. KALEE NARAIN SINGH v. PROTAB CHUNDER BURROOAH, **12 W.R. 231.** (8 W.R. 177, *D.*)

(23)—*Act* VIII *of* 1859, *s.* 230—*Execution—Dispossession—Procedure.*—When an application is made by a party on the ground that he was in possession, and that he has been dispossessed in execution of a decree in a suit in which he was not a party, the proper order that should be made under s. 230 of the Code in the first instance, is to examine the applicant. OBHOY CHURN DEY v. RAJENDRO COOMAR GHOSE, **16 W.R. 288.**

(24)—*Civ.Pro. Code, Act* VIII *of* 1859, *s.* 230—*Execution—Application by party dispossessed—Effect of attachment without dispossession.*—A person who is actually dispossessed of lands under colour of a decree against a third party, to which he (the person dispossessed was not a party), is entitled to an investigation of his title under s. 230, Civ. Pro. Code, and if his title is established the Court is bound to give him a decree. Where, however, the lands are merely attached by the judgment-creditor, there is no cause of action under the provisions of that section. HASSUN ALI v. NEIB AHMED, **11 W.R. 146.**

(25)—*Act* VIII *of* 1859, *s.* 230—*Execution—Dispossession under decree — Claim by third party*—Bona fides.— If there are reasonable grounds for thinking that the claim of a party complaining, under s. 230 of Act VIII of 1859, of having been dispossessed in execution of a decree to which he was not a party, is *bona fide*, it is the duty of the Court to treat the case as a regular suit between the claimant as plaintiff and the decree-holder and the judgment-debtor as defendants, the application being numbered and registered as a suit. LULEET NARAIN GOSSAMEE v. KESHUB DEB GOSSAMEE, **15 W.R. 209.**

(26)—*Execution of decree—Objection by purchaser of property—Failure of Court to proceed under s.* 230, *Civ. Pro. Code, Act* VIII *of* 1859.—The plaintiffs who had been decreed possession of some property as against some persons proceeded to execute their decree. The defendant intervened and claimed the property by right of purchase. The Court of first instance instead of proceeding under s. 230, Civ. Pro. Code, cancelled its former order which was in favour of the plaintiffs. The lower appellate Court after first refusing to entertain an appeal against such order, entertained a review of its order and admitted the appeal. *Held*, on special appeal by the defendant, that the proceedings of the lower appellate Court were void as being without jurisdiction, and that the Court of first instance ought either to have dismissed the defendant's application or to have numbered and registered it as a suit. SAHOO GOKUL PERSHAD v. MUSSUMUT ZYNUB, **1 N.W.P. 255.**

(27)—*Act* VIII *of* 1859, *s.* 230—*Objection to execution taking shape of suit— Question for determination — Possession as* dur-putneedar.

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—When an objection is preferred, and takes the shape of a suit under s. 230 of the Civ. Pro. Code (Act VIII of 1859), the question to be tried really is whether the objector has a better right to the possession of the property in dispute than the decree-holder who is executing his decree. It is quite possible that the objector should be entitled to hold as *dur-putneedar* and yet that he should not be entitled to *khas* possession. SHEERO KOOMAREE DEBIA v. KISSUB CHUNDER BOSE, **5 W.R. 224 = 1 Ind. Jur. N.S. 188.**

(28)—*Act* VIII *of* 1859, *s.* 230—*Application registered as suit—Question for decision—Possession—Title—Finality of decision.*—When an application under s. 230 of Act VIII of 1859 has been registered as a suit, the Courts are bound to investigate that suit as if it were an ordinary regular suit brought by the applicant in the Civil Court, and to try, not only the question of possession but also the question of title, and the decision is a final and complete decision both for possession and title. MUSSAMUT EHSAN KHATOON v. RAMNATH SEIN LUSHKUR, **15 W.R. 327.**

(29)—*Act* VIII *of* 1859, *s.* 230—*Dispossession—Suit for possession—Question of title.*—In a suit brought by a dispossessed person under s. 230 of Act VIII of 1859, the plaintiff must prove his possession ; and the question of title also should be enquired into. NUGENDUR CHUNDER GHOSE v. RAMCOMUL MUNDUL, **3 W.R. 213.**

(30)—*Act* VIII *of* 1859, *s.* 230—*Plurality of claimants—Proper procedure—Dispossession.*—Where a number of applications are made under s. 230, Act VIII of 1859, and several applicants claim possession of the same property, the question between each claimant and the decree-holder should be tried by itself. If the claimant was in possession, though without a good title, he cannot be dispossessed in execution of a decree against a third party to which he was no party. On the other hand, if the party against whom the decree was obtained was in possession, though without a good title, no person not in actual possession or receipt of rent can resist the execution of the decree. SARADA MAYI CHOWDRAIN v. NABIN CHANDRA ROY CHOWDHRY, **2 B.L.R. A.C. 333 = 11 W.R. 255.** (8 W.R. 477, *R.*)

(31)—*Act* VIII *of* 1859, *s.* 230, *decree under, establishing* khas *possession of* dur-*putneedar—Mokurrureedar seeking possession, to institute regular suit.*—In this application for review the applicant was the mokurrureedar and the opposite party the *dur*-putneedar. It was contended by the applicant that, as he had obtained a decree extinguishing the *dur*-mokurruree tenure, he was entitled to *khas* possession paying the rent of the mokurruree to the *dur*-putneedar. But the High Court *held* that the contention was wrong. The *dur*-putneedar had been found to be in *khas* possession which he had held for a lengthened period. He could not be ousted, and if the mokurrureedar wished to obtain *khas* possession, he must sue for

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confirmation of his title as such and for direct possession. SHERO KUMAREE DEBEE v. KESHUB CHUNDER BOSE, **8 W.R. 131.**

(32)—*Act* VIII *of* 1859, *s.* 230—*Execution—Claim—Original suit—Transfer of land from one jurisdiction to another—Duty of Court.*—In a suit under s. 230 of the Civ. Pro. Code, 1859, brought by an intervenor, the Court ought to determine all questions which arise on the intervenor's objections. It should not dismiss the decree-holder's claim and ask him to take out execution of his decree in some other Court to whose jurisdiction the villages, the possession of which is claimed under the decree, have, since the passing of the decree, been transferred. If, while the execution case was pending, the Court was deprived of jurisdiction, the Court should not dismiss the decree-holder's claim but should transfer the record to the Court to which jurisdiction is newly given. KALEE DOSS NEOGY v. HARONATH ROY CHOWDHRY, **3 W.R. 4.**

(33)—*Execution sale—Lands sold in execution of another decree—Suit by original decree-holder for possession—Putnee right.*—Where a decree-holder, who was called upon to furnish security, delayed to do so, and the lands decreed were attached and sold in execution of a decree obtained by others who purchased the property and entered on possession, and the decree-holder subsequently sued for possession and obtained a decree, *held*, that the effect of the decree was to confirm the plaintiff in the position which he occupied at the time when the property was sold in execution of his original decree. *Held*, further, that the plaintiff was not entitled to *khas* possession, if a putnee right had been proclaimed in favour of a third person at the time of the original sale. SHARADA PERSHAD MULLICK v. ROY DHUNPUT SINGH BAHADUR, **19 W.R. 219.**

(34)—*Civ. Pro. Code*, 1859, *ss.* 264, 269—*Delivery of possession—Subsequent obstruction.*—Delivery of possession is complete as soon as the steps prescribed by s. 264, Civ. Pro. Code, 1859, have been taken, and any subsequent act on the part of the claimant to the land will not be resistance or obstruction to the delivery of possession referred to in s. 269, but will be altogether a new disturbance which may very well give the auction-purchaser a cause of action against the person who commits it, but can in no way give a right to the Court to interfere in the summary way laid down in s. 269. All that is intended by s. 269 is to give power to the Court to carry out proceedings in execution to a determination, and as soon as possession is delivered in the manner prescribed by s. 264, the proceedings terminate. SYED WAJED HOSSEIN v. MOULVEE ABDOOL KADIR, **13 W.R. 418.** [*D.*, 18 W.R. 87.]

(35)—*Act* VIII *of* 1859, *s.* 269—*Suit for possession—Plaintiff not in actual possession.*—Plaintiff who had obtained an order for possession of property under an award under s. 269 of the Civ. Pro. Code, without getting actual possession of the same, sued for possession and got a modified decree, which however was given entirely in his favour on appeal to the lower appellate Court. *Held* that, in the absence of dispossession, the provisions of s. 269 of the Civ. Pro. Code, were not applicable, as they expressly refer only to cases of dispossession, and that if the plaintiff succeeded in proving the right, title and interest of his predecessor in title, then only would the defendant have to rebut that case by proving his own title. SUDARAM MAJEE v. MIRTUNJOY DEY, **12 W.R. 509.**

(36)—*Suit by auction-purchaser—Civ. Pro. Code*, *s.* 269—*Procedure.*—On attachment of a house of which the defendant was in possession, with a view to sale in execution of a decree, the defendant objected, but his objection was overruled and the rights and interests of the judgment-debtor were purchased by the plaintiff who brought a suit to recover possession of the house; *held* that it was not obligatory on the plaintiff-purchaser, when resisted in obtaining possession, to complain in the manner contemplated in s. 269. It was open to him to proceed at once by a regular suit against the person in possession of the property purchased by him. MADAREE v. BULLOO KOOEREE, **2 N.W.P. 450.**

(37)—*Act* VIII *of* 1859, *s.* 269—*Inquiry—Circumstances of the case taken into consideration.*—If a Court looks into the circumstances of a case with reference to the relative rights of the parties, and considers that under those circumstances, it is not bound to refuse to the execution-purchaser possession of what he has purchased, the Court must be deemed to have made precisely the kind of inquiry contemplated by s. 269, Act VIII of 1859. HURO PERSHAD ROY CHOWDHRY v. RAMESSUR MISSRY MAHIA, **24 W.R. 461.**

(38)—*Limitation—Civ. Pro. Code*, *s.* 269—*Summary order—Possession—Necessity for suit.*—The words "suit to establish his right" in s. 269 of the Civ. Pro. Code, mean a suit to establish his right to present possession. It is only where the summary order under s. 269 of the old Code (=s. 335 of the Code of 1882=O. XXI, r. 103 of the Code of 1908), was inconsistent with the defeated party's claim, that the latter was bound to bring a suit within one year; otherwise, not. RANGO VITHAL v. RIKHIVADAS *bin* RAYACHAND, **11 B.H.C. 174.** [*R.*, 9 B. 35, 14 B. 627, 22 B. 640.]

(39)—*Civ. Pro. Code*, 1859, *s.* 269 *&* *s.* 268—*Scope of.*—A person who does not come within one month of the date of dispossession, has under s. 269, Civ. Pro. Code, 1859, no *locus standi* in Court. The object of s. 268 was for the benefit of purchasers only, and no person has any ground to come in under the appellation of a purchaser except the party who is complained of as resisting or obstructing the purchaser in obtaining possession. HEERA LALL BANERJEE v. RAJAH BURODA KANT ROY, **13 W.R. 466.**

Resistance to execution of decree—*concluded.*

(40)—*Question* inter partes, *order of Court relating to, appealable under s.* 11 *of Act* XXIII *of* 1861—*Civ. Pro. Code, ss.* 226, 227—*Proof as to possession of land other than plaint lands.*—An order of the Court with regard to a question between the parties to the suit arising in execution of the decree is appealable by reason of its coming under s.11 of Act XXIII of 1861. In order to bring a case under ss. 226 and 227 of the Civ. Pro. Code, it is necessary to show that obstruction has been offered and that such obstruction has arisen from the circumstance that some lands of which possession was taken are not included in the plaint. PRANNATH ROY CHOWDHRY v. PREONATH ROY CHOWDHRY, **8 W.R. 398.**

Res Judicata.

1.—GENERAL.
2.—ADJUDICATIONS.
3.—CAUSE OF ACTION.
4.—COMPETENCY OF COURT.
5.—ESTOPPEL BY JUDGMENT.
6.—JUDGMENTS ON PRELIMINARY POINTS, EFFECT OF.
7.—MATTERS IN ISSUE.
8.—PARTIES.
9.—RELIEF NOT GRANTED.
10.—RES JUDICATA IN EXECUTION PROCEEDINGS.
11.—MISCELLANEOUS.

See CIV. PRO. CODE, 1908, s. 11.
See CIV. PRO. CODE, 1908, O. II, r. 2.
See ESTOPPEL—ESTOPPEL BY JUDGMENT.

——1.—General.

(1)—*Principle of — Scope.*—The application of the principle of *res judicata* discussed. KUNHUNNI v. SRIVALLABHAN, **11 M.L.J. 10, F.B.**

(2)—Res judicata *as rule of procedure*—Res judicata *if part of law of evidence.*—The principles of the law of *res judicata* as a matter of procedure, and of the law of estoppel as a matter of evidence, were in this case explained and distinguished by *Mahmood, J.* SITA RAM v. AMIR BEGAM, **8 A. 324=A.W.N. 1885, 101.**

(3)—*Civ. Pro. Code* (1908), *s.* 11—Res judicata—*Object of doctrine—Cross suits— Appeal from decision in one suit only.*—The main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants. The rule of *res judicata* is not limited to the Courts of first instance, but it applies equally to the procedure of the first and second Appellate Courts and indeed even to miscellaneous proceedings. The doctrine, so far as it relates to prohibiting the re-trial of an *issue*, refers not to the date of the commencement of the litigation, but to the time when the Judge decides the issue. (11 A. 148, 33 A. 51, 7 A L.J. 861, 7 Ind. Cas. 156, *F.*) Where

Res Judicata—continued.

——1.—General—*continued.*

there are two cross-suits and a certain issue is common to both suits and no appeal is brought against the decision in the one suit, the finding on the issue cannot be attacked in an appeal from the decision in the other suit. A decision on a point which is not substantially in issue in a suit cannot operate as *res judicata* in any later suit in which it may be substantially in issue. RAMAN CHETTY v. MUTUVEERAPPA CHETTY, **6 L.B.R. 93=5 Bur. L.T. 199=17 Ind. Cas. 850.**

(4)—*Act* VIII *of* 1859, *s.* 2—*Plea of—Requisites.*—For a successful plea of *res judicata*, under s. 2, Act VIII of 1859, three things should concur—*viz.*, the parties should be the same or their representatives; the subject-matter of the suit should be the same; and the cause of action the same. MAHARAJ SING v. MUSSAMUT BEELA KOER, **W.R. 1864, 320.**

(5)—Res judicata— *Civ. Pro. Code, s.* 13, *Expls.* I *and* II.—To assert the plea of *res judicata* successfully, a defendant must show not only that the matter in issue has been in issue in a former suit, between the same parties, in a competent Court, but also that the matter so in issue was heard *and finally decided* by the Court. A right or title, to be barred by such a plea, must, moreover, have been alleged *and denied* (Expl. I, s. 13) in the former suit, or it must have been a matter which *might and ought* (Expl. II) to have been made the ground of attack or defence in the former suit. Therefore the dismissal of a suit for pre-emption of a share of an estate on the ground of the plaintiff being in possession of the remaining share, would not bar a subsequent suit for the invalidation of the deed of sale as against the plaintiff as reversioner after the Hindu widow who executed it, where the plaintiff's right of inheritance to her deceased husband was asserted in the former suit, but not decided. SHEO RATAN SINGH v. SHEO SAHAI MISR, **6 A. 358 =A.W.N. 1884, 115.** [*R.*, 14 B. 31, 28 B. 338.]

(6 & 7)—Res judicata—*Previous suit—Claim which might and ought to have been included.*—In order to constitute a *res judicata* with regard to a plaintiff's claim, it must have been raised by a previous suit in a Court competent to entertain it, and must have been determined by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such suit, if he ever intended to avail himself of it. CHUNDER SHAKUR DEB ROY v. DOORGENDRO DEB, **3 W.R. 39.** (10 Jur. N.S. 366, *R.*) [*Expl.*, 13 W.R. 129; *R.*, 8 W.R. 175=2 Ind. Jur. N.S. 264.]

(8)—*Whether it bars any proceedings by general principle or only by special enactment—Dismissal of first application for maintenance—Whether it is a bar to second application on same facts— Where substantial justice has*

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***Res Judicata*—continued.**

—1.—General—*continued.*

been done by the lower Court—Whether High Court will interfere in revision— Civ. Pro. Code (Act XIV of 1882), s. 13, Crim. Pro. Code (Act V of 1898), s. 403.—The parties were husband and wife, living apart. The respondent applied to the Sub-Divisional Magistrate for an order for the applicant to pay an allowance for the support of their child. The Magistrate wrote "Respondent offers to maintain the complainant in a separate house, but she refuses to accept the offer. She alleges no ill-treatment. I have consequently no power to interfere. Case dismissed." This Magistrate was transferred, and the respondent subsequently applied to his successor for an order of maintenance for the child. The case was duly heard and an order made to pay Rs. 5 per month. *Held*, on appeal, that *res judicata* does not bar any proceedings by general principle but only by special enactment, as contained in s.13 of the Civ.Pro.Code, and s.403 of the Crim.Pro.Code. *Held* also that, where a Magistrate, to whom an application is made, knows or has reason to believe that a similar application on the same facts has been adjudicated on, he ought not to act on the application without considering the previous decision, but that, when he does so, he is not wrong in law, nor are his proceedings bad and void, regardless of the merits. Where the second Magistrate has done substantial justice, it is a sufficient reason for refusing to interfere in revision MAUNG PO SO v. MA KYIN MI, **14 Bur. L.R. 259.** (5 A. 224, *D.*)

(9)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11. *new Code*)—Res judicata—*Cross-appeals—Finding in appeal first heard bars trial of same issue in second.*—S. 13 of the Civ. Pro. Code, is not exhaustive on the law as to *res judicata*. The finding on an issue in an appeal first heard may be *res judicata* in an appeal between the same parties subsequently heard. Though s. 13 may not strictly apply to such a case, the general principles of *res judicata* would. RAM LAL v. CHHAB NATH, **12 A. 578=A.W.N. 1890, 184.** (11 I.A. 37=6 A. 269, *R.*) [*R.*, 16 A. 464; *D.*, 19 B. 821.]

(10)—*S.* 13, *Explns.* 2 *and* 5, (*Civ. Pro. Code*, 1882), *applicability of.*—In order to make s. 13 applicable, it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one to which Expln. 2 applies; otherwise, the explanation would be meaningless. NGA CHIT MAUNG v. NGA PO KIN, **U B.R. (1906), Civil Procedure, 46.** (24 C. 711, 20 A. 110, 24 A. 429, 16 I.A. 107 P.C., *R.*)

(11)—*S.* 13, *Civ. Pro. Code*, 1882—*Essentials of the rule of* res judicata—*"Competent jurisdiction"—"Heard and decided"—Prior decision of superior Court based on previous decision of inferior Court—Effect—Decision of Sadar Amin*—Where the earlier suit was heard and decided by a mufti Sadar Amin, the pecuniary limit

***Res Judicata*—continued.**

—1.—General—*continued.*

of whose jurisdiction would have precluded him from trying the present suit, his decision cannot operate as a bar to trying in the present suit the questions which he decided. The earlier suit should, if the decision is to be a bar to further proceedings, be tried by a Court which is competent to try the later suit. The rule is obviously enacted to save the jurisdiction of the superior Courts, to enable them to investigate questions when they arise in a suit of such value and importance that it is not entrusted to the inferior Court, even though these questions have been decided by the inferior Court in another proceeding of less value and importance—though between the same parties. S. 13 of the Code of 1882 in terms requires for the bar *a hearing* as well as a *final decision* by a Court competent to try the later suit. A decision of a superior Court in the second litigation, passed in accordance with an inferior Court's decision in a prior suit, cannot operate as *res judicata* in a third litigation which the original inferior Court would not be competent to try, by reason of the superior Court's decision in the second suit, the matter not being "heard and decided" in the second suit. The law of *res judicata* does not compel the Court trying the later suit to hold, without trial, that the decision in the earlier suit was correct; it merely estops the parties to the earlier suit and their privies from showing that it is incorrect. The Judge trying the later suit must give effect to the decision, but he is not bound to hold that it is right. VALESWARA IYER v. MUTHUKRISHNA IYER, **21 M.L.J. 57 =9 M.L.T. 288=9 Ind. Cas. 686.**

(12)—*Res judicata, essentials of.*—To conclude a plaintiff by a plea of *res judicata*, it is not sufficient to show that there was a former suit between the same parties for the same matter upon the same cause of action. It is necessary also to show that there was a decision, finally granting or withholding the relief sought. SAIKAPPA CHETTI v. RANI KULANDAPURI NACHIYAR, **3 M.H.C. 84.** [*R.*, 8 A. 282.]

(13)—*S.* 11(=*s.* 13, *Civ. Pro. Code*, 1882)—*General principles — Constructive estoppel.*—The conditions for the exclusion of jurisdiction on the ground of *res judicata*, are that the same identical matter, shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted and that it shall have been finally decided. In cases of *res judicata*, the question to be considered is not whether the previous judgment was right but whether it did or did not finally decide the matter in issue. There is no such thing known to the law as constructive estoppel, and if there were it would not satisfy the requirements of s. 13 of the Code of Civil Procedure, 1882. PARSOTAM GIR v. NARABADA GIR, **1 Bom L.R. 700=26 I.A. 175=21 A. 505, P.C.=3 C.W.N. 517=7 Sar. 538.** [*D.*, 4 Bom. L.R. 25.]

Res Judicata—continued.

——**1.—General**—*continued.*

(14)—Res judicata—Obiter dictum.—An issue which is directly and substantially raised between the parties to a suit, and has been determined, cannot be re-opened whatever the formal decree may show. In a suit for the recovery of a money-bond and of an over-payment made to the defendant, the latter preferred a counter-claim, and thus opened up the dealings and accounts between the parties. The suit as brought was dismissed, the Court finding in favour of the counter-claim. *Held* in a subsequent suit for the recovery of the bond on payment of the counter-claim found due, that the defendant cannot claim to re-open the accounts. *Held* also that the remarks of a Division Bench of the High Court in the previous suit (the finding on the accounts having become final) to the effect that when the matter comes up again, the accounts between the parties must be taken again, were mere *obiter dicta* and cannot enable the defendant to re-open the accounts. MOHAN LAL v. RAM DIAL. **2 A. 843, F.B.** [*R.*, 7 A. 606, F.B. =A.W.N. 1885, 89=17 A. 174.]

(15)—Res judicata, *principle of—Civ. Pro. Code*, s. 13.—The material point for deciding whether a matter is *res judicata* is, whether it was directly and substantially in issue between the same parties in a previous suit and was finally decided therein. If the issue had been clearly raised between the several parties to the suit and was adjudicated upon, it matters not that the parties were marshalled in the one case differently from the other. BISSORUP GOSSAMY v. GORACHAND GOSSAMY, **9 C. 120.** (3 C. 146, *F.*) [*F.*, 2 C.P.L.R. 52; *Overruled*, 12 C. 580, F.B.; *Diss.*, 6 C.P.L.R. 87.]

(16)—Res judicata—*Point not directly and substantially in issue—First suit to declare the land was exclusive property of plaintiff and not* shamlat—*Second suit for possession on the ground defendants are not* khewatdars.—*Held*, that a point not directly and substantially in issue in the previous case is not *res judicata* in a subsequent suit relating to the same property between the same parties, particularly when it was neither put in issue nor decided in the former suit. On the first occasion, the plaintiffs, at the time of partition of *shamlat* land, sued for declaration that certain land was their exclusive property and not *shamlat*, and, therefore, was not liable for partition. Three of the defendants had pleaded that the land was *shamlat* and as *khewatdars* they were entitled to get its share. It was then decided that the land was *shamlat* and consequently the plaintiffs' suit was dismissed. But the question whether the defendants were *khewatdars* in the village was not touched. After partition, the same persons who were plaintiffs on the previous occasion sued for recovering the land allotted to defendants, on the ground that they were not *khewatdars* and consequently they were not entitled to get a share therein. The

Res Judicata—continued.

——**1.—General**—*continued.*

question for decision now is whether defendants are *khewatdars*. *Held* that the present suit was not *res judicata*. JAN KHAN v. AHMAD, **24 P.W.R. 1912=134 P.L.R. 1912=13 Ind. Cas. 445.**

(17)—*Rent suit—Plea of title of third party—Defendant claiming title in himself adversely to plaintiff—Test of* res judicata, *what is—Civil Procedure Code* (*Act* XIV *of* 1882), s. 13.—When the title of a third party is pleaded by the defendant in a rent suit and that third party is not a party to the suit, the question of title is not *res judicata*. When, however, the defendant in a rent suit claims a title in himself adversely to the plaintiff and there is no question as to the controversy in the subsequent title suit, being between the same parties, the matter is not quite free from difficulty (15 C. 756, 25 C. 136, 11 C. 301, 6 C.W.N. 66, 10 C.W.N. 820, 9 C.L.J. 493, 4 Ind. Cas. 175, *R.*) The test of *res judicata* in cases of this kind is whether issue of title was directly and substantially raised in the rent suit. The plaintiff brought a rent suit, and the defendant denied that the lands were *mal* lands of the plaintiff and asserted that they were his *lakheraj*. The Court held that the lands were not the *mal* lands of the plaintiff but the *lakheraj* of the defendant, and that no relationship of landlord and tenant was made out, and the suit was dismissed. The plaintiff brought a title suit for a declaration of his *mal* rights and for eviction of the defendant for having denied the title of plaintiff: *Held*, that the question whether the land was the *mal* land of the plaintiff was *res judicata* and the suit must fail on this ground. As soon as the relationship of landlord and tenant is found to be wanting, the defendant become a trespasser and the provisions of the Bengal Tenancy Act are no longer applicable. RAM CHANDRA ROY v. GIRISH CHANDRA, **7 Ind. Cas. 15.**

(18)—*Suit for rent for one Fasli—Objection by defendant as to extent—Suit for rent for subsequent Fasli—Principle—Certainty.*— A tenant is entitled to have the question of the real extent of land in his possession during the respective Faslis, ascertained and determined; and this would have to be done even if in the previous suit it had been found as a fact that the tenant was in possession of the whole extent alleged in the plaint, for, such a finding relating as it did to the occupancy during the Faslis then in question could not of course affect the matter of possession in any succeeding year.—It is undoubtedly settled law that a judgment of a Court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any *uncertainty* (for certainty is an essential element of estoppel) on

Res Judicata—continued.

—1.—General—*continued.*

this head in the record, the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined (*Russel* v. *Place*, 94 U.S. 606, *R.*). Where the first Court based its decision upon one ground and the second Court upon different and inconsistent grounds, and the third Court simply affirmed the decision of both the Courts, the decision was uncertain and it would be impossible to say what was exactly decided. VYTHILINGA MUDALIAR v RAMACHANDRA NAICKAR, **14 M L.J. 379.** [*R.*, 15 M.L.J. 7.]

(19)—Res judicata—*Absence of issue.*—The decision in a previous suit that certain alienations were not binding on the plaintiff will not constitute the question, *e.g.*, whether such alienations were *bogus* transactions, *res judicata* in a subsequent suit between the plaintiff and the alienee. A mere assertion by the plaintiff in the former suit that the transfers were nominal cannot, in the absence of an issue on that point, be treated as evidence on that question. RAYI KRISHNAYYA v. GANGA BAI, **M.W.N. 1912, 380=15 Ind. Cas. 357.**

(20)—*Civ. Pro. Code*, s. 13—Res judicata.—It is necessary, in order to consider whether a case comes within s. 13, Civ. Pro. Code, to look, not only at the previous decree which is set up as a bar to a subsequent claim, but to see what were the questions raised, or what might or ought to have been raised by the parties, which, if raised, the Judge would necessarily be presumed to have decided affirmatively or negatively in order to justify the decree made by him. To do this it would be necessary to look at the pleadings and the judgment. CHAMPA KUAR v. MINA MAL, **A.W.N. 1887, 1.**

(21)—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 11—Res judicata, *basis of—Identity of title, not identity of subject-matter.*—It is the identity of title, and not the identity of subject-matter of the suit, on which the doctrine of *res judicata* is based (24 A. 112, *F.*; 17 A. 174, *D.*) The lands in dispute in the previous and subsequent suits were parts of the same area. In the previous suit, the plaintiff had claimed the ownership of the part then in dispute, on the basis of a sale certificate in his favour. The Court gave him a decree for possession of that part, holding that he was the owner in possession of the whole area comprised in the sale certificate. Without such a finding, a decree for possession of the then disputed part could not have been given to the plaintiff. *Held*, in the subsequent suit relating to the remaining portion of the same area, that, as the decision as to the ownership of the entire area covered by the sale certificate was material and essential in the previous suit, that decision operated as *res judicata* as regards the plaintiff's title to the part of the area in

Res Judicata—continued.

—1.—General—*continued.*

dispute in the subsequent suit. PANDIT RAM KRISHNA v. SHIAM CHAND, **5 Ind. Cas. 278.**

(22)—Res judicata, *principle of—Applicability under the Civ. Pro. Code of* 1859 *and* 1877—Res judicata, *examples of case not constituting—"Concurrent Jurisdiction," meaning of.*—The proposition, that the decision in a suit, in order to be final and conclusive, as *res judicata*, upon an issue raised in another suit, must be the decision of a Court, which would have had jurisdiction to decide the question raised in the subsequent suit, in which the prior decision is given in evidence as conclusive, [which was stated in 8 W.R. 175, F. B., and affirmed in 9 C. 439 P. C.=9 I.A. 197] is applicable equally to cases under s. 2 of the Civ. Pro. Code of 1859 and to those under the more complete s. 13 of the Code of 1877. [*F.*, 14 M.L.J. 281, 12 C.W.N. 359=35 C. 353=7 C.L.J. 470; *R.*, 12 A. 1, F.B., 23 C. 693, 5 C.L.J. 611=36 C. 193.] "Concurrent jurisdiction" means "Concurrent as regards pecuniary limit as well as the subject matter." [*F.*, 23 C. 415, 3 C.W.N. 202, 170 P.L.R. 1901=68 P.R. 1901, 29 M. 65; *R.*, 9 B. 75, 14 B. 206, 18 A. 59, 25 C. 571, 24 B. 456.] Where the issue in a suit (in a Sub-Court) by a Hindu, for the recovery of property against his deceased brother's widow, on the ground of survivorship, was whether, at the brother's death, the property was joint or separate, *held*, neither an order under Act XXVII of 1860 granting a certificate to the widow (the proceeding being one of representation and not otherwise of title), nor a decision of the same issue in a Munsiff's Court in a rent suit by the widow, the brother having been made a defendant therein on his own application under s. 73 of the Code of 1859, would constitute it *res judicata* in the widow's favour. (1 C. 144, P.C. =2 I.A. 283, *Followed.*) [*F.*, 9 C. L. J. 493.] Where a decree was based, not upon certain findings, but in spite of them, those findings could not be subsequently held to be conclusive against a party. RUN BAHADUR SINGH v. LUCHEO KOER, **11 C. 301, P.C.=12 I.A. 23=4 Sar. 602.** (*On appeal from* **6 C. 406**). [*F.*, 7 C.P.L R. 139, 24 C. 569, 5 C.W.N. 80=28 C. 122; *Appl.*, 10 C.W.N. 820; *Rel. on.*, 18 C. 647; *Cons.*, 25 C. 136; *R.*, 13 C. 17, 14 B. 206, 18 B. 597, 17 A. 174=15 A.W.N. 47, 11 C.P.L.R. 150, 24 C. 900, 24 C. 908, F.B., 19 A.W.N. 182, 9 C.W.N. 60, 7 O.C. 122, 56 P.R. 1904=84 P.L.R. 1904.]

(23)—*Res judicata—Law under the successive Codes* (1877 *and* 1882)—*S.* 13, *Expl.* 2, *Act* XIV *of* 1882, *Civ. Pro. Code—Dissimilar matters—Grounds of attack or defence—"Ought" in Expl.* 2, *s.* 13, *construction of—Arrangement between widow and reversioner—Suit by creditor against reversioner.*—The Acts of 1877 and 1882 (Civ. Pro. Code), were not introducing any new law, but were only putting into the form of a Code that which was the state of law at the time. The state of the law at the time was that persons should not be harrassed by

Res Judicata —continued.

——**1.—General** —*continued.*

continuous litigation about the same subject-matter. [*Expl.*, 13 M.L.J. 439; *R.*, 25 M. 300, F.B., 26 M. 760=13 M.L.J. 448.] Dissimilar matters, if their union does not lead to confusion, "ought to be united as grounds of attack or defence," but not otherwise. The question whether any matter ought to have been made a ground of attack or defence in a prior suit depends upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important. A widow purporting to charge land held for her widow's estate, with payment of debt, surrendered afterwards her estate to the next heir, or reversioner, on condition of his paying all her debts, and a creditor after the widow's death, brought the present suit (which had been preceded by another suit, brought by him against the widow then alive, and the reversioner, the cause of action against the latter being that in his hands was the property chargeable, which was dismissed as against him, but decreed against the widow), in which payment was claimed from the reversioner of a balance of the deceased widow's debt, on the ground that he had agreed on taking the surrender of the estate from her to become responsible for her debts:—*held*, that this "might and ought to have been made ground of attack" in the former suit, within Expl. 2, s. 13, Civ. Pro. Code, 1882, and must accordingly be deemed to have been directly and substantially in issue in the former suit, and therefore that the subsequent suit was barred. KAMESWER PARSHAD v. RAJ KUMARI RUTTAN KOER, **20 C. 79, P.C.=19 I.A. 234 =6 Sar. 241.** [*F.*, 26 M. 645; *Expl*, 25 B. 189, 26 M. 760=13 M.L.J. 448, 13 M.L.J. 439; *R.*, 21 M. 91, 19 A. 517=17 A.W.N. 143, 20 A. 81, 20 A. 516=18 A.W.N. 134, 26 B. 661, 31 C. 79; *R.*, 25 M. 300, F.B., 27 M. 102, 6 Bom. L.R. 594, 27 A. 37, P.C., 2 N.L.R. 94, 5 C.L.J. 611=36 C. 193, 4 A.L.J. 675= A.W.N. 1907, 275, 12 C.W.N. 292, 35 C. 979= 12 C.W.N. 862=8 C.L.J. 82; *D.*, 24 C. 83, 7 M.L.J. 288, 1 C.L. J. 248, 337, 55 P.R. 1907= 96 P.W.R. 1907= 65 P.L.R. 1908.]

(24)—*Act* VIII *of* 1859, *s.* 7 — *Scope.*—The bar, under s. 7 of Act VIII of 1859, applies to cases in which the plaintiff omits to seek relief in respect of a portion of a claim, and not to cases in which, though he may be entitled to claim more than one kind of relief, he seeks, for the time, one remedy only. Where the purchaser of certain lands, who was in a position to have sued for possession, sued at first only for a declaration of his title under the sale, *held*, in a subsequent suit by him for possession, that he was not barred. TULSI RAM v. GANGA RAM, **1 A. 252.** [*Appr.*, 8 C. 483, F.B.]

(25)—*Conflicting decisions.*—Where there are conflicting decisions regarding the subject-matter in dispute between the parties to the suit or their predecessors in interest, the latest of those decisions would override the earlier decisions and operate as *res judicata.* MALLU MAL v. JHAMMAN LALL, **1 A.L.J. 416.**

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——**1.—General**—*continued.*

(26)—*Civ. Pro. Code* (V *of* 1908), *s.* 11—Res judicata—*Findings on two issues of facts—Decision of issue which should have been first found.*—If there are two findings of fact either of which would justify in law the making of a decree, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata.* JIVA RAM v. KALYAN, **8 A.L.J. 409.** (17 A. 174, *F.*).

(27)—Res judicata—*Issue not material—Finding in prior suit—Subsequent suit—No bar.*—A finding in a former suit, on a question not material to the decision of that suit, cannot operate as *res-judicata* and bar a subsequent suit. VASUDEVA MULLAYA v. THATHADI NARANAPPAYYA, **9 M L.T. 450=9 Ind. Cas. 787.**

(28)—*Court's power to dismiss suit at any stage on point of jurisdiction.*—As a general rule, a Court cannot set aside any order passed by it of its own motion, but this rule does not apply to matters involving questions of jurisdiction, limitation, *res judicata*, etc., which take away jurisdiction. RANCHOD MORAR v. BEZANJI EDULJI, **20 B. 86.**

(29)—Res judicata—*Re-opening point already decided—Collusion.*—The only possible ground on which a matter which has already been litigated out may be re-opened is that the first suit had been entirely mismanaged and had in fact been brought in collusion. NUGENDRO NATH MULLICK v. TRIPOORA CHURN BOSE, **24 W.R. 217.**

(30)—Res judicata—*Defence to plea of* res judicata *that the prior decree was obtained through fraud and collusion—Guardian and minor.*—A plaintiff, to meet a plea of *res judicata* raised by the defendants, pleaded that the previous decree relied upon by the defendants, which had been made on an award in the course of a suit in which the plaintiff, then a minor, had been represented by his mother, as guardian appointed by the Court, had been obtained fraudulently and was not binding on him. *Held*, that the specific fraud attributed must be alleged and proved, and that such fraud must be fraud on both sides, *i. e.*, on the part of the guardian and on the part of the present plaintiffs, then opponents. Mere negligence on the part of the guardian in protecting the minor's interests would not be sufficient to prevent the decree being binding on the minor. DAULAT SINGH v. RAGHUBIR SINGH, **A.W.N. 1894, 141.** [*Expl.*, 23 A. 459; *R.*, 10 O.C. 321.]

Res Judicata—continued.

——1.—General—*continued.*

(31)—*Ss.* 13 *and* 43—*Applicability of sections.*—S. 13 of the Civ. Pro. Code, 1882, applies only if the parties are the same, and s. 43 if the claims arise out of the same cause of action. PURSHOTTAM v. ATMARAM, **1 Bom. L. R. 76 =23 B 597.** [*R.*, 19 M.L.J. 102.]

(32)—*Withdrawal of suit—Former suit—Withdrawal.*—S. 13 of the Code of Civil Procedure does not apply where the former suit is withdrawn. DURDUNDYAPA v. MALHAR, **2 Bom. L. R. 871.**

(33)—Res judicata—*Plea not raised in lower Court—Whether can be raised in Court of revision.*—The fact that the plaintiff did not set up the plea of *res judicata* in the lower Court does not preclude him from raising it in the Court of revision. SRIRAJAH VELUGOTI GOVINDA KRISHNA VACHENDRALUVARU BAHADUR, ZEMINDAR GARU OF VENKATAGIRI v. VADLAPUDI CHINNA VENKANNA, **7 M. L. T. 175=5 Ind. Cas. 925.** (4 A. 69, *F.*)

(34)—Res judicata—*Practice—Second appeal.*—A plea of *res judicata* may be taken orally in second appeal, even though it is not entered on the memorandum of appeal, inasmuch as such a plea involves a question of jurisdiction which a Court is bound to entertain whenever such question comes to its notice. BRIJBASI RAI v. SHIVATAHLU RAI, **A.W.N. 1891, 10.**

(35)—*Second appeal—Change of defence—Plea taken in second appeal which was repudiated in lower Courts.*—A plea of *res judicata* on account of a consent-decree passed in a previous suit between the representatives of both the parties, could not be raised in second appeal, where the appellant had, in the lower Courts, impugned such previous decree as fraudulent and collusive. KHAIRAT ALI v. KISHEN, **A.W. N. 1881, 117.**

(36)—Res judicata—*Plea raised first in second appeal—Court not bound to entertain plea if further findings of facts necessary.*—The plea of *res judicata* may be raised for the first time in second appeal. (4 A. 69, A.W.N. 1898, 104, *R.*) But, the Court is not bound to entertain the plea, when it cannot be considered and determined upon the record as it stands and renders it necessary to remand the case for further findings of fact. KANAHAI LAL v. SURAJ KUNWAR, **21 A. 446=A.W.N. 1899, 164.**

(37)—*Practice—Appeal—Allowance of ground of appeal not taken in lower Courts*—Res judicata.—In this appeal, the High Court allowed to be argued before it a ground of appeal raising a question of *res judicata* which had not been raised in either of the Courts below, and referred issues to the lower appellate Court to ascertain if such plea were well-founded. TEK NARAIN RAI v. DHONDH BAHDUR RAI, **A.W.N. 1898, 104.** (4 A. 69, *R.*) [*R.*, 21 A 446.]

(38)—*No demurrer by parties—Duty of Court.*—When parties themselves do not demur to an action, it may be presumed that there is no ground for one, and it is not for the Court to raise or determine on grounds not appearing in the statement of the parties before it. KISHEN MOHUN NEOGEE v. KALEE DASS NEOGEE, **W.R. 1864, 281.**

(39)—*Civ. Pro. Code, ss.* 13, *Expl.* II *and* 42—*Suit by reversioner on one degree of relationship—Dismissal of suit—Subsequent suit for same relief on another kind of relationship—Subsequent suit, whether barred—Reversioner to state all kinds of relationship in one suit.*—The plaintiff claimed certain properties as the reversionary heir of one M, basing that claim on the allegation that his father was taken in adoption as a son by M's divided brother. His claim was unsuccessful in the Court of first appeal, and in second appeal to the High Court, he asked permission to allege and prove a different claim as heir to M on another ground, that is to say, as being the grandson of M's sister. The High Court refused permission to do so in that suit and he now sought to do so by this separate suit:—*Held* that, as a plaintiff, who sued as reversioner, was bound by s. 42 to frame a suit in such a manner as to afford ground for a final decision as to his claim as reversioner and to prevent further litigation concerning it and as, in a suit to establish a claim as reversioner, that claim should be held to be the subject in dispute within the meaning of the section, the plaintiff in the former suit ought to have relied upon his descent from M's sister as well as upon the adoption, so that, if proof of the adoption failed, he might still establish his right as reversioner on the ground of this descent and prevent further litigation regarding it, and that, therefore, his subsequent suit was barred. MASILAMANIA PILLAI v. THIRUVENGADAM PILLAI, **31 M. 385.** (26 M. 760 and 29 M. 153, *F.*; 3 M.H.C. 320, 7 M.H.C. 160, 11 B.L.R. 158, 2 C. 152, 20 C. 79, 25 C. 189, 22 C. 259, 27 M. 102, *R.*) [*R.*, 12 O.C. 347.]

(40)—*S.* 13, *Civ. Pro. Code*, 1882—*Decree without direction for sale of property—Orders for sale obtained in execution—Estoppel.*—On applications by a decree-holder for sale in execution of his decree, a sale had been ordered in spite of the defendants' objections that the decree did not contain any direction for sale. *Held*, that the above orders, construing the decree as allowing a sale, estop the defendant from subsequently raising any contention inconsistent with those orders. ATMAKURU NARASAMMA v. ATMAKURU VENKATA NARASAYYA CHETTY, **15 M.L.J. 418.**

(41)—*S.* 13, *Civ. Pro. Code*, 1882—Res judicata—*Previous erroneous decision, no bar.*—Suit for rent. Plaintiff claimed interest on the arrears of rent at 24 *per cent. per annum* on the basis of a stipulation in the *kabuliyat* executed by defendants, permanent-tenure-holders. The defence was that interest was not allowable

Res Judicata—continued.

——1.—General—*continued.*

at the rate claimed. They relied on a previous decision between the same parties, under which it had been decided that interest at 24 *per cent. per annum* was not allowable. That decision proceeded on a decision of the High Court in 3 C.W.N. 36=26 C. 130, which has since been overruled by a Full Bench decision in 5 C.W.N. 438=29 C. 674, which rules that s. 67 of the Bengal Tenancy Act does not control s.179, and that a contract for the higher rate of interest is enforcible. *Held*, the erroneous decision in the previous suit did not operate as *res judicata* and the plaintiff was entitled to claim interest at 24 *per cent. per annum*, the fact that the previous erroneous decision was altered not by statute but by judicial decision not making any difference. ALIMUNISSA CHOWDHRANI v. SHYAMA CHARAN ROY, **9 C.W.N. 466=32 C. 749=1 C.L.J. 176.** [*R.*, 9 O. C. 243, 30 M. 461 =17 M.L.J. 250, 44 P.R. 1908.]

(42) — *General principles of — Civ. Pro. Code (Act* XIV *of* 1882)—*Ss.* 244, 276—*Re-opening questions already decided, if allowable.* —Where a question has been tried and determined under s. 244, Civ. Pro. Code, it cannot be re-opened under s. 276, merely because the assignee from the judgment-debtor has been made a party. It is *res judicata*. The decision is binding not because of s. 13, Civ. Pro. Code, but under general principles of law. UMESH CHANDRA SINGH v. MADHU SUDAN KHAMKAT, **9 C.L J. 356=4 Ind. Cas.119.** (6 A. 269, *F.*)

(43)—*Compromise in previous suit—Subsequent litigation containing partly untenable claim—Effect—Evasion of bar of* res judicata—*Finality of previous decision—Appeal to Privy Council—Valuation of claim.*—The valuation in the previous suit was less than Rs.10,000, and it was decided therein that a certain compromise between the parties was valid and binding. In the present suit between the same parties, the plaintiff inserted an untenable claim and thereby raised the valuation of the suit above Rs. 10,000, and also argued that the decision in the previous suit regarding the validity and binding character of the compromise did not bar the trial of the issue again in the present suit. *Held*, that the decision in the previous suit is final between the parties. VENKATA NARASIMHA APPA RAO v. NARASIMHA CHARYULU, **9 M.L.T. 89.**

(44)—*Civ. Pro. Code, Act* X *of* 1877, *ss.* 13 *and* 43—*Dismissal of previous suit, when and to what extent operates as bar by* res judicata *to maintenance of another suit—Splitting of claims.*—B, father of the plaintiff, who was the mafidar of a village, had entered into private arrangement with his brother, the grandfather of the present defendant, whereby, in consideration of the brother assisting him in collecting the produce in kind from the proprietors, he was to be allowed a half-share of whatever remained from the proceeds of the sale of the produce, after deducting the Government revenue on the resumed portion of the mafi and the mafidar's own dues. In pursuance of the above arrangement, the produce had been stored, preparatory to division, but before any division was effected, the brothers died. Disputes then arose between their descendants, and the present plaintiff filed a suit in 1879, against the defendant ignoring the former agreement between his father and uncle and claiming possession of the entire grain. In that suit, the Court found that money was due to the plaintiff for the Government and mafidar's shares of the revenue but, as it was not clear whether any portion of such sum had already been paid by the defendant's grandfather, or what was the state of the accounts between the parties, it left it open to the plaintiff to bring a separate suit for this item. The plaintiff instituted the present suit for the revenue of certain harvests. The question was whether the present suit was barred with reference to the provisions of s. 13 and s. 43 of Act X of 1877, and it was held that though the decision in question must undoubtedly be held to be a *res judicata* controlling the right of the parties it cannot *per se* operate as a bar under s. 13 of the Code to the maintenance of another suit by the same plaintiff to enforce the said agreement. Nor again, as the plaintiff did not claim in his first plaint any relief with respect to the revenue and mafi charges, could the dismissal of his suit be deemed to be a refusal by the Court to grant any relief with respect thereto, within the meaning of Expl. III of s. 13. As to whether the present suit was barred under s. 43 of Act X of 1877, as amended by Act XXI of 1879, it was held that what the plaintiff claimed in the previous suit and what the defendant refused was the right to take possession of the entire quantity of grain. Such refusal on the part of the defendant did not create any infraction of the rights of the plaintiff under the terms of the agreement, and, had the plaintiff then sued upon the agreement, the defendant could have successfully pleaded that the suit was premature. The dismissal of the previous suit could not, therefore, be held to debar the plaintiff from subsequently suing to recover the revenue, when the defendant, by taking possession of his own half-share, of the produce without paying the revenue, or by refusing to permit the gross produce to be sold, committed a breach of the agreement whereby the plaintiff acquired a cause of action which was not in existence when the first suit was filed. The facts alleged in the second suit constituted a different cause of action from that which gave rise to the previous suit. The revenue for which the plaintiff subsequently sued did not become payable by the defendant till at least the defendant got possession of his half of the grain, for it was out of it that it had to be paid, and further it did not become payable till the whole of the grain was sold by the parties. The fact that the former suit was brought was therefore held to be no bar to the maintenance of the present suit, either under s. 13 or s. 43 of the

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——1.—General—*continued.*

Civ. Pro. Code. SODHI HARNAM SINGH v. SODHI SUNDER SINGH, **168 P.R. 1882.** (24 P.R. 1882, 90 P.R. 1881, *R.*)

(45)—*Property subject of previous suit in Supreme Court—Plaintiff intervening by petition—Nature of order obtained not clear—Subsequent suit on same property—General demurrer as to* res judicata.—Case where the Judicial Committee allowed to be raised a general demurrer, on the ground of the subject-matter of the suit being *res judicata*, against a suit brought in the Supreme Court of *Bombay*, by a party claiming certain property, which had been the subject of a previous suit in the same Court, in which the plaintiff had intervened by petition, and obtained some order, the nature or effect of which was neither stated, nor was apparent upon the record then before the Court. MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZO ALLY MAHOMED SHOOSTRY, **5 M.I.A. 187=7 Moo. P.C. 382=1 Sar. 416.**

(46)—*Declaratory suit—Suit for possession—Appeals*—Res judicata.—During the pendency of a suit for a declaration that the alienation by a sonless proprietor would not affect the plaintiff's reversionary interest, the said proprietor died and the plaintiffs brought a suit for possession. In both suits, the plaintiffs got a decree for some of the properties and, on appeal from both heard on the same date, it was confirmed. The plaintiffs appealed from the judgment in the possessory suit. *Held*, that the hearing of the appeal was barred by plaintiffs' omission to appeal from the decree in the declaratory suit. NUR MUHAMMAD v. JAMUN, **153 P.R. 1890.**

(47)—Res judicata—*Suit to enforce a document—Decision relating to the document in a former suit between the parties.*—Where the suit was brought to enforce a document, which was held in a former suit to have no effectual binding power over the estate in question and not to affect it in any way as between the parties, *held*, that the suit was barred by the rule of *res judicata*. DURGA PRASAD LAHIRI CHOWDHURI v. SRIMATI SASHIBALA DEBI, **M.W.N. 1912, 73, P.C.=9 A.L.J. 165=15 C.L.J. 180=14 Bom. L.R. 177=16 C.W.N. 603=14 Ind. Cas. 463.**

(48)—Res judicata—*Appeal against only one out of two decrees.*—Where there have been two decrees passed by the Lower Appellate Court, and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks, but a second appeal is filed against one decree only, *held*, that the decision, which has been allowed to become final, operates as *res judicata* in respect of the second appeal. WALIULLAH v. EZAZ ALI, **15 O.C. 22=13 Ind. Cas. 984.**

(49)—Res judicata—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 158—*Dismissal of suit under this section, effect of—Gift of land out of holding to absentee relation—Whether* shamilat *included—Intention of parties—Status of full proprietor.*—The dismissal of a suit under s. 158 of the old Civ. Pro. Code, operates as *res judicata* in respect of the right of the plaintiff to recover by any subsequent suit the property sued for in the first suit. The ancestors of the plaintiffs and defendants originally owned a joint holding in equal shares. The plaintiff's branch, however, remained absentees for a long time. Their suit to recover their half share of the holding and of *shamilat* was dismissed in 1891. In 1897 defendants voluntarily gifted about 29 bighas to the plaintiffs out of the original holding. This area constituted about 1/5 share of the whole holding. On subsequent partition of the *shamilat* land, the area falling to the share of the holding was allotted to defendants without giving plaintiffs, any share. Plaintiffs thereupon sued for possession of one-half share of the *shamilat* area allotted to defendants. *Held* (1), that plaintiffs were not entitled to one-half share, as their suit for the *shamilat* was dismissed in 1891; (2) that, in considering whether the gift to plaintiffs in 1897 included the corresponding share of *shamilat*, what the Court had to look to was the intention of the parties, and as the mutation proceedings showed that plaintiffs were restored to the position of full proprietors in respect of 1/5 share in the holding, they were entitled to 1/5 share in the *shamilat* allotted to the holding. MUHAMMAD v. MUSSAMMAT IMAM KHATUN, **25 P.L.R. 1912=37 P.W.R. 1912.** (113 P.R. 1901, 34 P.L.R. 1902, *D.*)

(50)—Res judicata—*Question of law, Decision on—Suit for possession of income of temple.*—On the 9th January 1894, the plaintiff obtained a decree against the defendant for possession of a share of the income of a temple as mortgagee. Subsequently the plaintiff by the action of the defendant lost such possession as he had obtained under his decree. He then brought a suit in which he claimed possession of the same share alleging that there was still due to him a certain sum on his mortgage. The first Court decreed the claim. The Court of first appeal held that the question, whether the plaintiff was entitled to possession as against the defendant being a question of law, was not *res judicata* under the previous decree. *Held*, that the question was *res judicata*. The previous decree obtained by the plaintiff although passed *ex parte* was yet none the less final on that account and distinctly showed that the plaintiff was held to be entitled to possession of the share in dispute as mortgagee. It did not signify whether, in law, the decision embodied in the decree was right or was wrong. MANNI LAL v. BHAGWAN DAS, **5 O.C. 181.** [*R.*, 9 O.C. 243.]

(51)—*Civ. Pro. Code*, 1882, *ss.* 13, 206—*Decree not in accordance with judgment—Clerical mistake—Application to bring decree into conformity with judgment—Dismissal of application—Subsequent suit for declaration of the*

Res Judicata—continued.

——1.—General—*continued.*

mistake whether maintainable.—The plaintiff sued for a declaration that he was entitled to certain lands, which were in the defendants' possession as the result of a clerical mistake in a decree in a previous suit to which he was a party. A previous application in that suit to bring the decree into conformity with the judgment was rejected by the District Judge which order was confirmed by the High Court in revision. *Held*, that, as the said order was an adjudication on the very question which was raised in the present suit, the suit was barred as *res judicata*. THAMBALLA VEERAMMA v. THAMBALLA PALUR SUBBAMMA, **5 Ind. Cas. 119=7 M.L.T. 266.** (8 C-W.N. 473, *D.*)

(52)—*Determination of validity of assignment after notice to parties bars fresh enquiry.*—The question as to whether an assignment ought to be recognised or not was previously determined after notice duly served upon the appellant, who did not choose to appear in that proceeding where he could have taken the objection. *Held* that the question was *res judicata.* APPASAMI IYENGAR v. SUNDARAM IYENGAR, **7 M.L.T. 224=6 Ind. Cas. 286.**

(53)—*Applicability of the rule of—Competence of the Court of first instance regulates its application—Commencement of litigation not material for operation of rule.*—The rule of *res judicata*, so far as it relates to the retrial of an issue, refers not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue. It is the competency of the Court of first instance to entertain the former as well as the subsequent suit that regulates the application of the rule of *res judicata*. Where, therefore, a lessor brought a suit against his lessee for recovery of rent in respect of a period during which the lessee was out of possession, and the lessee subsequently brought a suit for compensation in respect of the same period, the suit of the lessee being decreed, *held* that the decree in the latter suit, having become final, operated as *res judicata*, irrespective of the facts that the suit was subsequent in date and that the appeal in the former lay to the Civil Court and in the latter to the Commissioner. BENI MADHO v. INDAR SAHAI, **6 A.L.J. 991=3 Ind. Cas. 707=32 A. 67.** (11 A. 148, *F.*)

(54)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *new Code*)—Res judicata—*Principle of rule—Assignment of Government revenue of village divided into* Khatas—*Claim as to interest on arrears of revenue - Decision in respect of one* khata, res judicata *in respect of others.*—Where the previous judgment negatives the liability, the main obligation itself, the defendant cannot re-agitate the same question of liability by saying that it refers to another portion of the property over which the whole liability, whatever its nature may be, is one and the same. (11 A. 148, *R.*) The plaintiff was assignee of the Government revenue of a certain *mahal*, which was divided into *khatas*, but the title to the revenue in respect of each and every *khata*, was the same. He sued to recover arrears of revenue in respect of *khata* No. 29 with interest. On his right to recover interest being disputed, *held* that a previous decision of a competent Court between the same parties dealing with a claim for interest due on arrears of revenue payable in respect of *khata* No. 47 operated as *res judicata* as to the claim with regard to *khata* No. 29. (15 M. 264, 15 M. 494, 11 A. 148, A.W.N. 1900, 173, *R.*) [*F.*, 30 A. 470=A.W.N. 1908, 192=5 A.L.J. 407; *D.*, 2 Ind. Cas. 853.] The principles on which the rule of *res judicata* is founded are two in number, *viz.*, the one, public policy, that it is the interest of the State that there should be an end of litigation; and the other, the hardship on the individual that he should be vexed twice for the same purpose. CHANDI PRASAD v. MAHARAJA MAHENDRA MAHENDRA SINGH, **24 A. 112=A.W.N. 1901, 177.**

(55)—Res judicata — *Plea finally decided between the parties by a single Bench of the Chief Court—Incompetency of Division Bench to question the opinion of the single Bench in revision of the orders on which it was based—Second review allowed—Review of order on review not allowed—O.* XLVII, *r.* 9 *of Act* V *of* 1908.—*Held* that a plea of *Res judicata* having been finally accepted before between the parties, though erroneously, by a single Bench of the Chief Court, Punjab, cannot be re-opened afterwards even by a Division Bench of that Court in revision from the orders of the Courts below upon which the judgment of the single Bench had been based, and therefore to revise these orders is fruitless to the party against whom the single Bench ruling subsists. *Held*, also that a second review of an order, though admissible as laid down in I.L.R. 15 Cal. 432 is barred by r. 9 of O. XLVII of Act V of 1908, where it is practically for the review of the order passed on review. DURGA DAS v. AMIR CHAND, **25 P.W.R. 1911.**

(56)—Ex parte *decree—Defence which could have been raised in previous suit—Estoppel by judgment.*—A suit was previously brought, in respect of the property in the present suit, against the defendant and his father. The question of non-transferability, which could have been raised, was not raised in that suit. The defendant's father did not contest that suit and allowed a decree to go against him by default:—*Held*, that the fact that the defendant's father allowed the judgment to go by default would not prevent the matter from being *res judicata* against him, and his son, having inherited the property, is bound by the judgment though *ex parte*. GOLOKE CHANDRA ROY v. SHAFAR ALI, **9 Ind. Cas. 363.**

(57)—*Civ. Pro. Code*, *ss.* 13 *and* 43—Res judicata—*Cause of action—Relief claimed in second suit which might have been claimed in former suit.*—The plaintiffs instituted a suit

Res Judicata—continued.

——1.—General—*continued.*

for recovery of possession of a moiety of a certain house with appurtenances on the allegation that those premises had formed part of the property of a joint family and had been divided equally between themselves and the defendants, but that in January, 1899, the defendants had ousted them from possession. The cause of action in the suit was the alleged dispossession by the defendants in January, 1899. This suit was first of all decreed, but afterwards was dismissed on appeal. Subsequently the plaintiffs filed a second suit, in which they alleged that the house was the joint property of themselves and the defendants, and that in January 1899, the defendants had ousted them from possession. They claimed a declaration that they were entitled to one-half of the premises and an order giving them possession by partition. *Held* that this latter suit was barred by the provisions of s. 43 and the second explanation to s. 13 of the Code of Civil Procedure. DHANPAT RAM v. BALBHADDAR NATH, **A.W.N. 1903, 97.** (25 B. 189, *R.*)

(58)—Res judicata—*Act* VIII *of* 1859, *s.* 2—*Party first setting up Will subsequently disclaiming it—Court not to permit party to use it again as Will—Privy Council—Practice.*—When a plaintiff claims an estate and the defendant, being in possession, resists the claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge then to bring forward. Two questions having arisen on an appeal to the Judicial Committee, first, as to whether the property was divided or undivided, and secondly, with regard to a Will set up as having been made by the plaintiff's father, the case was remanded for decision as to the divided or undivided nature of the property, the lower Courts having already finally decided the question as to the Will. When the matter again made on to be heard and decided in the Privy Council, the plaintiff, instead of insisting on the validity of the Will, on the other hand disclaimed all title under the instrument as a Will, and insisted that it must be regarded by the Court as not being testamentary. The Judicial Committee accordingly did not think it necessary to decide the validity or invalidity of the instrument as a Will. The plaintiff then brought the present suit to recover the property by setting up the same instrument as a valid Will and testament. *Held* that the suit could not be allowed to proceed, because (1) the instrument was in issue in the previous suit, and what was in issue must be taken to have been decided by the judgment; (2) the plaintiff having used the document and abandoned all right to it as a Will, could not be permitted to use it for another purpose. SREEMUTHOO RAGHUNADHA PERIYAOODYA TAVER v. KATTAMA NACHIAR, **10 W.R. P.C. 1=11 M.I.A. 50=2 Sar. P.C.J. 212.** [*F.*, 3 C.L.R. 253; *R.*, 12 W.R. F.B. 14, 18 W.R. 163, 22 W.R. 464, 1 A. 75, 2 C. 152, F.B., 6 C. 559=8 C.L.R. 10, 8 B. 174, 11 B. 708, 10 A. 289, 13 B. 567, 21 M. 91 = 8 M.L.J. 28, 20 A. 516 = 18 A.W.N. 134, 4 C. 190, P.C. = 3 C.L.R. 31=5 I.A. 149, 25 B. 189=2 Bom. L. R. 869, 26 M. 760=13 M.L.J. 448, 26 A. 61= A.W.N. 1903, 196, 9 Bom. L.R. 1020, 10 Ind. Cas. 29; *D.*, 15 W.R. 251, 24 C. 83, 5 Ind. Cas. 294.]

(59)—Res judicata—*First suit for rent, subsequent suit for title—Procedure to be observed in question of* res judicata.—Where the sole question raised in answer to a suit for rent was whether the plaintiff was entitled to the land as stated by him whether the defendant was the beneficial owner as alleged by him. *Held* that the decision on the point operated as *res judicata*, in a subsequent suit brought for declaration of title to the same land (10 C.W.N. 820, *F.*) In order to decide the question of *res judicata*, the Court has to look to the pleadings and judgment to ascertain what the matter in controversy really was and what was the decision actually given. It is not necessary that an issue should be formally raised. An estoppel is not confined to the judgment but extends to all facts, involved in it as necessary steps or ground-work, and the judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment. PANCHU MANDAL v. CHANDRA KANT SAHA, **14 C.L.J. 220=12 Ind. Cas. 9.** (6 C.L.J. 621 (630) *F.*)

(60)—Res judicata—*Two decrees in the same suit—Appeal against one decree only—Other decree allowed to become final—Appeal barred.*—The plaintiff brought a suit for the removal of certain constructions and for a mandatory injunction against the defendant. The first Court decreed the suit in part. Both parties appealed. The lower appellate Court disposed of both appeals in one judgment but framed two decrees, whereby the decree of the Court of first instance was modified. The plaintiff preferred an appeal to the High Court against the decree framed by the lower appellate Court on the defendant's appeal:—*Held*, that the appeal was barred by *res judicata*. LALA RAMCHARAN v. LACHMAN PERSHAD, **9 Ind. Cas. 667.** (7 A.L.J. 861, 7 Ind. Cas. 156, 33 A. 51, 7 A.L.J. 995, 7 Ind. Cas. 909, *F.*)

(61)—*S.* 13, *Civ. Pro. Code—Description of land in plaint not sufficient—Decree for possession—Execution proceedings not defining land with any greater certainty*—Res judicata.—A decree for possession of certain land had been made. The plaint described such lands by general boundaries not sufficiently detailed to admit of exact identification. The execution proceeding under which possession was obtained did not define them with any greater certainty. The possession actually taken, had been of lands demarcated shortly after possession was delivered—it did not appear by whom—but in a matter which was subsequently approved by the Revenue authorities. *Held*, in a suit by Government for ejecting the decree-holders, that

Res Judicata—continued.

——1.—General—*continued.*

the land so demarcated must be accepted as covered by the decree and that the suit was barred as *res judicata.* SECRETARY OF STATE FOR INDIA IN COUNCIL v. DURBIJOY SINGH, **19 C. 312, P.C.=19 I. A. 69=6 Sar. 113.** [*F.*, 11 O. C. 30.]

(62)—*Reg.* XVII *of* 1806 — *Foreclosure — Decree for proprietary possession*—Res judicata. —The plaintiffs, mortgagees, having obtained an order for foreclosure under the provisions of Reg. XVII of 1806 subsequently got an *ex parte* decree declaring their right to proprietary possession of the mortgaged property, and under that decree obtained possession thereof. More than 12 years after this decree had been executed, the mortgagors sued to cancel the foreclosure proceedings on the ground that they had been taken entirely behind their backs and they had no notice of them ; this plea had not been taken in the suit which had resulted in the mortgagor's decree for possession :—*held* that the plaintiff's suit was barred as *res judicata* and even if this were not so, the defendants had been in adverse possession for more than 12 years. MAULA BAKHSH v. TAJAMMAL HUSAIN, **A.W.N. 1892, 51.**

(63)—Res judicata—*Former decision that plaintiff purchased plot A only—Second suit that he purchased A and B, whether lies.*— The plaintiff purchased a certain plot of land which had been previously mortgaged to the defendant. The plaintiff instituted a suit for redemption and obtained a decree. It was decided in execution of that decree, on the objection of the defendant, that the plaintiff had purchased property A only. He subsequently brought a suit for possession of property B on the strength of the same sale. *Held*, that the suit was barred as *res judicata.* BOHRA GAJADHAR SINGH v. GIRDHARI LAL, **10 Ind. Cas. 453.**

(64)—*Effect of pleadings—Cause of action—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 2—*Issue really decided, though not in form*—Res judicata.—Plaintiff, as the adopted son of one C, brought this suit to recover certain immoveable and moveable properties belonging to the estate of C. The defendant was the widow of the devisee of C under a Will left by the latter. The plaintiff's contention was that the real property in dispute was either ancestral property or property acquired by C from the income of such property and as such ancestral, and that C had no right to dispose of any of them by Will. The defence was that the deceased C had, according to the *Mitakshara* law, power to dispose by Will of property acquired by him out of the income of ancestral property, and that such property was self-acquired. In a former suit between the same parties instituted by the present plaintiff for cancellation of several alienations made by C, the present defendant was a defendant. The effect of the pleadings in that suit was to put in issue the question, among others, whether C had power to dispose of the real properties by the Will in dispute : but the question actually dealt with in the case was as to whether or not the testamentary disposition was assented to by the present plaintiff ; and it was decided that he had assented to the Will. *Held*, that the effect of the pleadings in the previous suit being that the plaintiff sought therein to cancel the Will on the ground of the want of legal capacity in C to make a testamentary disposition of the real property by reason of its being ancestral property, (*i e.*) partly inherited and partly acquired out of the income of such property, the decision barred the present suit, though an issue in the form in which it was now raised had not been distinctly raised therein. The expression "cause of action" in s. 2 of Act VIII of 1859 (Civ.Pro. Code), is to be construed with reference rather to the substance than to the form of action. Viewed in this light the former suit was, in substance, taking the pleadings and the grounds of appeal into consideration, one to declare the Will invalid on the ground of the want of legal capacity in C to devise the property dealt with in the Will. S. 2 does not prevent the operation of the general law relating to *res judicata* founded on the principle "*nemo debet bis vexari pro eadem causa.*" SOORJOMONEE DAYEE v. SUDDANUND MOHA PATTER, **12 B.L.R. 304, P.C.=20 W.R. 377=I.A. Sup. Vol. 212=3 Sar. 285.** [*F.*, 6 C. 319, F.B.=7 C.L.R. 227 ; *Appl.*, 1 C. 144=2 I.A. 283 ; *Appr.*, 21 W.R. 207, 24 W.R. 304, 11 C 301, P C.=12 I.A. 23, 10 B. 439, 15 M. 494, 21 C. 430 ; *R.*, 7 N.W.P. 17, F.B., 7 N.W.P. 60, F.B., 3 B. 3, 4 C. 190, P.C.=5 I.A. 149, 6 C. 171=6 C.L.R. 439, 6 C. 406, 13 B. 567, 14 B. 31, 19 C. 372, 17 A. 174, 25 C. 136, 25 B. 189, 6 C.L.J. 621, 12 C. W.N. 739=9 C.L.J. 597 ; *D.*, 24 C. 83.]

(65)—*Act* VIII *of* 1859, *s.* 2—*Joint contract.* —If a party sues upon a joint contract, which is not also several, and gets a judgment, he cannot bring a fresh suit against the persons who were jointly liable with the defendant, but were not included in the former suit, such second suit being expressly prohibited by Act VIII of 1859, s. 2. NUTHOO LALL CHOWDHRY v. SHOUKEE LALL, **10 B.L.R. 200=18 W.R. 458.** (4 W.R. 50, *Diss.*) [*Appr.*, 3 C. 353 ; *R. & D.*, 23 C. 302, 22 A. 307, 25 A. 57=22 A.W.N. 190 ; *D.*, 5 C. 291=4 C.L.R. 501, 9 C. 888.]

(66)—*Error of law—Erroneous opinion on a point of law how far conclusive.*—An erroneous opinion on a point of law may be between the parties to it, but not further, a sufficient *res judicata* to preclude them from re-agitating it. WAMAN HARI v. HARI VITHAL, **8 Bom. L.R. 932=31 B. 128.**

(67)—*S.* 13, *Civ. Pro. Code*, 1882 (=*s.* 11, *present Code*)—*Decision erroneous in law.*—An erroneous decision on a pure question of law in

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Advocate High Court
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—1.—General—*continued.*

a previous suit may operate as *res judicata.* RAICHURN GHOSE v. KUMUD MOHON DUTTA, **1 C.W.N. 687.** (10 C. 1087, 15 A. 327, *F.*; 5 M. 304, *D.*; 9 B. 75, 15 B. 104. *R.*) [*R.*, 14 C.P. L.R. 109, 8 O.C. 37, 44 P.R. 1908; *D.*, 32 C. 749=9 C.W.N. 466=1 C L.J. 176.]

(68)—*Act* X *of* 1859, *s.* 54—Res judicata.—S. 54, Act X of 1859, contemplates cases where neither of the parties appear in person or by agent. It does not in any way apply to a case in which both parties being present, the Court held that, in the absence of documentary evidence, the plaintiff's claim must be dismissed. The decision being the dismissal of a suit after adjudication on the merits, the matter must be considered as *res judicata.* MOHANUND CHOWDHRY v. H. A. EGLINGTON, **1 W.R. 343.**

(69)—*Act* VIII *of* 1859, *s.* 2 — *Question of title—Suit prior to Act* X *of* 1859.—Where a rent suit was instituted and heard in a Civil Court before Act X of 1859 came into force, and an issue as to title between plaintiff and an intervenor was raised and decided, *held*, that a subsequent suit by plaintiff for possession was barred by s. 2, Act VIII of 1859. CHOWDHRI NILKANTH PRASAD SINGH v. DIGNARAYAN SINGH, **1 B.L.R.A.C. 30=10 W.R. 75.** (8 W.R. 175, *D.*) [*R.*, 13 W.R. 129.]

(70)—*Suit by purchaser of equity of redemption against mortgagee—Application for execution of decree after limitation—Subsequent suit by purchaser against mortgagees for redemption, maintainability of.*—Where the decree in a suit amounted in fact only to a decree declaratory of the proprietary right of the purchaser of the equity of redemption and under the circumstances of the admitted possession of the mortgagee, was not enforceable by delivery of possession, the remedy which the law gives by process of execution may, by lapse of time, be barred, and yet the right and title decreed may exist in full force, and be capable of enforcement by suit. JUGUR NATH v. BAL GOBIND, **1 N.W.P. 154.**

(71)—Res judicata—*Former suit dismissed for failure to produce evidence, with reservation to bring new suit—Fresh suit—Act* VIII *of* 1859, *s.* 2.—A suit brought in the year 1856, to set aside an auction sale of a *putnee taluk* for arrears of rent, under Beng. Reg. VIII of 1819, was dismissed for want of evidence on the part of the plaintiffs, with a reservation by the Court that the order made was not to be a bar to the plaintiffs, or any other persons who might substantiate their rights, from proceeding to recover. On a fresh suit by the same parties for the same matter, *held*, that such reservation was of no effect as, under s. 2 of Act VIII of 1859, the former suit was a bar, and a plea of *res judicata* allowed. There is no power in the Courts in India, similar to that exercised by Courts of Equity or Common Law in England, to dismiss a suit with liberty

Res Judicata—continued.

—1.—General—*continued.*

for the plaintiff to bring a fresh suit for the same matter, or to enter a non-suit. Such power of the Indian Courts is limited to questions of form, as (1) in the case of misjoinder of parties or of the matters in suit, (2) where a material document has been rejected for not bearing a proper stamp, and (3) if there has been an improper valuation of the subject-matter of the suit; but not to a case where the issue has been joined and the plaintiff fails to produce the evidence he is bound to give to support the issue. WATSON v. THE COLLECTOR OF RAJSHAYE, **3 B L R.P.C. 48=13 M.I. A.160=12 W.R. P.C 43=2 Suther. 269=2 Sar. 500.** [*F.*, 21 W.R. 291, 12 M. 500, 35 C. 924 =12 C.W.N. 921. *R.*, 3 A. 528, 9 A. 155, 9 A. 690, 14 B. 31, 19 B. 571, 9 C W.N. 679, 6 Bom. L.R. 594, 29 B. 219=7 Bom. L.R. 90, 29 A. 471=4 A.L.J. 375, 18 M.L.J. 198, 11 Bom. L.R. 1109; *Cons.*, 8 A. 282; *Observed on*, 16 W R. 276; *D.*, 23 W.R. 345, 3 C.L R. 447.]

(72)—*Civ. Pro. Code*, 1882, *s.* 13—*Res judicata—Civ. Pro. Code, s.* 373—*Withdrawal of suit—Notice of application, under s.* 373, *Civ. Pro. Code.*—Upon an application by plaintiff under s. 373, Civ. Pro. Code, praying for permission to withdraw from the suit with liberty to bring a fresh suit, the order passed by the Court was, "Let the plaintiff's claim be '*Kharij*' with costs, and let notice be given to the opposite party: the plaintiff has liberty to institute a fresh suit." This order, it was contended by the defendant was an order of dismissal, and barred the second suit by the plaintiff: *Held*, that the order was one of withdrawal with liberty to bring a fresh suit, and not a decree dismissing the suit. *Held*, further, that though the notice mentioned in the order was not issued, yet the validity of the order, not having been objected to in appeal or revision, could not now be questioned. LALTA PERSHAD v. CHUTKO, **1 O. C. 97.**

(73)—*Purchase by first mortgagee, of the equity of redemption — Suit to enforce lien against second mortgagee—Suits between first and second mortgagee—Erroneous suggestion by Court—Party acting upon it.*—A first mortgagee, under a security bond, who brings to sale and purchases the equity of redemption, in execution of a money-decree, passed by a Revenue Court on such bond, is not precluded from suing to enforce his lien on such property against the second mortgagee. Where, in a suit by the second mortgagee for the sale of the mortgaged property, the first mortgagee asserts his lien and is referred to a separate suit for enforcing it, this does not bar such separate suit, for the first mortgagee cannot resist the claim of the second mortgagee to bring the property to sale subject to the mortgage. Where the defendant raised certain contentions, and the Court, instead of trying and adjudicating on them, referred him to a fresh suit, his acquiescence in such suggestion, instead of preferring an appeal, is reasonable

Res Judicata—continued.

——**1.—General**—*continued.*

submission to the Court; and, in such circumstances, the rule of *res judicata* cannot be applied with justice. BABU LAL v. ISHRI PRASAD NARAIN SINGH, **2 A. 582, F.B.** [*R.*, 14 B. 31.]

(74)—*Judgment of Criminal Court, whether* res judicata *in civil suit.*—The judgment of a Criminal Court that a person did not commit an offence, does not operate as *res judicata* to prevent a Civil Court from determining such question for purpose of a suit. RAM LAL v. TULA RAM, **4 A. 97 = A.W.N. 1881, 143.** [*R.*, 23 C. 610.]

(75)— *Civ. Pro. Code, ss.* 13, 540, 561, 584 —*Decree--Judgment—Appeal—Objections of respondent—Res judicata.*—In a suit for possession of certain property and for setting aside a *wakfnama* or deed of endowment on the ground that the execution of it had been obtained by fraud, the defendant, a Muhammadan female, pleaded that the deed was valid and that she was entitled to retain possession of the property till her dower debt was satisfied. The Court of first instance held that the deed was invalid, but that the defendant was entitled to retain possession till her dower was paid, and simply dismissed the suit, without embodying in the decree its finding as to the deed. On appeal by the plaintiff, the defendant-respondent filed objections under s. 561, Civ. Pro. Code, to the lower Court's finding as to the deed. The District Judge dismissed the appeal, affirming the lower Court's finding as to the dower, and dismissed the respondent's objections also without going into the question of the validity of the deed as being unnecessary for the disposal of the appeal. The defendant appealed to the High Court.—*Held by the Full Bench (Oldfield and Mahmood, JJ., dissenting).* If a decree is upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable and nothing else, that party has no right of appeal therefrom. It may be that, in the judgment, of which such decree, is the formal expression findings have been recorded upon some issues against that party; but if this be so, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Civ. Pro. Code, or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matter, on the face of it, to show that something has been decided against him. In other words, he must obtain insertion, in the decree itself,—which alone contains the final determination of the cause, and not the judgment, —of such portions of the Court's findings as he considers himself injuriously affected by, so as to place himself in the position which the statute recognizes as giving him a right to impeach the decree. If he fails to follow this course, the decree, though in general terms, will stand good as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself actually rested. The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s. 13 of the Civ. Pro. Code—The defendant's objections before the lower appellate Court, therefore, were not maintainable, as the decree, on the fact of it, dismissed the plaintiff's claim in general terms, and did not record any adverse finding or declaration in respect of the defendant, and for the same reason, her appeal to the High Court was also not maintainable. And the District Judge was right in holding that it was unnecessary to go into the question of the validity of the *wakfnama.* (The judgment of *Straight, J.*, in 2 A. 497, *Appr. & F.*). *Per Oldfield, J.*—In order that a decree may agree with the judgment and fulfil the requirements of s. 206 it should contain the material points for determination passing out of the claim, and material for the decision thereon, and if any issue material for the decision of the suit has been decided, the determination of it should find a place in the decree: and if this has not been done, the defect is a good ground of appeal, even though the decree, on its face, may be altogether in favour of the appellant, and even though the appellant may not have applied for amendment of the decree under s. 206 of the Civ. Pro. Code, or for review of judgment. The defendant's objections and her appeal to the High Court were therefore maintainable. *Per Mahmood, J.*—The provisions of s. 13 of the Civ. Pro. Code, apply as well to the trial of issues as to the trial of suits. The validity or otherwise of the deed in the above case was directly and substantially in issue between the parties, and was adjudicated upon by the Court of first instance; its finding on that issue cannot be considered a mere *obiter dictum*, and would be binding on the defendant as *res judicata* though the suit against her was dismissed on another ground. Whatever has the force of *res judicata* must be necessarily appealable. The word 'from' in ss. 540, and 584 and the expression "objection to the decree" in s. 561 of the Civ. Pro. Code, are" not confined to matters appearing on the face of the decree, but they refer to matters which should have found a place in it, though they have been omitted. It is doubtful if, in the above case, the defendant could have applied for amendment of decree or for review of judgment, but even assuming such remedies were open to her, there was nothing to preclude her from seeking her remedy by way of appeal. JAMAITUN-NISSA v. LUTFUN-NISSA, **7 A. 606, F.B.** (7 B. 484, 1 A. 480, 2 A. 843, 6 C. 319, N.W.P. 1874, p. 19, *R.*)

***Res Judicata*—continued.**

——1.—General—*continued.*

[*F.*, 28 A. 365=3 A.L.J. 171=A.W.N. 1906, 44; *Cons.*, 17 A. 174; *R.*, 8 A. 354, F.B.=A.W.N. 1886, 110, 157 P.R. 1889, F.B., 18 B. 597, 22 M. 364, 56 P.R. 1904=84 P.L.R. 1904, 6 C.L.J. 621, 57 P. R. 1907=66 P.W.R. 1907.]

(76)—*Ryot's tenure sold in execution of decree—Purchaser not ryot's vendee— Admission.*—The purchaser of a tenure held by a ryot in execution of a decree under Act X for rent obtained by the zemindar, against the ryot registered in his sherista is not the ryot's vendee, and he is not bound by any decision to which the ryot was a party, or by an allegation or admission of that party. SHUMBOO CHUNDER SINGH v. RAM NARAIN DOSS, **9 W.R. 217.**

(77)—*Civ. Pro. Code, s.* 13—Res judicata—*Dismissal of suit—Under-valuation—Court Fees Act*, 170, *s.* 10, *cl.* (ii)—*Misjoinder—Dismissal of suit in its present form—Heard and finally determined.*—The dismissal of a suit on the ground that it has been under-valued, or that the plaintiff has failed to pay in time the additional Court-fee required, does not bar a fresh suit. The object of s. 10 of the Court Fees Act, and indeed of the whole Act, is to lay down rules for the collection of one form of taxation. Encroaching, as such provisions do, upon the rights of the subject, they must be construed strictly, especially when they impose a penalty. And the dismissal of a suit under s. 10 of the Act is intended to be simply a penal clause to enforce the collection of Court-fees. [*R.*, 3 C.P.L.R. 3; *D.*, 9 C.W.N. 679.] The dismissal of a suit for misjoinder does not bar a fresh suit. (13 B. L.R. App. 37, 7 C. 214, *R.*) [*R.*, 3 C.P.L. R. 3; *D.*, 9 C.W.N. 679.] The dismissal of a suit "in the form in which it is brought" (*bahaisiyat maujuda*) can have only one meaning, namely, that the Judge using those words in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure prescribed by Chap. XXII of the Civ. Pro. Code, is not the only manner in which a plaintiff can come into Court for the second time to ask for adjudication upon the merits of his rights—merits which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit (5 A. 595, *Diss.*; 13 M.I.A. 160, 5 A.W.N. 171, *R.*) [*R.*, 3 C.P.L.R 3; *D.*, 9 C.W.N. 679.] A decree disposing of a suit purely on the ground of technical defects, without going into the merits, cannot be *res judicata* so as to bar a fresh suit upon the same cause of action. To conclude a plaintiff by such a plea, it is not sufficient to show that there was a former suit between the same parties, for the same matter, upon the same cause of action. It is necessary also to show that there was a decision finally granting

***Res Judicata*—continued.**

——1.—General—*continued.*

or withholding the relief sought. MUHAMMAD SALIM v. NABIAN BIBI, **8 A. 282=A.W.N. 1886, 119.** (3 W.R Act X, Rul 140, 11 W.R. 327, 4 B.H.C. A.C. 110, 6 B. 482, 13 B.L.R. App. 37, 7 C. 214, 3 M.H C. 84, *R.*) [*R.*, 3 C.P.L.R 3; *D.*, 9 C.W.N. 119.]

(78)—*Civ. Pro. Code, s.* 13—*Joint family.*—Where the question about a family being joint or divided had not been determined in a previous suit as between the defendants *inter se*, but simply as against the plaintiff who was a stranger, the decision could not operate as *res judicata* when one of the defendants sued the other on the ground that the family was joint. BHAGAVANT SINGH v. TEJ KUAR, **8 A. 91=A.W.N. 1886, 12.** (4 A. 92, *D.*; 2 A. 738, *R.*) [*Appr.*, 6 C.P.L.R. 87, 25 B. 74.]

(79)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *new Code*)—*Decree in conflict with statements of fact.*—Where a finding on an issue in a judgment is in conflict with the decree and no steps are taken to bring the decree into conformity with the judgment, no plea of *res judicata* can be sustained on the strength of such finding. Thus, a decree in a suit gave the plaintiff an absolute right to certain property, but in the judgment it was stated that the defendant was entitled to certain rights in respect of the same property. No application was made to bring the decree into conformity with the judgment, and the decree as it stood was affirmed on appeal. *Held*, the finding in favour of the defendant would not constitute *res judicata* in the face of the clear wording of the decree. INDRAJIT PRASAD v. RICHHA RAI, **15 A. 3=A.W.N. 1892, 113.**

(80)—*Undivided family—Prior suit for partition against father—Dismissal of suit as to moveables and immoveables on different grounds —Suit on father's death.*—A previous suit for partition against the father in an undivided Hindu family, which was dismissed, as regards the moveables, on the ground that the son cannot compel his father in his life-time to make a partition of the moveables, and as regards the immoveables, on the ground that they were beyond the local limits of the Court's jurisdiction, does not bar as *res judicata* a suit by the same person brought against his brother, on the father's death, as to his rights in the joint ancestral estate. LAKSHMAN DADANAIK v. RAMCHANDRA DADANAIK, **1 B. 561.** [*R.*, 8 B. 548, 18 B. 389; *Affirmed*, 5 B. 48=7 I.A. 181=7 C.L.R. 520.]

(81)—*Act* VIII *of* 1859, *s.* 2—Res judicata.—A suit is not barred by Act VIII of 1859, s. 2, by reason of a prior suit decided against plaintiff's father while plaintiff was a minor, in which the father was sued in his personal capacity, the plaintiff being no party. RAJ DOOLLUB SIRCAR v. OOMA CHURN BISWAS, **21 W. R. 109.**

(82)—*Finding in previous suit on unnecessary issue—Insertion of finding in decree- Effect—*

Res Judicata - continued.

——1.—**General**—*continued.*

Subsequent suit between same parties - Civ. Pro. Code, s. 13—Res judicata—*Practice—Appeal.*—Where an issue is not necessary for the decision of the suit, the decree couched in general terms does not cover the finding on that issue; nor can such a finding by being expressly inserted in the decree acquired the force of *res judicata* in a subsequent suit between the same parties. The Civ. Pro. Code, does not contemplate findings on issues being inserted in decrees, nor is there any section in the Code which makes it necessary to appeal from a decree in which a finding on an issue not necessary for the determination of the suit has been inserted. (See ss. 2 and 6 of the Civ. Pro. Code, 1882, and the forms of decrees in the fourth schedule.) GHELA ICHHARAM v. SANKALCHAND JETHA, **18 B. 597.** [*Expl.*, 25 B. 115; *Appl.*, 35 B. 38=12 Bom. L.R. 766; *R.*, 17 A. 174=15 A.W.N. 47, 22 B. 245, 92 P.R. 1902, F.B.=16 P.L.R. 1903, 9 C.W.N. 60, 10 Bom. L.R. 380=32 B. 315.]

(83)—*Suit by a widow for declaration of her marriage to her husband (deceased)—Marriage—Decree on award by arbitrators appointed by consent of parties—Decree silent in respect of declaration prayed for—Subsequent suit by widow for declaring that she was the lawful wife of the deceased*—Res judicata—*Civ. Pro. Code,* 1882, *s.* 13—*Release.*—One H, a Cutchi Memon Mahomedan, died in 1872, leaving him surviving two widows F and A, and M, a daughter by F. In 1882, F sued A claiming a share of the property left by H, and prayed for a declaration that she was the legitimate wife and M the ligitimate daughter of H. The legitimacy of both was denied by A. In pursuance of the award given by the arbitrators appointed in the suit, a decree was passed directing A to pay F Rs. 55,000 in full satisfaction of all her (F's) claims and of her daughter's, and declaring A to be absolutely entitled to the property of H. A re-married in 1886. Therefore the present suit was brought by F against A in 1887. The plaintiff alleged that, by law and custom, the re-marriage of the defendant worked a forfeiture of her rights to the estate of H and that she was therefore solely entitled thereto. She also prayed for a declaration that the estate belonged to her as the sole surviving widow of H. The defendant contended (1) that the present suit was barred by *res judicata* inasmuch as the decree in the suit of 1882, in which the present plaintiff prayed for a declaration of the legitimacy of her marriage with H was silent in respect of it, the prayer must be considered to have been refused under s. 13, Civ. Pro. Code, 1882; (2) that the decree in the previous suit having awarded a certain sum in full satisfaction of her claims, she had no right to bring the present suit in any event, and (3) that the decree in the previous suit operated as a release and assignment by plaintiff of all her rights to the suit property to the

Res Judicata—continued.

——1.—**General**—*continued.*

defendant. *Held* (1) that, as the question of F's marriage with H was not denied and decided finally by the arbitrators, the present suit was not barred by *res judicata.* An award given by arbitrators would work an estoppel only as regards questions properly considered by them. S. 13, Explanation III of Civ. Pro. Code, (1882), is applicable to cases where the Court is silent on an independent head of relief claimed and denied but not where it is silent on a head of relief which is claimed only as ancillary to the main relief, and which by implication must be deemed to have been refused, (2) that the plaintiff was not estopped in bringing the present suit by the fact that, in the suit of 1882, she was awarded a fixed sum in full satisfaction of her claims on the suit property. The ground on which the present suit was brought was different from that which was the basis of the previous suit. The previous suit was by one widow against another. The present suit was by one widow against another who had lost her rights as widow by her remarriage. But the High Court dismissed the suit holding that the award and release contained in the decree of 1882 constituted a binding agreement by which the present plaintiff, for the sum of Rs 55,000, waived all her rights against the present defendant inclusive of the present claim. FATMABAI v. AISHABAI, **12 B. 451.**

(84)—Res judicata, *matter set up in defence whether could be objected to as—Dismissal of suit for failure to give security for costs, whether could operate as* res judicata.—In this suit on a promissory note, the plaintiff objected to the defendants being permitted to put forward, as their defence, the matters set forth in their written statement, inasmuch as they had been the matters in issue in a previous suit between them in which the present defendants were plaintiffs and the present plaintiff was the defendant. The previous suit had been dismissed on account of the then plaintiffs' failure to comply with the Court's order in that suit for giving security for the defendant's costs. *Held* that, although, under the words of s. 13 of the Civ. Pro. Code, "suit or issue," the answer of *res judicata* is admissible to estop a defendant from defence as well as a plaintiff from attack, there had been no final hearing or decision of the matter in the previous suit. The Court cannot properly be said to have *heard and decided* a matter, which it was actually relieved from hearing and deciding by reason of the plaintiff's default, whether such default be his non-appearance or his failure to furnish the ordered security. *Quære*:—Whether a plaintiff, whose suit had been dismissed under s. 381 of the Code could be allowed to litigate again the subject-matter of the dismissed suit (possibly, the reference to s. 373 may be found sufficient to preclude him from so doing). RUNGRAV RAVJI v. SIDHI MAHOMED EBRAHIM, **6 B. 482.** [*R.*, 12 C. 563, 10 M. 272; *R.*, 24 B. 251, 9 C.W.N. 679.]

Res Judicata—continued.

—**1.—General**—*continued.*

(85)—*Decree dismissing suit—Nothing in decree as* res judicata *in plaintiff's favour—Incidental finding against defendant—Judgment not appealable from by defendant.*—From a judgment against a plaintiff dismissing his suit, no adjudication of any point in his favour can properly be derived as *res judicata*, and no appeal being admissible as on any point not having the authority of *res judicata*, no appeal can be preferred by a defendant from a decree which, being adverse to the plaintiff, is not in any way prejudicial to the defendant merely on the ground of the judgment containing incidental decisions against the interests of the defendant. ANUSUYABAI v. SAKHARAM PANDURANG, **7 B. 464.** [*Appr.*, 15 M. 111; *R.*, 157 P.R. 1889, 2 M.L.J. 36, 18 B. 597, 17 A. 174, 11 C.P.L.R. 150, 32 B. 315=10 Bom. L. R. 380, A.W.N. 1908, 211.]

(86)—*Civ. Pro. Code*, 1882, *ss.* 13 *and* 43—*Suit for possession of land as* khewatdar *without claiming* shamilat.—*Held*, that a decree for possession of land in favour of plaintiffs as *khewatdars* impliedly included proportionate share of *shamilat* although no claim was specifically made in respect of it. In partition proceedings objection was taken that the decree-holders had no right to a share in the *shamilat* and they were referred to a regular suit; *held*, that the suit brought by the decree-holders was not barred by s. 13 or s. 43 of the Code of Civil Procedure. BURA v. JHANDA, **26 P. L. R. 1901=113 P. R. 1900.**

(87)—*Beng. Reg.* VIII *of* 1819—*Landlord and tenant—Non-registration of transfer—Sale for arrears of rent—Deposit to stay sale—Voluntary payment—Set off*—Res judicata.—The defendants L and R who were *patnidars* of a taluk, granted in 1856 a *darpatni* lease of the *mouza* to one S, at an annual rent, the lease stipulating that S should have full powers of sale and gift, but should not sublet in *sepatni* without the defendants' consent. The lease contained no stipulation for the registration of the name of any vendee or donee. In 1860, S, sold the *darpatni* lease to the plaintiffs. The deed of sale provided for mutation of names in the *patnidar's* books. The plaintiffs however never effected such mutation, and were never recognised by the defendants as their tenants, the rent of the *darpatni* being paid in the name of S. In 1864, the defendants having failed to pay their *patni* rent to the zemindar, the latter proceeded to sell the *patni* under Regulation VIII of 1819; whereupon the plaintiffs, in order to save their under-tenure, deposited a sum of money in the Collectorate on the 17th November, 1864. At that time, the plaintiffs were in arrear with their *darpatni* rent, and they accordingly applied to the defendants to set-off the amount deposited against such rent. The defendants refused and brought a suit against S and his sureties to recover the *darpatni* rent then due. The plaintiffs intervened in that suit claiming to be entitled to set-off the

Res Judicata—continued.

—**1.—General**—*continued.*

sum deposited against the rent, but the High Court, on the 26th June 1866, ruled that S was not entitled to the benefit of that set-off, on the ground that the deposit was only a voluntary payment by the plaintiffs. On the 30th October, 1867, the plaintiffs brought a regular suit against S and L and R to recover the amount of deposit. The plaintiffs obtained a decree in the first Court, but on appeal that decision was reversed and the suit dismissed for want of jurisdiction. On the 8th June, 1869, the plaintiffs filed the plaint in the proper Court. It was contended that the money deposited by the plaintiffs was a voluntary payment. *Held*, that though the transfer was not registered, the plaintiffs, being the assignees of the *darpatni* taluk, had the right and were compelled to deposit the amount of rent due to the zemindar in order to protect their own interest and that the plaintiffs were consequently entitled to recover the amount deposited by them in the Collectorate. *Held*, also, that the decision of the 26th June, 1866, was no bar to the suit. LACKHINARAIN MITTER v. KHETTRO PAL SINGH ROY, **13 B.L.R. 146, P.C.=20 W.R. 380=24 W.R. 407, Note=3 Sar. 273.** [*F.*, 10 C.L.J. 453, *Rel. on.*, 14 C.W.N. 905=6 Ind. Cas. 605; *R.*, 22 W.R. 299, 12 C. 622, 20 C. 247.]

(88)—*Valid and operative deed of gift*—Res judicata.—A deed of gift, valid and operative between the parties, cannot be avoided, for the reason that, in another suit between different parties, it has been held to be fraudulent as against creditors. It is doubtful whether a donor can avoid his own deed of gift on the ground of his own fraud. RAMANUGRA NARAIN v. MAHASUNDUR KUNWAR, **12 B.L. R. 433, P.C.=3 Sar. 277.** [*R.*, 33 C. 967=10 C. W.N. 650=4 C.L.J. 22.]

(89)—*Res judicata—Judgments* in rem *and judgments* inter partes.—A Rajah of an impartible *Raj* died, leaving children by various wives and concubines. A suit, by one of the widows, on behalf of an infant, was brought to set aside a summary award under Act No. XIX of 1841, giving possession and for possession of the *Raj*. This suit involved issues of legitimacy, and the validity of a particular form of marriage of one of the members of the family. The *Sudder Dewanny Adawlut* decreed in favour of the plaintiff. Another suit was afterwards brought by a member of the family, who was not a party to the former suit, against the party in possession, which raised substantially the same issue of legitimacy, and a further question of priority to succeed by reason of the superior nature of the marriage of which the plaintiff was the issue. The defendant pleaded the decree of the *Sudder* Court as a bar to the suit. *Held*, that the suit raised a different issue, and that the decree in the former suit was not a judgment *in rem*, but a judgment *inter partes*. JOGENDRO DEB ROY KUT v. FUNINDRO DEB KUT

Res Judicata—continued.

——1.—General—*continued.*

11 B. L. R. 244=17 W. R. 104=14 M.I.A. 367, P.C.=2 Suther. 517=3 Sar. 32. [*Appl.*, 5 B. 685; *R.*, 6 B. 703, 7 B. 467, 22 M. 461, 1 C.L.J. 388, 30 B. 477=8 Bom. L R. 268; *Cons.*, 12 A. 1.]

(90)—*Civ. Pro. Code*, 1877, *s.* 13.—The dismissal of a suit brought by the assignee of a hypothecation bond, on the ground that the deed of assignment to him, being unregistered, could not be received by him in evidence and could not convey to him any rights in the hypothecation-bond, cannot bar a subsequent suit by him on the same bond again assigned to him by a registered instrument. ISHRI DAT v. HAR NARAIN LAL, **3 A 334.**

(91)—Res judicata—*Letters of Administration, proceedings for—Title suit—Concurrent jurisdiction, Courts of—Matters directly and substantially in issue—Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 13.—X died leaving a widow Y. Upon the death of Y, A applied for Letters of Administration to the estate of X on the allegation that he was the next reversionary heir. B, a transferee from Y, opposed the application and denied that A was the reversionary heir. The application was dismissed as A failed to prove the alleged relationship. A then sued to recover from B the property transferred to him by Y, on the allegation that there was no legal necessity for the alienation and that, as the reversionary heir to the estate of X, he was entitled to recover possession: *Held*, that the decision on the proceedings for Letters of Administration did not operate as *res judicata* upon the question of the relationship between A and X. LALIT MOHAN DAS v. RADHARAMAN SAHA, **13 C.L.J. 547.** (20 C. 888, *F.*; 11 C.L.J. 623, *D.*)

(92)—*Civ. Pro, Code*, 1882, *s.* 13, *Ex*, II—Res judicata—*Auction sale of equity of redemption—Purchase by mortgagee—Fraud—Sale set aside—Suit on mortgage—No* res judicata.—Where the prior suit was to set aside an auction sale as fraudulent and void and for recovery of possession from the mortgagee purchaser, a decision in that suit cannot bar the mortgagee from suing to recover the amount due under his simple mortgage. The simple mortgage was not a matter which might or ought to have been made a ground of defence or attack in such suit, as it was wholly immaterial in answer to such an action and could not alter the result which was to set aside the auction sale. GURUSAMI AIYAR v. KAVEREE BOYEE AMMAL, **14 M.L.J. 485.**

(93)—*Civ. Pro. Code*, 1882, *ss.* 13, 43—*Suits on different titles*—Res judicata.—A suit by a person to recover certain property on the ground that he was the adopted son of the last owner could not bar a subsequent suit by him to recover the same property as the devisee under the Will of the said owner. SUBRAHMANIAN CHETTI v. AUTHINARAYANAN, **7 M.L.J. 288.**

Res Judicata—continued.

——1.—General—*continued.*

(94)—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 11—Res judicata—*Previous suit for a share as heir—Subsequent suit for maintenance—Plea of* res judicata *whether can be taken in second appeal—Pleading—Practice.*—In a previous suit, the plaintiff claimed her share under the Muhammadan Law and repudiated a will, under which the defendants held exclusive possession. In a subsequent suit she claimed maintenance under the will: *Held*, that the subsequent suit was not barred by *res judicata* (21 C. 157, 20 I.A. 155, *F.*; 25 B. 189, 11 M.I.A. 50, 10 W.R. 1, P.C. *D*; 21 A. 446, 4 A. 69, *F.*) The plea of *res judicata* can be allowed in second appeal although it was not taken in the first appellate Court. ABDUL AZIZ v. MUSAMMAT AZIMAN, **5 Ind. Cas. 294.**

(95)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 13 *and* 43.—In 1896 the plaintiff had sued one of the present defendants for a shop, on the ground that, at a previous partition between them, it had fallen to his share and had been leased to the defendant. Plaintiff could not prove partition as the deed of partition had not been registered, but in the Chief Court his claim was treated as one by a co-sharer against a trespasser who had wrongfully taken possession of joint property, and it was held that the plaintiff could not get possession of more than one-third share which was accordingly decreed in his favour. The plaintiff now brought a suit for partition of the whole joint property consisting of six shops, making his co-sharers parties and likewise impleading the defendant in the previous case as he was in possession of two-thirds of the shop in dispute in the previous case. The defendant pleaded that the previous suit and decree precluded the plaintiff from suing him again in respect of this shop. *Held*, that the plaintiff was not barred by the rule of *res judicata* from including in the partition suit the two-thirds of the shop in dispute which was in the defendant's possession and from ejecting him, if he got the aforesaid two-third shares allotted to him at partition, and that s. 43 of the Civ. Pro. Code had no application to the case. MULA MAL v. BHANA MAL, **48 P.L.R. 1902.**

(96)—*Right of mortgagee to throw the whole debt on a portion of the security and release the rest—Omission of prior mortgagee in a suit by subsequent mortgagee to set up his prior rights whether a bar by rule of, in a subsequent suit by him to enforce his security—Constructive—Applicability of—Determination of—Acknowledgment by mortgagor, saving of limitation by—Revival of mortgage right after satisfaction when permissible—Limitation after revival.*—The plaintiffs were mortgagees of certain properties. A major portion of the properties was sold to the plaintiffs for the purpose of discharging their mortgages and certain other debts due by the mortgagors. The mortgagors undertook to pay off the prior incumbrances on the properties sold and executed an *ekrarnamah*

***Res Judicata*—continued.**

—1.—General—*continued.*

under which they mortgaged a number of properties, not the subject of the present appeal, to secure the purchasers against any loss they might sustain by being called upon to pay off earlier incumbrances. Subsequently, the present appellants, who were subsequent incumbrancers upon a portion of the properties mortgaged to the plaintiffs, obtained a decree upon their mortgage and in execution of their decree purchased the properties mortgaged to them. The plaintiffs alleged that they were dispossessed of the properties sold to them and hence brought the present suit to recover possession of the property sold to them or, in the alternative, for enforcement of their mortgage. Before the suit came on for hearing, the plaintiffs exonerated the defendants, other than the appellants, in respect of claims against them so far as the mortgaged properties, other than those purchased by the appellants, were concerned. The lower Court, thereupon, passed a decree in favour of the plaintiffs for realization of sums due to them by auction-sale of the properties purchased by the appellants and by auction-sale of properties comprised in the *ekrarnamah. Held*, that the plaintiffs were not entitled to throw the whole debt on a portion (property purchased by the appellants) of the whole property comprised in the mortgage on the ground that the other shares had been mortgaged up to their full value under prior mortgages. Appeal allowed and suit dismissed so far as it affected the appellants. *Per Mookerjee, J.*—An acknowledgment by a mortgagor in favour of a first mortgagee, does not preclude a puisne mortgagee, whose title accrued before the acknowledgment was given, from relying on the Statute of limitation. For, the proper construction to be put upon s. 19 of the Limitation Act is that when it makes an acknowledgment given by one person operative against another on the ground that the latter derives title or liability from the former, it contemplates that the derivation of title or liability takes place after the acknowledgment has been given. (1 C.L J. 23, 12 W.R. 362, 8 A. 324, *R*) Although, ordinarily, limitation runs from the earliest time at which an action can be brought, yet there may be a revival of a right to sue when a previous satisfaction of the claim has been nullified. Consequently, in the present case, the plaintiffs got a fresh cause of action when the conveyance in their favour proved to be inoperative: and, as the suit was instituted within twelve years from the time when the money became due upon the revival of the cause of action, the suit was not barred. [*R.*, 2 C.L. J. 288; *D.*, 6 C.L.J. 612=12 C.W.N. 107.] It is open to a puisne mortgagee, in an action against his mortgagor, to join prior as well as subsequent incumbrancers as defendants, so as to enable them to obtain a decree entitling them to redeem the prior incumbrancers as also to call upon the subsequent incumbrancers to redeem him; in an action so framed, a prior incumbrancer must set up all the earlier securities held by him, and, if he omits to do so, he may find himself estopped when he seeks to enforce them in a subsequent action. On the other hand, if a puisne mortgagee brings an action against his mortgagor and joins all prior as well as subsequent incumbrancers, but asks for no relief against the holder of the prior security and contents himself with a prayer for the sale of the properties subject to prior charges, it is not necessary for the prior incumbrancer to set out his earlier securities; they are entirely foreign to the scope of the suit, and no investigation as to their validity or extent can possibly take place in the action so framed. The present plaintiffs were made parties to the previous suit by the appellants, as the holders of a subsequent mortgage, bound to redeem the then plaintiffs; but no relief was asked for against them in their character of prior mortgagees; it was, consequently, not obligatory on them to set up their prior securities, or to compel the then plaintiffs to convert their suit for sale into a suit for redemption. Consequently, the plaintiffs were not barred by rule of *res judicata* from enforcing their lien on their security. [*R.*, 33 C. 425=3 C.L J. 205, 5 C.L.J. 611=36 C. 193.] The doctrine of constructive *res judicata* embodied in explanation II to s. 13, Civ. Pro. Code, is not applicable, unless the subject-matter of the present suit was identical with the subject-matter of the previous suit. [*R.*, 35 C. 979=12 C.W. N. 862=8 C.L.J. 82.] In determining the question of *res judicata*, reference must be made not only to the decree but also to the judgment and pleadings. SURJIRAM MARWARI v. BARHAMDEO PERSAD. **1 C.L.J. 337.** [*F.*, 33 C. 613=10 C.W.N. 551=3 C.L.J. 576; *R.*, 6 C.L.J. 46, 10 C.L.J. 150, 9 C.L.J. 597=12 C.W.N. 739=6 M.L.T. 363, 10 C.L. J. 420=2 Ind. Cas. 129=13 C.W.N 1197; *D.*, 7 C.L.J. 274]

(97)—Res judicata — *Discharge, pleaded in prior suit—Not proved.*—A plea of discharge which the plaintiff failed to prove in a prior suit brought by the defendant against plaintiff to recover *waram* will not constitute *res judicata* in a subsequent suit by plaintiff for the return of a loan advanced to defendant. AKILANDAM PILLAI v. CHINNASAMI MOOPAN, **M.W.N. 1912, 172=11 M.L.T. 201=13 Ind. Cas. 642.**

(98)—Res judicata — *U. P. Land Revenue Act* (III *of* 1901), *s.* 185—*Decision of the Deputy Commissioner as to the amount of rent and cesses payable by an under-proprietor to a superior proprietor — Summary proceedings to recover rent, effect of—Oudh Land Revenue Act,* (XVII *of* 1876), *s.* 158—*Rural Police rate—Effect of neglecting to enforce right for some time—Want of inclusion in settlement amount.*—The decision of a Deputy Commissioner in a proceeding held under s. 185 of the United Provinces Land Revenue Act or s. 158 of the Oudh Land Reve-

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——1.—General—*continued.*

nue Act, 1876, does not render the question of the amount of rent and cesses payable by an under-proprietor to the superior proprietor *res judicata*. S. 185 of the United Provinces Land Revenue Act, like s. 158 of the Oudh Land Revenue Act of 1876, provides a summary remedy for the recovery of rent and other sums payable by the under-proprietors. Such proceedings do not result in a decree and cannot have the force of *res judicata*. A superior proprietor cannot be deprived of his rights merely because for some years he had neglected to enforce them. A claim for rural Police rate cannot be rejected on the ground that it was not included in the amount fixed as rent by the Settlement Officer at the revision of Settlement, where the Settlement was revised before the rural Police rate was imposed. RAJPAL SINGH v. PARTAB BAHADUR SINGH, **12 Ind. Cas. 331.**

(99)—Res judicata—*Joint tort-feasors—Action against one joint tort-feasor bars another action against others—Rule in, Brinsmead* v. *Harrison—Rule does not apply to subsequent tort—Cause of action in both suits to be the same for* res judicata *to apply*—Lis pendens *does not apply to moveable property—Plea of adoption by defendant—Decision in first suit—Defendant not claiming under the parties in first suit can agitate the question in second suit—Pledge—Conversion.*— M K, claiming to be the adopted son of M R, took possession of certain ornaments belonging to MR, which he wrongfully pledged in 1897 with G. Soon after, J, the daughter of MR sued MK to recover the ornaments, and obtained a decree which was not satisfied. MK had pledged only two of the ornaments with G before the date of the suit; while the remaining ones were pledged after the institution of the suit. Subsequently, in 1907 J sued G, the pawnee, to recover the ornaments. The defendant contended in reply that, MK and G being joint tort-feasors, the suit was barred under the rule in (15 A. 108, *F.*). He also pleaded that MK was the validly adopted son of MR. *Held*, that the plea of *res judicata* must fail in so far as it was based upon the rule of *Brinsmead* v. *Harrison*, for a fresh assignment in respect of a tort subsequent to that originally sued upon would not come within the scope of the rule so as to bar the fresh assignment; and that the cause of action in the second suit must be precisely the same as the cause of action in the first suit, in order to make the judgment in the first suit a bar to proceedings in the second suit; that the fact that the first suit was pending at the time of the pledge of a large portion of the ornaments sought to be recovered in the second suit could not prejudice the defendant on the issue of *res judicata*, for the doctrine of *lis pendens* did not apply to moveable property; that the defendant was entitled to raise the issue about MK's adoption, for the first suit was no bar to the issue sought to be raised by the defendant as it was subsequent to the pledge, and the defendant did not claim under a person against whom the issue of adoption had been at the time of the pledge finally heard and determined. GOVIND BABA GUJAR v. SHRIMANT JIJIBAI SAHEB, **14 Bom. L.R. 9=36 B. 189=13 Ind. Cas. 849.**

(100)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 7—*Suit for recovery of receipt no bar to subsequent suit for balance due on account — Cause of action.* —A person sued for the recovery of a certain commissariat receipt which had been made over to another as security for an advance of money given by the latter. *Held* in a subsequent suit by the same person against the same party for the balance due on the whole account, that the plaintiff was not bound to joint the present claim, which rested on a different cause of action, with the previous one in which it was not necessary for the Court to have gone into the whole account between the parties and have decided the amount of the balance due. NAWAB MEHDI ULLEE KHAN v. MAHOMED WAJID ULLEE, **1 N.W.P. 70.**

(101)—*Civ. Pro. Code, ss.* 12 *and* 13—*Rent, Suit for—Mesne profits, Suit for.*—A purchased a tenure at a sale for arrears of rent, and some time after, served a notice upon B, an under-tenure holder under s. 167 of the Bengal Tenancy Act. A then sued to eject B, and to recover mesne profits. The Court made a decree for ejectment and allowed mesne profits from the date of the service of notice under s. 167. B preferred an appeal. During its pendency, A sued B for rent for the period between the date of his purchase and the date of the service of notice. *Held*, (1) that the suit was not barred under s. 12 of the Civ. Pro. Code (7 C.W.N. 720, *Appl.*)—(2) that the suit was not barred under s. 13, Civ. Pro. Code, as A could not join claims for rent and mesne profits in the previous suit. NAFFAR CHANDER PAL CHOWDHURY v. MUNSHI MAHOMED KAYUN, **8 C.L.J. 303.**

(102)—*Suit for the possession of the whole dismissed—Subsequent suit for declaration of right—Cause of action— Civ. Pro. Code, s.* 13, *Exp. II. and s.* 43.--In consequence of a dispute between the parties, the Criminal Court acting under the provisions of the Crim. Pro. Code maintained the defendant in possession. The plaintiffs brought a suit for possession alleging that they were the owners of the whole. The Court found that the parties were joint owners but dismissed the suit on the ground that the plaintiffs had not asked for declaration of their right to a proportionate part. The plaintiffs brought this suit for declaration that they were entitled to collect their half share of rents from the land in dispute. *Held*, that, having regard to the nature of the two suits, the relief claimed in the present suit would have been inconsistent with the relief claimed in the former suit, and hence the plaintiffs were not bound to make it a ground of attack in that suit. The present claim

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——**1.—General**—*continued.*

was, therefore, not barred by Exp. ii to s. 13 of the Code. *Held*, further, that the suit was not barred by s. 43. MAHANDAR SINGH v. JANKI SINGH, **2 A.L.J. 342.** (19 A. 517, 25 B. 189, A.W.N. 1903, 97, *R.*)

(103)—*Plea of* res judicata *in appeal.*—A plea of *res judicata* may be raised at any stage of a case, provided that where the plea is urged in the appellate Court the facts are already in evidence which are alleged to bar the suit. FATTEH KHAN v. BAZ, **139 P.R. 1888.** (80 P.R. 1884, *R.*)

(104)—*Act* X *of* 1877, *s.* 13—Res judicata, *essentials of.*—To constitute a *res judicata* under s. 13 of the Civ. Pro. Code, not only must the same issue have been raised between the proper parties, but it must have been heard and finally decided. KHUSHALA v. ISHAR DAS, **104 P.R. 1883, Note (a).**

(105)—Res judicata—*Act* X *of* 1877, *s.* 13.—Where the plaintiffs' suit relating to a certain land at the Summary Settlements in 1857, 1858 and 1859, were according to the practice of that time dismissed, and they were told to sue again at the Regular Settlement, a suit brought by them at the Regular Settlement was held not barred by s. 13, inasmuch as the matter in dispute could not be said to have been heard and finally decided in the former suits within the meaning of that section, the effect of the former decisions being simply to postpone the determination of the matter. ALLAHYAR v. SHAHWALI, **104 P.R. 1883, Note (b).**

See ACCOUNTS—SUIT FOR ACCOUNTS, 3 C.L.R. 444.

See ACT XX OF 1863, s. 2, 14 M. 1.

See ACT IV OF 1869, ss. 13, 14, 45 P. R. 1871.

Reference to Civil Court of question of apportionment of compensation money—Decision, if *res judicata* on question of title to other properties—*See* ACT I OF 1894, 11 C.W.N. 525=34 C. 466.

Adjudication by Forest Settlement Officer under Madras Forest Act of 1882—Subsequent civil suit barred—*See* ACT I OF 1894, ss. 16, 48, 17 M.L.J. 557.

Decision of Settlement officer that land was not held rent-free, effect of—*See* BEN. ACT VIII OF 1885, s. 9, 11 C.W.N. 859.

Previous rent decree not deciding rate of rent —*Res judicata*—*See* BEN. ACT VIII OF 1885, s. 29, 9 C.L.J. 343=36 C. 604=2 Ind. Cas. 828.

Suit for assessment of additional rent on same additional area which formed subject-matter of previous suit barred—Previous suit operates as—*See* BEN. ACT VIII OF 1885, ss. 30, 37, 50, 52, 115, 12 C.W.N. 904.

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——**1.—General**—*continued.*

Whether decision in a previous rent-suit operates as—In a suit for rent for subsequent years—*See* BEN. ACT VIII OF 1885, s. 51, 5 C. L.J. 92.

Temporary revenue settlement—Settlement affirmed by special Judge—*See* BEN. ACT VIII OF 1885, ss. 55, 107, 109, 109-A, and 192, 11 C.W.N. 939.

Question heard and decided by a Revenue officer—Decision operating as *res judicata*—*See* BEN. ACT VIII OF 1885, ss. 102, 106, 17 C. 721.

Dismissal of a petition of objection under s. 104-E of the Bengal Tenancy Act, does not bar subsequent suit for rent by objector—*See* BEN. ACT VIII OF 1885, ss. 103-A, 104-E, 104-H, 111-A, 3 C L.J. 133.

See BEN. ACT VIII OF 1885, ss. 105, 106, 28 C. 471=5 C.W.N. 798.

Decision under ss. 105, 106, 809, Bengal Tenancy Act—*Res judicata*—*See* BEN. ACT VIII OF 1885, ss. 105, 106, 109, 7 Ind. Cas. 71.

See BEN. ACT VIII OF 1885, s. 107, 28 C. 676.

Rate of rent determined in a rent-suit—Subsequent suit at enhanced rate—Effect of entry of rate of rent in settlement record—*See* BEN. ACT VIII OF 1885, ss. 107, 109, 32 C. 336 =9 C.W.N. 610=1 C.L J. 134.

Prior suit on pattah—Inclusion of voluntary fees in pattah—Failure to object to such inclusion — Subsequent suit—*Res judicata*—*See* MAD. ACT VIII OF 1865, 17 M.L.J. 433=30 M. 498=3 M.L.T. 17.

See MAD. ACT VIII OF 1865, ss. 7, 9, 13 M. L.J. 485.

Dismissal of suit to enforce acceptance of patta by Revenue Court—Subsequent civil suit for recovery of rent on the basis of tender of proper patta—*See* MAD. ACT VIII OF 1865, ss. 9 and 72, 17 M.L.J. 601=3 M.L.T. 186= 31 M. 62.

See U. P. ACT XIX OF 1873, ss. 113, 114, 2 A 839.

See U. P. ACT XVII OF 1876, s. 53, 5 O.C. 97.

Previous suit for interest on rent for a different period—*Res judicata*—*See* U. P. ACT II OF 1901, s. 101, 1 Ind. Cas. 529.

Suit for rent under Agra Tenancy Act—Tenant not pleading proprietary title—Subsequent suit for declaration—*Res judicata*—*See* U. P. ACT II OF 1901, s. 190, 6 A.L J. 259= 31 A. 323=2 Ind. Cas. 218.

Judgment of Assistant Collector—*Res judicata*—*See* U. P. ACT II OF 1901, s. 199, 6 A.L J. 917=32 A. 8=3 Ind. Cas. 954.

Res Judicata —continued.

——**1.—General** —*continued.*

Bond obtained from tenant for non-occupancy and ex proprietary holding—Application for fixing rent—Bond found to have been obtained by undue influence as to ex-proprietary holding—Subsequent suit for arrears of rent—Whether finding as to undue influence *res judicata*—*See* U.P. ACT III OF 1901, s. 36, 5 A.L.J 642=A.W.N. 1908, 250.

Finding upon unnecessary issue—Whether *res judicata*—*See* APPEAL—GENERAL, 120 P. L.R. 1911.

Plea of *res judicata* taken for first time in second appeal—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 4 A. 69, F.B.=A.W.N. 1881, 116.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 2 Hay 154.

Order refusing to file award—Suit to enforce it whether barred—*See* AWARD, 8 A.L.J. 315.

Applicability of rule of—To insolvency proceedings—*See* CIV. PRO. CODE, 1882, ss. 336, 344, 75 P.R. 1905, F.B.=193 P.L.R. 1905.

Interpretation of decree in a particular sense —Effect—*See* CIV. PRO. CODE, 1908, s. 33, 7 A.L.J. 190=5 Ind. Cas. 210=32 A. 210.

See CIV. PRO. CODE, 1908, ss. 47, 11, 1 O. C. 22.

Sale of property under attachment—Partition of property purchased—Dismissal of suit by attaching creditor, as co-sharer, for declaration of his title to property purchased—Subsequent application for sale of property in execution of decree—*See* CIV. PRO. CODE, 1908, s. 64, O. XXI, r. 58, 2 A.L J. 265.

See CIV. PRO. CODE, 1908, s. 144 (1), 9 O.C. 254.

See CIV. PRO. CODE, 1908, O. IX, r. 8, 177 P.R. 1888.

See CIV. PRO. CODE, 1908, O. X, r. 4, 13 B.L.R. 658.

See CIV. PRO. CODE, 1908, O. XXI, r. 2, 20 M. 369=7 M.L.J. 71.

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Res judicata—Decision declaring character as legal representative—*See* CIV. PRO. CODE, 1908, O. XXII, r. 5, 9 M.L.T. 403.

Res judicata—Appeal—Unconditional withdrawal of—Whether bars fresh suit—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 1, 5 N.L.R. 88=3 Ind. Cas. 61.

Suit for share of profits—Compromise—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 3, 2 O.C. 112.

Res Judicata —continued.

——**1.—General** —*continued.*

Operation of—Preventing a judgment-debtor from pleading bar by limitation in respect of a previous application ordered without objection —*See* CIV. PRO. CODE, 1908, O. XXVI, rr. 13, 14, 47 P.R. 1906=86 P.L R. 1907.

Compromise decree by guardian ad item, suit leased on allegation of fraud, to set aside—Subsequent suit for the purpose on the ground of want of Court's sanction—*See* COMPROMISE—GENERAL, 21 M. 91=8 M L.J. 28.

Compromise decree when operates as—*See* COMPROMISE—EFFECT OF, 5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913.

Estoppel by—Applicability of rule—Question of law—*See* COMPROMISE—ENFORCING, 9 M.L.T. 497.

See CONTRACT ACT, 1872, s. 43, 3 C. 353=1 C.L.R. 488.

Suit for contribution—Question left open in previous suit—Limitation—*See* CONTRIBUTION, SUITS FOR—GENERAL, 71 P.L.R. 1911 =66 P.W.R. 1911=10 Ind. Cas. 839.

Question of Khanadamad—*Res judicata*—*See* CO-SHARERS—GENERAL, 145 P.W.R. 1904=4 Ind. Cas. 1004.

Costs—Plea of—Raised after evidence—*See* COSTS—SPECIAL CASES, 6 C. 406=7 C.L.R. 251.

See CUSTOMS—PUNJAB — GENERAL, 23 P.R. 1897.

Alienation by sonless proprietor—Suit by reversioner during life of proprietor—Dismissal of such suit—Subsequent suit by reversioner's son after proprietor's death barred—*See* CUSTOM—PUNJAB—ALIENATION, 68 P.R. 1905.

Res judicata—Dismissal of previous declaratory suit brought by some reversioners to contest alienation on the ground that they had no *locus standi*—Subsequent suit by other reversioners not party to the former suit, whether barred—*See* CUSTOM — PUNJAB — ALIENATION, 36 P.W. R. 1908=111 P.L.R, 1908.

Former suit by mortgagee to enforce his rights—Subsequent suit by his sons and reversioners to protect their intersts—Opposite finding in two cases illegal—Duty of Judge—*See* CUSTOMS—PUNJAB—ALIENATION, 139 P.W. R. 1909=4 Ind. Cas 997.

See CUSTOMS—PUNJAB—ALIENATION, 140 P.L.R. 1902.

See CUSTOMS—PUNJAB— INHERITANCE, 146 P.R. 1894.

Identity of subject-matter, if essential—How established—*See* DEBUTTER PROPERTY, 12 C.W.N. 739=9 C.L.J. 597.

Declaration of title—*See* DECLARATORY DECREE, SUIT FOR, 5 A. 345, F.B.

***Res Judicata*—continued.**

——1.—General —*continued.*

Decree obtained *ex parte* for specific performance—Declaration of plaintiff's right alone under agreement—Dismissal of defendant's application to set aside decree—Subsequent application for amending decree — Whether barred by — *See* DECREE — ALTERATION OR AMENDMENT OF DECREE, 12 B. 174.

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 10 A. 51=A.W.N. 1887, 284, 15 M. 403=1 M.L.J. 535.

Decisions on questions raised and decided in review-proceedings — *See* DECREE—MISCELLANEOUS, 2 C.L.J. 508.

Acquisition of easement — *Res judicata*—*See* EASEMENTS ACT, 1882, s. 13, 9 Ind. Cas. 813.

See ENHANCEMENT OF RENT—ENHANCEMENT, NOTICE OF, 3 C. 271.

Estoppel by conduct—Cause of action—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 2 Ind. Jur. N.S. 122.

See EVIDENCE ACT, 1872, s. 13, 25 A. 546 =A.W.N. 1903, 137.

See EVIDENCE ACT, 1872, s. 40, 20 B. 475.

See EVIDENCE ACT, 1872, ss. 40, 41, 42, 24 A. 242=A.W.N. 1902, 38.

Estoppel by judgment — Judgment *inter partes*—Non-disclosure of title in a previous suit—*See* EVIDENCE ACT, 1872, s. 115, 1 C. L J. 23=32 C. 357, P.C.

See EVIDENCE ACT, 1872, s. 116, A.W.N. 1884, 274.

Finality of *ex parte* decree—Suit to set aside decree—Fraud— Limitation—*See* EX PARTE DECREE, 47 P.L.R. 1910=8 Ind. Cas. 232.

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Decree without fraud, strangers when bound by—Decree obtained on fraud of one of the parties, effect of, till set aside for fraud—Fraud and collusion of both parties to suit, decree obtained on, how far binding on other persons—*See* FRAUD—EFFECT OF FRAUD, 6 B. 703.

Fraudulent transaction upheld by decree of Court—Party precluded from setting up his own fraud—*See* FRAUD—MISCELLANEOUS, 4 M.L.T. 331.

Alienation by grand-father—Vendee suing minor grandson for possession—Guardian *ad litem* confessing judgment—Subsequent suit for possession by minor not barred — *See* GUARDIAN—GENERAL, 15 P.L.R. 1912=36 P.W.R. 1912=13 Ind. Cas. 20.

Petition by one of minor's relatives to be appointed guardian in preference to another, referred to a fresh petition—Subsequent petition, if—*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 5 M.L.T. 208.

***Res Judicata*—continued.**

——1.—General—*continued,*

See HIGH COURT, 17 A. 294, F.B.=15 A. W.N. 1895, 167.

Question of validity of adoption settled in prior suit—*See* HINDU LAW—ADOPTION, 1 M.H.C. 45.

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Institution of suits as regards different portions of estate belonging to family — *Res judicata*—*See* HINDU LAW—PARTITION, 13 B. 25.

See HINDU LAW—RELIGIOUS ENDOWMENT, 14 B.L.R. 450, P.C.=3 Sar. 449=23 W.R. 253=2 I.A. 145.

First suit by some reversioners against others during widow's life—Second suit between the same parties after widow's death—Question in issue same in both suits—*See* HINDU LAW—REVERSIONERS, 2 C.L.J. 144.

Finding not embodied in decree may operate as—*See* HINDU LAW—WIDOW, 3 N.L.R. 35.

See HINDU LAW—WILL, 2 Ind. Jur. N.S. 24.

Decision of questions in former suit, not quite necessary for its determination, not—Between same parties in latter suit—*See* HINDU LAW—WILL, 12 C.W.N. 1002=36 C. 75=1 Ind. Cas. 523.

See INSOLVENCY—GENERAL, 76 P.R. 1899.

See LANDLORD AND TENANT—EJECTMENT, L.B.R. 1872—1892, 625.

Tenancy denied in previous suit for rent between landlord and tenant—Suit for rent dismissed—Plaintiff seeking to recover possession cannot sue defendant as tenant—Plea of *res judicata*—Only course is in ejectment—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 34 C. 922.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 6 A. 52= A.W.N. 1883, 203.

Finding as to eviction—Erroneous decision on point of law—Effect—*See* LANDLORD AND TENANT—TENANTS' LIABILITY FOR RENT, 13 C.L.J. 119=9 Ind. Cas. 568.

Claim to lands—Omission to make some defendants as parties respondents—*Res judicata*—*See* LANDLORD AND TENANT—TENANTS' LIABILITY FOR RENT, 9 C.L J. 479=13 C. W.N. 746=1 Ind. Cas. 539.

See LANDLORD AND TENANT—TENANTS' LIABILITY FOR RENT, 14 M. 365.

Decree for ejectment against tenant for converting agricultural holding into one of a different nature—Effect of decree on tenant's minor son not party to suit against tenant—Suit by son claiming tenancy—*See* LANDLORD AND TENANT—MISCELLANEOUS, 2 M.L.T. 86 =17 M.L.J. 197.

Res Judicata—continued.

——**1.—General** —*continued.*

See LANDLORD AND TENANT—MISCELLANEOUS, 9 Ind. Cas. 2.

Court misconstruing decree— If mistake of law can give rise to—*See* LEASE—GENERAL, 6 M.L.T. 313=20 M.L.J. 20=33 M. 102=3 Ind. Cas. 701.

Decree for money rent—*Res judicata*—*See* LEASE -CONSTRUCTION OF LEASE, 12 C.L.J. 595=8 Ind. Cas. 945.

Decision of issue improperly raised after remand—*See* LIMITATION ACT, 1908, s. 29 (1)*a*, arts. 118, 144, 10 C.W.N. 1065, P C.=8 Bom. L.R. 722=16 M.L.J. 440=3 A.L.J. 695=4 C. L.J. 405=1 M.L.T. 265=9 O.C. 377=28 A. 727=33 I.A. 156.

Withdrawal of suit—Order becoming final—*Res judicata*—*See* LIMITATION ACT, 1908, s. 31 (2), 9 A.L.J. 378=14 Ind. Cas. 175.

See LIMITATION ACT, 1908, arts. 116, 62, 97, 29 M. 353.

See LIMITATION ACT, 1908, arts. 120, 140, 144, 3 M.L.J. 213.

See LIMITATION ACT, 1908, art. 134, 12 B. 352.

See LIMITATION ACT, 1908, art. 144, 2 C. L.R. 10.

Successive rent suits—Question of area on which rent assessable—*See* LIMITATION ACT, 1908, art. 175, 11 C.W.N. 1100=6 C.L.J. 715 =34 C. 1020.

See LIS PENDENS, 1 A. 588.

Unsustainability of plea of—in the absence of previous proceedings in evidence — *See* MAHOMEDAN LAW—WILL, 9 C.W.N. 938, P.C.=1 C.L.J 594=2 A.L.J. 758=15 M.L.J. 336=7 Bom. L.R. 876=33 C. 116=32 I A. 244.

See MALABAR LAW—ENDOWMENT, 14 M. 312.

Former suit declaring possession in favour of Tarwad—Right of Karnavan to claim possession in subsequent suit—*Res judicata*—*See* MALABAR LAW—JOINT FAMILY, 7 M.L.T. 431=6 Ind. Cas. 268.

Between co-defendants — Appellate Court declining to decide an issue and disposing of the case on other grounds—First Court's judgment upon that issue no bar to future suit—*See* MORTGAGE—GENERAL, 5 C.L.J. 653.

Mortgage—Second suit not maintainable for same cause—*See* MORTGAGE—GENERAL, 8 A.L.J. 599

Subsequent mortgagee seeking priority — Failure to plead in previous suit plea barred in subsequent suit—*See* MORTGAGE—GENERAL, 9 C. L.J. 78=3 Ind. Cas. 686.

Res judicata—Prior suit for declaration of title to moiety of property —Dismissal—Subsequent suit for declaration of title to whole property and injunction — *See* MORTGAGE—GENERAL, 7 M.L.T. 405=6 Ind. Cas. 764.

Res Judicata—continued.

——**1.—General** —*continued.*

Mortgage suit—Person joined as defendant failing to set up paramount title—Effect—*See* MORTGAGE—GENERAL, 6 N.L.R. 156.

See MORTGAGE—REDEMPTION, 2 A. 455.

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Constructive — Defence which might and ought to have been taken in former trial—Principle of the rule—Civ Pro. Code, s. 13, Explanations 2 and 3—*See* MORTGAGE—REDEMPTION, 5 C.L.J. 192=34 C, 223.

Suit for redemption—Two appeals in the lower Court - Two decrees passed — Appeal against one —*Res judicata*—*See* MORTGAGE—REDEMPTION, 8 A.L.J. 605.

Whether right to redeem is —*See* MORTGAGE —REDEMPTION, 4 M.L.T. 73.

Redemption suit dismissed for default of payment—Second suit barred—*See* MORTGAGE —REDEMPTION, 2 Ind. Cas. 662.

Second suit for redemption—First decree not fixing a time within which mortgage-money was payable—*See* MORTGAGE — REDEMPTION, 8 O.C 361.

Property undivided and subject to mortgage —Power of one sharer to redeem—Lien over other shares—*Res judicata*—*See* MORTGAGE —REDEMPTION, 8 M.L.T. 186.

See MORTGAGE—REDEMPTION, 5 Ind. Cas. 478=8 M.L.T. 252, 9 Ind. Cas. 158, 4 O.C. 100, 6 O C. 239, 8 O.C. 302.

See MORTGAGE—MISCELLANEOUS, 8 C. W.N. 385, L.B.R. 1893—1900, 14.

"Heard and finally decided," meaning of—Effect of appeal in former suit having abated—Partition suit—*See* PARTITION—GENERAL, 8 Ind. Cas. 325.

Suit by a Mahomedan co-sharer for partition and separate possession of his share—No obligation on other co-owners to come to partition—Fresh suit by another co-sharer for separate possession of his share, maintainability of —*See* PARTITION—GENERAL, 3 S.L.R. 93=3 Ind. Cas. 899.

See PARTITION—RIGHT TO PARTITION, 7 B. 272.

Previous suit for partnership debt—Widow as co-plaintiff—Application of old or new Code on the question of—*See* PARTNERSHIP—GENERAL, 142 P.W.R. 1910=97 P.R. 1910=8 Ind. Cas. 999.

See PLAINT—AMENDMENT OF PLAINT, 4 O.C. 108.

Mortgage—Equity of redemption, capable of being subject of adverse possession—Limitation —*See* POSSESSION—ADVERSE POSSESSION, 14 B. 176.

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——1.—General—*continued.*

See PRE-EMPTION—MISCELLANEOUS, 8 P. R. 1904.

Pre-emption suit decreed on the ground that an ostensible mortgage is in reality a sale—Subsequent suit by vendor's son against vendee to impugn alienation — *Res judicata—See* PRE-EMPTION—MISCELLANEOUS, 157 P.W. R. 1909.

Two appeals from one decree—Decrees in appeal drawn up in identical terms, effect of—*See* PRINCIPAL AND AGENT—GENERAL. 4 A.L.J. 587=A.W.N. 1907, 245=29 A. 730.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1865, s. 6, A.W.N. 1890, 21, 9 C. 183=11 C.L.R. 305.

See REGISTRATION ACT, 1908, s. 17, cl. (2), 2 O.C. 250.

Decision in rent suit how far operates as—*See* RENT, 2 Ind. Cas. 160.

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See RENT, SUIT FOR, 3 O.C. 65.

High Court's powers of revision—Wrong decision on question of—*See* REVISION—GENERAL, 9 B. 432.

Erroneous decision on question of res judicata—Failure to exercise jurisdiction—Revisional powers of High Court under s. 622, Civ. Pro. Code, 1882—*See* REVISION—GENERAL, 11 B. 488.

Wrong decision as to—When a ground for revision—*See* REVISION—GENERAL, 2 P.R. 1910, Rev.=6 Ind. Cas. 75=101 P.L.R. 1910.

See RIGHT OF SUIT—DECREES, 2 N.W.P. 382.

Effect of *obiter dictum—See* SHAMILAT, 94 P.L.R. 1910.

See SUCCESSION CERTIFICATE ACT, 1889, s. 18 (*b* and *c*) 19 B. 821.

S. 13 Civ. Pro. Code, 1882, applicability of, to applications under s. 90 of the Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882, s. 90, 2 A.L.J. 379=A.W.N. 1905, 144.

See TRANSFER OF PROPERTY ACT, 1882, s. 90, 14 M.L.J. 103.

See TRANSFER OF PROPERTY ACT, 1882, s. 99, 18 A. 325=A.W.N. 1896, 94.

Wills—Application for probate—Earlier wills not revoked by last—Finding by Probate Court—*Res judicata—See* WILL—CONSTRUCTION, 9 M.L.T. 319=21 M.L.J. 485=9 Ind. Cas. 613.

By plaintiff with permission to sue afresh—Subsequent suit on same cause of action—Civ. Pro. Code, 1882, ss 13, 373—*See* WITHDRAWAL OF SUIT, A.W.N. 1885, 151.

Res Judicata—continued.

——1.—General—*concluded*

Former suit dismissed for failure to produce evidence, with reservation to bring a new suit—Fresh suit—*See* WITHDRAWAL OF SUIT, 3 B.L.R. P.C. 48=13 M.I.A. 160=12 W.R. P.C. 43.

No judgment defining rights and obligations of defendants *inter se*—Applicability of principle of—*See* WITHDRAWAL OF SUIT, 7 Ind. Cas. 892=12 C.L.J. 434.

——2.—Adjudications.

See ESTOPPEL — ESTOPPEL BY JUDGMENT.

(1)—*Decree, test of* res judicata.—It is by the decree and not by the judgment that a question of *res judicata* must be decided. AVALA v. KUPPU, **8 M.77.** [*R.*, 12 M. 500.]

(2)—Res judicata—*Error of law.*—The doctrine of *res judicata* does not necessitate a repetition of an error of law. VENKU v. MAHALINGA, **11 M. 393.** [*F.*, 28 M. 517=15 M.L.J. 466, 44 P.R. 1908; *R.*, 2 O.C. 261, 14 C.P.L.R. 109, 32 C. 749=9 C.W.N. 466=1 C.L.J. 176, 8 O.C. 37, 30 M. 461=17 M.L.J. 250.]

(3)—*Final adjudication—Parties to be arrayed on opposite side.*—For the purposes of *res judicata*, no adjudication can be final, unless the parties between whom the doctrine is to be applied were arrayed on opposite sides in the former litigation. MUHAMMAD ZAHIA KHAN v. MIRDAD KHAN, **A.W.N. 1887, 246.**

(4)—*Decision of question of title—Test.*—In considering the question whether a decree determines the rights of parties so as to bar a subsequent suit, it must not be assumed that, because a decree does not in precise terms say anything as to the matter of title involved in a suit, it necessarily does not determine such title. What has to be seen is, whether, upon examination of the pleadings of the parties, and the questions arising between them thereon, a decision of the question of title was essential to the passing of a decree. If it was, then, the decree must be taken to decide it; if it was not, then otherwise. MELVILL v. KHUAJU, **A.W.N. 1886, 3.**

(5)—*Adjudicated matter incidentally in issue—Finality.—Per Muthusami Aiyer, J.*—If the matter adjudicated on in a suit, is only incidentally in issue or cognizable, the adjudication is final, whether by a Court of concurrent or limited jurisdiction only for the proper purpose and object of that suit. MANAPPA MUDALI v. S. T. MCCARTHY, **3 M. 192, F.B.** [*F.*, 1 M.L.J. 313, 2 M.L.J. 36; *R.*, 13 M. 287.]

(6)—*S. 13—Civ. Pro. Code*, 1882.—Res judicata—"*Finally decided,*" *meaning of.*—A matter cannot be considered to be finally decided, unless in point of fact it was actually decided by all the tribunals before which that

Res Judicata—continued.

——**2.—Adjudications**—*continued.*

particular matter came for decision. Therefore, when the decision of a lower Court is appealed to a superior tribunal, and that tribunal for any reason does not think fit to decide the matter, it is left an open question. BISHNU CHARAN MODAK v. MOHESH CHANDRA MOHANTI. **3 Ind. Cas. 87.** (11 C.L.R. 22=18 C. 631, *F.*)

(7)—*Civ. Pro. Code*, s. 13 — *Matter directly and substantially in issue.*--Although a plaintiff and a defendant may have been co-defendants in a former suit, a matter in dispute between them, in a subsequent suit, may have formed the subject of active controversy in the former suit so as to preclude them from raising the same question in the subsequent suit. The adjudication of a matter, directly and substantially in issue between the parties in a previous suit, operates as *res judicata* to bar the trial of the same issue in a subsequent suit, even though the decision of the previous suit may not have proceeded upon the finding on this issue. VENKAYYA v. NARASAMMA, **11 M. 204.** [*F.*, 15 M. 264; *R.*, 14 M. 324, 79 P. R. 1905.]

(8)—*Civ. Pro. Code* (*Act* VIII *of* 1859), s. 148—Res judicata.—The plea of *res judicata* ordinarily pre-supposes an adjudication on the merits, as contra-distinguished from an adjudication of which the effect consists in suspending the right of action, until a certain event occurs or for some time. S. 148 of the Code of Civil Procedure (Act VIII of 1859) contains a statutory direction that, in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff. VENKATACHALAM v. MAHALAKSHMAMMA, **40 M. 272.** [*R.*, 9 C. W.N. 679.]

(9)—*Civ. Pro. Code*, s. 13—Res judicata—*Litigating under the same title.*—A plea of *res judicata* is a bar, under s. 13, Civ. Pro. Code, not only to the trial of a suit, but also to the trial of any one of the issues in a suit which may have been finally heard and determined, and which may form the ground or one of the grounds of decision, and the trial of such an issue will be barred, even though the ground of action in the second suit is not the same as in the first. The words litigating under the same title do not refer to the identity of the ground of action, but mean that the question must have been raised and decided in the same right, *i.e.*, in the right of the parties to the second suit. ALI MOIDEN v. KOMBI, **5 M. 239.**

(10)—*Civ. Pro. Code*, s. 13—*Decision of a Court in British India, whether* res judicata *in Berar.*—S. 13, Civ. Pro. Code, *as applied to Berar*, is not the same law as it is in British India. In British India, it is Act XIV of 1882 enacted by the Governor-General in

Res Judicata—continued.

——**2.—Adjudications**—*continued.*

Council. In Berar it is a *replica* of this enactment set up by an executive order of the Government of India in the Foreign Department. In Berar, the judgment of the Nagpur Court is a foreign judgment. Hence a matter decided by a Court in Nagpur is not *res judicata* as applied to Berar. SYED IMAM v. MOHAMAD SHIKANDAR, **4 N.L.R. 61.** (29 C. 707, *F.*)

(11)—*Civ. Pro. Code*, 1882, s. 13 (=s. 11, *New Code*)—*Application under* s. 90, *Transfer of Property Act*, IV *of* 1882.—S. 13 of the Civ. Pro. Code would not apply to an application under s. 90 of the Transfer of Property Act, for a decree, no matter whether the plaintiff had or had not claimed originally in his suit subsequent relief, or whether, if claimed, such subsequent relief had been allowed or disallowed by the Court when making the decree under s. 88 of the Act, the time for adjudicating on the claim for subsequent relief not arriving until the decree under s. 88 had been exhausted. HAMID-UD-DIN v. KEDAR NATH, **20 A. 386=A.W.N. 1898, 83.** (14 A. 513, *F.*) [*R.*, A.W.N. 1899, 72.]

(12)—Res judicata — *Judgment —Findings essential to sustain judgment—Re-agitating to defeat direct object—Will, construction, suit for —Representative of trustee, if necessary party—Party having no present interest praying for construction of Will—Party, if bound—Co-defendants — Adjudication defining rights — Erroneous decision on question of law, if operates as* res judicata—*Trustee, dealing with trust property for his benefit—Trustee, who to be appointed—Costs.*—An estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or groundwork : in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment. The rule against re-agitating matters, adjudicated is subject to the restriction—that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may as to his immediate and direct object be, those facts are not all necessarily established conclusively between the parties, and, that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object. In a suit for construction of a will, the representatives of the original trustees appointed thereby are necessary parties. (3 C.L.J. 224, *R.*) Where a party did not ask the Court to be dismissed from the suit on the ground that, as he disclaimed all present interest in the estate, he was not a necessary party, but raised the question of construction of the will in that suit, he is bound by the decree. Where an adjudication between defendants who had a conflict of interest between them,

Res Judicata—continued.

—2.—**Adjudications**—*continued.*

was necessary to give the appropriate relief to the plaintiff and there was such adjudication, the adjudication which defined the real rights of the defendants *inter se* will be *res judicata* between the defendants, as well as between the plaintiff and the defendants. (5 C.L.J. 611, 36 C. 193, 5 C.L.J. 653, *F.*) So far as an issue of mixed law and fact is concerned, it stands on the same footing as an issue of fact, and decision thereon operates as *res judicata.* Cases of construction of Wills fall within this class. (28 C. 318, 29 M. 225, *R.*) As regards applicability to decisions erroneous in law, the rule of *res judicata* applies where the parties seek to litigate again the same cause of action as had been decided between them in a prior suit; but where the dispute relates to matters which had already been in controversy and formed the subsidiary consideration in the previous suit, although the causes of action in the two suits may be distinct, the estoppel is to be limited to matters distinctly put in issue and determined in the prior action, and it should further be restricted to questions of fact or mixed questions of fact and law. Cases on the subject reviewed. The same words in different parts of a will should be given the same meaning, unless there is some clear indication that the testator intended to use the word a second time in a restricted sense. Although the cardinal rule in the construction of will is to give effect to the intention of the testator, the duty of the Court is to discover, not what the testator meant, but what is the meaning of his words. Those who claim under an instrument are bound by the testator's expressed intention. A trustee, who deals with the trust property for his own personal advantage, renders himself liable to be removed. A man should not be appointed a trustee who is likely to misappropriate trust money, but poverty alone is not a sufficient ground for exclusion from the office of trustee. Where difficulty has been created and litigation has been in a manner rendered necessary by the act of the testator, for instance, by reason of the ambiguity or inconsistency in the provisions of his will, the Court orders costs of all parties to come out of the estate (3 C.L.J. 224, *R.*). AGHORE NATH MUKERJEE v. SRIMATI KAMINI DEBI, **11 C.L.J. 461=6 Ind. Cas. 554.**

(13)—*Decree for possession—Right to execution in terms of decree—Separate suit.*—Where a decree is specific and unmistakeable in its terms and the remedy awarded by it is clear and definite, the decree holder is entitled to have execution according to the terms of the decree and ought not to be driven to a separate suit to enforce it. BIRJ LALL v. BURKUT ALI, **109 P.R. 1868.**

(14)—Res judicata—*Finding of fact in judgment not necessary for the decree, effect of—Civ. Pro. Code,* s. 13.—For findings of fact in a judgment to operate as *res judicata,* they must have been findings upon which the decree or

Res Judicata—continued.

—2.—**Adjudications**—*continued.*

some operative part of it was made, and which were necessary for the making of the decree in the way in which it or some operative part of it was made; and, it is the decree read in the light of such findings, and not the findings in the judgment apart from the decree, which finally, within the meaning of s. 13, Civ. Pro. Code, decides the matters in issue or which might and ought to have been in issue (Expl. II) between the parties to the suit. Where the decree is inconsistent with the findings, the decree prevails over such findings. In such a case, the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit. Further, such a finding to have the effect of *res judicata* need not have been the sole finding of fact upon which the decree was made, but it must have been a necessary and material finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree, as it was made, to have been a good result in law from the fact or facts so found. SHIB CHARAN LAL v. RAGHU NATH, **17 A. 174=A.W.N. 1895, 47.** (2 I.A. 283, I.A. Sup. Vol. 262, 12 I.A. 23, 15 I.A. 97, 25 W.R. 225, 6 C. 319, 7 A. 606, 1 A. 489, 2 A. 497, 1 A. 666, 7 B. 464, 4 M. 134, 18 B. 597, 5 W.R. 63, *R.*) [*F.*, 20 A.W.N. 89, 32 B. 315=10 Bom. L.R. 380; *R.*, 19 A.W.N. 182, 27 A. 37, P.C., 121 P.R. 1907=51 P.W.R. 1907, 4 M.L.T. 90; *D.*, 24 C. 900, 4 O.C. 145, 57 P.R. 1907, F.B.=66 P.W.R. 1907, A.W.N. 1908, 41=5 A.L.J. 48.]

(15)—*Civ. Pro. Code,* 1882, s. 13—Res judicata—*Finding in judgment not necessary to decree as made.*—Where there are two findings of facts either of which would justify in law the making of the decree which was made, that one, of such two findings of facts, which should in logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata.* HIRA LAL v. DOST MUHAMMAD KHAN, **A.W.N. 1900, 89.** (17 A. 174, *F.*)

(16)—*Civ. Pro. Code,* s. 13—Res judicata—*Effect of finding in judgment not embodied in decree.*—In order that a finding in a judgment, which is not embodied in the decree, may be available as *res judicata* in a subsequent suit, it is necessary that such finding should be *essential* to the making of the decree as framed in the former suit. ALI SAJJAD v. JHAMMO BIBI, **A.W.N. 1899, 182.** (17 A. 147, *F.*; 12 I.A. 23, *R.*)

(17)—*Consent decree—Evidence—Civ. Pro. Code,* s. 13.—A consent decree in a suit, being the decree of a Court having jurisdiction over the subject matter of the suit and over the

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

parties, is admissible in evidence in a subsequent suit between the same parties. LALA SHIB LAL v. LALA GOURI PRASAD, **2 C.W.N. 174.**

(18)—*Purchase of land—Entry of sale in* wajib-ul-arz, *effect of—Limitation.*—An entry in the *wajib-ul-arz* is only good for what it may be worth as evidence, and cannot be held to be like a judgment or to require to be set aside by a suit subject to a limitation reckoned from the date of the instrument. BHOLA SINGH v. BULRAJ SINGH, **1 Agra 233.**

(19)—*Adjudications held to be* res judicata—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *New Code*) —*Validity of decree in previous suit cannot be questioned in subsequent suit.*—Where a decree in a previous suit has not been set aside and is still a subsisting one, its operation as *res judicata* in a subsequent suit regarding the same subject-matter cannot be prevented, nor can the validity of the previous decree be questioned in the subsequent suit. BANSI LAL v. RAMJI LAL, **20 A. 370=A.W.N. 1898, 75.** (9 A. 508, 13 B. 137, *R.*)

(20)—*Matters mentioned in s.* 521 *of the Civ. Pro. Code being directly and substantially in issue determined in proceeding under s.* 525—Res judicata.—Any matters, mentioned in s. 521 of the Code, which have been directly and substantially in issue and determined in a proceeding under s. 525, Civ. Pro. Code, would be *res judicata* in any subsequent litigation in which the same matters were sought to be put in issue. In order to make the refusal to file an award a binding judgment, against its validity, on the ground of the partiality of the arbitrator, it would be at least necessary to show that the point was definitely raised and put in issue and made the subject of trial. MUHAMMAD NEWAZ KHAN v. ALAM KHAN, **18 C. 414, P.C.=18 I.A. 73=6 Sar. 26.** [*F.*, 13 M.L.J. 275; *Appr.*, 14 M.L.J. 356; *Cons.*, 25 C. 757, F.B.; *R.*, 17 A. 21, F.B.=A.W.N. 1894, 187, 28 A. 21=2 A.L.J. 450=A.W.N. 1905, 165, 2 C.L.J. 80, 9 O.C. 205, 33 C. 881=4 C.L.J. 162, 4 L.B.R. 130.]

(21)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13—Res judicata—*Question of law.*—Even if the former Court was in error in a point of law, the matter, which such Court adjudicates on, is, for the purposes of the second Court, *res judicata.* MAIGAR SINGH v. JOTI LAL SAHU, **3 Ind. Cas. 351.** (28 C. 318, *F.*; 5 M. 304, *Diss.*)

(22)—*S.* 13, *Civ. Pro. Code*, 1882—Res judicata—*Plea of res judicata prevails even where its effect is to sanction what is illegal—Bhagdari and Narvadari Act* (*Bombay Act* V *of* 1862), *s.* 3.—A plea of estoppel by *res judicata* can prevail, even where the result of giving effect to it will be to sanction what is illegal, in the sense of being prohibited by Statute. CHHAGANLAL KISHORDAS v. BAI HARKHA, **11 Bom.L.R. 345=33 B. 479=2 Ind. Cas. 530.**

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

(23)—*Civ. Pro. Code, s.* 13—*Suit dismissed on an alternative ground, whether* res judicata.—A decision in a former suit will operate as *res judicata* notwithstanding the fact that the previous suit was decided on an alternative ground of decision. MALLISHERI ILEATH VASUDEVAN NAMBUDIN v. KOVOOR CATHATH KANNAN NAMBIAR, **4 M.L.T. 90.** (24 C. 900, *F.*; 17 A. 174, *D.*)

(24)—*Civ. Pro. Code, s.* 13—Res-judicata—*Plaintiff declining to proceed with suit.*—Where in a previous suit the plaintiff sued R for inheritance of D, and the defendant dying during the pendency of the suit, A applied to be made and was made, a party, but on the plaintiff's statement, that he did not wish to proceed against A, the latter was absolved from liability.—*Held*, that a subsequent suit against A by the same plaintiff for inheritance of D was barred by *res-judicata.* AMIR CHAND v. DURGA DAS, **198 P.L.R. 1908=218 P. W. R. 1908.**

(25)—Res judicata—*Inconsistent findings.*—Where there are two inconsistent findings of the same Court in two suits, one declaring the sale of the rights of the defendant's husband to be valid, and the other invalid, and in the earlier of the above suits the rights of the ladies were under determination, the decision in the former suit should be upheld, as the Court ought to have abstained in the latter suit from coming to an independent conclusion on that point SALIGRAM SINGH v. MAHARAJAH RAJENDUR KISHORE, **5 W.R. 149.**

(26)—*Appeal against only one out of two decrees.*—Where there have been two decrees passed by the lower appellate Court, and both of them require to be set aside in order to give the dissatisfied party, the relief which he seeks, but a second appeal is filed against one decree only, *held*, that the decision, which has been allowed to become final, operates as *res judicata* in respect of the second appeal. WALIULLUAH v. EZAZ ALI, **15 O.C. 22=13 Ind. Cas. 984.**

(27)—*Judgment, if conclusive when appeal pending.*—Where S and others sued to recover two villages from T and others, claiming title from C the purchaser, and T alleged that her husband and not C was the purchaser, and it appeared that the question was determined in a former suit in which T was plaintiff and S and others defendants, and was decided in favour of S and others by the Civil Judge, and the decision was confirmed on appeal by the Sudr Court, and an appeal to Her Majesty in Council was dismissed for want of prosecution, *held* that the matter in issue was *res judicata. Quære*—Whether the former judgment could be deemed conclusive for the purposes of *res judicata*, when an appeal was pending. SRI RAJA SURIYA NARAYANA RAZU GARU v. O. ELLAMMA, **5 M.H.C. 176.** [*R.*, 11 A. 148.]

Res Judicata - continued.

——2.—Adjudications —*continued.*

(28)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11)—Res judicata —*Former decision not sound in law, effect of, where no appeal was made therefrom.* —S. 13 of the Code forbids the re-opening of any question which was a matter in issue decided directly in the former suit between the parties; and the former decretal finding on any legal point, though ever so erroneous, would be binding on parties who did not get rid of it by appeal. PHUNDO v. JANGI NATH, **15 A. 327=A.W.N. 1893, 110.** (5 M. 304, *Diss.*) [*R.*, 1 C.W.N. 687, 28 C. 318, 14 C.P.L.R. 109, 5 O.C. 181, 8 O.C. 37, 9 O.C. 243, 57 P.R. 1907, F.B.=66 P.W.R. 1907, 44 P.R. 1908; *D.*, 32 C. 749=9 C.W.N. 466=1 C.L.J. 176.]

(29)—*Findings by Court not embodied in decree*—Res judicata—*Findings not embodied in the decree —Duty of parties—Amendment of decree.*—Although the decision in a former suit becomes immaterial for the purposes of that suit and the defendant had no opportunity of appealing against it because the decree was in his favour, it would be binding as *res judicata* on him. (25 W.R. 225, 12 B.L.R. 304=20 W. R. 377 and 1 C. 144=25 W.R. 1=2 I.A. 283, *R.*) [*Not F.*, 9 C.L.J. 493, 18 C. 647, 31 P.R. 1898; *R.*, 18 B. 597, 17 A. 174=15 A. W. N. 47, 24 C. 900, 9 C.W.N. 60.] If the material findings in a case are not, as they ought to be, embodied in the decree, the parties must, to avoid being bound by decisions against which no appeal lies, apply for amendment of the decree in accordance with the judgment. NIAMUT KHAN v. PHADU BULDIA, **6 C. 319=7 C L. R. 227, F.B.** [*Not F.*, 9 C.L.J. 493, 18 C. 647; *Diss.*, 4 M. 134; *R.*, 22 M. 364, 56 P.R. 1904=84 P.L R. 1904.]

(30)—*Jurisdiction—Competent Court wrongly deciding question arising in suit.*—If a Court is competent to hear and to decide a suit, it is competent to decide it wrongly as well as rightly, and as long as the decision stands unreversed by a higher tribunal on appeal, it is a valid and binding decree. The mere fact that a Court competent to hear and decide a suit decides it wrongly on a question of limitation does not make the decree, though unreversed and final, a nullity. NATHU RAM v. KALIAN DASS, **26 A. 522=1 A.L.J. 217.** (25 B. 337, 22 A. 270, *R.*) [*R.*, 7 P.R. 1906=56 P.L.R. 1906, 6 Ind. Cas. 98.]

(31)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *ss.* 32, 36 — *Dismissal of suit under s.* 32 — *Fresh suit, on same cause of action—Whether legal.*—The fact that provision is expressly made in s. 36 of the Civ. Pro. Code, to the effect that when plaints are rejected under ss. 29 to 31, the plaintiffs are not precluded from bringing fresh plaints on the same cause of action suggests the inference that, when a plaint is rejected under s. 32, a fresh plaint cannot be entertained on the same cause of action, as an appeal lies from that order of rejection. NAGAR MAL v. BHAGWANDAS, **81 P.R. 1878.**

Res Judicata —continued.

——2.—Adjudications—*continued.*

(32)—*Adjudication between co-defendants — Right of appeal.*—Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants, with a right of appeal. MOOLCHAND DOULAT v. MOOLCHAND KHUBCHAND, **16 C.P.L.R 42.** (18 B. 520, *F.*)

(33)—*S.* 11, *Civ. Pro. Code*, 1908—*Two suits —One judgment, but two decrees—Appeal against one decree—Finality of the other decree.* —The Code of Civil Procedure requires a separate judgment and decree for each suit for appeal, and two or more decrees cannot be challenged by one appeal. A decree, unless it be a decree, which is a nullity by reason of, for example, fraud, cannot be superseded, except it be upon appeal in the regular course. An Appellate Court is bound to apply the rule of *res judicata*, even though the decision pleaded in bar is the decision of an inferior Court, provided that that Court was competent to decide the case. Where, therefore, two suits were tried together and disposed of by one judgment, and a decree was passed in each suit, but an appeal was preferred against the decree in one of the suits only, *held* that the appeal would be barred by the other decree which stood unreversed, and was binding upon the appellant. ZAHARIA v. DEBIA, **7 A.L.J. 861, F.B.=7 Ind. Cas. 156.** (10 A. 123, 11 A. 148, 12 A. 578, *Appr. & F.*, 29 A. 730, *Overruled*) [*F.*, 7 A.L.J. 995.]

(34)—*Civ. Pro. Code*, *s.* 13—*Two connected suits—Appeal in one suit, the decree in the other meanwhile becoming final—Effect.*—One K.T. brought two suits, the one, to redeem a mortgage of a 4 anna share in a village, against A and M, and the other for a declaration of his right to redeem a 3 anna share out of the above mentioned 4 anna share, against B and M. The plaintiff obtained decrees in both suits. No appeal was preferred in the first suit. In the second suit an appeal was preferred by the defendants, but, by the time that appeal came on for hearing, the decree in the first suit had become final. Under these circumstances, it was held that, so far as the appellant M was concerned, he was precluded from questioning the title of the plaintiff which had been affirmed in the first suit. KESHO TIWARI v. SARJU KUAR, **A.W.N. 1893, 221.** [*F.*, A.W.N. 1908, 211.]

(35)—*Civ. Pro. Code*, *s.* 13—Res judicata—*Cross appeals from one decree—Appeal from one of the appellate decrees but not from the other.*—If an issue decided against a party is embodied in two decrees and that party appeals from one of them only, the other decree on becoming final operates as *res judicata* and precludes the Original and Appellate Courts from deciding that issue again. ABDUL BASIT v. ASHFAQ HUSAIN, **A.W.N. 1908, 211=4 M.L.T.172.** (10 A. 123, A.W.N. 1890, 183, A.W.N. 1893, 190, 221, *F.*; 29 M. 333, 16 C. 233, 33 C. 1101, 29 A. 730, *Diss.*)

***Res Judicata*—continued.**

——2.—Adjudications—*continued.*

(36)—Res judicata—*Cross appeals—Death of plaintiff—Legal representative brought on record in plaintiff's appeal—Omission to add in defendant's appeal—Both appeals decided in favour of plaintiff—Right of plaintiff to execute the whole decree.*—Where in cross appeals by both parties to a suit decreed in part plaintiff died and his representative was brought on the record in the plaintiff's appeal but the defendant omitted to do so in his appeal, *held*, on both the appeals being decided in favour of plaintiff, that his representative was entitled to execute the decrees in both, as the decision adding plaintiff's representative in the one appeal was *res judicata* so as not to affect the right to execute the other decree in appeal by reason of defendant's omission to add the legal representative. SANOLI BIBI v. KAPUR CHAND, **A.W.N. 1888, 83.**

(37)—*Compromise of appeal—Effect of.*—The fact that an appeal against a decree was compromised and withdrawn, does not preclude the decree becoming final, and hence operating as *res judicata*. VYTHILINGA v. VIJAYATHAMMAL, **6 M. 43.** [*R.*, 15 B. 370, 54 P.R. 1908=87 P.L.R. 1908=40 P.W.R. 1908.]

(38)—*Civ. Pro Code (Act* XIV *of* 1882), *s.* 13—Res judicata—*Pre emption, suits by rival pre-emptors—Final decision in one suit operates as* res judicata *in other.*—Where, in the pre-emption suits filed by rival pre-emptors, the plaintiffs are impleaded as defendants in each other's suits and a decree is passed in the suit instituted first, and the unsuccessful pre-emptor files appeal against the decree passed in the suit in which he is defendant, but omits to file appeal in the counter-suit, the decree not appealed against operates as *res judicata*, and the appeal in the other suit cannot be heard. The Appellate Court may in a fit case keep the appeal pending and allow the appellant time to enable him to file the appeal in the other case. GURMUKH SINGH v. HARI CHAND, **104 P.L.R. 1903=8 P.R. 1903.** (A.W.N. 1887, 301, 83 P.R. 1888, *R.*)

(39)—*Pre-emption decree — S.* 2, *Civ. Pro. Code*, 1859—*Act* XXIII *of* 1861, *s.* 11.—Plaintiff having obtained a decree for pre-emption against defendant in respect of certain land with trees on it, obtained possession of the same. He now sued for the value of the said trees which had been cut and removed by defendant during the pendency of the previous suit. *Held* that the matter was *res judicata* (s.2, Civ. Pro. Code). Whether the value of any missing trees could be deducted from the price payable was a question properly determinable in execution or under s. 11 of Act XXIII of 1861, and not by a separate suit. FUTTA v. BHANI SINGH, **48 P.R. 1871.**

(40)—*Decrees determining exactly the same matter one of which decrees has become final—Pre-emption, Suit for — Appeal filed beyond time owing to erroneous advice given by pleader —"Sufficient cause," for admitting appeal*

***Res Judicata*—continued.**

——2.—Adjudications—*continued.*

filed beyond time—Limitation Act, s. 5.—Certain persons sold a share in a village to one E on the 7th February, 1899. On the 4th February 1900, S.K., G.P., and S entered into an agreement in writing. This agreement recited the fact of the sale, that S.K., G.P., and S had a right of pre-emption, that G.P. was entitled "in every way," and that S.K., G.P., and S "with an unanimous opinion claimed for pre-emption," and then provided as follows: "Therefore, we with the consent of each other do covenant and put into writing that the law costs and miscellaneous expenses incurred in the pre-emption (suit) shall be borne by S. K. and S, besides, after the disposal and success of the suit, each party shall pay the principal money together with law and miscellaneous costs in proportion to the share which he buys and shall be entitled to the said share." Two days later, that is, on the 6th February, 1900, G. P. instituted a suit against the sellers and the purchaser to enforce his right of pre-emption. On the same day, S. K. instituted a suit against the same persons to enforce his right of pre-emption. In his plaint, he referred to the agreement, and he alleged that, after its execution "G.P. acting on some policy colluded with the purchaser and through his help and at his cost made himself a separate claimant." G. P's suit was numbered 32 and S. K.'s 33. S. K. was made the 7th defendant in suit No. 32 and G. P. was made the 7th defendant in suit No. 33. The Subordinate Judge decided the suits by his judgment in suit No. 33 in which he passed a decree to the effect:—"Decreed that on payment of Rs. 6,000 up to 15th October, 1900, G. P. plaintiff in case No. 32 or S. K. plaintiff in this case (No. 33), or both of them, or any of them shall take possession by right of pre-emption of the 1 anna 6 pies share in question sold under the deed dated the 7th February 1899, but, in case of default in such payment, ordered that both the suits shall stand dismissed with costs. If one of the plaintiffs pays the money and the other does not, the payment by such plaintiff shall be taken as being made in his own case and he shall be deemed a decreed pre-emptor, but, if each plaintiff pays the same in his case, the question as to who is the person to enforce pre-emption shall be determined by lot, and in conformity with the result of such lot, the unsuccessful plaintiff's suit shall stand dismissed against the vendee and the vendors, but not against defendant No. 7 in each case, it being open to them (plaintiff or defendant No. 7 in each case) to ask eventually against each other any relief that might be based on the genuine terms of the agreement dated the 4th February 1900." A similar decree was made in suit No. 32. In both suits G.P. appealed to the Judicial Commissioner. The appeal in suit No. 33, the time for presenting which expired on the 21st September 1900, was not presented till 26th August

Res Judicata —continued.

——2.—**Adjudications** —*continued.*

1901. The Court was asked to admit it under the provisions of s. 5 of the Limitation Act, on the ground that the appellant had sufficient cause for not presenting it within time, inasmuch as, at the time when he preferred the appeal in suit No. 32, he consulted a pleader as to whether an appeal in that suit should only be preferred or appeals in both suits should be preferred; and, as he was advised by the pleader that it would suffice to prefer an appeal in suit No. 32 only, he preferred an appeal in that suit only. But on the 26th August 1901, the date fixed for the hearing of that appeal, he was told by another pleader that he should have preferred appeals in both. He had no personal knowledge as to whether one or two appeals should be preferred and in preferring only one he acted honestly and on the advice of the pleader first mentioned. The truth of this statement of the appellant (G.P.) was accepted by the Court. *Held*, that the circumstances that the appellant did not prefer the appeal within time in consequence of having been erroneously advised by a legal practitioner not to prefer the appeal was not a sufficient cause for not presenting it within time, and that his appeal in suit No. 33 should be dismissed *Held*, further, that the decree in suit No. 33, which determined that K had a right of pre-emption, having become final, the Court was debarred from trying that question in the appeal in suit No. 32 by the principle of *res judicata*. GAJADHAR PERSHAD v. MUSSAMAT LACHMIN, **5 O.C. 384.**

(41)—*Case taken up and enquired into on verbal application—Irregularity.*—In this case, the Settlement Officer called on the plaintiff, in the presence of the defendant's agent, seemingly on his verbal application, to state his claim to the village in question, which the plaintiff did. The Officer then passed a decree for proprietary rights in favour of the defendant, which was confirmed on appeal. In a suit to set aside these decisions, it was contended that they were not judicial ones, but were vitiated by the Settlement Officer having no jurisdiction inasmuch as he took up the case without any proper petition and did not carry out the proper procedure which should have prevailed in a judicial trial. *Held* that the suit did not lie as it was perfectly clear that both parties looked after their interest to the best of their power and that the Courts went thoroughly into the claims of both parties and gave well-considered judicial decisions. MULLIK SHER BAHADUR KHAN v. MULLICK FUTTEH SHUR KHAN, **60 P.R. 1870.**

(42)—*Prior suit for possession—Occupancy rights set up by defendants—Defendant referred to separate suit*—Res judicata.—In a previous suit for possession, the present plaintiffs, then defendants, pleaded their right as occupancy tenants. The suit was decreed and the defendants therein were directed to bring a separate suit to establish their occupancy rights, and they accordingly instituted the

Res Judicata—continued.

——2.—**Adjudications** —*continued.*

present suit. *Held* that the decree for possession in the former suit, though erroneously ignoring the then defence of the present plaintiffs on the ground of occupancy and leaving the question of their status undetermined, was a bar to the present suit. The remedy of the plaintiffs was to have appealed from the decree passed against them. KALA v. WILAYAT, **45 P.R. 1879.** [*D.*, 25 P.R. 1884.]

(43)— *Suit relating to occupancy rights—Decree passed before passing of Tenancy Act*, 1868 — *Second suit relating to same matter after passing of Act*—Res judicata—*Compromise—Tenancy Act, s. 2, effect of.*—In a suit tried by the Court of the Superintendent of Settlement, with the aid of assessors, the plaintiff A claimed proprietary rights in a certain land, and the Court, in accordance with the finding of the assessors which was accepted by both parties, passed an order that the defendant B should be allowed occupancy rights for 7 years. After the expiry of the 7 years, A served a notice of ejectment on B, and the latter brought the present suit claiming to hold the land as a tenant with rights of occupancy under s. 5 of the Tenancy Act, 1868, which was passed subsequent to the decision in the former suit. *Held* that the decision in the former suit barred the present suit. *Per Plowden, J.*—The order in the previous suit was a *judgment* of a competent Court in a contested suit and not merely an order giving effect to a compromise between the parties, and barred the plaintiff's claim, by the rule of *res judicata*; the claim was also barred by s. 2 of the Tenancy Act. If the order in the first suit be regarded as one merely based on compromise, so that it could have no effect as a judgment upon the matter in dispute, the compromise itself would furnish a complete answer to the second suit to establish the disputed claim. *Per Fitzpatrick, J.* The judgment in the first suit was passed by consent of parties and was based on a compromise of a doubtful and disputed claim and the present suit was barred by the general law relating to *res judicata*, according to which a decree by consent is regarded as an estoppel *quasi* of record. BAGGU KHAN v. SUJA, **77 P.R. 1877.** [*R.*, 22 P.R. 1879, 67 P.R. 1880, 104 P.R. 1884.]

(44)—*Bombay Act*, III *of* 1876, *s.* 13—*Suit in Mamlatdar's Court—Dismissal for default—Suit under s.* 9, *Specific Relief Act.*—A plaintiff, whose plaint has been rejected for default in the *Mamlatdar's* Court under Bombay Act III of 1876, would be barred by *res judicata* from bringing another possessory suit on the same cause of action in the Civil Court under s. 9 of the Specific Relief Act, 1877. The rejection of a plaint for failure of appearance under s. 13 of the Bombay Act III of 1876 is a hearing and a final decision of the suit for the purpose of the rule of *res judicata* in s. 13 of the Civ. Pro. Code (Act X of 1877). RAMCHANDRA v. BHIKIBAI, **6 B. 477.** [*Diss.*, 24 B. 251; *R.*, 21 B. 91, 25 B. 82, 28 B. 601=6 Bom. L.R. 612.]

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

(45)—*Act* X *of* 1859, *decision passed under, Civil Court bound by.*—This case had been remanded to the Judge of the lower appellate Court because he had not considered the effect of a former decision in an Act X suit and he was directed to consider the legal effect of that decision alleged by the plaintiff to be a pre-adjudication in his favour, and he again dismissed the plaintiff's suit.—The High Court *held* that he was wrong in saying that a decision in an Act X case could not bind a Civil Court. An Act X Court is a regular Court. and all questions involving title are appealable to the Judge, and the present case had been so appealed to the Judge. WOOMESH CHUNDER SOOTE v. RAM CHUNDER MOWREE, **4 W.R. Act X, 40.**

(46)—*Act* VIII *of* 1859, *s.* 2—Res judicata —*Joint right declared in first suit—Separate share claimed in second suit—Mode of enjoyment—Ijmalee property.*—Plaintiff sued for a declaration of his right to occupy one half of a *chundee mundul* for *pooja* purposes, to a joint right in which he had been previously declared to be entitled. Looking at it as an attempt to reverse a previous decision passed in a suit in which the plaintiff claimed a separate share of the *chundee mundul* but in which the Courts declared him entitled to joint possession of it, the suit was not maintainable under s. 2, Act VIII of 1859 ; but regarding it as a means of obtaining from the Court an order as to the mode in which an *ijmalee* right should be exercised, it was equally untenable. The mode of enjoyment of *ijmalee* property is a matter for private arrangement, and not for judicial determination. ROMESH CHUNDER BHUTTACHARJEE v. SOORJOO COOMAR BHUTTACHARJEE, **5 W.R. 90.**

(47)—*S.* 13 (*Civ. Pro. Code*, 1882)—*Res judicata—Selami and tehwari cesses agreed to be paid under kabuliyat—Previous decision disallowing the same.*—Plaintiff sued a *Mokuraridar* for rent and, also, for certain illegal cesses known as *selami* and *tehwari* on the basis of a *kabuliyat*, under which the defendant-*mokuraridar* had agreed to pay the same. The defendant denied his liability to pay the cesses and relied, in his support, on a judgment between the same parties and in relation to the same property in a suit for a previous *fasli*. *Held*, the claim for the cesses was *res judicata*, the judgment in the previous suit having declared the non-liability of the defendant to pay the same. RAJAH PADMANAND SINGH BAHADUR v. RADHE SINGH, **9 C.W.N. 469.**

(48)—*Civ. Pro. Code*, 1882, *s.* 13— *Suit for recovery of lands.*—Where a prior suit for the recovery of lands, claimed as a portion of certain parcels situate in a mouza leased in putni, was dismissed on the ground of those parcels having been included in a putni lease of an adjoining mouza, granted prior to the plaintiff's lease, a subsequent suit for the recovery of certain other lands forming portion of the same parcels on the same title was held barred as *res judicata*. SUNDHYA MALA v. DABI CHURN DUTT, **6 C. 715.** (1 M. H.C. 245, 13 W.R. 64, 2 C.L.R. 33, 3 C. 145, *F.*) [*R.*, 12 C.W.N. 739=9 C.L.J. 597.]

(49)—*Act* XIX *of* 1863, *ss.* 8 *and* 9—*Adjudication of title—Res judicata.*—An adjudication of title by a Collector under s. 8 of Act XIX of 1863, which, under s. 9, becomes final by not being appealed against, is *res judicata* and cannot be re-opened in a civil suit. HARSAHAI MAL v. MAHARAJA SINGH, **2 A. 294.** [*F.*, 5 A. 280= A.W.N. 1883, 20 ; *D.*, 2 A. 839.]

(50)—*Landholder and tenant—Ejectment of tenant by order of Revenue Court—Suit by tenant in Civil Court for declaration of title—Jurisdiction*—Res judicata —*Act* XVIII *of* 1873 (*N. W. P. Rent Act*), *ss.* 34, 93 (*b*)—*Civ. Pro. Code*, *s.*13.—Where the question of a tenant's liability to ejectment in consequence of certain acts committed by him, being made exclusively cognisable by the Revenue Court, is decided by such Court, such decision, on becoming final, is *res judicata*, and bars a fresh suit in the Civil Court in respect of the same matter. RADHA PRASAD SINGH v. SALIK RAI, **5 A. 245=A. W.N. 1883, 10.** (3 A. 85, *D.*)

(51)—*Act* II *of* 1901, (*Agra Tenancy Act*), *s.* 199—*Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself.*—In a suit for ejectment under Act II of 1901, the defendants did not plead their own title to the plot in suit, and, in fact, did not oppose the suit for ejectment. *Held* that a subsequent suit, brought in a Civil Court by the then defendants, for proprietary possession of the same plot, was barred by the principle of *res judicata*. BIHARI v. SHEOBALAK, **A.W.N. 1907, 189=4 A.L.J. 545=29 A. 601.** (A.W.N. 1904, 109, 141, 27 A. 569, *D.*; A.W.N. 1907 1, 6, *R.*; 29 C. 707, *Disc.*) [*R.*, 6 A.L.J. 259.

(52)—Res judicata—*Decision in rent suit—Ex-parte decree—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13.—The rule of *res judicata* may be applied, although the decree in the former suit was passed *ex parte*. Where an issue was raised on the points now called in question, and the issue was heard and finally decided by the Court on the previous occasion in the rent suit, the rule of *res-judicata* applies, although the suit was decided *ex-parte*. HARA CHANDRA BAIRAGI v. BEPIN BEHARY DAS, **6 Ind. Cas. 860.** (2 Ind. Cas. 11, *Affirmed.*)

(53)—Res judicata—*Matter of record—Estoppel.*—Where, in a previous suit for rent, the Court found that the defendant was not the plaintiff's tenant, the defendant is estopped by a matter of record from pleading in a subsequent suit for

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

khas possession that he is plaintiff's tenant. FAYJ DHALI v. AFTABUDDIN SIRDAR, **6 C.W.N. 575.** [*F.*, 3 C.L.J. 201, 34 C. 922; *Doubted & D.*, 9 C.W.N. 928=2 C.L.J. 389; *D.*, 11 C.W.N. 100, N, 7 C.L.J. 483=35 C. 807.]

(54)—*Civ. Pro. Code*, 1882, *s.* 13—*Suit for rent based on a lease deed—Subsequent suit for possession and rent based on same lease deed—* Res judicata—*Oaths Act* (X *of* 1873)—*Decree of appellate Court on strength of oath of party—Confirmation of first Court's decree—Final adjudication.* — Plaintiff sued to recover a *paramba* with arrears of rent. A prior suit by the plaintiff for rent in respect of the same land and based upon the same lease deed had been dismissed. Plaintiff contended that as the former suit was cognizable by a Small Cause Court, the present suit was not barred by the decision in that suit. *Held* that the present suit was within the competency of the Court which tried the other suit, notwithstanding that in that other case there could have been no second appeal. The suit was, therefore, barred by s. 13, Civ. Pro. Code. (17 M. 273, *R.*; 28 C. 78, *F.*; 18 M. 189, *R.*) [*Overruled*, 29 M. 195=16 M.L.J. 41=1 M.L.T. 25, F.B.; *F.*, 13 M.L.J. 23; *R.*, 27 M. 63, 13 M.L.J. 134, 9 C.W.N. 656.] Where an appellate Court confirms the decree of the first Court on the strength of the oath of a party to the suit on a question of fact, the decree of the appellate Court is none the less a final adjudication. AHMED v. MOIDIN, **24 M. 444.**

(55)—*Suit for declaration of nature of rent payable by tenant and that plaint lands were* nij-jote *lands — Settlement proceeding fixing certain kind of rent, existence of, whether a bar to suit—Necessity for adjudication as to* nij-jote *or otherwise of land—Bengal Tenancy Act, ss.* 104 (2) *to* 107 *and Civ. Pro. Code, s.* 13.—The plaintiff sued for a declaration that the land in dispute situated in Orissa, was held by the defendants under the plaintiffs on a produce-rent and not on a money-rent as shown in the settlement records and also for a declaration that the lands were the *nij-jote* lands of the plaintiffs and used to be cultivated before the plaintiffs and their ancestors. Both the lower Courts held that the first question was *res judicata* by virtue of a settlement proceeding and that there was no necessity for determining whether the lands were *nij-jote* or not. *Held*, the Settlement Officer had jurisdiction to deal with the question of fair rents arising between the parties, because a settlement of revenue was being made in the province of Orissa. That being so, the Settlement Officer had jurisdiction under sub-s. 2 of s. 104 of the Bengal Tenancy Act. He fixed a money-rent and not a produce-rent as payable by the defendants to the plaintiffs. No objection was preferred under s. 105 and no dispute was raised under 106 and, therefore, under the provision of 107, the decision of the Settlement Officer in the proceedings for settlement of rent under s. 104 had the force of a decree. Consequently, the plaintiff's claim for rent in kind was barred by rule of *res judicata*. *Held*, also, that it was quite unnecessary in this case to decide whether the lands were the *nij-jote* lands of the plaintiffs or not, for, in Orissa, occupancy-right can accrue in *nij-jote* and their accrual is not barred, as in Bengal, under s. 116 of the Bengal Tenancy Act. This section was not extended to Orissa. BRAHMANUNDA MAHAPATRA v. ARJUN RAUT, **1 C.L.J. 310.**

(56)—*Legality of resumption by Zamindar—Question decided once—Subsequent suit between same parties in respect of same matter—Maintainability.*—Where the question of the legality of a resumption made by a zemindar had become final by a decision, of the second appellate Court, it was not competent to the parties to litigate again in respect of the same matter. VENKATA NARASIMHA APPA ROW v. SOBHANADRI APPA ROW, **13 M.L.J. 134.**

(57)— *Enhancement* — Res judicata—*Fresh evidence, discovery of—Review of judgment.*—The question of the right to enhance, having been decided in the plaintiff's favour in the former suit, it must be considered as *res judicata* in this suit for enhanced rent. The course for the defendant when he discovered fresh evidence not in his knowledge or power at the time of the first decision, is to apply for a review. BHUGGOBUTTY DABEA v. RAM KANNAYE LOHA, **1 W.R. 167.**

(58)—*Suit for enhancement—Dismissal—Re-assessment—Subsequent suit—Maintainability.*—A suit for enhancement of rent was dismissed on the ground that the defendant held under an unexpired lease. Subsequently, Revenue authorities re-assessed the land. A second suit was then brought for enhancement. *Held* that the circumstances that the Government had increased the assessment will not alter the relative position of the parties and therefore the second claim was *res judicata*. MUHAMMAD GUL v. KARAM CHAND, **6 P.R. 1890, Rev.**

(59)—Res judicata—*Right of Brahmans of* Mauza *Sangal*, Tahsil *Kaithal to one-fourth of* khudi kamini *or hearth tax—Revision—S.* 16 *of Act* XVII *of* 1887.—*Held*, that Brahmans of *mauza* Sangal, *tahsil* Kaithal, are entitled to get from the Lambardars of that place one-fourth of the *khudi kamini* or hearth tax collected by them, and their right to get it is *res judicata* by reason of a previous decision between the parties. *Held*, also that an order of a Revenue Court, which re-opens a *res judicata* question between the parties, is liable to be set aside on revision under s. 16 of Act XVII of 1887. BODHA RAM v. NET RAM, **4 P.W.R. 1911, Rev.=10 Ind. Cas. 299.**

(60)—*Suit to enforce award of, for partition—Alternative relief.*—Where disputes as to partition of family properties had been submitted to arbitrators and an award had been made and

***Res Judicata*—continued.**

——2.—Adjudications—*continued.*

some properties divided in pursuance thereof, but the partition was not completed on account of disputes, *held*, in a suit to enforce the award, that an alternative claim for partition cannot succeed, since there has been already a valid award. SUBBARAYA CHETTI v. SADASIVA CHETTI, **20 M. 490**.

(61)—*Suit for partition—Award, effect of.*—An award duly passed in accordance with a submission of the parties is equivalent to a final judgment. To give effect to it, the subsequent consent or approval of neither party is required. After an award made for a partition of joint property neither party can sue for partition, any more than he could, if a decree in a suit for partition had been passed. In order that the parties should be remitted to their previous rights, there must be positive evidence that both parties agreed that the former state of things should be restored. It is not enough that the award was not enforced or that even both the parties objected to it. KRISHNA PANDA v. BALARAM PANDA, **19 M. 290**. [*F.*, 20 M. 490, 33 C. 881=4 C.L.J. 162=11 Bom. L.R. 20=5 M.L.T. 220, 1 S.L.R. 236; *R.*, U. B.R. 1906, 1st Quarter, Specific Relief, 30.]

(62)—*Partition-proceedings — Determination of question of title*—Res judicata—*Act* XIX *of* 1873 (*N. W. P. Land Revenue Act*), *ss.* 113, 114.—An adjudication of a question of title raised between parties to partition-proceedings under Act XIX of 1873, is a bar to a suit in the Civil Court between the same parties in respect of the same title, although, in some respects, such adjudication may have been defective or irregular. (2 A. 294 and S. A. No. 129 of 1881, decided on 27th July, 1881, *F.*) Such an adjudication, being one under s. 113 of the Act, can be questioned only in the manner provided by the subsequent sections, and not by separate suit. BATESHAR NATH v. FAIZUL-HASAM, **5 A. 280=A.W.N. 1883, 20.**

(63)—*Civ. Pro. Code* (1882), *s.* 13— *Decisions of questions of title in suits under s.* 283, *when operate as* res judicata.—Where in his suit under s. 283 of the Code, the claimant-objector claims both in form and substance, against the judgment-debtor, a declaration of his title to the whole of the property, the title to which is in issue in the suit, a decree in such suit declaring the liability or non-liability of the property to attachment and sale in execution of the creditor's decree, must necessarily, unless the suit be decided on a ground not involving the question of title, decide and determine all questions of title on which the parties to the suit could rely, so that such decision would operate in any future suit between the parties as *res judicata* on those questions of title, though such subsequent suit might relate to property not in question in the prior suit under s. 283 of the Code. DWARKA DAS v. KAMESHAR PRASAD, **17 A. 69=A.W.N. 1895, 3.** [*R.*, 57 P.R. 1907=66 P.W.R. 1907.]

***Res Judicata*—continued.**

——2.—Adjudications—*continued.*

(64)—Res judicata—*Dismissal for default—Questions of title—Civ. Pro. Code*, 1882, *s.* 13.—Where, in a former suit between the parties, issues had been fixed on the question of title, and the suit was dismissed, as the plaintiffs had failed to adduce evidence, which it was incumbent upon them to do, it must be held to have been dismissed on the merits, so that a subsequent suit for possession of the property on the same title would be barred as *res judicata*. KARTICK CHANDRAPAL v. SRIDHAR MANDAL, **12 C. 563.** [*R.*, 9 C.W. N. 679, 6 C.L.J. 362.]

(65)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11)—*Dismissal of suit—Decree providing that fresh suit might be brought as to part of subject-matter*—Res judicata.—Where a suit for possession of immoveable property was dismissed on the ground that plaintiff could not prove his title to the whole property, although he could to the extent of one-third, it was held that the decision was *res judicata* in regard to the one-third, although the decree declared that he could bring a second suit for it, and although this portion of the decree was not appealed against. SUKH LAL v. BHIKHI, **11 A. 187, F.B.=A.W.N. 1889, 13.** (5 A. 595, 8 A. 282, 9 A. 155, A.W.N. 1885, 171, *Expl.*) [*R.*, 6 Bom. L.R. 594; *D.*, 17 C. 398.]

(66)—*Decision in previous suit for possession, holding plaintiff's right barred by reason of an agreement — Whether* res judicata *in a subsequent suit, after bar of the agreement by time.*—The present suit for possession was on a cause of action identical with that of, and between parties virtually the same as those in, a prior suit, in which, it had been held that the plaintiff was not entitled to possession, by reason of an agreemet to sell in favour of the defendant. The Subordinate Judge dismissed the present suit as *res judicata* by reason of the prior decision, but the District Judge held that the plea of *res judicata* was not sustainable. Setting aside the decree of the District Judge *held* the fact that the agreement to sell in favour of defendant was enforceable by him, at the time of the prior suit, but had become barred by time, at the time of the subsequent suit, could not prevent the operation of the bar by *res judicata*. ADAKKALAM CHETTIAR v. RAMALINGA CHETTIAR, **29 M. 320.**

(67)—*Civ. Pro. Code. s.* 13—*Suit for joint possession—Prior suit for same relief dismissed*—Res judicata.—The plaintiffs had brought a suit against the defendants for exclusive possession, and, in the alternative, for joint possession of the plaint land. The questions raised in that suit having been brought into issue and evidence having been taken, the action was dismissed. The Court in dismissing the suit, though wrongly, did not reserve to the plaintiffs the right to bring a fresh action. The present suit was for joint possession of the same land. *Held*, that the dismissal of the

Res Judicata—continued.

——**2.—Adjudications**—*continued.*

former suit was a bar to the present suit. KUDRAT v. DINU, **9 A. 155=A.W.N. 1887, 5.** (5 A. 595, 8 A. 282, 13 M.I.A. 160, *R.*) [*F.*, 9 A. 690; *Appr.*, 11 A. 187.]

(68)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Suit for declaration when plaintiff was entitled to possession—Passing of decree accordingly—Subsequent suit for possession—Mistake of law—Maintainability of suit.*—There were two divided brothers. One of them, in conjunction with his senior wife and to the exclusion of the first defendant, his junior wife, took a son of the other brother in adoption. On the date of the adoption he made a settlement of some of his properties upon the first defendant for life and with remainder to his daughter by her. He died sometime after and was followed by his senior wife and the adopted son successively. Thereupon his brother, claiming as the reversionary heir of the deceased adopted son, sued for a declaration that he was entitled to succeed to the properties left by his brother, including the properties comprised in the deed of settlement made by him in favor of the first defendant and her daughter. The suit was dismissed as regards the properties comprised under the deed of settlement, and a decree was passed in respect of the other properties. On the death of the then plaintiff, his sons, the present plaintiffs, instituted the present suit for possession of the properties in respect of which a declaratory decree had been passed in the former suit. Plaintiffs contended that on the death of the adopted boy, the first defendant, being only in the position of adoptive step mother, could not succeed to his properties and their father succeeded to those properties and on their father's death, the same devolved on them by descent as his heirs. They sought avoid the effect of the former decree on the ground that it proceeded on a mistake of law, namely, that the first defendant was entitled to succeed as adoptive mother and that their father was only presumptive reversioner on her death. *Held*, that the express adjudication in the former decree, that the plaintiff's father was entitled to succeed to the properties now sued for only on the death of the first defendant, necessarily implied that the first defendant and those claiming under her were entitled to the possession and enjoyment of the properties during her life-time. When such declaration was embodied in the decree itself, it was immaterial that no question or issue was actually raised and decided as to whether or not plaintiffs' father was entitled to succeed to the properties on the death of the adopted boy as his immediate heir, which was the claim on which the present suit was founded. The plaintiffs' claim could not be allowed and declared in the present suit and plaintiffs put into possession by ejecting defendants, without setting aside the prior decree. The present suit was therefore barred as *res judicata*, quite independently of explanation I or explanation II to s. 13, Civ. Pro. Code. KAVERI AMMAL v. SASTRI RAMIER, **26 M. 104=13 M.L.J. 58.** [*R.*, 13 M.L.J. 448, 9 O.C. 243, 30 M. 461=17 M.L.J. 250, 44 P.R. 1908, 26 M. 760.]

(69)—*Decision as to point pleaded by one defendant and supported by another defendant to be* res judicata *between them.*—The plaintiff, S, brought a suit against the defendant, C, for possession of a deceased Hindu's property on the ground that he became entitled to it by survivorship. The defendant, besides pleading adoption, custom, &c., also pleaded that, if his adoption was invalid, it was not the plaintiff but one R who was entitled to the property by right of inheritance. In consequence of this last plea, it would seem, R instituted a suit for possession of the property. The Subordinate Judge thereupon made R a defendant to the plaintiff, S's suit and S a defendant to her suit. In the suit of R, it was pleaded by the present defendant, C, that R had a better right than the present plaintiff, S. The Subordinate Judge held that R had no title as against the plaintiff, S, and accordingly decreed to claim of S and dismissed that of R who did not appeal. The defendant C appealed, making the plaintiff, S, alone a respondent. *Held*, that the question whether it was R or the plaintiff, S, who had a better title was *res judicata* between the plaintiff and R as well as between the plaintiff and the defendant. C. CHUNNI LAL v. SRIMANDIR DAS, **9 O.C. 125, B.**

(70)—*Civ. Pro. Code* (1882), *s.* 13 (=*s.* 11, *Present Code*)—Res judicata—*Suit by puisne mortgagee—Prior mortgagee's omission to plead his charge—Decree for sale—Subsequent suit on puisne mortgage, not maintainable.*—If, in a suit by a subsequent mortgagee for sale of the mortgaged property, a prior mortgagee who is impleaded as defendant, fails to plead his prior mortgage and his right to have it redeemed, and a decree is passed for sale of the mortgaged property, but not subject to his prior charge, a subsequent suit by him on his prior mortgage will be barred by Expl. II to s. 13, Civ. Pro. Code. SRI GOPAL v. PIRTHI SINGH, **24 A. 429, P.C.=6 C.W.N 889=4 Bom. L.R. 827=29 I. A 118=8 Sar. 293.** [*F.*, 2 C.L.J 574; *Rel. on*, 31 C. 428; *Expl.*, 1 C.L.J. 248, 1 C.L.J. 337; *R.*, 7 O.C. 152, U.B.R. 1906, 3rd Qr. C.P.C. 46, 36 C. 193=1 Ind. Cas. 913=5 C.L.J 611, 12 C.W.N. 292=7 C.L.J. 504, 10 O.C. 146, 12 C.W.N. 862=8 C.L.J. 82=35 C. 979, 12 O.C 347, 9 C.L.J. 78=3 Ind. Cas. 686, 13 M.L.J. 448=26 M. 760; *Appl.*, 17 M.L.J. 301=2 M.L.T. 330=30 M. 353.]

(71)—*Dismissal of suit for possession—Second suit for redemption by same plaintiff*—Res judicata—*Act* VIII *of* 1859, *s.* 2.—A suit for proprietary possession of a house having been dismissed on the ground that the defendant had been in adverse possession, the plaintiff brought a second suit for redemption against the same defendant, alleging that the house had been

Res Judicata—continued.

——2 —**Adjudications**—*continued.*

mortgaged to defendant by the plaintiff's father, and the defendant was in possession as mortgagee. *Held*, that, as the plaintiff had an opportunity of bringing the question of mortgage before the Court in the former suit and failed to do so, he could not rest a new suit on that ground, and that the second suit was barred by s. 2 of Act VIII of 1859. PARI MAL v. VASAND RAM, **33 P.R. 1877.**

(72)—*Civ. Pro. Code*, 1882, *ss.* 13, *Expl.* II, 42, 43—*Dismissal of suit for redemption of mortgage—Subsequent suit for redemption of another mortgage.*—Though the subject of *res judicata* was dealt with more comprehensively in Act XIV of 1882 than in the former Code, yet, ss. 13 and 43 of the Code of 1882 were not exhaustive of the law of *res judicata.* That law was the same under the Codes of 1877 and 1882 and was substantially the same as the English law. The expression "the subjects in dispute" in s. 42 signifies the jural relation between the parties to the suit, for the determination of which the suit was brought. The object of s. 42 was to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object matter of the suit. Where several independent grounds of action are available, a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action. Plaintiff, claiming as the daughter's son and legal representative of the original owner of certain property, sued for redemption of an alleged usufructuary mortgage thereon. The defendants, while denying the plaintiff's relation to the owner as well as the mortgage sued upon, pleaded that a portion of the property had been usufructuarily mortgaged to them by the said owner and that the same had been sold to them subsequently. Without deciding the question of plaintiff's relation to the owner, the suit had been dismissed, on the ground that the mortgage sued upon was not proved. Thereupon, plaintiff brought the present suit substantially against the same defendants for redemption of the usufructuary mortgage admitted by the defendants in the previous suit. ***Held*** **that neither of the decisions of the Privy** Council in 11 B.L.R. 158 and 20 C. 79, nor Expl. II to s. 13, could be relied on as lending any support to the proposition that a plaintiff who sought to redeem a specific mortgage or to eject on a specific lease and failed in such suit, because the mortgage, or lease was not proved, was thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage, or to eject, on the strength of his title, the person in possession. The real test was whether the cause of action, or the transaction on which the two suits were

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

based, was the same, and not whether the transaction was sought to be established in different modes or by different means. Consequently, the present suit to redeem a mortgage other than that which formed the subject of the prior suit was not barred by s. 13, Expl. II, or by s. 43 of the Code. RAMASWAMY AYYAR v. VAITHINATHA AYYAR, **26 M. 760 = 13 M.L. J. 448.** (21 M 91, 22 M. 259, *Disc.*; 25 B. 189, *Diss.*) [*Not F.*, 6 Bom. L.R. 594; *F.*, 28 M. 406, 29 M. 153 = 16 M.L.J. 48, F.B.; *Appr.*, 27 M, 102; 2 N.L.R., 94; *R.*, 27 M. 380, 1 C.L.J. 337. 30 B. 395 = 8 Bom. L.R. 296, 55 P.R. 1907 = 96 P.W.R. 1907 = 65 P.L.R. 1908, 7 C.L.J. 504 = 12 C.W.N. 292, 31 M. 385, 12 O.C. 347.]

(73)—*S.* 11, *Civ.Pro. Code*, 1908, *Expl.* IV—*Suit on first mortgage—Order for unconditional sale—Non-disclosure of second mortgage—Subsequent suit on second mortgage — Bar.*— Where a mortgagee holding two mortgages, under two separate deeds, of the same property, sued upon the first mortgage without disclosing the existence of the second mortgage, and obtained a decree for unconditional sale of the property, and where he subsequently sought, by a second suit, to enforce his second mortgage by sale of the same property, *held* that he was barred from suing a second time for sale of the property on his second mortgage, by s. 11, Expl. IV, Civ. Pro. Code, 1908. DIWAN SAHIJRAM TAHILRAM v GAGUMAL DHARAMDAS, **4 S.L. R. 82 = 8 Ind. Cas. 216.** (24 A. 429, P.C., 30 M. 353, *F.*)

(74)— *S.* 13, *Civ. Pro. Code*, 1882—*Prior mortgage of entire share with possession—Second mortgage of two-third share—Suit for sale on second mortgage— Prior mortgagee party—No prayer for possession of one-third—Second suit for possession*— Res judicata.— D, father of R K, R L and G, mortgaged his property to S with possession. Subsequently R K and R L executed a simple mortgage of their two-third share to B. B brought a suit for sale upon his mortgage and offered to redeem S. He did not ask for possession of G's share after redemption. The Court gave him a decree ordering him to pay up S's mortgage. B applied for an order absolute praying for sale of G's share after redemption. The application was rejected. He then brought the present suit against G for possession of G's one-third share. *Held* that the suit was barred by the rule of *res judicata* inasmuch as the plaintiff in the first suit ought to have claimed possession of G's one third share, which could not be sold in execution of his decree against the other two-third. The cause of action for demanding possession had accrued when B brought the former suit. The right for the redemption of the entire mortgage, as then interpreted, had vested in B, and to demand possession was part and parcel of that right. BHURA v. GHURE, **8 A.L.J. 352.** (26 B. 661, *R.*)

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

(75)—*Act* IV *of* 1882 (*Transfer of Property Act*), *ss.* 90, 100—*Suit to enforce vendor's lien by sale—Determination in that suit of vendee's personal liability—Application for decree over under s.* 90.—In a suit for enforcemsnt of a vendor's lien by sale of the property, the Court further decided that " the defendants cannot, either personally or their other properties, be held liable for any part of the amount claimed. The property sold to them can alone be liable." Subsequently, the plaintiffs applied for a personal decree under s. 90 of the Transfer of Property Act, 1882. *Held*, that it was within the competence of the Court to determine the personal liability or otherwise of the defendants—if not, at that stage, to pass any decree under s. 90—and that the matter so determined was *res judicata* in respect of their subsequent application (14 A. 513, 11 A. 486, 13 A. 356, A.W.N. 1890, 142, *R.*) and it was none the less *res judicata* because the finding as to the personal liability of the defendants was not embodied in the decree. UTTAM ISHLOK RAI v. RAM NARAIN RAI, **A.W.N. 1906, 44 = 3 A.L.J. 171 = 28 A. 365.** (7 A. 606. *R.*)

(76)—*S.* 13, *Civ. Pro. Code*, 1882, Res judicata—*Suit for sale on a mortgage—Compromise by which mortgagee accepted a simple money decree—Second suit for sale barred.*—A suit for sale on a mortgage was compromised on the terms that the mortgagee should accept a simple money decree for the amount of the mortgage-debt, and such a decree was accordingly passed. This decree not being satisfied, the mortgagee again sued for sale of the mortgaged property. *Held* that the suit was barred. PIARI LAL v. NAND RAM, **A.W N. 1908, 265 = 5 A.LJ.. 732 = 31 A. 19 = 1 Ind. Cas. 561.** (33 C. 849, *F*; 26 A. 223, A.W.N. 1905, 152, *D.*)

(77)—*Consent decree—Effect.*—A decree by compromise is as binding on the parties thereto and their privies as the decree obtained on contest. NICHOLAS V. ASPHAR, **24 C. 216.** (*In re South American and Mexican Co.*, L.R. 1895, 1 Ch. 37, *The Bellcairn*, L.R. 10 P.D. 161, 18 M. 1, 13 M.I.A. 497. *R.*)

(78)—*Evidence Act, s.* 13—*Previous judgment* inter partes *determining question at issue*—Res judicata—*Act* VIII *of* 1859, *s.* 2.—Plaintiff in the present suit instituted in 1874, had sued the defendant in 1872 for alienating a piece of land alleged to belong to the gaddi of a Dhurmsala to which plaintiff claimed to be the apparent successor. A decree having been then made in favour of the plaintiff, he again sued the same defendant for making another alienation of a portion of the same land. It was held that the previous judgment of 1872 was a fact and a relevant fact (Indian Evidence Act, s. 13) on the issue between the parties whether the land belonged to the gaddi or not. The judgment therefore was relevant and cogent evidence that the property in question belonged to the gaddi and not to the defendant

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

by acquisition. It was not therefore open to the defendant to again raise the defence that the land did not belong to the gaddi, the issue as to the ownership of the property having become *res adjudicata* between the parties. LACHMAN GIR v. LAHAR SINGH, **70 P.R. 1875.**

(79)—*S.* 13—*Civ. Pro. Code*, 1882—Res judicata—*Manager of trust property must set out his title in an ejectment suit.*—Plaintiff filed a suit to eject defendant in possession of a room used as a temple in a house belonging to the plaintiff. The plaintiff's title to the property was not set out in the plaint, and no question was raised whether the whole of the property was not the subject of a religious trust. He got a decree in the Court of first instance, but the Appellate Court came to the opinion that the house was impressed with a religious trust, and that the plaintiff's claim should have been based upon his right as manager. The plaintiff was offered an opportunity of altering his claim as manager under the will of the person who established the trust. That offer was not accepted and the Appellate Court dismissed the suit. The plaintiff subsequently brought another suit, as manager under the will of the owner of the house who established the trust, to eject the defendant from the room and to get an account of the profits and emoluments which the defendant had received as manager. *Held*, that the second suit was barred as *res judicata*, for the plaintiff in both the suits was asserting a purely personal right in his own personal interest, and it was a right which might and ought to have been put forward in the first suit. HARGOVAN RAMJI v. MULJI HARJIVAN, **11 Bom. L.R. 921 = 34 B. 416 = 4 Ind. Cas. 241.**

(80)—*Claim by a scheduled creditor against the insolvent after his discharge—Held*, that a suit by the creditor of an insolvent in respect of debt entered in the schedule prepared in the insolvency proceedings of which he was well aware, was barred as *res judicata*. J.B. PENHEAROW v. PARTAB SINGH, **76 P.R. 1899 = 24 P.L.R. 1900, Notes of Judgments.**

(81)—*Procedure—Fresh suit for portion of claim disallowed--Extra-judicial advice—Small Cause Court — Jurisdiction — Chief Court—Powers of interference.*—A portion of the plaintiff's claim having been decreed, and the remaining portion disallowed, the plaintiff on the advice of the Judge, brought a fresh suit for the disallowed portion. *Held*, on these facts (1) that defendant's answer of judgment recovered, would entitle him to a decree upon the production of the first record, for the cause of action was the same; (2) that the extra-judicial advice of the Judge had no effect whatever upon the right of the defendant. And with reference to the plaintiff's prayer for the exercise by the Chief Court of its discretionary powers under

***Res Judicata*—continued.**

—2.—Adjudications—*continued.*

s. 28 of Act XI of 1865, *held* that the said discretion must be exercised on general principles in regard to established rules, and the Court had no power, upon a suggestion or a doubt of a possible failure of justice, to alter orders duly and formally made upon evidence heard. MOKURDAR MULL v. KHODABUX, **14 P.R. 1866, Civ. Ref.**

(82)—*Suit to set aside decree*—Res judicata *Review*—Where a suit seeks the reversal of a former decree between the same parties on the allegation of the falseness of a fact which the former decree establishes as true, the suit cannot lie. The plaintiff's remedy is by way of review of judgment in the previous suit. MALAKSHAHBAZ v. MOWAZ, **31 P.R. 1868.**

(83)—*Suit to set aside a decree on the ground of fraud—Sole question raised in the suit already decided in proceedings under s.* 108 *of the Code of Civil Procedure*—Res judicata.—In a suit to set aside a decree, as having been obtained against the plaintiff by fraud, substantially the only ground relied upon was that the suit had been improperly instituted against the plaintiff as of full age, when, in fact, he was a minor. This had been decided against the plaintiff in earlier proceedings between the parties under s. 108 of the Code of Civil Procedure. *Held* that the suit was not maintainable. NIDAR MAL v. RAUNAK HUSAIN, **A.W.N. 1907, 191=4 A.L.J. 668=29 A. 608.** (29 A. 212, *F.*; 21 C. 395, *D.*)

(84)—*Suit to set aside deed of relinquishment —Dismissal of suit for default after partial enquiry—Subsequent suit by defendant to enforce the deed—Applicability of rule of—Civ. Pro. Code, ss.* 13 *and* 372—*Suit based upon registered deed of release—Limitation Act, arts.* 49 *and* 116, *applicability of.*—The plaintiff in the suit alleged that he was desirous of publishing translations of certain Sanskrit religious books and that the defendant agreed to act as the Honorary Secretary in respect of the business of the publication. The publication became a lucrative business and was conducted entirely by the defendant as manager on behalf of the plaintiff. Subsequently, a deed of relinquishment was executed, by which the defendant acknowledged the plaintiff's title in the business and by which certain mutual agreements were entered into between them with regard to the accounts of the business. The defendant, however, declined to make over the stock of the business. Hence the present suit by plaintiff, for delivery to him of the books and publications in the possession of the defendant. The defendant contended that the deed of relinquishment was executed *benamee* and that the plaintiff's suit was barred by limitation. Prior to the institution of the plaintiff's suit, the defendant had brought a suit against the plaintiff for a declaration that the deed was *benamee*. The suit was, however, dismissed, after the examination of the present defendant as plaintiff in that suit in

***Res Judicata*—continued.**

—2.—Adjudications—*continued.*

consequence of a report by his counsel that he had no instructions in the case, on a subsequent day to which it had been adjourned. The present plaintiff, therefore, contended that the defendant in consequence of the dismissal of the suit brought by him, was estopped from impugning the validity of the release deed. *Held*, the deed of relinquishment was in effect a contract and the acknowledgment that the property in the books and publications belonged to the plaintiff contained therein, implied that the property in suit was the property of the plaintiff. Hence the document fell under art. 116 and not under art. 49 and was not, therefore, barred. *Held* further, that the issue raised in the suit on behalf of the defendant had previously been an issue raised by him in the prior suit, *i.e.*, as to whether the deed of relinquishment was or was not a *benamee* transaction. The matter in issue in this suit was directly and substantially in issue in the previous suit between the same parties. The question was heard and finally decided within the meaning of s. 13, Civ. Pro. Code, because the defendant having had an opportunity to prove his case failed to prove it. Consequently, the defendant was precluded from setting up the plea that the deed of relinquishment was not real but *benamee* and the provisions of s. 373, Civ. Pro. Code, availed him nothing (19 C. 159, 15 I.A. 186=16 C. 173, 2 C.W.N. 337=25 I.A. 102, *D.*; 6 B. 482, 8 A. 283, 23 W.R. 58, 10 M. 272, 13 M. I.A. 160, 12 C. 563, *R.*) But the Court having found, on the evidence in the case, that the plaintiff did not prove his case that the business was commenced by him with his funds, gave a decree for the plaintiff, for an account of the stock in trade of the business without costs. ROMA NATH DAS v. MOHESH CHUNDER PAL, **9 C.W.N. 679.**

(85)—*Land Acquisition Act* (I of 1894), *decision as to person entitled to compensation in proceedings under, effect of.*—The question, in this case, was with reference to the binding nature of a decision as to the rights of persons, who claimed compensation in a previous proceeding under the Land Acquisition Act, conducted on a reference made by the Collector owing to disputes between the said persons. *Held*, that an adjudication as to the right of persons claiming the compensation in accordance with the provisions of the Land Acqusition Act (X of 1870), concluded the question between the same parties was decided by the Judicial Committee and there is nothing in the present Act (I of 1894) to warrant its being held differently in regard to similar adjudications made under it. CHOWAKARAN MAKKI v. VAYAPPARATH KUNHI KUTTI ALI, **29 M. 173.** (20 M. 69, *D.*)

(86)—*Application under Administrator-General's Act, s* 63—*Civ. Pro. Code*, 1877, *s.* 13. —An application by petition under s. 63 of Act II of 1874 is a suit within the meaning of s. 13 of the Civ. Pro. Code (X of 1877) and is barred by the diposal of a similar former application in the same matter, though the order

Res Judicata—continued.

——2.—Adjudications—*continued.*

passed is capable of being reviewed. ELIZA SMITH v. THE SECRETARY OF STATE, **3 C. 340.**

(87)—*Relief granted in former suit possible only upon certain findings—Subsequent suit, claim in, to be decided upon same findings—Applicability of rule of—Dismissal of suit for non-joinder after trial—Limitation Act, s.* 14, *applicability of—Dispossession caused by removal of decree, whether, would give fresh cause of action—Limitation Act, arts.* 93, 142. —A, the purchaser of a three-fourths share in a certain village, sued to recover possession of the lands. P objected to the suit on the ground that he was the prior purchaser of the lands and that the suit was barred by limitation. The questions for decisions were, whether P was barred, by the rule of *res judicata*, from setting up his title to the lands and whether s. 14 of the Limitation Act could save the suit from limitation. *Held*, in a former suit between the parties concerning a portion of the same village the question of the genuineness of the sale deed to P was gone into by the Court of first instance and the Court of first appeal. Both the Courts found that the sale to P was antedated and a forgery and that the sale to A was true and supported by consideration. The High Court, on appeal, adopted these findings in granting a relief which was possible only on such findings. Therefore, it was not open for P in this suit to plead that his sale-deed was not antedated and not a forgery. *Held*, also, that the dismissal of a former suit between the parties about the same lands on the ground of non joinder of parties was not for a cause of a like nature with defect of jurisdiction, under s. 14 of the Limitation Act. The dismissal of the suit was based on findings arrived at by the Court. The Courts were able to, and did, entertain the suit. Consequently, the finding of the former suit could not save the present suit from limitation. Further, art. 142 of the Limitation Act applied to the suit. The plaintiff could not treat his second dispossession, *i. e.*, under the order of the Court in the first suit above referred to, restoring possession to P as giving him a fresh cause of action. Therefore, the suit was barred by limitation (5 B. 382, *F.*; 1864 W.R. 43, 8 W.R. 373, 22 B. 733, *R.*) Art. 93 of the Limitation Act would not apply to a suit for possession of immoveable property though the defendant pleads that the deed whereon the suit is based is a forgery. NARAYANAN CHETTY v. KANNAMMAL ACHI, **28 M. 338.** (16 M. 311, 16 B. 186, *F.*) [*R.*, 6 C.L.J. 621.]

(88)—*Property sued for but excluded from decree for want of certificate under Pensions' Act—Subsequent suit for such property not barred by s.* 43, *Civ. Pro Code—Intentional relinquishment or omission to sue.*—In a previous suit by the plaintiffs, the present claim was expressly included by them, and after a decree in their

Res Judicata—continued.

——2.—Adjudications—*continued.*

favour by the Chief Court, the present defendant applied for and obtained a review on the ground that, under s. 4 of the Pensions' Act (XXIII of 1871), the Court was precluded from entertaining the suit which related to the property in the present suit, in the absence of a certificate under the Pensions' Act from the Deputy Commissioner authorising such suit being tried. On the authority of the certificate subsequently obtained, the present suit was instituted for the property excluded by the Chief Court from its decree. It was argued for the defendant that there was, in point of law, an omission to sue, because the plaintiffs had failed to obtain a certificate under s. 6 of the Pensions' Act, without which the Court was prohibited, by s. 4 of the Act, from entertaining a suit for the property claimed. The Commissioner proceeded upon the view that it was owing to want of ordinary diligence in complying with the law that the plaintiffs were not 'entitled to make' the present claim in the former suit, and that, therefore, they must be treated as having omitted to sue for it. But, the Chief Court was of opinion that, as they actually did sue for it, and as even if they had not done so, they were under no obligation either to postpone the claim which they were at the time entitled to make, or to relinquish what they might afterwards become entitled to sue for, and, as in the previous suit it was decided that the Court could not then entertain the claim, it was impossible to accept the proposition that, in the previous suit, the plaintiffs either omitted to sue for or intentionally relinquished the claim now made. MUHAMMAD RUSTAM ALI KHAN v. NAWAB MUHAMMAD AZMAT ALI KHAN, **64 P.R. 1882.**

(89)—*Civ. Pro. Code, s.* 13, *Expl.* IV—Res judicata—*Suit for mesne profits by purchaser of equity of redemption, dismissal of—Subsequent suit by same person for same relief—Whether maintainable.*—A suit brought by the purchaser of the equity of the redemption of a mortgage on the allegation that the mortgage debt had been paid by the mortgagor before sale, against the mortgagee for mesne profits of the land for the harvest subsequent to the purchase, had been dismissed on the ground that no cause of action had arisen as redemption had not been effected. *Held*, in a subsequent suit by him against the mortgagee for the same relief after redemption, that the claim was *res judicata* under s. 13, Expl. IV of the Civ. Pro. Code, as the previous suit was between the same parties and for the same matter as in the subsequent suit, and the plaintiff was not allowed to withdraw his claim with permission to sue again, and as the former decision not having been appealed against, became final and barred the subsequent suit. PRABH DYAL v. DEVI DAS, **69 P.R. 1883.**

(90)—Res judicata—*Civ. Pro. Code (Act* X *of* 1877*), s.* 13, *Expl.* IV—*Previous suit between same parties, erroneous dismissal of—Subsequent*

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

suit for same relief barred.—It is equally opposed to the intention of s. 13 of the Civ. Pro. Code, to allow a decision that a suit is barred by a positive rule of law, to be treated in a subsequent suit as not binding the parties to that decision, as it is to allow a decision upon any question of fact which was directly and substantially in issue in a former suit to be so treated. Where a suit by landlords to recover possession of their lands from their tenants, has been dismissed by a Court of first instance on the erroneous ground that a previous decision has made the matter *res judicata*, the landlords are barred from bringing a fresh suit for the same relief, such dismissal being a final decision of matter directly and substantially in issue between the parties, within the meaning of s. 13 of the Civ. Pro. Code, Expl. IV, and the same question cannot be again tried between the parties otherwise than by an appeal from the first Court's decision. UMRA v. DITTA, **95 P.R. 1883.**

(91)—*Civ. Pro. Code, s.* 13, *Expl.* III, *and s.* 373—*Dismissal of suit "in present form," effect of.*—A suit by an auction-purchaser of immoveable property in execution of a decree having been dismissed "in the present form" on account of the non-production of the sale certificate by the plaintiff, *held* that such dismissal was a decision of the suit in the sense of s. 13, Expl. III, that the use of the words "in the present form" did not amount to the permission to sue again contemplated by chap. XXII of the Civ. Pro. Code, and that such dismissal was a bar to a fresh suit. GANESH RAI v. KALKA PRASAD, **5 A. 595 = A.W.N. 1883, 140.** [*Diss.*, 8 A. 282; *Expl.*, 11 A. 187, F.B.; *R.*, 9 A. 155.]

(92)—*Execution of decree—Decision of objections raised by judgment-debtor.*—In answer to an application for execution of a simple money decree, obtained against her deceased husband, the widow objected that the property sought to be taken in execution was in her possession by consent of the heirs of her husband in lieu of dower; but this objection was not pressed, and was disallowed, and no appeal was preferred from the order disallowing it. *Held*, that the same objection could not be raised again at a subsequent stage of the execution of the same decree. ABADI BEGAM v. ABDUL GHAFFAR, **A.W.N. 1906, 70 = 3 A.L.J. 198.** (24 A. 282, *F.*; 12 A.W.N. 238, *D.*)

(93)—*Plaintiff not paying into Court expenses of commission as ordered—Dismissal of suit—Nature of order of dismissal—Civ. Pro. Code,* 1882, *Ch.* VII—*Fresh suit on the same cause of action*—Res judicata—*Civ. Pro. Code,* 1882, s. 13.—Where a suit is dismissed because of the failure of the plaintiff to pay into Court, as ordered by it, the expenses of a commission which he had applied for, the order of dismissal is not one passed under any of the provisions of Ch. VII of the Civ. Pro. Code for want of attendance of the parties, but must be considered

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

to be a decision of the suit on the merits, both parties being present. Such an order is only open to appeal in the regular course of procedure, and another suit on the same cause of action is barred by the rule of *res judicata.* RAM GULAM SINGH v. HARNANDAN SINGH, **A.W.N. 1885, 168.**

(94)—*Ss.* 13, 258, *Civ. Pro. Code,* 1882—*Application under s.* 258, *Civ. Pro. Code,* 1882, *to have adjustment out of Court recorded—Dismissal on merits—Subsequent suit to recover money paid out of Court*— Res judicata.—A judgment-debtor applied under s. 258, Civ. Pro. Code, 1882, to have an adjustment out of Court recorded. The Court dismissed the application on its merits, and that order was upheld in appeal. The judgment-debtor thereafter brought the present suit, to recover the money alleged to have been paid by him by way of adjustment out of Court. *Held*, that the provisions of s. 11, Civ. Pro. Code, 1908 (=s. 13, Civ. Pro. Code, 1882) applied and that the suit was barred as *res judicata.* MANURATH SINGH v. RAJ KUMARI AND RAM SINGH, **U.B.R. 1909, 2nd Quarter, Civil Procedure, 31.** (11 I.A. 37, 13 W.R. F.B. 69, 21 C. 437, 5 M. 397, 18 M. 26, *R.*)

(95)—*Purchase* pendente lite—*Civ. Pro. Code, s.* 13—*Res judicata.*—A purchaser, *pendente lite*, is bound by the decree passed against the persons through whom he claims, and cannot, in a fresh suit, claim to go behind the decree, on the ground, that it was wrong in so far as it included the property he had purchased. HUKM SINGH v. ZAUKI LAL, **6 A. 506 = A.W.N. 1884, 177.**

(96)—*Adjudications held to be no* res judicata—"*Former suit*"—*S.* 13, *Civ. Pro. Code,* 1882.—The expression "former suit" in s. 13 of the Code means a previously instituted suit and cannot apply to a suit instituted subsequently to the suit in which the bar is pleaded. GHAMANDI LAL v. BHANA MAL, **57 P.R. 1895.**

(97)—*Civ. Pro. Code (Act* X *of* 1877), *ss.* 10, 12—Res judicata—*Suit dismissed for default no bar to subsequent suit for same subject-matter.*—A suit which was dismissed for default under s. 110 of Act VIII of 1859, was held to be no bar with reference to s. 12 or s. 13 of the Civ. Pro. Code, to the institution of a subsequent suit by the same plaintiff against the same defendants and relating to the same subject-matter. It was no bar with reference to s. 12 because it was *not pending* at the date of the institution of the second suit, nor was it a bar with reference to s. 13, as the matter in issue in it was not finally decided between the parties within the meaning of that section, inasmuch as the Court could, on the application of the plaintiff, have altered the decision then passed. GULABA v. RAI SINGH, **104 P.R. 1883.**

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——**2.—Adjudications**—*continued.*

(98)—*Refusal to consider a question.*—Where the Court refused to consider a question at all, there is no adjudication of it, and so, the matter is not really *res judicata.* DROBOMOYI GUPTA v. C. T. DAVIS, **14 C. 323.** [*R.*, 3 O.C. 273.]

(99)—*Matter substantially in issue in previous suit, refusal by Court to decide, whether amounts to final determination within s.* 13, *Civ. Pro. Code.*—This was a suit for declaration denying the right of occupancy of the defendant in certain land. Defendant contended that, as his right to an occupancy tenure was expressly challenged by the plaintiff in a former case, and was put in issue, it must be assumed to have been decided against plaintiff, notwithstanding that the Court expressly left the question undecided. *Held* that the contention was unsustainable inasmuch as, though the point was substantially in issue, it was never decided at all. BAGO v. DIWAN, **25 P.R. 1884.** (45 P.R. 1879, 84 P R 1880, *R.*)

(100)—*Refusal to consider issues—No* res judicata.—Where the Court refused to consider a question at all, there is no adjudication of it, and so the matter is not really *res judicata.* KOKAN MAL v. MIR ALAM, **51 P.R. 1891.**

(101)—Res judicata—*Matter pleaded as constituting* res judicata *not "heard and finally decided" in the former suit—Civ. Pro. Code,* s. 13, *Explanation* II.—A plea of *res judicata* cannot be maintained where the issue pleaded as constituting *res judicata,* though raised in a former suit, were not adjudicated upon by the Court in that suit. YAKUB ALI v. DHANPAT, **A.W.N. 1892, 238.** [*Dist.*, 3 A.L.J. 198=A.W.N. 1906, 70.]

(102)—*Effect of appeal from judgment containing finding of lower Court—Finding not gone into by Appellate Court—Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2; *Act* X *of* 1877, *s.* 13, *Expln.* 4.—When the judgment of a Court of First Instance upon a particular issue is appealed against, that judgment ceases to be *res judicata,* and becomes *res sub judice*; and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of Appeal. NILVARU v. NILVARU, **6 B. 110.** [*F.*, 11 A. 148=A.W.N. 1889, 42, 5 C.L.J. 653, 1 S.L.R. 171; *R.*, 9 B. 75, 15 B. 370; *D.*, 4 N.L.R. 98.]

(103)—*Civ. Pro. Code, s.* 13—Res judicata—*Finally decided.*—N and U were brothers. N died first and his share of the property was enjoyed by his wife. After the death of U, his sons hypothecated their interest in the property to the defendant. The grandsons of U instituted a suit in 1865 against the defendant for a declaration that their shares of the property were not liable for the decree obtained by the defendant against their father. The suit was

Res Judicata—continued.

——**2.—Adjudications**—*continued.*

dismissed in 1866. In that suit, the grandsons of U, the plaintiffs stated that N's wife was in possession of her share of the joint property. N's wife died. Then the plaintiffs again instituted the present suit against the defendant claiming to be entitled to the whole of the estate of N as his heirs. The defendant pleaded that the suit was barred by *res judicata* and contended that N was joint with U and N's property also was affected by the decree of 1866. *Held* that the suit was not barred by *res judicata* inasmuch as the question whether the father of the plaintiffs (the judgment-debtor in the previous suit) had acquired then any interest in the property of N, was not heard and finally decided in that suit. NATHU SINGH v. BHUPAT RAM, **A.W.N. 1883, 190.**

(104)—*Civ. Pro. Code, s.* 13—Res judicata—*Question in issue but not heard and finally decided in a previous suit.*—The appellants sued their vendor and the respondent for the possession of the property purchased by them under a sale deed. The respondent contested the suit on several grounds, one of which was his right of pre-emption. The Court framed an issue to the effect whether the respondent was a proprietor and could in that suit claim the right of pre-emption. The Court decided that the respondent should sue separately for pre-emption, as the matter could not be decided in that case. The respondent then brought a a suit for pre-emption against the appellants, who urged that this suit was barred by the provisions of s. 13 of the Code of Civil Procedure and was *res judicata. Held,* that the question whether the respondent had a right of pre-emption in respect of the property was not heard, and finally decided in the former suit and that, therefore, the present suit was not *res judicata.* SHAMBHU NATH v. AMBIKA PRASAD, **3 O. C. 273.**

(105)—*Erroneous decision of question of law—Re-trial of the same question.*—The erroneous decision, by a competent tribunal, of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question in a subsequent suit according to law. (5 M. 304, 11 M. 396, 28 M. 517, 22 B. 669, 32 C. 749, *R.*) The Court cannot, of course, allow the correctness of the decree given in the former suit to be questioned in the latter suit, on the ground that the former suit was decided under a mistake of law; nor can it pass a decree, the effect of which would be to set at naught, in whole or in part, the decree in the former suit. MANGALATHAMMAL v. NARAYANASAWMY AIYAR, **17 M.L.J. 250=30 M. 461.** (26 M. 104, 29 M. 235, 32 C. 749, *R.*) [*F.*, 18 M.L.J. 548=4 M.L.T. 233; *R.*, 20 M.L.J. 20=6 M.L.T. 313=3 Ind. Cas. 701.]

(106)—*Alternative finding, whether operates as* res judicata.—A sold to C 47 *bighas* of land. B sued to pre-empt 23 *bighas* on the allegation

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

that A owned only that extent of land. In the course of inquiry, it was found that, even according to B's allegation, A's share was about 28 *bighas*. In the final judgment, the finding was:—"Whether B's allegation was true or C's allegtaion was true, the suit must fail:"—*Held*, that the finding could not operate as *res judicata* in a subsequent suit between B and C as to the extent of A's share. HARPAL SINGH v. SHEO MANGAL, **14 Ind. Cas. 161.**

(107)—"Res judicata"—*Question of law.*—An error committed by a competent tribunal in deciding on a question of law, which was directly and substantially in issue between the parties to a suit, does not compel the Court to repeat its error on every subsequent occasion when the same question arises between the parties. PARTHASARADI v. CHINNA KRISHNAN, **5 M. 304** [*Diss.*, 15 A. 327, 1 C.W.N. 687, 28 C. 318, 8 O.C. 37; *Not F.*, 14 C.P.L.R. 109; *F.*, 22 B. 669, 28 M. 517=15 M.L.J. 466, 30 M. 461=17 M.L.J. 250; *Appr.*, 11 M. 393; *R.*, 31 B. 128, 32 C. 749=9 C.W.N. 466=1 C.L.J. 176, 22 B. 669, 14 M. 312, 2 O.C. 261, 26 B. 25=3 Bom. L. R. 450, 44 P.R. 1908; *D.*, 15 M. 327, 29 M. 225=16 M.L.J. 136.]

(108)—*Civ. Pro. Code*, 1882, *s.* 13—Ex parte *judgment not final decision.*—An *ex parte* judgment is not a final decision within the meaning of s. 13, Civ. Pro. Code. SELLATHAMMAL v. OLIVER, **9 M.L.J. 60.** (18 M. 164, *D.*; 7 C. 23, 8 C. 23, 8 C. 275, *F.*)

(109)—Ex parte *decree, Non-execution of—Effect—Admissibility in subsequent suit against defendant—Decree whether binding on question common to both suits*—Res judicata—*Civ. Pro. Code*, *s.* 13, *Expl.* IV.—If a defendant does not think it worth while to contest the suit but allows the plaintiff's evidence and the judgment passed upon it to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself. An *ex parte* decree, if it was never executed, cannot be held to have become final within the meaning of Expl. IV to s. 13 of the Civ. Pro. Code, as it remained open to the defendant to have it set aside. But the decree is admissible in evidence against the defendant in a subsequent suit between the same parties on a question common to that and the former suit, and it is not enough for the defendant to say that he absented himself from the trial of that question. He must at least show grounds which would have justified the Court in setting aside the *ex parte* decree, had he applied for that, or that owing to some fraud, or some irregularity in the proceedings, it should not be treated as binding on him. MUSSAMMAT MEHARI v. GUNDA SINGH, **78 P.R. 1883.**

(109-*a*)—Ex parte *decree, Non execution of—Whether bar to subsequent suit between same parties—Civ. Pro. Code*, *s.* 13, *Expl.* IV.—An *ex parte* decree which was never executed cannot bar a subsequent suit between the same parties, as the Court which passed the *ex parte* decree could have altered it. HASAN MUHAMMAD v. SHAH MUHAMMAD, **78 P.R. 1883, Note.** [*R.*, 78 P.R. 1883.]

(110)—Res judicata—*Withdrawal of former suit—Permission of Court.*—A suit is not barred by the principle of *res judicata* because, in a former case between the same parties, and on the same cause of action, the plaintiff, after the evidence had been recorded, obtained the Court's permission to withdraw the case, with permission to bring another suit. SREEMOTEE MONA BIBEE v. OOMED ALI, **16 W.R. 276.** (12 W.R. P.C. 43, *D.*)

(111)—*S.* 13, *Civ. Pro. Code*, 1882—*Mere filing of an appeal—Effect—Appeal dismissed on ground of limitation alone—Effect—Pendency of proceedings by way of appeal—English Law—Law in India.*—The mere filing of an appeal does not vacate or annul the judgment appealed against. A judgment still liable to appeal, which has not yet been appealed from or an appeal which is actually pending, cannot operate as *res judicata*, during the interval preceding the appeal or while the appeal is actually pending. (5 C. 246, 11 A. 148, *R.*) Where an appellate Court dismisses an appeal on the ground of limitation alone, the appellant is not in a better position than one who is heard but fails on the merits. In such a case the decision of the lower Court on the points actually decided binds the parties to the suit. (6 B. 110, 7 C. 381, 8 C. 631, 22 B. 216, *D.*) In English Law even the pendency of proceedings by way of appeal is no answer to a pleading of estoppel by judgment, though it may be ground for applying for a stay of proceedings For India Explanation IV to s. 13, Civ. Pro. Code (1882), lays down a different rule. RAM CHANDRA NARAIN, **4 N.L.R. 98.**

(112)—*Remand—Appeal from order of remand—Effect of order in appeal*—Res judicata.—An order of High Court, on appeal from an order of remand, setting aside the order of remand, being merely of an interlocutory kind, cannot have the effect of *res judicata* upon any point that may be urged in appeal on the merits. Any affirmance in such order, of the lower appellate Court's findings on the merits must be considered merely as an *obiter dictum.* DEOKISHEN v. BANSI, **8 A. 172, F.B.=A.W. N. 1886, 35.** [*R.*, 14 A. 348, 15 A. 413, 10 O.C. 350.]

(113)—*S.* 13, *Civ. Pro. Code*, 1882—Res judicata—*Rival suits—Same judgment in both suits—One appeal sufficient.*—When two suits are filed by two persons in respect of the same subject-matter (*e.g.*) for pre-emption, against the same defendant, and they are impleaded in each other's suit, and the same issues are fixed in each and the suits are heard together and disposed of by one judgment and decree, it is not necessary for the party, against whom the decree is passed, to file an appeal in each

Res Judicata—continued.

——2.—Adjudications—*continued.*

case. It is sufficient for enabling the Court of appeal to give a binding decision with respect to any matter common to the cases, if that party appeals in his own suit, though such matter has been decided adversely to him in the other suit also. The adverse decision, in the other suit not appealed against, does not preclude the Court of appeal from entering into the question in each party's appeal. JUGAL KISHORE v. CHAMMO, **151 P.L.R. 1905, F.B.=85 P.R. 1905.** (83 P.R. 1888, 10 A. 123, 16 C. 233, 23 P.R. 1897, 31 P.R. 1898, 8 P.R. 1904=104 P.L.R 1903, *R.*) [*R.*, 57 P.R. 1907, 88 P.R. 1908.]

(114)—*Civ. Pro. Code, s.* 13 — *Two suits decided by same judgment—Appeal in one suit, if barred by decision in the other suit—"Former suit," what is—Hearing two suits together —Irregularity.*—A Mahomedan died leaving two widows. Each of them brought a suit, for the recovery of her dower, from the estate of the husband, making the other a party defendant. One of the widows, M, having claimed certain houses to be her exclusive property, and the other, J, denying it, an issue was raised in each of the suits as to whether those houses belonged to the estate of the husband, so as to be liable for the dowers claimed, or, were the separate property of M. The two suits were, with the consent of the parties, tried together and decided by one and the same judgment, though two separate decrees were made, the Court holding that the houses were M's property. J appealed only from the decree in her suit, and it was contended on behalf of M, that the judgment in her suit, not having been appealed from, became final, and was a bar to the trial of the issue as to the ownership of the houses in the appeal preferred by J, in her suit. *Held, per Ghose, C.J.*, agreeing with *Harington, J.* (*Rampini, J., contra*). That there was no separate judgment in M's suit to operate as a bar by way of *res judicata* to the trial of the appeal in J's suit. (16 C. 233, *Rel. on*; 11 A. 148, 24 M. 350, *R.*) The two suits ought not to have been heard together. The proper procedure indicated. MARIAMNESSA BIBEE v. JOYNAB BIBEE, **10 C.W.N. 934=4 C.L.J. 149=33 C. 1101.** [*Diss.*, A.W.N. 1908, 211=4 M.L.T. 172; *F.*, A.W.N. 1907, 245=4 A.L.J. 587=29 A. 730.]

(115)—*Civ. Pro. Code, Act* XIV *of* 1882, *ss.* 13, 158—*Dismissal of previous suit for non-production of succession certificate.*—The dismissal of a previous suit on the same cause of action, on the ground that no succession certificate was produced, is not a decree under s. 158 of the Civ. Pro. Code. The non-production is an omission which precludes the Court from entering into the merits at all. The dismissal therefore does not operate as *res judicata*. PETHAPERUMAL CHETTI v. MURUGANDI SERVAIGARAN, **18 M. 466=5 M.L J. 189.**

(116)—*Suits between different parties—Nature same—Evidence same—Appeal to High Court in one suit and to District Court in others—Effect of decision in High Court—Mere guidance to Judge.*—Three cases brought by three parties claiming shares in the same land as against a zemindar were tried together. In one, the amount being beyond the limit, the appeal lay to the High Court; in the two others, the appeal lay to the Judge. The two cases before the Judge were postponed to await the decision of the High Court. After such decision, the Judge on that "precedent" decided the other two cases. *Held*, that though the decision of one case was not a pre-adjudication binding in law on the other two claimants, yet it would go far to guide the Judge in his finding on the facts. G. GREGORY v. HURREE KISHORE ROY, **3 W.R. 2.**

(117)—*Adverse finding against party—Decree not based on such finding— In subsequent suit, such finding not* res judicata.—Where, in a suit by a creditor against the debtor's brother, the latter pleaded, among other contentions, that he had become divided from his deceased brother and the Court held that that plea was not right, though it dismissed the suit as against him on the ground that he had not benefited by the loan, in a subsequent suit between the parties the decision in the prior suit on the question of partition was not *res judicata*. SURYABHAN v. ISHWAR, **7 C.P.L.R. 139.** (11 C. 301, 13 C. 17, 18 C. 650, *F.*)

(118)—Res judicata — *Non-suit.*—This suit was brought at a time when the present defendant had been unsuccessful in the lower Court in a separate suit involving the whole of the property claimed, which suit had been decided in the Civil Court in the plaintiff-appellant's favour, and while the appeal was still pending in the High Court. By the decision of the High Court above alluded to, the position of the parties was reversed, and a decree was given in favour of the present defendants. *Held*, that the lower Court was wrong in non-suiting the plaintiff in this case, and that the case should have been allowed to proceed subject to the eventual decision of the separate appeal in the other case, as the present plaintiff's position (which he lost by the decision of the High Court) might be again restored to him by the Privy Council. With reference to the peculiar state of the parties, the case was, by consent ordered to be restored to the file of the lower Court pending the decision of the Privy Council. GUNPUT LOLL v. KHEDOO LOLL, **1 W. R. 365.**

(119)—*Civ. Pro. Code (Act* V *of* 1908), *s.* 11 —Res judicata — *Different subject-matter.* — Two houses A and B were purchased under a sale deed, dated 15th June, 1881. There was a previous litigation between the same parties in respect of the house A, in which it was decided that the house A belonged beneficially to M and not to S. The present suit was brought in respect of the house B: *Held*, that the decision in the previous suit did not operate as

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— 2.—**Adjudications** —*continued.*

res judicata, inasmuch as the question of title to the house B was never determined, nor was it in dispute in the previous litigation. KHALIK YAR KHAN v. MOBARIK BEGAM, **7 Ind. Cas. 388.**

(120)—*Civ. Pro. Code*, 1882, *ss.* 13 (=*s.* 11) 43 (=*O.* II, *r.* 2, *new Code*)—Res judicata.—Where a suit for setting aside an order made in one district, for sale of plaintiff's interest in property therein, was dismissed, *held*, that it did not bar another suit to obtain relief against an order in another district for the sale of property therein belonging to him, or of other property not included in the order of sale against which the former suit was directed. RADHA PRASAD SINGH v. LAL SAHAB RAI, **13 A. 53 =17 I.A. 150, P.C.=5 Sar. 600.** [*R.*, 15 A. 359, 16 A. 390, 24 B. 251, F.B., 10 C.W.N. 40.]

(121)—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 11—Res judicata—*First suit between the parties deciding on merits, but failing on account of non-payment of deficiency in Court-fee—Second suit for trial on the same merits—Practice.*—In a previous suit between the parties, there was a decision on the merits; but the suit failed on the ground that the plaint had been undervalued and the plaintiff had refused to pay the additional Court-fee. A subsequent suit having been brought between the parties for determining the same issues, the decision in the first case was pleaded as *res judicata*: *Held*, that, the failure of the first suit on non-payment of additional Court-fees was sufficient by itself for the dismissal of the previous suit; and that, therefore, the findings on the issues on the merits not having been necessary for the decision of the suit, could not have the force of *res judicata*. IRAWA LAXMANA MUGALI v. SATYAPPA SHIDDAPPA MUGALI, **12 Bom. L.R. 766.**

(122)—*Ss.* 13 *and* 43, *Civ. Pro. Code*, 1882—*Partners suing for specific sum of money—Previous partnership suit wherein adjustment of accounts effected by Amin.*—Where some partners, parties in a previous partnership suit, brought a suit for the recovery of the amount due to them under an Amin's adjustment, in the previous suit, *held*, by *Norris* and *Bannerjee*, *JJ.* (*Rampini*, *J.*, *contra*), that the suit was not barred. DHANI RAM SAHA v. BHAGIRATH SHAHA, **22 C. 692.**

(123)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13—*Former suit*—Res judicata—*Proceeding under Land Acquisition Act* (I *of* 1894), *does not bar subsequent suit.*—A decision in a proceeding under the Land Acquisition Act, cannot be treated as a decision in a former suit, so as to operate as *res judicata* with reference to the property other than that to which the enquiry under that Act related. BASANT DEO v. KESHAL DEO, **2 Ind Cas. 853.** (12 C. 484= 42 I.A. 188, 24 A. 112, *D.*; 34 C. 466, 20 M. 269, 7 C. 406=9 C.L.R. 117, *R.*)

(124)—*Decree in prior suit allowing interest —Interest claimed in subsequent suit for arrears*

Res Judicata—continued.

— 2.—**Adjudications** —*continued.*

—Res judicata.—There was no decision in the previous litigation between the parties to this suit on the question of the plaintiffs' title as assignee of the Government Revenue. There was no previous adjudication of the defendant's liability to pay interest on the arrears and there was, therefore, no bar of conclusiveness such as *res judicata* precluding the agitation of that question in the present suit. (*Per Bannerji*, *J.*, *Aikman*, *J.*, *dissenting.*) CHANDI PRASAD v. MAHARAJAH MAHENDRA MAHENDRA SINGH, **23 A. 5=A.W.N. 1900, 177.**

(125)—*Claim for future mesne profits—Judgment silent thereon*—Res judicata—*Civ. Pro. Code*, *s.* 13—*Interest*—*S.* 211, *Civ. Pro. Code.*—Where in a suit for possession of immoveable property with past and future mesne pofits, possession is decreed with past profits, and the decree is silent as to future profits, the claim for the latter must be held to have been refused, but such constructive refusal applies only to profits accrued up to the date of the decree, and not to those which thereafter accrued before delivery of possession. A suit for such profits would not be barred under s. 13, Civ. Pro. Code. RAMABHADRA v. JAGANATHA, **14 M. 328=1 M.L.J. 171.** [*Overruled*, 15 M.L.J. 462, F.B.; *F.*, 32 C. 118; *Diss.*, 21 A. 425, F.B.; *R.*, 25 B. 115.]

(126)—*S.* 13—*Civ. Pro. Code*, 1882 — Res judicata — *Suit for possession not barred by previous suit by the same plaintiffs for mesne-profits.*—A suit for possession is not barred, by a suit previously instituted by the same plaintiffs for mesne-profits. (31 M. 405, 11 M. 151, *F.*, 11 M. 210, *R.*) The right to mesne-profits may exist without any right to possession, and the cause of action need not necessarily be one and the same. MUTHUKARUPPA KOTHAN v. SITHA VEERAYYA CHETTY, **5 M. L.T. 220.**

(127)—*Finality of decision—Civ. Pro. Code*, (*Act* X *of* 1877), *s.* 13.—Where, in a prior suit between the same parties, with respect to the same land, the lower Courts decided the suit on the question of title as well as possession, but the High Court, on appeal, decided the case on the question of possession alone, without entering into that of title, *held*, the question of title was still open between the parties and not barred under s. 13 of the Civ. Pro. Code, as the decision, in the previous suit, of the lower Courts, on the question of title, could not be said to be *final*. GUNGA BISHEN BHUGUT v. ROGHOONATH OJHA, **7 C. 381= 9 C.L.R. 34.** [*Appl.*, L.B.R. 1893—1900, 544; *R.*, 3 O.C. 273, 25 B. 115, 5 C.L.J. 653; *D.*, 4 N.L.R. 98.]

(128)—*Civ. Pro. Code*, 1877, *ss.* 331 *and* 332 —*Specific Relief Act*, *s.* 9—Res judicata.—The investigation, under s. 331 of Civ. Pro. Code, before its amendment, was to proceed as in a suit under s. 9 of the Specific Relief Act; only there was an appeal from the decree under

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——**2.—Adjudications**—*continued.*

s. 332. The question tried in such a suit was only one of possession and, notwithstanding the decree, the parties may proceed to try the title in a subsequent suit. CHINNASAMI PILLAI v. KRISHNA PILLAI, **3 M. 104.** [*R.*, 14 B. 627.]

(129)—*Decision in pre-emption suit that no real sale took place—Whether bars adjudication upon that point in subsequent suit by vendee for possession against vendor—Right of one of two or more defendants to appeal from a decree adversely affecting him, even in cases whether plaintiff's claim is unsuccessful.*—The decision in the pre-emption suit that no real sale had taken place is no bar to an adjudication upon that point in a subsequent suit by the vendee for possession against the vendor, though both the latter were co-defendants in the pre-emption suit. (3 A. 152, *F.*) In certain cases it may be open to one of two or more defendants to appeal from a decree which adversely affects him, even in a case when the plaintiff's claim is unsuccessful. But the question 'who may appeal' is determinable by the commonsense consideration that there can be no appeal when there is nothing to appeal about. DHIAN SINGH v. MUSSAMMAT BELAS KAUR, **42 P.R. 1912 = 123 P.W.R. 1912 = 154 P.L.R. 1912 = 16 Ind. Cas. 127.** (9 C.W.N. 584, *R.*)

(130)—*Mortgage — Decree for redemption—Fresh suit again for redemption if barred.*—In this suit for redemption of a mortgage, the defendant pleaded that a previous suit in which redemption of the same mortgage had been decreed to the plaintiff was a bar to the present suit. *Held* that the second suit was not barred by reason of the previous suit. (86 P.R. 1877, *F.*) NATHU SINGH v. RURA, **14 P.R. 1881.** (86 P.R. 1877, *R.*) [*F.*, 93 P.R. 1908, F.B. = 164 P.L.R. 1908; *R.*, 100 P.R. 1905 = 16 P.L.R. 1906; *D.*, 43 P.R. 1907.]

(131)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Redemption—Second suit for—Conditional decree in first suit not given effect to.*—Where a mortgagor brings a suit for redemption and obtains a conditional decree, but, omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption, unless the decree lays down that, if he fails to fulfil these conditions, the property will be sold or he will be debarred of all his rights to redeem. NAKTA RAM v. CHIRANJI LAL, **7 A.L.J. 185 = 5 Ind. Cas. 269 = 32 A. 215.**

(132)—*Mortgage—First suit by second mortgagee for sale—Discharge of first mortgage by second mortgagee under his decree—Second suit by second mortgagee to sell property mortgaged to first mortgagee—Civ. Pro. Code, s. 13, explanation* II.—When a second mortgagee sued for sale of property mortgaged to him and offered, and was allowed by the decree, to redeem a prior mortgage, and realised his mortgage money by sale of the property

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——**2.—Adjudications**—*continued.*

mortgaged to him, *held* that a second suit by him, to sell the rest of the property under the first mortgage, which was discharged by him, was not barred by the rule of *res judicata* as laid down in explantion II of s. 13 of the Civ. Pro. Code. AJUDHIA PRASAD v. HAR DAYAL, **3 A.L.J. 541 = A.W.N. 1906, 249.**

(133)—*Civ. Pro. Code*, s. 13—Res judicata—*Mortgage—Redemption suits—Held*, by the Full Bench, following the principle of *stare decisis*, that it is open to a mortgagor who has brought a suit for redemption and obtained a decree to bring a second suit for redemption. DHANPAT MAL v JHAGGAR SINGH, **164 P.L.R. 1908, F.B. = 93 P.R. 1908 = 133 P.W.R. 1908.** [*F.*, 100 P.R. 1909.]

(134)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Suit for redemption of mortgage and also on title—Question of title excluded from consideration—Dismissal of suit—Subsequent suit on the strength of lease and title, whether sustainable.*—A brought a suit for redemption of a mortgage and based his suit also on his title as Jenmi. The question of title was excluded by the Court from consideration, and the suit was dismissed, the Court having found that the property was held only under a lease. The present suit was then brought on the strength of the lease and also on title. The lease was not proved, and as to title the lower appellate Court found the claim was barred as *res judicata*. *Held*, the fact that A prayed for relief on title in the previous suit for redemption makes no difference, as the Court has excluded the question from consideration, and treated the suit solely as one for redemption of mortgage, and that the present claim based on title is not barred as *res judicata*. KUNDUR CHIRUKANDAN v. MANNATH KANDI CHATHU, **7 M.L.T. 354 = 5 Ind. Cas. 262.**

(135)—*Ss.* 13, 43, *Expl.* II, *Civ. Pro. Code*, 1882—Res judicata—*Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Suit not barred.*—The dismissal of a previous suit for redemption upon an alleged mortgage is no bar to another suit for redemption on another mortgage in respect of the same properties, under the provisions of ss. 13 and 43, Civ. Pro. Code, 1882. RAM SAHAI v. AHMADI BEGAM, **8 A.L.J. 47 = 9 Ind. Cas. 53.** (29 M. 153, *F.*)

(136)—*Suit for redemption—Dismissal for non-payment of mortgage-money before suit—Second suit for redemption on full payment not barred—Transfer of Property Act* (IV *of* 1882), *ss.* 92, 93.—A decree in a suit for the redemption of a usufructuary mortgage, not being a conditional decree for redemption under s. 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage-money at a time authorised by the deed, cannot

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——2.—**Adjudications**—*continued.*

have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, where the deed has expressly authorised redemption on payment of the mortgage-money in a particular month in any future year after due date, and the mortgagor has tendered the whole of such money in that month between the dismissal of the first suit and the institution of the second. DONDH BAHADUR RAI v. TEK NARAIN RAI, **21 A. 251=A.W.N. 1899, 50.** [*R.*, U.B.R. 1897—1901, Vol. II, 582, 3 O.C. 371, 24 A. 44=A.W.N. 1901, 194, 7 A.L.J. 185; *D.*, 25 M. 300.]

(137)—Ex parte *decree ordering repayment of money due under mortgage—Subsequent redemption suit.*—An *ex parte* decree obtained by the mortgagee, for the recovery of the amount due under the mortgage, does not bar a subsequent suit by the mortgagor to redeem the property, on the ground that the mortgage amount has been paid off from the usufruct. LAKSHAMAYA v. APPADU, **7 M. 111.**

(138)—Samudayam, *uralers and tenants*—Samudayam *a mortgagee in possession.*—In previous litigation between the *samudayam*, the uralers, and the tenants, the opinion was expressed in judgments of the High Court, that the position of the *Samudayam* was that of a mortgagee in possession. But, as it appeared that such opinion was not expressed as to the construction of the document, it was held not to be *res judicata* when the question of the proper construction of the document arose. KRISHNAN v. VELOO, **14 M. 301, F.B.** [*F.*, 14 M. 312.]

(139)—Res judicata—*Civ. Pro. Code*, 1877, s. 13—*Sale subject to mortgage.*—In execution of a decree against the purchaser of a certain property subject to a mortgage, such property was attached and sold, and the balance of the sale proceeds, after satisfaction of the decree, was paid over to him. In two suits brought by the mortgagees against the mortgagors, the purchaser above-mentioned, and the auction-purchaser, for the interest on the mortgage which was payable annually, it was decided that the purchaser was primarily and personally liable for the same, as he had received the balance of the sale proceeds. The purchaser having subsequently refunded the sale proceeds into Court, *held* in a subsequent suit by the mortgagees to recover the principal and interest by sale of the mortgaged property, that whatever might have been the rights and relations of the parties so long as the sale proceeds remained with the purchaser, they underwent a change when such proceeds were refunded, and the "*ratio decidendi*," of the previous decisions having ceased to exist, the mortgagee was not precluded, from claiming in the first instance the sale of the mortgaged properties, by the previous decision that the purchaser was primarily and personally liable. RATAN RAI v. HANUMAN DAS, **5 A. 118=A.W.N. 1881, 139.**

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(140)—*Civ. Pro. Code* (*Act* XIV *of* 1882), s. 13—*Finally decided*—Res judicata.—Where, in a previous suit by the plaintiff for possession of certain mortgaged lands, the first Court found that there had been no default in payment of interest, a condition precedent to the plaintiff's right to possession, and that full consideration had not been paid, and, on appeal, the Divisional Judge held that there had been no default in payment of interest, and dismissed the appeal *in limine*, but also remarked in the judgment that the plea of consideration (want of consideration) for the mortgage did not seem sound—*Held*, that the trial of the question regarding the alleged failure to pay consideration was not barred by *res judicata*. SULTAN v. HAKIM RAI, **10 P.L.R. 1902.**

(141)—Res judicata—*Abatement of suit—Fresh suit—Civ. Pro. Code*, 1859—*Civ. Pro. Code*, 1877, s. 371.—Property which had been previously mortgaged was sold in execution of a money decree against the mortgagor. The mortgagee, subsequent to this sale, brought a suit upon the mortgage, against the mortgagor and the auction-purchaser. The purchaser having died in the meanwhile, no steps were taken to make his heirs or representatives parties to the suit in his place. The decree was passed and the mortgagee purchased the property in execution. He sued now to recover possession of the property from the representative of the purchaser at the former execution sale. *Held* that the previous mortgage suit was not a bar to the present suit against the defendant, the representative of the purchaser in execution of the money decree, as the present suit was under the Procedure Code of 1859, which did not contain the express provision which is to be found in the Code of 1877, which provides that when a suit abated, as regards the defendants or one of the defendants, no fresh suit could be brought on the same cause of action. NISTARINI DEBI v. BROJO NATH MUKOPADHYA, **10 C.L.R. 229.**

(142)—*Partition suit — Incidental determination of question of partition in previous suit for possession*—Res judicata.—Where the previous suit brought to establish the plaintiff's sole right to a certain land, which the defendant also claimed as his share obtained by partition, was dismissed, the Court holding that no partition had taken place, *held* that a second suit for partition of the field, including the land for which his former suit had been instituted, was not barred by the previous suit. SHIVRAM v. NARAYAN, **5 B. 27.**

(143)—*Civ. Pro. Code*, 1882, s. 13—Res judicata—*Dismissal for want of cause of action—Partition of mahal—Refusal by Revenue Court to partition—Suit to establish right—Jurisdiction of Civil Court.*—A applied to the Revenue Court for the partition of a village. B objected to it on the ground that he was entitled to the entire *mauza* by the right of primogeniture. A was therefore referred to the Civil Court for the

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determination of his right to and possession of, a moiety of the village. This suit was ultimately dismissed on the ground that the Revenue Court ought to have disposed of the application for partition and had no power to decline to grant it. A thereupon again applied for partition of the village, but this application was again refused by the Revenue Court on the ground that the village was impartible. He then brought the suit to have it declared that he had equal rights with his brother B in the village. *Held* that the suit was not barred by s. 13 of the Civ. Pro. Code, as the dismissal of the suit on the ground that there was no cause of action for the suit, was no adjudication of any right so as to bar the present suit. *Held*, also that the order of a Revenue Court declining to give partition, on the ground that the village was impartible, was not a bar to a subsequent suit in the Civil Court to have it declared that the plaintiff had equal rights with the defendants in the village, as a Revenue Court was not competent to determine the rights of the parties. JAGAT SINGH v. DURJANLAL, **A.W.N. 1884, 2.** [*R.*, 13 A. 309.]

(144)—*Suits by tenant to compel tender of* pattah *and by landlord to compel acceptance of it—Both suits decided against the tenant—Appeal from one of the decisions—The unappealed decision whether* res judicata—*Civ. Pro. Code, s.* 13.—The appellant, a tenant sued the respondents to compel them to grant him a *pattah* and subsequently the respondents instituted a suit against the appellant before the same Revenue Court for compelling him to accept a *pattah* for the same year. The suits were tried together and judgment given on the same day. The decree in each suit ought to have been, in effect, the same but the Court however dismissed the appellant's suit and allowed the landlords' suit brought against him. The tenant appealed to the District Judge against the dismissal of the suit brought by him without any reference to the other decision against him in the landlords' suit. *Held*, on reference to a Full Bench in second appeal — though, technically, the tenant's appeal ought to have been in both suits and the proper course for the District Judge to have taken would have been to require the appellant to amend his memorandum of appeal so as to make it an appeal in both suits, yet the fact that the tenant appealed in his own suit and did not prefer an appeal in the landlord's suit, did not preclude the District Judge from deciding upon the merits of the questions raised in the appeal, which was before him, because an appellate tribunal cannot be regarded as incompetent to deal with a question, which comes before it on appeal, because an inferior Court, upon the same facts, but in a case other than the case under appeal, had given a decision, which had not been appealed against, at the same time as the decision in the case under appeal. PANCHANADA VELAN v. VAITHINATHA SASTRIAL, **16 M.L.J. 63=29 M. 333.**

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—2.—**Adjudications**—*continued.*

(3 C. 30, *R.*; 16 C. 233, *F.*) [*Diss.*, A.W.N. 1908, 211; *F.*, A.W.N. 1907, 245 = 29 A. 730.]

(145)—Res judicata—*Suit for rent — Previous certificate cancelled on ground that* bona fide *claim of right is involved— No adjudication on merits—Public Demands Recovery Act (I. B. C. of* 1895), *s.* 7, *sub-s.* (1), *cl.* (*c*), *s.* 10, *s.* 12, *sub-s.* (1), *s.* 32, *sub-s.* (1)—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 13.—A certificate for arrears of rent was made on behalf of a landlord who was a ward of Court. The tenant objected on the ground that he held the land rent-free. The certificate officer decided in favour of the landlord. Upon an appeal by the tenant, the Collector, without entering into the merits, cancelled the certificate on the ground that there was a *bona fide* claim of right involved in the proceedings. The landlord then brought a suit for rent in respect of which the certificate had previously been made: *Held*, that the suit is not barred by the doctrine of *res judicata*, as the Collector did not cancel the certificate on the merits. JANKI KOERI v. BASDEO OJHA, **13 Ind. Cas. 351.**

(146)—*Adjudication of title of intervenor in rent-suit—Act* X *of* 1859.—The decision on a question of title of an intervenor in a rent suit brought under Act X of 1859, though passed by the District Judge on appeal against the Deputy Collector's decision, would not operate as *res judicata* in a subsequent regular suit by such intervenor in a Civil Court. MAHOMED AFSURUDDIN v. BEER CHUNDER MANIKYA, **8 C. 470=10 C.L.R. 416.** (B.L.R. Sup. Vol. 366=5 W.R. Act X, Rul. 23, *R.*)

(147)—*Civ. Pro. Code*, 1882, *s* 13—*Previous decision in rent suit, no* res judicata *in subsequent suit.*—The previous decision in a suit by a landlord for rent does not operate as *res judicata*, and the Court must determine upon the evidence adduced whether the rent claimed in the particular suit, under adjudication, is or is not due. MAHARAJA JOTINDRA MOHUN TAGORE v. SHUMBHU CHUNDER BHUTTACHARJEE, **4 C.W.N. 43.** (19 C. 656, 21 C. 236, *F.*) [*Appl.*, 6 C.W.N. 589.]

(148)—*Declaratory suit—Suit for possession —Denial of tenancy—Jurisdiction—Civ. Pro. Code, s.* 13—Res judicata—*Act* XII *of* 1881 (*N.W.P. Rent Act*), *ss.* 35, 40, 95.—S. 95 of the Rent Act pre-supposes the admitted relation of landholder and tenant; where this is denied, a Revenue Court cannot adjudicate on the rights of the parties; and an adjudication by such Court under such circumstances would not bar a suit in the Civil Court for the relief which had been refused by the Revenue Court. LODHI SINGH v. ISHRI SINGH, **6 A. 295= A.W.N. 1884, 90.**

(149)—*Civ. Pro. Code*, 1882, *ss.* 12, 13, 18, *Expl.* (IV)—*Pending suit—Malikana—Different*

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

reliefs claimed—Recurring liability—Different subject matters claimed—Judgment in first suit relating to root of plaintiff's title—"Final" judgment—Judgment liable to or under appeal—Effect of final judgment in previous suit pronounced subsequant to decision in second suit of lower appellate Court, but before hearing of second appeal in second suit—Civ. Pro. Code, 1882, s. 13, *applicability to appeals and applications.*—The rule contained in s. 12 of the Code forms no part of the rule of *res judicata*, for it relates to matters *sub judice*, and bars only a "suit," while the rule in s. 13 relates to matters which have passed into *rem judicatam* and bars the trial of a "*suit*" and of an "*issue*." Accordingly, the pendency of a litigation connected with the rent, *malikana*, or any other demand for one year does not, under s. 12 of the Code, bar a suit for a subsequent year, the *reliefs* prayed for in the two cases not being the same. (8 C.L.R. 113, *R.*) [*R.*, 12 C.P.L.R. 91, 16 M.L.J. 526=2 M.L.T. 40, 1 S.L.R. 104.] For the purposes of *res judicata*, it is *not* essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit, for the rule bars a suit as well as the re-trial of an *issue* (12 I A. 16, *R.*). Where a recurring liability is the subject of a claim, a previous judgment, dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*, but if such previous judgment does negative the title itself, the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation. So, if in the previous litigation, any final adjudication, as to the plaintiff's absence of title to receive *malikana* has been arrived at, the mere circumstance that that adjudication related to a claim of *malikana* for the earlier years will not prevent the application of the rule of *res judicata*. [*R.*, 23 A. 5, 24 A. 112, 12 C.W.N. 739, 33 C. 1101=10 C.W.N. 934=4 C.L.J. 149; *D.*, U.B.R. 1897—1901, Vol. II, 535, 31 P.R. 1898.] A judgment liable to appeal and which has not yet been appealed from, or an appeal from which is actually pending, being only a provisional but not definitive or *final* adjudication, cannot operate as *res judicata* during the interval preceding the appeal and the period during which the appeal is depending in a higher tribunal (Expl. IV to the section *commented on*, 5 M.H.C. 176, 6 B 110, *R.*) [*R.*, 4 N.L.R. 98.] The doctrine of *res judicata*, so far as it relates to prohibiting the re-trial of an *issue*, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For, even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a *final* judgment pronounced meanwhile in such previous litigation by a competent Court (the identity of parties and other conditions mentioned in s. 13 being satisfied), should operate as *res judicata*, preventing the Judge dealing with the later litigation from adjudicating differently. [*F.*, 24 M. 350, 6 A.L.J 991=3 Ind. Cas. 707; *R.*, 13 M.L.J. 134, 6 C L.J. 74=11 C W.N. 732, 9 C.L J. 597, 12 C.W.N. 739, A.W.N. 1908, 211; *D.*, 31 P.R. 1898.] The rule contained in the section is not limited to the Courts of first instance, but applies equally to the procedure of the first and second Appellate Courts, and even to miscellaneous proceedings BALKISHEN v. KISHAN LAL, **11 A. 148=A.W.N. 1889, 42.**

(150)—*Claim to arrears of rent disallowed in previous suit--Subsequent suit for enhancement--Beng. Act* VIII *of* 1869.—The judgment in apprevious sut, disallowing the claim of the plaintiff to arrears of rent at a certain rate, on the plea of the defendant that the land had been held at a uniform rent for more than twenty years, would not bar a subsequent suit for enhancement of rent on notice, neither of the questions for consideration in the latter suit having been concluded by the decision in the former GOPEE MOHUN MOZOOMDAR v. HILLS, **3 C. 789.**

(151)—*Favourable decree—Unfavourable finding on one issue.*—A plea set up by the tenants in a Civil Court, in answer to a suit by the landlord for recovery of rent, was found against them, but the suit was dismissed as the patta tendered to the tenants was not such an one as they were bound to accept. In a subsequent suit, by the landlord to enforce the acceptance of a patta, the tenants are not disabled from setting up the same plea, as it does not operate as *res judicata*. MUTTUKUMARAPPA v. ARUMUGA, **7 M. 145.** [*R.*, 13 B. 650, 157 P. R. 1889, F. B ; *D.*, 30 M. 447=17 M.L.J. 260=2 M.L.T. 368.]

(152)—*Civ. Pro. Code, ss.* 13 *and* 43—*Suit to recover land on contract of letting.*—Where, in a suit to recover land on a contract of letting in which the title also was alleged, the question was deliberately narrowed to that of letting, and a decision was arrived at on an adjudication of that question alone, a subsequent suit based on title was not barred by the provisions of s. 13, inasmuch as the question of title cannot be said to have been heard and determined in the former suit, though the question was in issue in that suit also. The suit was not also barred under the provisions of s. 43 as the cause of action was different in both the suits; in the former, the non-payment of rent due constituted the cause of action, the title being only an incidental question; in the latter, the title was the cause of action. THYILA v. THYILA, **4 M. 308.** (3 C. 23, 2 C. 152, *D.*) [*Cons.*, 14 B. 31; *R.*, L.B.R. 1893—1900, 575, 7 M. 264, 21 A. 425, 25 B. 189, 13 M.L.J. 448=26 M. 760, 13 B. 326.]

(153)—*Ejectment— Limitation — Estoppel—* Res judicata—*Jurisdiction.*—In a suit for ejectment and mesne profits on the allegation that

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——2.—Adjudications—*continued.*

the terms of the temporary leases under which defendants had been in possession had expired, where defendants pleaded that they had held the land in *mokurrari* for generations, and that an ancestor of plaintiffs had confirmed their *mokurrari* rights by the grant of a *pattah*, *held* that, if defendants could prove that they had held for more than 12 years previous to the institution of the suit under a *mokurrari* tenure to the knowledge of the plaintiffs, the suit would be barred by limitation. *Held* that the judgment of the Munsiff's Court (confirmed by the lower appellate Court) in a suit for arrears of rent as to the validity of the same leases which plaintiff there set up and of the same *mokurrari pattah* which defendants then brought into Court was not conclusive evidence in the present case; for, though an inferior Court has jurisdiction to try every matter which is necessary for the adjudication of the point in contest before it, its decision is not final as regards other facts not in contest before it. TEKAITNI GOWRA KUMARI v. THE BENGAL COAL COMPANY, **5 B.L R. 667, Note.**

(154)—*Former judgment non-suiting plaintiff —Decision of point of limitation in favour of plaintiff, if conclusive in subsequent suit.*—The proceedings and judgment in a prior suit in which the Judge, although he decided the issues both of limitation and right in favour of the plaintiff, had yet non-suited him, cannot be taken as conclusive as regards the point of limitation in a fresh suit brought for the same matter. MUDDUN MOHUN CHUNDER CHOWDHRY v BRINDABUN CHUNDER SIRCAR CHOWDHRY, **4 W.R. 104.**

(155)—*Right to levy cess—Suit for declaration of*—Wajib ul-arz — *Proceedings of Settlement Officer.*—The mention of a cess in the *wajib-ul arz* and in the Settlement Officer's proceeding, was held not equivalent to a judgment on the question raised in a civil suit so as to preclude adjudication on the merits. RAM CHUND v. ZAHOOR ALI KHAN, **1 Agra 135.**

(156)—*Act* XIV *of* 1859, *s.* 1, *cl.* 6—*Proceedings of Settlement Officer—Cess—Mention of, in* wazib ul-arz—*Conclusive.*—In a suit to set aside an order of the Settlement Department, it was held that the proceeding before the Settlement officer was not a judicial award, as it was merely a fiscal one not adjudicating on any point at issue between the parties, and s. 1, cl. 6 of Act XIV of 1859, was inapplicable; and that the mention of the cess in the *wazib-ul-arz* was not conclusive proof of the right of the zemindar to levy it against persons who were not parties to that record. RAM CHUND v. ZAHOOR ALI KHAN. **1 Agra 134.**

(157)—*Order of Superintendent of Settlement, whether a decree of Court of competent jurisdiction*—Res judicata.—A judicial decision by a Superintendent of Settlement in a suit between landlord and tenant (passed before the Tenancy Act XXVII of 1868 became law), which awards

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——2.—Adjudications—*continued.*

to the tenant a status unknown to the law, and which the subsequent legislation shows to have been based upon a misapprehension of the law, may be successfully impugned in a subsequent suit, notwithstanding the rule as to *res judicata.* SIDHA v. DATA RAM, **118 P.R. 1876.** [*D.*, 77 P.R. 1877, 22 P.R. 1879.]

(158)—*Mutation proceedings — Persons not parties*—Res judicata.—Ordering *dakhil kharij* does not constitute the matter *res judicata*, much less as against persons not parties to the mutation proceedings. HEERA SINGH v. JAGEER BEG, **3 P.R. 1868.**

(159)—*Civ. Pro. Code*, 1882, *s.* 13—*First suit for revocation of agency—Subsequent suit for dismissal on the ground of misconduct, maintainable—Agency when terminable—Duty of agent —Cause of action, existence of, how determined —Abatement.*—First defendant was appointed agent of plaintiff for 18 years. Plaintiff brought a suit for revoking the authority, which was dismissed on the ground that the authority was irrevocable. He then brought the present suit for dismissing the first defendant on the ground of misconduct. *Held* that the suit was not barred on account of the decision in the former suit. *Held* also that, in every contract of service here, is an implied condition that, if the service be not faithfully performed, the employer is entitled to put an end to the contract. *Held* also that the agent was bound to act, in all matters left to his discretion, in good faith and to the best of his judgment, solely for the benefit of his principal. That the first defendant, whether regarded as a servant or as an agent, or as holding a fiduciary position resembling in respect of his duties the position of a trustee, his right to retain his position depends on the faithful performance of duties attached to it. In considering the question of the cause of action, the allegations of misconduct set out in the plaint must be assumed as true. *Held* further that the appeal would not abate owing to the death of the first defendant pending the appeal. MAYIL NAIR v. KUNDUR KUTTALA MADATHIL PITCHU PATTAR'S SON SUBRAMANIA PATTAR, **7 M.L.T. 87=33 M. 162=5 Ind. Cas. 758.**

(160)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Order refusing to file an award—Subsequent suit to enforce the award.* — An application was made to file an award, and the question of misconduct of the arbitrators was heard and decided in that proceeding, and an order was made refusing to file the award. In a subsequent suit for enforcing the award, the same question was raised. *Held* that the issue as to misconduct of the arbitrators was decided in a proceeding which was not a suit within the meaning of s. 13, and the decision on the said issue could not operate as *res judicata.* KUNJI LAL v. DURGA PRASAD, **7 A.L.J. 425=6 Ind. Cas. 127=32 A. 484.** (6 A. 186, A.W.N. 1904, 234, 28 A. 21, *F.*)

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——2.—**Adjudications**—*continued.*

(161)—*Civ. Pro. Code*, 1882, *s.* 13—*Arrears of maintenance, Suit for - Contribution, Suit for —Rights of defendants* inter se, *Determination of* — Res judicata.—In a previous suit for arrears of maintenance by one F. A., against the person in possession of different portions of an estate on which it was alleged the maintenance was a charge, the plaintiff was one of the defendants against whom a decree was passed, for the full amount of arrears, while some defendants were discharged from liability. The plaintiff appealed making F.A., and his co defendants respondents in the case. The appellate Court refused to decide the relative liability of the defendants and referred the plaintiff to a suit for contribution. Subsequently, the plaintiff brought a suit for contribution against his co-defendants on the allegation that they were liable to contribute towards the sum decreed in proportion to their shares. *Held*, that the second suit was not barred by s. 13 of the Code of the Civil Procedure, the rights of the defendants *inter se* not having been finally decided in the first suit. MANIK CHAND v. RAJA TASADDUK RASUL KHAN, **2 O.C. 303.**

(162)—*Civ. Pro. Code*, 1882—*Ss.* 13, 43, 462 —*Custom—Adoption—Daughter's son*—Dhillon Jats *of Hoshiarpur district* — Res judicata—*Splitting of claims-Minor- Compromise of suit on behalf of.*—*Held*, that adoption of a daughter's son among Jats of Hoshiarpur district being established by custom, the burden of proving that the custom did not apply to *Dhillon Jats* of the district, lay on the defendants who contested the validity of such adoptions and that they had failed to prove it. (50 P.R. 1893, *R.*) Where it appeared that a suit by the father of a minor on behalf of the latter was misconducted by him, that the father was incapacitated owing to physical incapacity from properly representing the minor's interest at the time of the institution of the suit, and no steps taken in the suit could be treated as taken in good faith, and the suit was allowed by Court to be dismissed on the father entering into a compromise with the opposite party, under which the father relinquished claim to nearly half of the property to which the minor was clearly entitled. *Held*, that the minor could not be held bound by the compromise, and a fresh suit filed by him was not barred either under s. 13 or s. 43, Civ. Pro. Code. *Held*, also, that the Court should not have sanctioned the compromise under s. 462 of the Code. JAWALA SINGH v. JAIMEL SINGH, **25 P.L.R. 1909=14 P.W.R. 1909=1 Ind. Cas. 400.**

(163)—*Ss.* 13, 623, 1882—*Civ. Pro. Code—Consent decree—Application for review on the ground of fraud, coercion, misrepresentation, &c., refused—Fresh suit for same relief, if lies—Election of remedies*—Res judicata — *Appropriate remedy for setting aside consent-decree on ground of fraud.*—When a consent-decree is sought to be attacked on the ground of fraud, misrepresentation, mistake, coercion or undue influence or any similar grounds, the appropriate remedy is by a suit, although, on the terms of s. 623, Civ. Pro. Code (1882), as also on the authorities, it cannot be said that a Court has no jurisdiction to review a consent decree on any such ground. (10 C. 612, *Cons.*; 6 B.L.R. 649, 13 B.L.R. App. XI, 22 W.R. 213, 5 C.W.N. 757=28 C. 475, 6 C.W.N. 473=29 C. 395, 29 I.A. 99, 22 W.R. 290, 25 C. 649, 3 C.L.J. 119, 34 C. 83, 8 C.L.J. 266, 8 C.W.N. 473, 3 C.W.N. 375, 10 C.W.N. 286, 15 B. 594, *R.*) The two remedies though co-existing are not inconsistent remedies, so that, when the party aggrieved has had recourse first to the less appropriate remedy of a review and has failed, the doctrine of election does not apply in bar of a regular suit for the same relief. No question of election of remedies arises, unless the remedies are inconsistent and alternative. The decision of the Court upon the application for review would not also operate as *res judicata* in the regular suit subsequently instituted. (10 C.W.N. 529 =2 C.L.J. 508, *Doubted*; 11 I.A. 37=6 A. 269, 11 I.A. 181=7 A. 102, 8 I.A. 123=8 C. 51, *R.*) Where however in such a case, the aggrieved party has been successful in one proceeding, the judgment absorbs all his other judicial remedies. MUSSAMMAT GULAB KOER v. BADSHAH BAHADUR, **13 C.W.N. 1197 =10 C.L.J. 420=2 Ind. Cas. 129.** [*F.*, 14 C.W.N. 451; *R.*, 10 C.L.J. 538=3 Ind. Cas. 346=6 M.L.T. 255.]

(164)—*Civ. Pro. Code*, *s.* 13—*Right to sue reserved by decree—Second suit not barred by first.*—In a suit by an auction purchaser for recovery of lands, the decree directed the dismissal of the suit on the ground of non-production of the sale-certificate, but reserved the right of the plaintiff to bring a fresh suit on obtaining the sale-certificate. In a second suit by the plaintiff for recovery of the same property on production of the sale-certificate, *held*, the first suit did not operate as *res judicata*. MURUGAPPA ASARI v. SANTHIAMMAL, **18 M.L.J. 198.**

(165)—*Suit against widow for setting aside gift by her—Subsequent suit against her daughters for possession, subject-matter of, neither in issue nor heard and decided in previous suit —Civ. Pro. Code*, *s* 13, *Expl.* II.—Plaintiffs, who were the collaterals and reversioners of one B. deceased, had sued his widow M to set aside a gift of B's estate made by her. Subsequently, the widow having died, the present suit for possession of the property, was instituted by them against the two daughters of B and certain co-reversioners with them. The daughters pleaded that the plaintiffs had not a superior right to succeed, but their contention was overruled by the lower Courts as barred under s. 13, Civ. Pro. Code, Expl. II, on the ground that, although the daughters were not parties to the previous litigation, the entire estate was represented by their mother through whom they claimed and they were therefore

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——2.—**Adjudications**—*continued.*

bound by the prior decision that the plaintiffs were the reversionary heirs. *Held*, because the question as to who had the superior claim was not a necessary issue in the previous declaratory suit and had not been therefore adjudicated upon, the matter could not be held as having been heard and finally decided, within the meaning of s. 13, Civ. Pro. Code, and the daughters were not barred from setting up the above defence, by reason of the decision in the prior suit. BEHARI v. PIR BAKHSH, **107 P.R. 1906=76 P.L.R. 1907.** (24 C. 711, 28 C. 17, *F.*; 29 P.R. 1895 and 11 C. 196, *D.*)

(166)—*Estoppel*—Res judicata —A plaintiff, who sues to obtain property which belonged to a Hindu widow, on the ground that he is the adopted son of a brother of the deceased husband, is not barred from setting up his title, because, in a former suit against the same defendants for other property, it was decided that he was not the adopted son of that brother. KRIPARAM v. BHAGWAN DAS, **1 B.L.R.A.C. 68=10 W.R. 100.** [*Overruled*, 1 C. 144, P.C.; *Disappr.*, 4 C. 199, P.C.]

(167)—*Principles operating—Will—Gift to widow—Absolute or life estate.*—Where, in a former suit, a party disputed a will on the ground that the properties willed belonged to the undivided Hindu family, which was found against, a later suit in which he seeks a declaration that the will gave only a life estate to the widow, and that he was the reversioner, is not barred by *res judicata.* In order to avoid the objection of *res judicata* it is not necessary that a plaintiff should put forward the claim and also the alternative inconsistent claim. Where the adjudication of the matter was wholly unnecessary for the decision of the case, the matter cannot be *res judicata.* Where the testator makes no express bequest in favour of his widow, but merely says "they shall have the documents:" *Held*, that the widow did not get an estate of inheritance. DHANAPALU CHETTY v. ANANTHA CHETTY, **M.W.N. 1913, 322=13 M.L.T. 305=24 M.L.J. 418=18 Ind. Cas. 973.**

(168)—*Right to construct a wall, declaratory decree obtained in respect of—Subsequent interruption by defendant—Fresh suits for injunction—One co-sharer whether bound by suit by or against another co-sharer*—Res judicata—*Act X of* 1877, *s* 13, *Expl.* V *and s.* 30.—Plaintiff in this suit asked for the following reliefs: (1) a declaratory decree that he was entitled to build up a wall in the lower court-yard of his house, so that it might serve as a boundary line between his own and the defendants' premises which adjoined each other; (2) to erect a balakhana or upper story, so as to exclude the defendants from the use of the roof; and (3) for an injunction to restrain the defendants from interfering with his building the wall in the lower court-yard. Plaintiff alleged that the site, on which he desired to build the wall, had been previously decreed in his favour by a decree

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——2.—**Adjudications**—*continued.*

dated 21st March 1878, and that the roof on which he now wished to erect a balakhana had also been decreed to him on the 22nd March 1878, but that, five days before the present suit, the defendants had prevented the plaintiff from building up the wall, and he accordingly prayed for an injunction that the defendants might be restrained from obstructing him in exercising a right which he was declared entitled to exercise by a competent Court. The lower Appellate Court considered that plaintiff was entitled to the injunction claimed, with respect to the wall, on the ground of the subsequent obstruction complained of in the plaint; and, with respect to the balakhana, it held that the rights of the parties were conclusively settled by the previous decisions. On this appeal by one of the defendants, it was argued for him, first, that plaintiff was bound to proceed by enforcing the declaratory decree previously obtained by him and was not entitled to bring a fresh suit. Secondly, that the appellant was not bound by the previous decisions, as he was no party to those suits and because Expl. V, s. 13, is altogether inapplicable to a case where one of the two co sharers is either sued or sues in his own name and not as representing a numerous class of persons. *Held* that the previous decree obtained by the plaintiff was of the nature of a declaratory decree and that plaintiff, when he came into Court a second time, alleging a new and recent obstruction to the exercise of his rights, had *prima facie* a fresh cause of action entitling him to maintain a suit. On the question whether the defendant appellant must be held bound by the result of the previous litigation conducted by his brother, the Chief Court was of opinion that he was not so bound. Courts are not bound to allow Expl. V, s. 13, to operate as a bar to litigation unless they are firmly persuaded that it applies to the exact case in point. The above provision of the law was not intended to apply to a case similar to the present, where a junior brother finding himself involved in litigation regarding property held jointly by himself and an elder brother during the absence of that brother in a distant part of the country, did his best to defend the joint rights, and at the same time, pointed out to the Court that advantage had been taken by the opposite party of such absence, no notice having been given through the Court to that elder brother of the fact of the pendency of the litigation. GHULAM GHOUS v. SHER MUHAMMAD, **111 P.R. 1882.** [*R.*, 38 P.R. 1897, 41 P.R. 1899, 27 P.R. 1900=241 P.L.R. 1900.]

(168-*a*)—Res judicata—*Notice under s.* 30, *Civ. Pro. Code—Present plaintiffs not parties to arbitration in previous suit—Question not previously litigated* bona fide—*Expl.* V *to s.* 13 *inapplicable.*—The three plaintiffs in the suit instituted previously in January, 1878, sued for what their co-sharers were entitled to; yet when the case was referred to arbitration, the award

Res Judicata—continued.

——2.—**Adjudications**—*continued.*

only disposed of the shares of the plaintiffs whose names were on the record. Admittedly no notice was given to the present plaintiffs under s. 30 of the Civ. Pro. Code so as to bind them by the result, and they were no parties to the appointment of arbitrators, and could not be held to have been deprived of their right to sue, because other persons claimed on their behalf what they were entitled to, but were content in the end to accept their own shares as individuals. SHEOYA v. SHADI, **111 P.R. 1882, Note (a).** [*R.*, 111 P.R. 1882.]

(168-*b*)—*Civ. Pro. Code*, s. 13, *Expl.* V—*Question relating to construction of mortgage*—Res judicata—*Parties interested bound by* bona fide *proceedings*—In a previous suit between the parties, the decision was in favour of a particular construction of the terms of a mortgage-deed. *Held*, that the parties were bound by this decision and that it was not open to them, in a subsequent suit, to contend for a different construction Where the proceedings in the former suit were carried on in perfect good faith by the then plaintiffs, and it was plain that the then plaintiffs sued on behalf of themselves and all the mortgagees and were allowed by the Court to do so, the decision in the suit would bind all the parties interested. DINA v. MUSST. ATMA DEVI, **111 P.R. 1882, Note (b).** [*R.*, 111 P.R. 1882.]

(168-*c*)—*Civ. Pro. Code*, s. 13—Res judicata—*Suit in respect of private right claimed in common by plaintiffs and others—Subsequent suit on same title—Presumption as to* bona fides *of litigation.*—In a previous case in 1865, two persons S. and M. litigated as plaintiffs in respect of a private right claimed in common for themselves and others. The right of S. and of the plaintiff in the present case was based upon precisely the same title and S. claimed the right in common for himself and the present plaintiff among others. There was no ground for supposing that the litigation was otherwise than *bona fide*; the presumption was that it was *bona fide* and also on the appeal to the Commissioner no objection was raised on the point specifically. *Held*, that the present plaintiff was bound by the decree in the suit of 1865. JAI SINGH v. THOBA, **111 P.R. 1882 Note (c).** [*R.*, 111 P.R. 1882.]

(168-*d*)—*Erroneous decision by lower Appellate Court on question of* res judicata—*Material irregularity—Revision—Civ. Pro. Code*, s. 622.—In this case, the lower Appellate Court had wrongly held that the present suit was barred under Expl. V, s. 13, by reason of a former suit to which the plaintiffs were no parties, and had for that reason refused to adjudicate on the merits of the plaintiff's appeal. *Held*, that the lower Appellate Court had committed a material irregularity justifying interference under s. 622, Civ. Pro. Code. As the provisions of s. 30 had been previously entirely ignored, it was not possible to hold that the present plaintiffs were bound by the previous decision, simply because certain persons chose to sue others as representing them, who were not authorised in any legal way to act on their behalf. Moreover, the previous case had been referred to arbitration and decided by the Court on the same day that the award was filed, contrary, to the express provisions of s. 522 of the Code, and, such decision contrary to law cannot be regarded as the final decision of a competent Court within the meaning of s 13 of the Code, so as to bind the present plaintiffs. CHUHAR v. DEVIA, **111 P.R. 1882, Note (d),** [*R.*, 111 P.R. 1882.]

(169)—*Evidence Act* (I *of* 1872), s. 41—*Judgment of Court of Probate, a judgment* in rem—*Proceedings under Probate and Administration Act* (V *of* 1881), *previous decision under Guardians and Wards Act* (VIII *of* 1890), *if* res judicata—*Civ. Pro. Code*, s. 13.—On an application for probate of a will, the District Judge passed an order refusing probate on the ground that, in the course of certain prior proceedings, *inter partes*, under the Guardians and Wards Act, it had been decided that the will propounded was not a genuine will, and that by virtue of such decision the question as to the genuineness of the will was *res judicata*, and could not be re-opened in the subsequent proceedings for probate. The order was reversed on the ground that the proceedings under the Guardians and Wards Act could not so operate as to make the question of the genuineness of the will *res judicata* so as to bar the subsequent application for probate. The prior decision under the Guardians and Wards Act was only a decision *inter partes* and could not affect the subsequent application for probate, the adjudication upon which will have the effect of a judgment *in rem*, as provided in s 41 of the Evidence Act, and will affect not only the parties to the previous proceedings, but the beneficiaries under the will and the world at large. CHINNASAMI v. HARIHARABHADRA, **16 M.380=3 M.L.J. 121.**

(170)—*Civ. Pro. Code*, ss. 111, 13—*Ascertained sum due to defendant in same matter as plaint transaction, set-off allowable in respect of—Ground of claim for set-off in subsequent suit not in issue in previous suit, no* res judicata.—Plaintiff sued to recover money due as wages from the defendant, who had engaged him to sell cloth at a monthly salary. Defendant claimed to set-off a certain sum due to him, as the price of cloth sold on his account, by the plaintiff on commission. In a previous suit by the present defendant to recover the price of the above cloth alleged to be sold and delivered to the present plaintiff, the latter (defendant in the former suit) pleaded that the cloth had been delivered to him only for sale on commission. In that suit, which was dismissed, the question whether any sum was due, as for cloth sold on commission sale, was not gone into. Under the circumstances, the defendant was held entitled, under s. 111, of the Civ. Pro. Code, to set off the sum claimed by him as due for cloth

Res Judicata—continued.

—2.—Adjudications—*continued.*

sold on commission, since it was an ascertained sum claimed in relation to the same contract as that on which the plaintiff's claim was based. Further, the claim for the set-off was not barred by s. 13 of the Code, since, the claim made by the defendant in the subsequent suit was based on a different ground from that of his claim as plaintiff in the previous suit, and the issue in the later suit had not been heard and decided in the previous one. AMIR ZAMA v. NATHU MAL, **8 A. 396=A.W.N. 1886, 159.** [*R.*, 16 C.P.L.R. 118.]

(171)—*Indian Oaths Act, ss. 9 and 11—Estoppel.*—The decision of an issue arrived at, under the provisions of the Oaths Act, ss. 9 and 11, is not an adjudication operating as an estoppel in any future proceedings. KESHAVA v. RUDRAN, **5 M. 259.** [*Expl.*, 10 M. 272; *R.*, 6 M. 284, 25 M. 662; *D.*, 21 B. 465, 24 M. 444.]

(172)—*Civ. Pro. Code (Act V of 1908), s. 11—*Res judicata—*Suit for partition—Previous suit for partition of other property.*—K, a Hindu widow, sued the heir of her husband's brother (defendant No. 1) in 1884, to recover by partition her husband's share, certain lands which he held jointly with his brother, but failed. In 1908, the plaintiff claiming through K's husband, sued defendant No. 1 to recover possession of the house in which K resided during her lifetime. In both the suits it was alleged that the brothers had already separated as regards houses and the house in question had fallen to the share of K's husband. The defendant contended that the second suit was barred by *res judicata*: *Held*, that the suit was not barred by *res judicata*, for what was substantially in issue between the parties in the second suit, did not necessarily call for decision and had not in fact been decided in the first suit. MULJIBHAI NARBHERAM BHATT v. LAKHMIDAS DADABHAI PATEL, **13 B L.R. 1034=36 B. 127=12 Ind. Cas. 711.**

(173)—Res judicata—*Two findings in former suit—Second finding not necessary to dispose of the case—Whether bars subsequent suit.*—A brought a suit against B for profits of a certain plot of land for the year 1313 F., on the allegation that the same had been assigned to him by C and D. The Court dismissed the suit on the finding that the profits had not been assigned to A by C and D. It further found that it had not been proved whether C and D themselves had been in enjoyment of the profits within 12 years prior to the institution of the suit. Subsequently A brought a second suit for recovery of the profits for the years 1314-1315-F., against the same defendant on the ground that he was mortgagee in possession of the share of C and D. *Held*, that the second suit was not barred by *res judicata*. The finding in the former suit as to the enjoyment of profits by C and D was not a finding on which the decision of the case turned. MISRI LAL v. MOHAMMAD PIDA HOSAN, **11 Ind. Cas. 89.** (27 A. 436, A.W.N. 1905, 36, 2 A.L.J. 107, 17 A. 174, *R.*)

Res Judicata—continued.

—2.—Adjudications—*continued.*

(174)—*Occupancy tenants—Status*—Res judicata.—In a suit for enhancement of rent, the Settlement Collector declared the tenants to come under s. 6 of the Tenancy Act, 1887, and enhanced their rent accordingly. The tenants had not expressly claimed any particular *status*, and the question of their *status* was not expressly put in issue. *Held*, in a subsequent suit by the tenants to establish a right of occupancy under s. 5, sub-s. (1) (*a*) of the Tenancy Act, that the Lower Courts had rightly held that the question of *status* had already been decided. NIHAL SINGH v. HIRA SINGH, **5 P. R. 1892, Rev.**

(175)—*Civ. Pro. Code (Act X of 1877), s. 375—*Razinamah—*Subsequent suit to enforce promise inducing compromise*—Res judicata.—The fact that in a former suit between the same parties, a *razinamah* had been filed by the plaintiff admitting complete satisfaction, does not prevent him from afterwards suing to enforce a specific promise to pay a certain sum of money on the strength of which he was induced to forego his original claim in that suit: and, if such a promise could be proved, he would be entitled to maintain the subsequent suit, and to obtain a decree for such sum as was agreed to be paid. NARAIN DAS v. BABA KISHEN DAS, **95 P.R. 1880.** [*R.*, 1 P. R. 1904=41 P. L R. 1904.]

See ACT X OF 1870, s. 39, 7 C. 406=9 C L.R. 117.

Suits settled by compromise—Compromise dealing partly with properties in suit and partly with those outside suit—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 3, 1 C.L.J. 388.

Refused by Criminal Court—*See* COSTS—SPECIAL CASES, 8 C.W.N. 178.

See EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, 13 C. 352, F.B.

See LIMITATION ACT, 1908, s. 19, 20 P.R. 1887.

Arrears of share in vatan cash allowance by Government, suit for recovery of—Limitation—Limitation Act, 1877, art. 62—Previous decision *inter partes* on point of law, cannot operate as *res judicata*—*See* LIMITATION ACT, 1908, art. 62, 22 B. 669.

See LIMITATION ACT, 1908, ART. 182—MISCELLANEOUS 23 A. 465=A.W.N. 1901, 142.

Ss. 13, 102, 103, Civ. Pro. Code, 1882—Redemption suit dismissed for default—Second suit not barred—*Res judicata*—*See* MORTGAGE—REDEMPTION, 2 Ind. Cas. 630.

See MORTGAGE—REDEMPTION, 24 A. 44, F.B.=A.W.N. 1901, 194, 27 P.R. 1900.

See PLAINT—REJECTION OF PLAINT, 12 A. 553=A.W.N. 1889, 185.

Res Judicata—continued.

—2. —**Adjudications**—*concluded.*

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 6 W.R. 157.

See TRANSFER OF PROPERTY ACT, 1882, 92, 25 M. 300, F.B. = 12 M.L.J 128.

——3.—**Cause of action.**

See CAUSE OF ACTION.

See RELINQUISHMENT OF PORTION OF CLAIM.

(1)—*Civ. Pro. Code—Judgment and order passed on review, part of record.*—The rule of law applicable to the defence of *res judicata* in bar of a suit is that there must be not only the same property or subject of demand in dispute either wholly or in part between the same parties or their privies, but it must also appear that the identical question of right or title has been before *in judicio.* The judgment must be on the same *res* or matter directly in question as that sought to be litigated in the second suit. When a question of right or title has been adjudicated on in a suit, the bar of the judgment cannot be avoided by suing on a new form of claim, or on a ground of relief which might have been, but was not, raised or determined in the former sui, if such claim or ground arises out of and depends upon the same right or title as that which was directly in question in the former suit. [*F.*, 22 W.R. 464, 28 M. 406; *Cons.*, 2 C. 152, F.B.; *R.*, 7 M.H.C. 160, 4 C. 190, 14 B. 31, 20 B. 86, 2 O. C. 303, 13 M. L. J. 448 = 26 M. 760, 31 M. 385.] The Civ. Pro. Code makes the judgment of the Court and an order passed on a review of judgment as much a part of the record in a suit as the decree, and in considering the question of *res judicata*, they should be looked at to see not only that the suit was dismissed on the merits but how the matter in litigation was judicially dealt with. CHINNIYA MUDALI v. VENKATACHELLA PILLAI, **3 M.H.C. 320.**

(2)—*Suits based upon same right.*—Where the causes of action in the former and subsequent suits are identical and there is no allegation of a wholly different right or of a wholly different group of facts infringing it in the latter suit from what there was in the former one, the rule of *res judicata* will apply. Having striven to establish his title by one means and failed, a person cannot be permitted in a latter suit to establish that title by other means which were equally at his command when the former suit was tried, and so connected with the grounds on which he in that case relied that they ought to have been submitted for consideration together. HAJI HASAM v. IBRAHIM MANCHARAN KALIANDAS, **3 B 137.** [*R.*, 8 B. 174, 14 B. 31, 21 M. 35, 25 B. 115, 25 B. 189, 1 Ind. Cas. 808.]

(3)—*Pleadings—Every title should be raised—Decision on every part of case to be obtained—Fresh suit.*—A plaintiff is bound to raise can succeed and to

Res Judicata—continued.

——3.—**Cause of action**—*continued.*

obtain a decision upon every part of his case, and if it is found that any part of the case which he made has been neglected by the Court which tried the suit, he is not at liberty to bring a fresh suit in respect of such part SREEKRISTO BISWAS v. JOY KRISTO BISWAS, **24 W.R. 304.**

(4)—*S.* 13, *Civ. Pro. Code*, 1882—Res judicata—*Joinder of several causes of action—Institution of suit in superior Court—S.* 13 *not evaded*—To make a matter *res judicata*, the two suits need not be open to appeal in the same way. (25 C. 571, *F.*; 9 B. 75, 15 B. 104, 111, 9 C. 439, *D.*) [*F.*, 24 M 444; *Rel. on*, 10 C.W.N. 529 = 2 C.L.J. 508; *Not F.*, 29 M. 195, F.B. = 1 M.L.T. 25 = 16 M.L.J. 41; *D.*, 9 C.W.N. 656, 35 C. 353 = 12 C.W.N. 359 = 7 C.L.J. 470; *R.*, 13 C.W.N. 1197 = 10 C.L.J. 420.] A plaintiff cannot be allowed to evade s. 13, by joining several causes of action against the same defendant in one and the same suit and instituting it in a superior Court. BHUGWANBUTTI CHOWDHRANI v. FORBES, **28 C. 78 = 5 C.W.N. 483.** [*R.*, 57 P.R. 1907 = 66 P.W.R. 1907.]

(5)—*Civ. Pro. Code*, 1882, *ss.* 13, 43—Res judicata—*Prior suit erroneously dismissed under s.* 43, *Civ. Pro. Code—Subsequent suit on same cause of action—Object matter same.*—The decision in a former suit erroneously dismissing it under s. 43, Civ. Pro. Code, will be *res judicata* in a subsequent suit brought for the same relief, on the same cause of action, between the same parties, as the object matter is the same. DASARI CHELLAMMA v. M. CHELLAYYA, **7 M.L.T. 84 = 5 Ind. Cas. 756.**

(6)—Res judicata—*Issue heard and determined—Act* VIII *of* 1859, *s.* 2.—S. 2 of Act VIII of 1859 bars a suit where the matter in issue has been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. NUFUR CHUNDER PAUL CHOWDHRY v. LUCKHEE MONEE DABEE, **9 W.R. 300.**

(7)—Res judicata—*Omission to include claim in previous suit—Cause of action.*—A party who based a previous suit as against the present defendant on the same cause of action and might then have made his present claim, but did not, cannot bring a second suit on the same cause of action for that purpose. LALLA LUCHMUN SAHOY v. RAMSARU PANDYAN, **20 W.R. 144.**

(8)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2—*Dismissal of suit to recover property by right of gift—Subsequent suit by right of inheritance.*—A plaintiff's cause of action is a very different thing from his title; the one is something done contrary to a person's interest which obliges him to seek the aid of a Court of justice, the other is the proof that that something affords him a valid ground for relief. (10 W.R. 426, *Appl.*) A litigant cannot be allowed to keep

Res Judicata—continued.

——**3.—Cause of action**—*continued.*

back one of his titles, on the ground that he had still a right in reserve, as he is bound to disclose all his titles at once. Dismissal of a suit brought by a person claiming property by gift to his mother bars a subsequent suit by that person claiming the same property as heir to his grandfather, when the cause of action was the same in both the suits. BROJO LALL ROY v. KHETTUR NATH MITTER, **12 W.R. 55.** [*R.*, 11 B.H.C. 224, 2 O.C. 347.]

(9)—*Civ. Pro. Code*, 1882, *ss.* 13, 43—*Suit for permanent injunction — Second suit for possession barred—Cause of action—Object of* res judicata—*Suit for declaration* —A suit by an owner, out of possession, for a permanent injunction against the defendant, who holds the property in dispute adversely to him, bars a subsequent suit for possession on the same cause of action. (5 A.L.J. 640, A W.N. 1908, 252, 4 M.L.T. 444, 4 A. 261, 2 A. 356, *D.*; 1 A. 252, 8 C. 528, 14 A. 512, 8 C. 483, *R.*) The object of the rule of *res judicata* is always put upon two grounds:—(1) the public policy that there should be an end of litigation; (2) the hardship on the individual that he should be vexed twice for the same cause. The expression cause of action means infringement of some right by some one, which entitles the owner of the right to seek the assistance of the Court. S. 43 of the Civ. Pro. Code, 1882, must apply to the facts as found by the Court and not to facts as alleged in the plaint. GOKUL MISIR v. BANDE ALI BEG, **8 Ind. Cas. 9.** (18 B. 537, *Appr.*; 8 C. 819, 12 C. 291, *R.*;

(10)—*Identity of basis of claims—Non-production of evidence—Effect.*—The latter of two suits (between the same parties or their privies), in which the reliefs sought for are different, but in respect of the same property and based on the same title, is barred by the dismissal of the former for failure to establish the title. [*D.*, 14 B. 206.] Dismissal for non-production of evidence has the same effect as dismissal founded on evidence, in barring a subsequent suit as *res judicata*. RAMA RAO v. SURIYA RAO, **1 M. 84.**

(11)—*Second suit for same property on different title.*—A plaintiff, bringing a suit, to recover property on the strength of one title, and failing in such suit, cannot, afterwards, sue to recover the same property on another title which he might have, but did not, put forward in the first suit (*Garth, C.J., Diss.*) [*F.*, 3 C. 23; *D.*, 6 C. 559=8 C.L.R. 10, 5 B. 589, 10 M. 272, 16 C. 137, 14 B. 31, 24 C. 83; *Diss.*, 4 M. 308, 26 M. 760=13 M.L.J. 448; *R.*, 8 C. 483 =11 C.L.R. 57.] *Garth, C.J.*, held that the suit was not barred by *res judicata* because the words 'cause of action' mean not the claim itself (*e.g.*) the money, goods, or land claimed by the plaintiff but the grounds upon which that claim is founded and that, for a judgment to operate as *res judicata*, the grounds upon which a thing is sought to be recovered must be substantially the same in both the suits. DENO BUNDOO CHOWDHRY v. KRISTOMONEE DOSSEE, **2 C. 152.** [*Diss.*, 25 B. 189 =2 Bom. L.R. 872.]

(12)—*Suit for specific sum of money—Civ. Pro Code.* (*Act* VIII *of* 1859), *s.* 2.—A plaintiff, suing for a specific sum of money, must put forward every right, under which he claims it. A subsequent suit for the same sum under a right different from the one put forward in the first suit would be barred by *res judicata*. BEEKHA LALL v. BUGGOO LALL **3 C. 23.** (2 C. 152, *R.*) [*D.*, 6 C. 559=8 C.L.R. 10; *Diss.*, 4 M. 308; *R.*, 26 M. 760=13 M.L.J. 448.]

(13)—*Cause of action—Suit for mesne profits —Former suit for possession.*—The plaintiff sued to recover possession of land and for *wasilat* from the period at which he alleged he was dispossessed; and he obtained a decree for possession of the lands and for *wasilat* from the date of the plaint. He afterwards sued the defendant for *wasilat* from the date of the alleged dispossession to the date of the plaint. *Held* that *wasilat* having been claimed in the previous plaint for that period, and there having been an adjudication upon his claim for *wasilat* and no evidence that *wasilat* was withheld for the period for which it was now claimed, through inadvertence or by mistake, the case within Act VIII of 1859, s. 2, excluding from the jurisdiction of the Court causes of action "which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties." LUTEE FOONISSA BIBEE v LUCKEEMONEE DOSSEE, **Marsh 93=1 Hay 161.**

(14)—*Causes of action—Decision as to genuineness of document—Civ. Pro. Code*, 1859, *s.* 2—*Co-defendants.*—A former judgment, in which a certain document has been held to be genuine between a third person as plaintiff and the present plaintiff and present principal defendant as defendants, was held to be conclusive in this suit on the point of authenticity of the document, though not a *res judicata* under s. 2, Act VIII of 1859, in other respects. KALLY PERSAD SEIN CHOWDHRY v MOHESH CHUNDER BHUTTACHARJEE, **Hay 430.**

(15) *Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2—*Decision of claim of title in prior suit—Fresh suit in respect of same subject-matter.*—Where the ground of legal right on which a plaintiff sues was a point raised and opened for decision in a former suit and was finally dealt with by the judgment and decree therein, it cannot be permitted to be raised in a subsequent suit between the parties or their representatives in interest. As a rule, a party is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He is not at liberty to abstain from relying upon, still less to abandon a ground of claim which is in question and proper for consideration and decision in the

***Res Judicata*—continued.**

——3.—Cause of action—*continued.*

suit, and afterwards to make it a cause of fresh suit in respect of the same subject-matter of litigation. Plaintiff sued to recover possession of a zamindari as the legal representative of a devisee under the will of a former zemindar. The whole foundation of the suit was the validity of the alleged will. In prior suits for possession brought by the testator's widow and daughter, respectively, against the plaintiff's father and the plaintiff, the same will was set up as the ground of title on behalf of the defendants, though the actual decision of the suits went on different grounds. *Held* that it was open to the present plaintiff as party in both suits to have put forward the right claimed under the will and to have his case upon that point fully heard and determined. The cause of action upon which the present suit was brought was finally concluded by the judgment and decree in the appeal in the prior suits. Consequently the present cause of action was concluded. It made no difference that the party now plaintiff was defendant in the former suit. UDAIYA TEVAR v. KATAMA NACHIYAR, **2 M H.C. 131.** [*R.*, 3 W.R. 39, 3 M.H.C, 320, 7 M.H C. 263, 14 B. 31, 26 M. 760 ; *D.*, 3 M.H.C. 217.]

(16)—*Suit for same property by defendant in prior suit on fresh ground—Prior suit adjudging possession of Hindu mother, a widow—Subsequent claim by defendant in the first suit, as reversioner.*—When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge then, to bring forward. If (*e.g.*) he could have, but did not, put forward a *Kulachar* or family custom, negativing the right of the plaintiff in the first suit, a Hindu mother, but giving him a right to succeed, he cannot avail himself of that ground in a subsequent suit, of his own, to recover the same property as against the successful plaintiff in the first suit. [*D.*, 24 C. 83 ; *R.*, 11 C.L.R. 483, 14 B. 31, 24 C. 711.] But he may avail himself of the ground of the *Kulachar* or family custom, set up by him, to show that he, if he survived the widow, would be entitled to succeed her in preference to other male heirs and that, on that ground, he is entitled to question the alienations made by the widow. DOORGAPERSAD SINGH v. DOORGA KONWARI, **4 C. 190, P.C.=3 C.L.R. 31=5 I A. 149 =3 Sar. 827.** [*R.*, 16 M.L.J. 307=1 M.L.T. 183=29 M. 390.]

(17)—*Suit—Difference in terms of partnership*—Res judicata.—Where there is a difference between the terms and conditions of the partnership set up in the first suit and those asserted in the second, and the first was dismissed for want of proof of the partnership, the circumstance of difference in terms alone will not give a new cause of action. SAMARAPURI v. SHANMUGA, **5 M. 47.**

(18)—*Previous suit dismissed—Second suit for same subject—Suit for recovery of property as son of pattashree of last owner—Later suit as eldest son of such owner.*—Where a previous suit is dismissed, a second suit for the same object matter cannot be brought because a new basis in fact of the same "*causa*" is adduced, but a second suit can be brought where there is a different "*causa.*" Where a suit for recovery of property on the ground that the plaintiff was heir being the son by the Pattaba Stri of the last owner was dismissed, a second suit could not be brought for recovery of the same property on the ground that he was the eldest son of the last owner and was therefore the heir. To the judgment reported at 3 M. H.C.R. 326-334, after the words in p. 334 "in favour of the defendant all the objective grounds of the decision which have led to the dismissal of the suit," the following ought to be added, "and without the establishment of which the suit could not have been logically or legally dismissed." MUTHUMADEVA NAIK v. SEVATTAMUTHUMADEVA NAIK, **7 M.H.C. 160.** [*Appr.*, 28 M. 406, 31 M. 385; *R.*, 13 M.L.J. 448=26 M. 760 ; *D.*, 24 C. 83.]

(19)—*Civ. Pro. Code, Act* VIII *of* 1859, *s* 2—Res judicata—Solehnamah, *effect of.*—The plaintiff had in 1853 sued for certain properties claiming them as belonging to her deceased father's estate. It was found that the said properties belonged, not only to her father, but also to another person. Those properties which did not belong to her father's estate were excluded and set apart from the decree obtained by her. Fourteen years after this she brought a second suit based on a right of inheritance to a share in her father's estate, claiming those very properties belonging to another which had been excluded from the decree in the former suit. *Held* that the second suit was barred under s. 2 of Act VIII of 1859, that, as it was distinctly based on a right of inheritance and not, as it was contended, on a *solehnamah* (which altered and modified the decree of 1853 by admitting and declaring that the disputed properties belonged to her father's estate), she was not entitled to claim those properties, the *solehnamah* not having given her a fresh cause of action. MUSSAMUT SYUDOONISSA v FEDA HOSSEIN, **12 W.R. 182.**

(20)—Res judicata—*First suit based on title on strength of gift—Second suit basing claim on title by inheritance.*—Where the plaintiff sued the defendant on the strength of a title derived by gift from plaintiff's mother, a subsequent suit basing a similar claim on the strength of title by inheritance would be barred by ss. 2 and 7 of the Civ Pro. Code, 1859, if the title by inheritance existed on the date of the first suit.—(*Mitter, J., dubitante*) DUDSAR BIBEE v. SHAKIR BURKUNDAZ, **15 W.R. 168.** [*R.*, 11 B.H.C. 224.]

(21)—*Mahomedan Law*—Imamea *school—Registered deed of gift—Donee obtaining possession by suit against donor—Claim of donor's heir to gift property whether maintainable.*—A

Res Judicata—continued.

——3.—Cause of action—*continued.*

Shea made a gift of all his property to his wife's niece, by a registered deed. Shortly after, the donee sued the donor for possession and obtained a decree, the donor having confessed judgment. After the donor's death, his brother sued to set aside the deed of gift, contending that the gift was invalid as there had not been actual transfer of possession. *Held* that though it might have been a good defence on the part of the donor to the suit brought against him by the donee, still, after the decision of the suit, declaring the validity of the gift, as against the donor and all others claiming through him, it was not open to his heir to dispute the donee's title, as the heir could have no higher right than the donor had at his death. MIR GURZAND ALI v. MUSSUMAT JAFFREE BEBEE, **5 N.W.P. 118.**

(22)—*Suit for demurrage—Civ. Pro. Code (Act* VIII *of* 1859), *s.* 7—Res judicata.—Where, in a suit for demurrage, the plaintiff fails to claim a portion, he is barred, by the principle of *res judicata* under s. 7, Act VIII of 1859, from subsequently instituting a suit for recovering such portion of the claim. MUNGHROO MANJHEE v. GYARAM NUNDEE, **14 W.R. 253.**

(23)—Res judicata—*Act* VIII *of* 1859, *s.* 7.—Where plaintiffs had, in a former suit, claimed certain moneys alleged to have been misappropriated by defendant as manager for the joint family, the cause of action having been the latter's refusal to allow plaintiffs their share at the time of separation, their present suit for a share of certain paddy which defendant had refused to make over when the separation took place, was held to be barred by s. 7, Act VIII of 1859. GANES CHANDRA CHOWDHRY v. RAM KUMAR CHOWDHRY, **3 B.L.R.A.C. 265=12 W.R. 79.** (8 W.R. P.C. 11, *R.*) [*R.*, 1 A. 543.]

(24)—Res judicata—*Grant of share to widow—Decree not appealed against—Suit to set aside effect of decree.*—A widow was treated as an equal sharer in her husband's estate with her sons, and in conjunction with one son applied for and obtained partition as a sharer. Objections were taken as to her right to the partition; these objections were overruled, and no appeal was made to the Civil Court. *Held* that the partition proceedings still standing good, a suit to declare that the widow was entitled only to maintenance was not maintainable. MUSSUMMAT OODIA v. BHOPAL, **3 Agra 137.**

(25)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 2, 3—*Alienee suing for alienor's share twice—Same cause of action.*—In a former suit the plaintiffs, the purchasers of the rights of some widows in certain property, claimed a partition of the shares so purchased. The defendants admitted the right of the widows to some share, but the suit was dismissed on the ground that partition could not be obtained until the plaintiffs had established their right, and that the extent of their right was as claimed by them. *Held*, on a second suit by the plaintiffs against the same defendants, that the cause of action being clearly the same in both suits, *viz.*, the plaintiffs' alleged right as purchasers to some share of the property of the widows, the cognizance of the second suit was barred by the Civ. Pro. Code., 1859, s. 2; that the defendants' admission in the first suit which was merely evidence in the plaintiffs' favour did not give rise to a fresh cause of action; that, if the judgments in the former suit were erroneous or defective, the High Court have no authority to revise them in a new suit, nor can it in a new suit take cognizance of that which might have been brought forward as part of the subject in the contest in the former suit. GHASEE KHAN v. KULLOO, **1 Agra 152.** [*F.*, 7 N. W.P. 17, F.B.]

(26)—*Ss* 13 (*Exp.* II), 43, 373, *Civ. Pro. Code*, 1882—*Cause of action—Second suit in respect of a portion of claim omitted in a previous suit on the same cause of action*—Res judicata—*Withdrawal of suit with permission to bring a fresh suit, application for—Effect upon subsequent suit when application for withdrawal of previous suit refused and suit dismissed.*—M, the defendant's predecessor in title, obtained against the plaintiff a decree for possession of a village under s. 108, cl. 10 of the Oudh Rent Act. The plaintiff afterwards sued M for a declaration of his right before a Civil Court, but amended the prayer so as to read that a decree be passed in his favour for possession of the village. The suit was dismissed on the ground that it was not cognisable by a Civil Court. In second appeal the plaintiff applied under s. 373, Civ. Pro. Code, for leave, to withdraw the suit with liberty to bring a fresh suit. The application was refused and the appeal dismissed. The plaintiff then brought the present suit with the only difference that, now, he prayed for a declaration of right of which in the former suit the prayer was for possession. *Held*, that although the cause of action stated by the plaintiff was identical in both suits, yet as the only matter, which was determined in the former suit was that the Civil Court could not give the relief therein sought, it was doubtful whether s. 13. Civ. Pro. Code, or explanation II of that section could apply, but that s. 43 of the Code barred the suit. The "cause of action" means every fact of which it is material to be proved to entitle the plaintiff to succeed and every fact which the defendant would have a right to traverse, and does not depend upon the relief claimed. One test in deciding whether the cause of action in two suits is the same is whether the same evidence would support both. (15 C. 422=15 I. A. 66, P.C., 16 C. 98=15 I.A. 156, P.C., *R.*) *Held*, further, that s. 373, Civ. Pro. Code, did not bar the present suit. MOHAMMED ASGHAR v. AMJAD ALI, **8 O.C. 389.** (26 M. 760, 24 M. 491, 5 O. C. 173, *R.*) [*F.*, 10 O. C. 44; *R.*, 13 O.C. 19.]

Res Judicata—continued.

——3. – **Cause of action**—*continued.*

(27)—*Civ. Pro. Code*, 1882, *ss.* 13, 42, 43, 102, 103, 157, 158—*Adjournment of suit—Absence of plaintiff or his pleader on adjourned date—Dismissal for default—Suit for injunction Subsequent suit for possession—Cause of action—Multifariousness.*—After the settlement of issues, a case was fixed for final hearing on a certain date. On that date the plaintiff obtained adjournment on the ground that he had not sufficient time to summon his witnesses. On the adjourned date the plaintiff or his pleader, did not appear, though some of the witnesses summoned were present, and the Court dismissed the suit with the following order: "From the issues above mentioned it will be seen that the plaintiff's claim is completely denied by the defendants. I should, therefore, dismiss the plaintiff's suit with costs." *Held*, that, as the plaintiff did not appear at the adjourned hearing, the order of dismissal was made under s. 102 read with s. 157, Civ. Pro. Code (1882). (12 M. L. J. 473, *F.*) *Held*, further, that, where the plaintiff does not appear at the adjourned hearing of a suit, time having been granted at his instance, it is open to the Court to deal with the matter either under s. 157 or s. 158. There is nothing in the language of s. 158 to preclude its application to a case where the plaintiff does not appear. (5 Ind. Cas. 23, 20 B. 736, *Diss.*) In the suit, dismissed as aforesaid, the plaintiff had sued for a perpetual injunction restraining the defendant from interfering with the suit land on the ground of his (plaintiff's) relationship to one N. In the present suit, he stated that neither N nor his widow S was exclusively entitled to the property, and he prayed for possession also. In both suits the cause of action was alleged to be that Government, by mistake, had recognised the title of the defendant. *Held* that, in order to ascertain whether the cause of action in the two suits was the same, it was open to the Court to travel outside the four corners of the plaint, and to refer to the issues which were raised in the first action for the purpose of finding out what the plaintiff had to prove and undertook to prove in order to support his claim as alleged in the plaint, that the second suit was barred under s. 42, Civ. Pro. Code (XIV of 1882), as it was open to the plaintiff in the first suit to base his claim on the two alternative titles which he put forward in the second suit. NAGANADA IYER *alias* ESWARAPPIER v. KRISHNAMURTHI AIYAR, **6 Ind. Cas. 233 = 8 M L T. 60 = 20 M.L J. 535.** (16 C. 98, 3 B. 137, 18 W.R. 163, 11 B L.R.P. C. 158, 11 M I.A. 551, *R.*; 8 M. 520, 29 M. 760, 8 C. 819, *D.*)

(28)—*Civ. Pro. Code* (*Act* XIV *of* 1882), s. 13—*Suit to recover property as trustee—Subsequent suit by heirs after plaintiff's death*—Res judicata.—Plaintiff's father sued to recover certain property as its trustee. That suit was dismissed. After plaintiff's father's death, plaintiffs brought the present suit to recover the same property as trustees: *Held*, that, whether the plaintiffs succeeded their father as trustees or the trusteeship was joint family property of which the father was the manager, the plaintiffs were concluded by the decision in the previous suit by their father. RAMAPPAYA v. AITHU MELANTA, **7 Ind. Cas. 184 = 8 M.L. T. 221.**

(29)—*Civ. Pro. Code* (*Act* XIV *of* 1882), s. 13—*Suit to declare plaintiff's right as* karnam—*Prior suit between parties for invalidation of* pattahs *granted by plaintiff—Decision that plaintiff was not* karnam—Res judicata.—Plaintiff sued for declaration of his right as hereditary *karnam* of a certain temple. In a prior suit between the parties (wherein plaintiff was third defendant) it was sought to invalidate certain *pattas* granted by plaintiff in respect of the temple lands. An issue was raised as to whether plaintiff was *karnam* of the temple and was decided against him. *Held*, that the present suit was barred as *res judicata*. *Obiter*: The suit will not be *res judicata* if it were based on a subsequent appointment of plaintiff as *karnam*. ANTHARYAMI PATNAIK v. HARIBANDHU SABUTO, **8 Ind. Cas. 427 = 9 M.L.T. 107.**

(30)—*Civ. Pro. Code*, 1882, s. 13—*First suit on pro-note executed for balance due under accounts, dismissed—Second suit on accounts barred.*—Where a suit on a pro-note executed by the defendant to the plaintiff for balance due on a settlement of accounts, in which it was alleged in the plaint that the note was made in the plaintiff's account book, was dismissed on the ground that the plaintiff failed to prove the execution of the pro-note set up, a subsequent suit by him on the accounts is barred by s. 13, Civ. Pro. Code, as the plaintiff might and ought to have joined the latter claim in the former suit. MURUGA PILLAI v. SUBRAHMANIA AIYAR, **8 M.L.J. 197**, (21 M. 91, *F.*)

(31)—Res judicata—*Suit for possession—Setting aside sale — Irregularity — Void sale.*—When a plaintiff sues for possession and determination of right to a certain property, and to set aside an execution sale of a portion of the property on the ground of irregularity, and his suit is dismissed on the merits, a subsequent suit for possession of the property sold, on the ground that the sale was *void ab initio*, will be barred as *res judicata*. THOMAS M. PIGOU v. SYED MOHAMED ABOO SYED, **3 C.L.R 253.** (11 B.L.R 158, 11 M.I.A. 50, *F.*)

(32)—*Previous suit for confirmation of sale—Dismissal—Subsequent suit for sale certificate.*—A previous suit by the purchaser at an execution sale for an order confirming the sale, after reversing the order of a Judge annulling the sale, was dismissed on the merits and he subsequently brought a suit for possession with mesne profits by the reversal of the said order of the Judge and of the purchase by third parties and for a *bynama* or sale certificate of the same property; *held* that, the legal point arising

Res Judicata —continued.

——**3.—Cause of action**—*continued.*

out of both the plaints and now in issue, being the same, *viz.*, whether the summary order for reversal of the sale can be set aside in a regular suit as between the parties before the Court, and it having been adjudicated upon unfavourably to the plaintiff, the present suit was barred. G. LAMB v. DEWAN PUDDUM LOCHUN, **W.R.F.B. 28=Marsh. 96=1 Hay 168.**

(33)—*Transfer of Property Act, ss.* 92, 93—*Decree for redemption—Failure to pay by mortgagor—Subsequent suit for redemption*—Res judicata.—A decree passed under s. 92 of the Transfer of Property Act becomes a final decree, even though no order under s. 93 has been passed, when the time limited in it for the payment of the mortgage amount has expired, without the mortgagor taking any steps. No subsequent suit for redemption of the same mortgage will lie. RAMASAMI v. SAMI, **17 M. 96=4 M.L.J. 29.** [*Cons.*, 25 M. 300, F.B.; *R.*, 19 M. 40, F.B., 25 M. 244, 21 A.W.N. 1901, 194=24 A. 44, 27 M. 40, 6 O.C. 114.]

(34)—*Civ. Pro. Code* (1859), *s.* 114—*Identity of cause of action in two suits—Difference of relief.*—Though in the former suit a person claimed the under-proprietary right in virtue of a sub-settlement, and in the subsequent suit he claimed the superior proprietary right, *held* that the difference in the mode of relief claimed did not affect the identity of the cause of action, which was in both cases the refusal of the right to redeem, and that under s. 114 of the Code of 1859 the judgment in the prior suit was final. SHANKER BHAKSH v. DAYA SANKAR. **15 C. 422, P.C. = 15 I.A. 66=5 Sar. 107.** [*F.*, 39 P.L.R. 1905=32 P.R. 1905; *R.*, 14 B. 31, 117 P.R. 1891, 19 C. 372, 25 M. 736, 8 O.C. 389, 43 P.R. 1907, 101 P.W.R. 1907=43 P.R. 1907=169 P.L.R. 1908.]

(35)—*Suit on bond to recover money enforcing mortgage-lien—Decree passed for money only—Subsequent suit to enforce lien, not maintainable.*—Plaintiff sued on a registered bond to recover the amount due upon it enforcing his mortgage-lien thereunder; he however obtained only a money decree. Another person who also held a decree against the same debtor caused a portion of the property included in the plaintiff's mortgage to be brought to sale, and the present suit was brought by the latter to enforce the lien and was met, on the part of the purchaser, with the plea that, as the person from whom he derived title had been already once sued on the same cause of action, the suit was not maintainable. The question amounted to this, whether, when a plaintiff has put a cause of action in suit and claimed in respect of it all the relief to which he can be entitled, and has obtained a decree which, by inadvertence, has omitted to give him all the relief to which he is entitled, he can maintain a second suit on the same cause of action, claiming in part the relief he had already claimed in the former, but which had been omitted from the decree; and, it was held that where a plaintiff complains that the decree obtained by him does not award him all the relief which he has claimed and to which he is entitled, his remedy lies in appeal or by review, and he cannot seek it in a second suit. The substance of the action or the question of right in dispute in the first suit was the plaintiff's right under the bond, which included a right to charge the property for the debt, and this last claim must be held to have been raised in the pleadings, for it was expressly named in the plaint and was part and parcel of the right to which the bond given entitled the plaintiff, and when a decision was in that suit, it must be held to have been one upon the entire right of the plaintiff under the bond, with everything that properly belonged to it, and so must include the right to charge the property for the debt. If the decree was purposely or accidentally silent on the point, the plaintiff should proceed with his proper course of remedy by way of appeal or review of judgment, but not by a second suit which would be barred by s. 2 of Act VIII of 1859. BAHO SINGH v. HET RAM, **7 N.W.P. 17, F.B.**

(36)—*Ss.* 13 *and* 43, *Civ. Pro. Code*, 1882—*Prior and puisne mortgage—Sale of mortgaged property—Redemption by vendee of the prior mortgage—Suit for sale by puisne mortgagee—Dismissal of suit on the ground that previous mortgage not offered to redeem—Second suit for redemption of prior mortgage and sale* — Res judicata—*Transfer of Property Act* (IV *of* 1882), *s.* 89.—In August 1876 the owners of a village M mortgaged it to one G for Rs. 7,000 and put him in possession. In February 1884 the owners mortgaged M and other property to the plaintiff's father for Rs. 2,400 without possession. In October 1891 the owners sold M to the defendant for Rs. 14,000, of which Rs. 7,000 was left with the purchaser in order to redeem the mortgage of 1876. Defendant redeemed the mortgage and obtained possession. In August 1892 plaintiff sued for recovery of the amount due on his mortgage impleading the owners, the defendant and other persons describing them in the plaint as transferees of the mortgaged property, but he did not offer to redeem any mortgages. One of his prayers for relief was that the Court should make all orders that might be necessary to give him the main relief, *i. e.*, sale of the property. The Court held that the plaintiff could redeem the village M, but he could not bring it to sale without first redeeming it. It therefore declared that the village was not saleable for plaintiff's money. A decree for the sale of other property was, however, passed in favour of the plaintiff. The present suit was instituted by the plaintiff for redemption of the mortgage of 1876 and for the sale of M to recover the costs of redemption and the balance due at the date of suit on the former decree. (*Per Chamier, A.J.C.*) *Held*, that the plaintiff's cause of action for the present suit was exactly the same as his cause of

***Res Judicata*—continued.**

——3.—Cause of action—*continued.*

action for the former suit, *viz.*, mortgage to him and non-payment of the mortgage money. In the former suit, he might and ought to have offered to redeem the prior mortgage. The Court, which decided the former suit, did not mean to decide that the suit was premature. The suit should therefore be dismissed as barred by ss. 13 and 43, Civ. Pro. Code. (24 M. 491, P.C., *R.*) (*Per Scott, J.C.*) *Held*, that the decision in the first suit was in fact that the suit was premature, and this decision being on a question of law was *res judicata* between the parties. *Held*, further, that the words "ground of defence or attack" in s. 13, Civ. Pro. Code, do not include a ground of defence or attack, which may come into existence by some act of the plaintiff, such as the payment of money to another. They refer to the condition of things at the time the former suit was instituted. *Held*, also, that the suit was not barred by either s. 13 or 43, Civ. Pro. Code. (1 O.C. 105, 8 O.C. 37, *R.*) (*Per Evans, A.J.C.*) *Held*, that the plaintiff was bound to sue for redemption of the prior mortgage in his first suit and ought to have made the offer to redeem a ground of attack. He is, therefore, barred from bringing a fresh suit on the same cause of action. *Held*, further, that the plaintiff having obtained a decree for sale on his mortgage and the decree for sale having been made absolute, the security had been extinguished under s. 89, Act IV of 1882, and the plaintiff had therefore no title to maintain the present suit. CHAUDHRI GANGA SINGH v. LACHMI NARAIN, **10 O.C. 145.** (20 A. 110, 2 A. 429, P.C., *R.*) [*R.*, 12 O.C. 347.]

(37)—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* II—*Mortgage for balance of unpaid purchase-money—Dismissal of suit on mortgage—Subsequent suit to enforce lien for balance of unpaid purchase-money—Maintainability.*—A mortgage deed had been executed for certain unpaid purchase money. Plaintiff instituted a suit on the mortgage deed and the suit was dismissed on the ground that the mortgage deed had not been registered. Subsequently, plaintiff brought this suit to enforce his lien for the balance of unpaid purchase money. *Held* that the suit was one to which s. 13, expl. II, Civ. Pro. Code, applied. There was nothing to prevent the plaintiff from instituting the former suit on the basis of his lien for the balance of unpaid purchase money under the general law. He ought to have then based the suit on this ground as well as on the mortgage sued on, so as to avoid the necessity for a second suit in the event of the mortgage being held invalid for want of registration. AKAYI KUNTI v. AYISSA BI, **26 M. 645.** (20 C. 85, *F.*) [*R.*, 1 Ind. Cas. 808, 12 O.C. 347.]

(38)—*Civ. Pro. Code* (*Act* X *of* 1877), *s.* 13—Res judicata—*Different plots in the same holding—Previous suit for one plot—Subsequent suit for another plot.*—The plaintiffs claimed certain land's situate in B as covered by a certain pottah granted to them by certain persons.

***Res Judicata*—continued.**

——3.—Cause of action—*continued.*

The defendant also claimed to hold the lands under a pottah granted by the same persons prior to the pottah of the plaintiffs. The plaintiffs claimed the land in dispute as appertaining to mouzah M of which they were the putnidars, whereas the defendant claimed it as appertaining to mouzah S. It appeared that in a former suit between the same parties in respect of another portion of B, it was *held* that B belonged to mouzah M, but that the pottahs of both the plaintiffs and the defendant covered B, and that, inasmuch as the present defendant's pottah was prior in title, he had the preferential title to the land. *Held* that the matter in dispute in the present case was *res judicata* by the former suit, because the present suit referred only to another plot in the same holding. SUNDHYAMULA v. DEVI CHURN DUTT, **9 C.L R. 216.**

(39)—*Civ. Pro. Code*, *s* 13—Res judicata—*Prior suit for rent—Determination of question of title—Subsequent suit for possession*—If in a rent suit the question of title is decided, that decision constitutes *res judicata* between the same parties in any subsequent suit relating to the title between the same parties. GOPAL DAS v. GOPI NATH SIRCAR, **12 C L.R. 38.** (1 C.L.R. 35, *F.*) [*R.*, 26 C. 428, F.B., 49 P.L. R 1903.]

(40)—*Previous suit for arrears of rent—Plaintiff made party at his own request—Failure to prove claim—Subsequent suit for land—Bar.*—Where, in a previous suit, by the defendant against a tenant, for arrears of rent, the plaintiff was made a party, at his own request, on the ground that he was the person entitled to the rent, but failed to establish his claim, it was held that a subsequent suit, by the plaintiff against the defendant, for possession of the land under a certain right, which he could have advanced in the prior suit, was barred as *res judicata*. BEMOLASOONDURY CHOWDHRAIN v. PUNCHANUN CHOWDHRY, **3 C. 705.** (3 C. 145=1 C.L.R. 35, *F.*) [*Cons.*, 5 C. 832=6 C.L.R. 305; *R.*, 6 C. 406=7 C.L.R. 251, 6 C. 559=8 C.L.R. 10.]

(41)—*Civ. Pro. Code* (XIV *of* 1882), *s.* 13—Res judicata—*Prior suit based on lease, title of plaintiff recognized in—Subsequent suit on title not barred.*—In a previous suit based on a verbal letting by the plaintiff, it was found that the defendants were tenants in possession under the plaintiff. The defendants set up a written lease, but the Court held that they did not occupy under that letting but under a subsequent verbal letting. On the present suit brought for possession with arrears of rent as under the written lease, plaintiff was *held* entitled to a decree for land on the strength of his general title, the omission to sue on which in the previous suit was no bar to the subsequent suit. With regard, however, to the arrears of rent claimed under the above old written lease, the plaintiff's claim was held to be barred by *res judicata* by reason of the prior decision of

Res Judicata —continued.

——3.—Cause of action—*continued.*

the Court that the defendant did not hold under that lease. KUTTI ALI v. CHINDAN, **23 M. 629.** (22 M. 323, *R.*) [*R.*, 13 M.L.J. 448=26 M. 760.]

(42)—Res judicata — *Identity of cause of action with that of prior suit.*—Where an Oudh Talukdar died leaving talukdari as well as non-talukdari estate, and his heir, under Oudh Act I of 1869, obtained a judgment declaring that he was entitled to the *talukdari* estate, as against a person who claimed under a will of the deceased, which, however, was found to have been revoked, *held*, that that judgment was a bar to a subsequent suit by the latter for declaration that he was entitled to the whole estate of the deceased, talukdari as well as non-talukdari, it being found that this suit was only founded upon his rights under the will and not under any other title, although the heir was not entitled to possession of the non-talukdari estate of the deceased. TRILOKI NATH SINGH v. PERTAB NARAIN SINGH, **15 C. 808=15 I.A. 113, P.C.=5 Sar. 219.** [*R.*, 20 B. 86.]

(43)—*Suit for possession*—Res judicata.—A suit for possession of lands, by setting aside a sale executed by the plaintiffs' mother as their guardian, was held barred on the principle of *res judicata* by reason of a previous decision between the mother as guardian and the defendant for setting aside the sale as not being for any legal necessity, in the absence of an allegation and proof that the sale and the subsequent suit were collusive. Where the plaintiffs' pleader in the above case, without any instructions whatever, suggested that the mother was a frail woman and executed the sale while she was in improper intimacy with the defendant: *Held*, that it amounted to gross impropriety and that the pleader ought to be censured. GUNGA RAM SADHOOKHAN v PANCH COWREE PORAMANICK, **25 W.R. 366.**

(44)—Res judicata—*Difference of title with same cause of action, Act* VIII *of* 1859, *s.* 2.—A suit to recover possession as part of her own taluk of land which plaintiff had claimed in a former suit as towfir reclaimed and occupied, is barred by s. 2, Act VIII of 1859. UMATARA DEBI v. KRISHNA KAMINI DASI, **2 B.L.R. A.C. 102=10 W.R. 426.** [*Affirmed*, 11 B.L.R.A.C. 158; *F.*, 13 W.R. 209, 2 C. 152, F.B.; *Appr.*, 12 W.R. 55, 12 W.R. 235; *R.* 14 B. 31; *D.*, 13 W.R. 343.]

(45)—*Suit for taluk on joint title—Civ. Pro. Code*, 1859, *ss* 2, 7—Res judicata.—A previous suit founded on the allegation that the plaintiff was entitled to enjoy a certain land with several other persons as part of a taluk was dismissed, and the plaintiff brought the present suit claiming the same property against the same defendants, basing his right on a joint title with one other person as part of another taluk. *Held*, that the second suit was barred

Res Judicata —continued.

——3.—Cause of action - *continued.*

and the plaintiff had lost his right by any title that existed at the time of his bringing the first suit to insist upon having possession of the land as against the defendant. SHIB SHANKER NEOGI v. HURO SOONDUREE GOOPTA, **13 W.R. 209.**

(46)—*Act* XIV *of* 1863, *s.* 10—*Suit by landlord to enhance rent—Decision in former suit barring right of enhancement—Bar to subsequent suit*—Res judicata.—In a suit by a landlord to enhance rent, it was shown by the defendant-cultivator that in a former suit brought by him to contest the right of his landlord to enhance rent, it had been decided that the landlord had no right to enhance. *Held*, that as the two suits were precisely of the same character, and the issue tried was the same, the decision in the former suit operated as a bar to the subsequent suit as *res judicata*. KOOER MANIK SINGH v. PIRTHEE SINGH, **5 N W.P. 163.** (1 W.R. 128, *F.*)

(47)—*Landlord and tenant*—Kabuliat—Res judicata.—Where, in a former suit, it was determined that the defendant held only 7 bighas out of 8 bighas and 17 cottas for which plaintiff sued to obtain a *kabuliat*, a subsequent suit to eject defendant from the remaining 1 bigha 17 cottas is not maintainable. GOPAL-CHANDRA ROY v. NABIN CHANDRA BHANDARI, **3 B.L.R. App. 34.**

(48)—*Suit to contest enhancement—Occupancy—Presumption.*—If in a suit to contest enhancement the plaintiff admits that his tenure was created in 1244, such admission would deprive him of the benefit of the presumption of having held on fixed rates from the time of the permanent settlement. And if the liability of the tenure to enhancement was decided against the zemindar in a former suit, that finding must be treated as *res adjudicata*. SREEDHESSURY CHOWDHRY v. MUDDUN KOOWAR JHA, **1 W.R. 128.** [*F.*, 5 N. W. P. 163.]

(49)—*Suit for enhancement of rent—Previous decree*—Res judicata.—A previous suit for enhancement of rent, wherein the Court found that the tenure was liable to enhancement, but that the grounds for enhancement had not been sufficiently established, is binding on the tenants in a subsequent suit for enhancement, and they cannot question the liability of their tenure to enhancement even though the finding in the previous suit regarding the question of enhancement was not incorporated in the decree which was merely a decree for payment of rent at the old rate. SHAIKH ENAETOOLLAH v. SHAIKH AMEER BUKSH *alias* SHAIKH MOHEEOLLAH, **25 W. R. 225.** [*Not F.*, 17 A. 174=A.W.N. 1895, 47; *R.*, 7 C.L.R, 227.]

(50)—*Putnee and mowrosee titles—Cause of action—Estoppel.*—In a former suit to establish his right to certain land as belonging to his putnee taluq, the plaintiff failed. *Held*, that he cannot, in a subsequent suit, claim the

Res Judicata—continued.

—3.—**Cause of action**—*continued.*

same land under a different title, *viz.*, as belonging to his mowrosee, the cause of action in both the suits being the same. AUNUNGO MOHUN DEB ROY v. UNNODA DOSSEE, **17 W.R. 351.**

(51)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2 —*Claim to land as accretion—Prior suit for same land as accretion of different estate—Difference in origin—No difference in cause of action.*—A complainant must avail himself of all the grounds of origin of his right. Whatever grounds there are plaintiff must bring them all in his suit. Where certain land was claimed as an accretion to a particular mouzah, a decision in a prior suit between the parties in respect of the same land as an accretion to a different mouzah operated as a bar under s. 2, Act VIII of 1859, the difference in the origin not giving rise to a different cause of action in determining the same question of title by accretion. KASHEE KISHORE ROY CHOWDHRY v. KRISTO CHUNDER SANDYAL CHOWDHRY, **22 W R. 464.** [*F.*, 3 B. 132; *Appl.*, 1 B. 87; *R.*, 2 C. 152, F.B.]

(52)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2 —*Suit on joint promissory note—Prior suit against executant dismissed for want of jurisdiction—Subsequent suit against him for balance due.*—Where a suit on a joint promissory note was dismissed against one of the executants for want of jurisdiction over him, a subsequent suit against him for the balance of money due to the obligee after execution of the decree in the prior suit brought in a Court having jurisdiction over him, was not barred by the provisions of s. 2. Act VIII of 1859. SREERAM MITTER v. NOBIN KRISTO MOOKERJEE. **22 W.R. 290.**

(53)— *Suit by younger son for maintenance charged upon inheritance*—Res judicata —An order dismissing a claim for maintenance, founded on an *ekrarnama*, by a younger son against the father, would not bar a subsequent suit by such son for maintenance charged on the inheritance, to which the elder brother succeeded as eldest male member after the father's death. AHMED HOSSEIN KHAN v. NIHAL-UD-DIN KHAN, **9 C. 945, P.C.=13 C.L R. 330 =10 I.A. 45=4 Sar. 442.**

(54)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Nature of claims.*—The fact that the plaintiff's former claim to certain property as the heir of S's father was dismissed cannot bar his present suit for possession of the same property as the heir of S under s. 2 of Act VIII of 1859. Although the property may be the same, the nature of the claim is different. GOOROO DUTT v. SOOROO, **16 W. R. 264.** [*R.*, 12 O.C. 347.

(55)—*Civ. Pro. Code, ss.* 13, 43 *and* 44—Res Judicata—*Joinder of causes of action—Right to sue — Presumption of correctness of a geneological table prepared at Settlement—*

Res Judicata—continued.

—3.—**Cause of action**—*continued.*

Custom—Inheritance—Escheat to the proprietary body—New case set up in the Chief Court on appeal.—In 1875, N. and S. sued in the Court of a Munsif, 1st class, to contest the validity of the adoption of K. by H. That suit was dismissed, it being found, firstly, that N. and S. were not collaterals of H., and so had no *locus standi* to object; and, secondly, that the adoption was valid. K, having died without issue, N. and S. filed a suit for possession of the moveable and immoveable property of K, as collaterals of his adoptive father H. D. and others, proprietors of and in possession of the land, also filed another suit for declaration of their title to succeed as the proprietary body denying the relationship of N. and S, with H. *Held*, that the question, whether N. and S. are collaterals of H. or not, is not barred by *res judicata* by reason of its being decided in the previous suit in 1875, as—The Court trying the first suit, a Munsif with jurisdiction up to Rs. 1,000 only, had no jurisdiction to try the subsequent suit which was valued at more than Rs. 1,000. D. and C. cannot be said to be suing as representative of H. and K., who were defendants in the previous suit. The claim is simply a claim founded on the custom of escheat in favour of the proprietary body who no more represent the deceased than the Crown does in cases in which property lapses to the Crown for want of heirs. A party claiming as an heir can and should sue for the whole of the estate, both moveable and immoveable, in one and the same suit (10 M. 375, *F.*) Although a presumption exists by law in favour of the correctness of the pedigree table as prepared at a settlement, such presumption is greatly weakened, if the contents of that document are vague. The contention of N. and S., that they were also members of the proprietary body, along with D and others, could not be entertained in the Chief Court, where it was raised for the first time on appeal RAM SINGH v. DULA SINGH, **58 P.W.R. 1908.**

(56)—Res judicata—*Subsequent suit on title different from that set up in previous suit.*—Where the previous suit for a share of the family property had been brought, as based on an express written agreement between the members, such suit was held not to bar a subsequent suit in which the plaintiff sought to enforce his general rights of inheritance as a member of the family. SADU v. BAIZA, **4 B. 37, F. B.** [*D.*, 25 B. 189.]

(57)—*Act* VIII *of* 1859, *s.* 2 — Res judicata—*Suit for share—Declaratory decree — Permission to bring fresh suit.*—The plaintiff obtained a decree in a former suit for a share of the ancestral property, both moveable and immoveable. On appeal by the defendant, the plaintiff retained his decree for a share of the immoveable property, the decree for the value of the moveables being set aside, as there was no evidence as to their value. The plaintiff, however, got a declaratory decree affirming his

Res Judicata—continued.

——3.—**Cause of Action**—*continued.*

right to the share of the moveables claimed by him. The plaintiff then brought the present suit for the value of the moveables. *Held* that the suit was not barred by s. 2 of Act VIII of 1859. No permission to bring a fresh suit can be given under s. 97, Act VIII of 1859, where final judgment has been pronounced. RAJAH SHEORAJ NUNDUN SINGH v. RAJCOOMAR BABOO DEO NUNDUN SINGH, **24 W.R. 23.**

(58)—*Civ.Pro.Code*, 1882, *s.* 13 (=*s.* 11, *New Code*)—Res judicata—*Former suit as family arrangement—Subsequent suit for same subject-matter as co-sharer—Cause of action.*—A former suit for a share of joint family property based upon an alleged agreement is no bar to a subsequent suit based on the plaintiffs' hereditary right to sue as members of the family.. NILO RAMCHANDRA v GOVIND BALLAL, **10 B. 24.** (8 B. 174, *F.*) [*R.*, 14 B. 31].

(59)—Res judicata—*Suit for possession of ancestral property — Eviction.* — Where the previous suit was to establish the plaintiff's right to a share of the ancestral property, part of which was in his sole possession, *held*, that that would not operate as *res judicata* in a subsequent suit to recover possession of a part of the ancestral property which was in his sole possession and from which he was forcibly evicted by the defendant during the pendency of that suit. BABOO GOOROO DOSS ROY v. BABOO HURONATH ROY, **7 W.R. 423.** [*R.*, 20 B. 86.]

(60)—*Suit for declaration of title as reversioner to widow—Previous suit based on title as heir to ancestral joint estate prior to widow—Causes of action different*--Res judicata.—Plaintiff was the son of one brother, and the first defendant, the widow of the other. Plaintiff sued as reversionary heir to the first defendant, the widow of his uncle, for a declaration of his title and interest after her death, and was met by the defence that his claim was barred by ss. 2 and 3 of Act VIII of 1859 by reason of the dismissal of a previous suit brought by the plaintiff in 1847. The lower Court dismissed the plaintiffs' suit as barred, since, in the previous suit above mentioned, it had been decided that the property was the separate and distinct property of his uncle, the husband of the first defendant; and consequently, plaintiff, as the son and heir of the other brother, could have no right to a part or any other share of it on a claim founded, as the present one was, on the allegation of the same property being joint and undivided. The High Court reversed the order of the lower Court, observing that that Court was wrong in having concluded that the causes of action in the two suits of the plaintiff were the same, and that the plaintiff's present suit was therefore barred under ss. 2 and 3 of Act VIII of 1859. The claim of the plaintiff in 1847 was that he had a title as heir to the moiety of the property prior to his uncle's widow, in respect of the whole of the estate in

Res Judicata—continued.

——3.—**Cause of Action**—*continued.*

suit, on the plea that it was joint and undivided, whereas plaintiff now claimed as heir next in reversion after the widow, regarding her property as separate, with a view to a declaration of his right as such heir, to have a certain alienation by the widow, alleged by the plaintiff to be illegal, set aside. The two cases and causes of action were therefore essentially and truly different. BABOO SUNKUR DYAL SINGH v. BABOO PURMESSUR DYAL SINGH, **6 W.R. 44.**

(61)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Reversioner suing in representative character and in his own right.*—A Hindu widow who had transferred to her granddaughter by agreement certain land of which she was a life-tenant, subsequently sued to have that agreement set aside. She died while the suit was in the appellate stage, and the next reversioner, one D, was allowed to carry on the appeal on her behalf on his own application to the Court to be made *kaem-mukam* of the widow. The agreement was upheld in its integrity and the possession of the grantee was maintained. D, as next reversioner, afterwards sued to recover possession of that very land. *Held* that D was not bound to disclose his whole claim when he represented the widow, as the causes of action in the two cases were very different; that s. 2 of Act VIII of 1859 was no bar to the subsequent suit as the reversioner was not in a position to introduce any pleas arising out of a new state of facts not existing or before the Court, when the former suit was instituted and decided in the first Court. DEORANEL KOOWAR v. MUSSAMUT INDURJEET KOOWAR, **12 W.R. 234.** (10 W.R. 426=2 B L.R.A.C. 102, *D.*).

(62)—*Suit for recovery of property from Hindu widow's alienee—Subsequent suit for compensation-money awarded by Government for the same property — Execution proceedings, claim not determinable in.*—The decision in a suit for the recovery of property, (instituted in ignorance of the property having been taken up by Government for public purposes), wrongly alienated by a Hindu widow, would not bar a subsequent suit for the recovery of the compensation-money paid therefor by Government, which had been withdrawn from the collectorate by the defendants during the pendency of the former suit. The claim of the heirs to the money in the second suit could not have been determined in the execution-proceedings of the decree in the first suit but was triable only in a regular suit. NUND LALL BOSE v. MEER ABOO MAHOMED, **5 C. 597=5 C.L.R. 45.** [*R.*, 38 P.L.R. 1909=37 P.R. 1909.]

(63)—Res judicata—*Former suit dismissed for want of cause of action and for want of jurisdiction—Subsequent suit after accrual of cause of action.*—One of the sons of an undivided Hindu father, governed by the *Mitakshara* law of the Bombay Presidency, sued for a partition of the moveables and immoveables belonging to the

Res Judicata—continued.

——3.—**Cause of Action**—*continued.*

family; and the suit was dismissed as regards the moveables on the ground that he could not compel a partition of them during his father's lifetime, and, as regards the immoveables, on the ground of want of jurisdiction. On the death of the father the same person brought a suit against his brother for partition of the same properties. *Held* that the former suit did not operate as *res judicata* because in that suit there was no adjudication between the brothers as to their rights in the estate arising on their father's death. LUKSHMAN DADA NAIK v. RAM CHANDRO DADA NAIK, **7. C L. R. 320, P.C. = 5 B. 48 = 7 I.A. 181 = 4 Sar. 173.**

(64)—*Civ. Pro. Code*, 1877, *s.* 13 (=*s.* 11, *New Code*)--Res judicata—*Hindu family—First suit for possession on ground of partition—Second suit for general partition — Maintainability—Whether objection can be taken for first time in appeal.*—Although a claimant, who has failed to recover property under one title, cannot bring a second suit to recover the same property by a different title, yet there is nothing to prevent that person from suing for *another* property under a different title. In the former suit between the plaintiff and the defendant, the plaintiff's case was that there had already been a valid partition of their property into two parcels A and B; and he asked that either A or B may be awarded to him. The suit was rejected without prejudice to the plaintiff's bringing a fresh claim for a general partition. Accordingly, the present suit was brought, in which the plaintiff's case was that there was no partition, and that he may recover not A, nor B. but such portion of both A and B as may fall to his share upon a general partition made in the ordinary manner between the defendant and himself as members of an undivided Hindu family. *Held* that the former suit did not operate as *res judicata*, the cause of action in the two cases not being the same, and the relief sought also being essentially different. [*R.*, 14 B. 31, 15 M. 336 = 2 M.L.J. 130, 24 C. 711 = 1 C.W.N. 565, 27 B. 379, 4 P.R. 1903; *Expl. and D.*, 25 B. 189.] The objection on the ground of *res judicata* may be taken for the first time in appeal. KONERRAV v. GURRAV, **5 B. 589.**

(65)—*Previous suit for partition based on general right as co parcener — Right to partition under previous award not included in plaint—Subsequent suit whether maintainable as based on award—Civ. Pro. Code*, 1882, *s.* 13, *Expls.* 1 *and* 2.—P, the father of the plaintiffs in this suit, had brought a suit in 1874 for partition of the joint property of the family. In that suit, P applied to the Court to withdraw it alleging that the partition had been effected through private arbitration, and the suit was accordingly dismissed. The award deciding on postponement of partition till the payment of all family debts, was accepted by the parties and, on the subsequent payments of such debts, P demanded partition of the estate which was refused by the co-sharers. In 1883, P, therefore, again sued the present defendants for declaration of his half share in the estate and for possession of the same. In the plaint in this suit, no mention was made of the suit of 1874 or of the circumstances under which it had been withdrawn. Those facts, however, having come out in the pleadings, P applied for leave to amend his plaint so as to include his right to partition as based on the previous award. The Court refused the application on the ground that it was made too late, and that it would change the nature of the suit. The Court confined the plaintiff to the title put forth in his plaint, *i.e.*, the ordinary right of a member of a Hindu family to a share in undivided joint property, and refused to allow him to change to the title not mentioned in the plaint, *viz.*, the same rights modified by the compromise which had been put in the form of an award in the previous proceedings. P's claim was therefore rejected as barred by s. 373 of the Civ. Pro. Code, since the previous suit of 1874 had been withdrawn without the Court's permission. P did not appeal against the above decision, and his sons, the present plaintiffs, filed this suit in 1884 to obtain possession of their one-half share in the estate founding their claim on the arrangement made in 1874. The Subordinate Judge awarded the claim, holding that the suit was not barred by limitation, or by s. 43 or by s 373 of the Civ. Pro. Code, that the arbitration award of 1874 was proved and valid and that the plaintiffs were half sharers in the estate. *Held*, on appeal, that the refusal of the Subordinate Judge, in the suit of 1883, to adjudicate on the right to partition as the claim was then framed was no bar to the present claim, the adjudication on which was expressly reserved for further suit if such should be brought. Also, the defendant's plea of *res judicata* could not be sustained, because, though P *might* have framed the plaint of 1883 to the effect that even if his general right to partition as a member of an undivided Hindu family was lost owing to withdrawal of the suit of 1874, he still was entitled to partition by the agreement of the parties subsequent to the filing of the former suit in 1874, it cannot be said that he ought to have done so. THAKORE BECHARJI RANAJI v. THAKORE PUJAJI VAKTAJI, **14 B. 31** [*R.*, 20 B. 86, U B.R. 1897--1901, Vol. II, 284, 10 C.W.N. 839, 11 Bom. L.R. 46; *D.*, 25 B. 115, 10 O.C. 44.]

(66)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 2, 32—*Rejection of plaint—Unlikelihood of plaintiff's success not sufficient ground.*—A suit had been instituted between two brothers in respect of their patrimonial estate. The suit was compromised, the brothers agreeing to divide certain properties equally. The plaintiff in the suit obtained possession of the property which fell to him under the *rasinamah*. The plaintiff having subsequently died, his widow entered

Res Judicata—continued.

—3.—Cause of Action—*continued.*

into an agreement with the surviving brother and filed in Court an instrument in writing, whereby the property got possession of by her deceased husband was to be made over to the defendant, who was to maintain her by giving her certain allowances in money and grain. Subsequently, the parties put in an amended copy of the instrument. The defendant not having acted according to the agreement, the widow instituted the present suit to recover possession of the said property which, having belonged to her deceased husband, vested in her on his death. The widow alleged that by the agreement she did not absolutely relinquish all rights to the property, and that she had lost confidence in the defendant by his subsequent conduct. The Court rejected the plaint on the ground that the subject-matter of the plaint did not constitute a cause of action and that the agreement had determined the matter in dispute between the parties. *Held* that the agreement could not be considered as a *razinamah* so connected with the suit by the widow that the alleged cause of action in the suit could be held to have been heard and determined in the former suit within the meaning of s. 2 of the Code *Held* also that, under s. 32 of the Code, it was not necessary that the cause of action alleged in a plaint was likely to succeed. It was enough if it appeared that the subject-matter alleged raised a fair question of claim or right for trial and determination between the parties. Where that was the case, a plaintiff was entitled to institute his suit and to have it regularly proceeded with and fully heard, and a decree pronounced upon the matter in question. In the present case, the cause of action alleged by the widow was the breach of the agreement, and this depended upon the meaning and effect to be given in the construction of the agreement to the language used, as regards the intention of the parties. Consequently, the Court was wrong in having rejected the plaint. LAKSHMI AMMAL v. TIKARAM TOVAJI, **1 M. H.C. 240.**

(67)—*Principal and agent—Suit for money due after prior suit for account.*—In the mofussil, a second suit by a principal against his agent, for the recovery of the sum found due in a prior suit for account alone, is not barred as *res judicata* by the first suit. GOBIND MOHUN CHUCKERBUTTY v. SHERIFF, **7 C. 169=8 C. L.R. 357.**

(68)—*Civ. Pro. Code*, 1877, *s.* 13—Res judicata—*Cause of action—Suit on accounts.*—A brought a suit against B for the recovery of a sum due on an account. The parties agreed out of Court to refer the matter to arbitration, and sometime after, the Court, hearing that the matter had been settled by arbitrators, dismissed the suit for default. In a suit brought by A against B, claiming a certain sum on the award, it was *held* that the suit was not barred. SANNU PURWAR v. BRIJ LAL, **A.W.N. 1881, 23.**

Res Judicata -continued.

—3.—Cause of Action—*continued.*

(69)—*Instalment-bond — Declaratory decree for future instalments*—Res judicata—*Civ. Pro. Code*, 1877, *s.* 13.—In a suit on an instalment-bond, hypothecating immoveable property as collateral security for the payment of instalments, in which not only the two obligors but also the immoveable properties hypothecated were impleaded as defendants, a decree was passed for the amount of the overdue instalments claimed, against the two defendants, and a declaration was also made, as prayed for, that "until the satisfaction of the entire amount of the bond, the plaintiff can realize the amount of each future instalment as it became due, by executing this decree." Execution of this decree by sale of the hypotheca for instalments that had become due subsequent to the passing of the decree having been refused, on the ground that it was only a money decree, *held*, in a subsequent suit by the plaintiff upon the bond to recover such instalments by the sale of the hypothecation, that the suit was not barred by s. 13 of the Civ. Pro. Code; for (1) it was doubtful whether the Court was competent to grant the declaration prayed for in the first suit, in respect of future instalments, and (2) the relief claimed in the second suit, *viz.*, a decree for instalments actually due, was quite different from a declaration in respect of instalments to fall due in the future. [*R.*, 17 A. 174.] Observations by *Stuart, C.J.*, condemning the practice of allowing parties to implead immoveable property as a defendant in a suit. UMRAO LAL v. BEHARI SINGH, **3 A. 297.**

(70)—*Promise to pay money and grain—Pro-note*—Res judicata.—Where, since the date of a document executed by defendants promising to pay a certain sum and grain, there was an oral promise by some of the defendants to pay their quota, the dismissal of a suit based on the oral promise is no bar to a subsequent suit on the original claim, under s. 13, Civ. Pro. Code, exp. 2. MUTHU v. MUTHAN, **4 M. 296, F.B.** [*R.*, 4 P.R. 1903.]

(71)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*First suit to share in certain bond debts—Second suit for share in moneys since realised.*—Where the former suit merely declared a right to a share of certain bond debts, and the subsequent suit was for a share of certain moneys which had since been realised upon those debts, the causes of action in the two suits were very different. BURODA SOONDUREE DOSSEE v. RAJ BULLUB SEN, **18 W.R. 202.**

(72)— Res judicata—*Suit on bond—Subsequent suit for original consideration—Suit of small cause nature.*—Plaintiff's suit against the defendant to recover money due on a bond having been dismissed, he again sued to recover the identical sum as a balance of money due on a khata account. *Held* that the second suit was not brought on a cause of action previously tried and determined between the parties. *Held*,

Res Judicata—continued.

——3.—**Cause of Action**—*continued.*

also, that the suit was cognizable by a Court of Small Causes. AUGHORE NATH GHOSAL v. ROOP CHUND MUNDUL, **13 W.R. 97.**

(73)—*Decree for restitution of conjugal rights—Decree not executed—Subsequent co-habitation—Second desertion by wife—Second suit for same relief—Maintainability* — Res judicata—*Civ. Pro. Code*, 1882, *ss.* 13, 244.—In 1885 A obtained a decree against his wife B for restitution of conjugal rights. Plaintiff's attempt to execute the decree proved a failure and in 1887, the defendant, after returning to the plaintiff and staying with him for two months, subsequently deserted him with the result that a second suit for restitution of conjugal rights was filed against the defendant. The lower Court dismissed the suit on the ground that the matter was *res judicata*. On appeal by the plaintiff, *held* that s. 13 or s. 244 of the Civ. Pro. Code was no bar to the suit. The decree having been satisfied by the wife coming to the husband's house voluntarily and living with him, her subsequent withdrawal from co-habitation constituted a fresh cause of action. KESHAVLAL GIRDHARLAL v. BAI PARVATI, **18 B. 327.**

(74)—*Suit heard and determined—Civ. Pro. Code*, 1859, *s.* 2—*Misdescription of document—Admissions.*—The dismissal of a former suit to recover land, on the ground that it was mortgaged to the defendant by a predecessor of the plaintiff, does not bar a subsequent suit for redemption of the mortgaged property. *Held*, also, that the description which the former judgment of the Court gave of the document under which the defendant held the land as an instrument of sale, was not conclusive in the second suit as to the real nature of the instrument. VALLABH BHULA v. RAMA, **9 B.H.C. 65.** [*F.*, 14 B. 78.]

(75)—*Civ. Pro. Code, s.* 13—Res judicata—*Cause of action.*—Where a suit for the cancellation of a document has been dismissed for non-payment of Court-fees, it does not operate as *res judicata* to bar a subsequent suit for a declaration that the document was executed for nominal purposes only and was not intended to take effect, as the cause of action in the two suits is not the same. NAGATHAL v. PONNUSAMI, **13 M. 44.** [*R.*, 18 M. 189, 23 B. 406]

(76)—Res judicata—*Damages—Breach of continuing contracts.*—Where a contract is a continuing one, then the cause of action is also a continuing one; and therefore, a new cause of action arises every time a breach is committed of the continuing contract. A suit for damages for a former breach of continuing contract does not bar similar suits for subsequent breaches of the same. COOK v. JADAB CHANDRA NANDI, **2 B.L.R.O.C. 48.**

(77)—*Civ. Pro. Code, ss.* 13 *and* 43—*Plaintiff suing as administrator formerly—Subsequent suit by him for share in deceased's estate—*

Res Judicata—continued.

——3.—**Cause of Action**—*continued.*

Whether subsequent suit res judicata.—A plaintiff, who formerly sued as the administrator of the estate of the deceased, subsequently sued for his share in the same estate. The former suit had been dismissed, one of the grounds of the decision being that the plaintiff had received his share by way of remission of a debt due by him to the deceased. *Held*, though the same issue was involved in the subsequent suit, yet the title under which the parties litigated was not the same and that the later suit was not barred. MAUNG SAW BWA v. MAUNG SAW KE, **14 Bur. L R. 334.** [21 C. 157, *R.*]

(78)—*Sale of share in similar wells—Decree for pre-emption*—Res judicata—*Subject-matter different.*—Where in the case of the sale of a share in the same wells of an exactly similar nature, the plaintiff has obtained a decree for pre-emption against the present defendant, this would not bar the defendant's right to contest the principle when another share is the subject of dispute. Though the principle at issue would be the same in both the cases, yet the things are different. UMUR ALI v. MUKHDUM ALI MOHOMED, **59 P.R. 1870.**

(79)—*Decision in pre-emption suit that no real sale took place—Whether bars adjudication upon that point in subsequent suit by vendee for possession against vendor—Right of one of two or more defendants to appeal from a decree adversely affecting him, even in cases where plaintiff's claim is unsuccessful.*—The decision in the pre-emption suit that no real sale had taken place is no bar to an adjudication upon that point in a subsequent suit by the vendee for possession against the vendor, though both the latter were co-defendants in the pre-emption suit. In certain cases it may be open to one of two or more defendants to appeal from a decree which adversely affects him, even in a case when the plaintiff's claim is unsuccessful. But the question 'who may appeal' is determinable by the common sense consideration that there can be no appeal when there is nothing to appeal about. DHIAN SINGH v. MUSSAMMAT BELAS KAUR, **42 P.R. 1912 = 123 P.W.R. 1912 = 154 P.L.R. 1912 = 16 Ind. Cas. 127.** (3 A. 152, F.B., *F.*; 9 C.W.N. 584, *R.*)

(80)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2—*Question not decided in previous suit—Cause of action different.*—A suit was instituted by a Mahomedan daughter to obtain her share of her deceased father's property. She also claimed a share in certain property in respect of which her father before his death had recorded the name of his minor son, contending that the alienation was invalid as no deed of gift had been executed. When the case came on before the High Court the daughter contended that as some portion of the property was '*musha*' (undivided) the gift in regard to that portion was invalid. As this objection had not been taken in the Court of first intance, the point being one of fact, the High Court refused to allow the plea to be taken in special appeal.

Res Judicata—continued.

——**3.—Cause of Action**—*continued.*

One of the widows of the deceased who was a defendant in the above suit sold her share of the property, in which was included a portion of the property affected by the gift. The purchaser sued his vendor, the daughter and the other members of the family and the guardian of the minor son to recover the property sold to him, and it became necessary for him, in order to realize all his property, to set aside the gift as invalid, because a portion of the property conveyed by it was undivided, and therefore a gift of such property was invalid under the Mahomedan law. The guardian of the minor contended that the suit by the purchaser was barred by s. 2, Act VIII of 1859. *Held*, that, as the question whether the gift was valid or invalid was not determined in the former suit, and as the cause of action in that suit was not the same as in the subsequent suit, s. 2, Act VIII of 1859, was no bar to the second suit. MUSAMMAT IMAMAN v. FAZUL KARIM, **7 N. W.P. 251.**

(81)—*Suit for possession of share as heir to husband—Previous suit under will of husband —Second suit not barred by s. 2, Act* VIII *of* 1859—*Possession in lieu of dower.*—The question referred to the Full Bench in this case was, whether the plaintiff having once previously sued for recovery of the property under her husband's will, and failed, it was competent for her to again sue the same parties for a portion of the same property by right of heirship to her husband. It was decided by the Full Bench that the suit was not barred by s. 2 of Act VIII of 1859, by reason of the former suit brought on the basis of the will. Admittedly, the title asserted in the present suit was by right of inheritance to a portion of the property claimed by her in the former suit and was thus perfectly distinct from that set up by her therein. The ground of claim asserted in the present suit was not that advanced in the former suit, nor could it have been raised and determined in that suit. There was no *idem jus*; the present claim was in virtue of a cause of action which was not advanced in the former suit and which was not pertinent to the cause of action asserted in that suit. On the merits, it was found that the defendant widow having obtained actual and lawful possession of the estate in lieu of dower, she was entitled to retain possession as against the present plaintiff whose claim brought for possession as such was held to be liable to dismissal without prejudice to any suit for administration. MUSSAMMAT NOUSHA BEGUM v. MUSSAMMAT UMRAO BEGUM, **7 N.W.P. 60.** [*R.*, 9 O.C. 235, 12 O.C. 347.]

(82)—*Ss.* 13, 43 *and* 45, *Civ. Pro. Code*, 1882, —*Suit based on one cause of action no bar to suit based on different cause of action— No estoppel—Plaintiff not bound to unite in a suit claims based on several causes of action.*—The two widows of a Mahomedan owner of a permanently settled estate held possession of

Res Judicata—continued.

——**3.—Cause of Action**—*continued.*

the estate for more than twenty years to the exclusion of their husband's residuaries. On the death of one of them, her brother and sister brought a suit and obtained a decree for possession of half the estate. The other widow, by name Mussammat Bhagbhari, died leaving behind her three brothers and one sister, the present plaintiff. Before the present suit, the plaintiff had brought two other suits. One was against one of her brothers and sons of another brother, for maintenance alleged to be due upon an agreement given by her three brothers, on the death of her father, and this suit was compromised; the other was against the same persons for her legal share, as a sister, in the property left by Bhagbhari and in which she obtained a decree. In the present suit, she claimed the whole share, which her other brother had inherited from his sister, Bhagbhari, and the whole of the property which he inherited from his father, on the allegation that his widow and daughters were excluded by custom and that his nephews were, by her, rendered *mahjup ul-irs*. The Subordinate Judge dismissed the suit on the ground that the plaintiff had, by her conduct, renounced her right to the property in suit and was also, by that conduct, estopped from putting forward her claim. *Held*, on appeal, that the plaintiff had not, by her conduct, relinquished her rights. Her present claim and the maintenance claim were totally dissimilar and the joinder of the two claims would have been very inconvenient. Nor need she have joined this claim with her claim in the second suit. It would not be right to infer, from the plaintiff's inaction in the two suits, that she intended to abandon her claim to a share in the property, which had devolved upon her brother on the death of Bhagbhari. Before a *pardanashin* lady, like the plaintiff, can be held by implication to have renounced her rights, it must be shown that she was aware of them. Her failure to claim her brother's property in the second suit is of little value as indicating renunciation, for she was then claiming a sister's share in her sister's property. So, neither of her claims in the present suit were barred by either s. 13 or s. 43, Civ. Pro. Code, and plaintiff was not bound, by s. 45, Civ. Pro. Code, to include in any suit several causes of action arising on different dates and relating to entirely different properties. MUSSAMMAT IMTIAZ FATIMA v. MOHAMMAD KAMIL, **8 O.C. 65.** (17 W.R. 108, *Expl.*; 17 W.R. 1, P.C., *R.*) [*R.*, 12 O.C. 347, 13 O.C. 183.]

(83)—*Former suit for possession—Second suit for possession on title.*—M K and H, were three Muhammadan brothers. M died and his widow J became possessed not only of her share in M's estate but also of the share inherited by K and H from M in lieu of her dower. On J's death, the defendants, who were her personal heirs, brought a suit against the plaintiffs to recover the property which was in J's possession and obtained a decree. Subsequently the plaintiffs

Res Judicata—continued.

—3.—**Cause of Action**—*continued.*

brought the present suit to recover the ¾ths share of M's property, the remaining ¼th being the share of J, deceased. *Held*, that the present suit was not barred by *res judicata* by reason of the former suit by the defendants against the plaintiffs. JAMADAR v. IMAM BAKHSH, **16 Ind. Cas. 431.**

(84)—*Suit for recovery of land based on demise—Demise not proved—Fresh suit on title also—Bar.*—The dismissal of a suit for the recovery of land based on a demise, because the demise was not proved, is no bar to a fresh suit based on title and on a prior demise, of which the later demise was alleged to be only a renewal. KANDUNNI v. KATIAMMA, **9 M. 251** [*Appr.*, 22 M. 323; *R.*, 26 M. 760=13 M.L.J. 448.]

(85)—Res judicata—*Act* VIII *of* 1859, *ss.* 2, 26 (4).—In a previous suit brought to recover certain land on the ground that the plaintiff had been forcibly dispossessed, the Court of first instance disallowed the claim, on the ground that the plaintiff had failed to prove dispossession but suggested that the plaintiff could bring another suit to recover the land from the defendant as a trustee on payment of certain *judi* to him. A suit as suggested was brought against the defendant who pleaded the previous suit as barring the present suit. *Held*, that, as the second suit was based on a different cause of action and as no question of title was gone into in the previous suit, the second suit could not be held to be barred. BHISTO SHANKAR PATIL v. RAMACHANDRARAV RAGHUNATH JAHAGIRDAR, **8 B.H.C.A.C. 89** [*R.*, 11 B.H.C. 224, 3 B. 137; *D.*, 8 B. 124, F.B.]

(86)—Res judicata—*Unsuccessful suit for damages for trespass—Suit to establish title to lands—Act* VIII *of* 1859, *s.* 2.—A, alleging himself the owner of a certain garden, brought a suit for damages against B and C for forcibly carrying off fruit grown in such garden. In this suit the question whether A was exclusively in possession of the garden was incidentally raised and decided against him. Thereupon A who in the meantime had been ousted from possession, brought a subsequent suit in which B and C, together with others, were co-defendants, in which he claimed an undivided share in the same garden. *Held* that, under the circumstances, the doctrine of *res judicata* did not apply, and that such suit was maintainable. DOORGARAM PAUL v. KALLY KRISTO PAUL, **3 C.L.R. 549.**

(87)—Res judicata—*Splitting of causes of action—Error—"May," Construction of word—Act* VIII *of* 1859, *s.* 372.—Where a suit by A against B and B's judgment-debtor C, for a declaration that property attached by B was a portion of a turuf purchased by A from C, was dismissed on the ground of A having held *benami* for C, and then B purchased the rest of the turuf from C and sued A and C for possession thereof, *held*, that A was not barred on the question of title. It is not every error which warrants a remand. The High Court must be satisfied that the error is a substantial error, which may have (according to s. 372 of Act VIII of 1859) produced an error or defect in the decision of the case upon the merits. "The word 'may' in s. 372 does not imply 'may by some possibility,' but only 'may not improbably.' It is not for the High Court to exercise its discretion in determining whether there is such a probability, whether there has been a fair and sufficient trial and whether the litigation has reached a stage at which it ought to cease or not." RAM CHUNDER CHOWDHRY v. KASHEE MOHUN, **21 W.R. 57.**

(88)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 13, 43—Res judicata—*Court not competent to try the earlier suit—First plaint alleging interference with plaintiff's possession—Second plaint alleging dispossession—Cause of action.*—A suit will not be barred under s. 13 of the Civ. Pro. Code (XIV of 1882), by reason of a prior suit having been instituted in respect of the same subject-matter, if the Court in which the first suit was not competent to try the later suit. Where the first suit did not allege dispossession by defendant, but only a certain degree of interference with plaintiff's possession and the plaint in the second suit alleged dispossession. *Held*, that the two causes of action were not the same, and the second suit was not barred under s. 43, Civ. Pro. Code (1882). GADULULA VENKATAMMA v. YADIKI HONKARAM, **4 Ind. Cas. 97=6 M.L.T. 375.**

(89)—*S.* 13, *Expln.* II, *Civ. Pro. Code—Former suit based on allegation that plaintiff was owner by purchase—Dismissal of suit—Subsequent suit for possession by him as heir.*—Expln. II to s. 13 merely explains a matter directly and substantially in issue in a suit but it does not dispense with the necessity of finding, in a particular case, the other equally essential requirements of the section, such as that the parties were litigating under the same title and that the matter in issue was finally heard and decided. So, where the former suit brought by a person was based on an allegation that he was owner of the land then sued for by reason of his purchase, the dismissal of that suit is not *res judicata* in a subsequent suit brought by him for possession of the same land on the ground that he was entitled thereto, not as owner, but as heir to the last male owner. Under such circumstances, the plaintiff could not have included such inconsistent claims in one plaint in the former suit without creating confusion. CHIRAGH DIN v. NIZAM DIN, **55 P.R. 1907=96 P.W.R. 1907=65 P.L.R. 1908.** (146 P.R. 1890, 26 M. 760, 27 M. 102, 28 C. 17, 24 C. 711, *R*; 4 P.R. 1889, 4 P.R. 1903, 39 P.R. 1881, 142 P.R. 1884, 96 P.R. 1881, 146 P.R. 1890, 63 P.R. 1896, 100 P.R. 1898, 19 A. 517, 20 C. 79, 20 A. 81, 20 A. 516, *D.*)

(90)—*Suit for possession dismissed as premature—Subsequent suit for possession on cause of action arising thereafter.*—A suit for possession

Res Judicata—continued.

——3.—Cause of Action—*continued.*

based on a cause of action arising after the date of decree in a previous suit for possession, which was dismissed as plaintiff was not entitled to possession at that time, is not barred. SHAM DAS v. GAMUN, **41 P.R. 1891.**

(91)—*Act* VIII *of* 1859, *s.* 2—*Suit for* khas *possession.*—S. 2 does not apply to a suit for ejectment and *khas* possession brought after plaintiff had, in a former suit, obtained a declaration that the land was his *mal* land and not defendant's *lakhiraj*, and had served defendant with a notice to quit, which was not complied with. ESHAN CHUNDER GHOSE v. HURISH CHUNDER BANERJEE, **10 B.L.R. App. 5=18 W R. 19.**

(92)—*Mesne profits*—Res judicata.—Where, in a suit for possession, mesne profits are not treated as a matter in issue, the question cannot be regarded as a cause of action "heard and determined" under s. 2, Act VIII of 1859. Where the amount of mesne profits cannot be ascertained till after the end of the year, the cause of action does not arise till then. Further, the parties in possession are liable for mesne profits to the legal owners, although there is no *mala fides* on their part. BABU GARBI BAIJNATH PRASAD v. BUDHU SING, **2 B.L. R.S.N. 16=10 W.R. 486.**

(93)—*Suit for rent — Tenancy not proved—Suit dismissed—Suit for possession and mesne profits based on title.*—The plaintiff had sued the defendant, describing him as a tenant, for an arrear of rent; on the defendant's denial of the tenancy and the plaintiff's title to the land, the suit was dismissed in the Revenue Court. The plaintiff then sued him as a trespasser in the Civil Court to recover possession of the land with wassilat, estimating wassilat only at the rate of rent which he had claimed in the Revenue Court. *Held* that the plaintiff was entitled to possession as well as mesne profits, and that the second suit was not for the same thing as the first under a different name. DATARAM v. RAM KRISTO, **9 W.R. 594.**

(94)—Bona fide *lessees without title — Purchaser—Mesne profits.*—A plaintiff failing in a previous suit to establish his title under two leases against a purchaser is not barred from pleading in a subsequent suit the *bona fides* of his leases as exempting him from the purchaser's claim for *wassilat* during the plaintiff's possession as lessee. MAHOMED KAWIL v. GOBIND CHUNDER SEIN, **1 W.R. 293.**

(95)—*Civ. Pro. Code, s.* 13, *exp.* III—*Suit for mesne profits accruing due during pendency of suit for possession.*—Suit for mesne profits. In a previous suit for possession, plaintiff had asked for mesne profits from date of suit to date of possession. The Court awarded possession, though the decree was silent as to the mesne profits claimed. *Held*, the omission in the previous suit, to grant mesne profits did not debar the present claim therefor as *res judicata*, because, the grant of mesne profits

Res Judicata—continued.

——3.—Cause of Action—*continued.*

pending suit was discretionary with the Court, under s. 211, Civ. Pro. Code, and s. 13. exp. III is not applicable to such a case. BAPUJI KALE v. YAGOSA LAID, **2 N.L.R. 91.** (21 A. 425, 32 C. 115, *F.*)

(96)—*Ss.* 13, 373, *Civ. Pro. Code*, 1882—*Future mesne profits claimed in a previous suit for possession—Previous suit dismissed in toto—Subsequent suit for the same mesne profits no bar either under s.* 13 *or* 373.—Present plaintiff had previously instituted a suit for possession of the lands, whose mesne profits from the subject-matter of the present suit. In that suit, he had added a prayer with regard to the said mesne profits as well, but the Court of first instance dismissed the suit in *toto*. Plaintiff appealed from the dismissal and stated in his memorandum of appeal that he would make his claim for future mesne profits, the subject of a separate suit. Plaintiff, subsequently, instituted this second suit, against the same defendants as before, claiming mesne profits from the date of the plaint in the previous suit up to the date of the delivery of the lands for the recovery of which that suit had been brought. The Court of first instance and the lower appellate Court dismissed this second suit. On second appeal, the question was referred to the Full Bench, whether, on the facts of the case, the claim of the plaintiff in the second suit for mesne profits, in respect of the period between the institution of the previous suit and the decree therein is *res judicata*, or is barred by the provisions of s. 373 of the Civ. Pro. Code. *Held*, that the claim of the plaintiff is not *res judicata* (17 C. 968, *F.*), and is not barred by the provisions of s. 373. The words of explanation III to s. 13 "relief claimed in the plaint" mean relief which, assuming the defence fails, the plaintiff is entitled to as of right. Provision for the future mesne profits, therefore, which the Court has a discretion, in any event, either to make or to refuse, is not "relief" within the meaning of the explanation. Future mesne profits, accruing after the institution of the suit, do not form part of the causes of action and cannot be claimed as of right and could not, but for s. 211, be asked for at all, and may, in any case, be refused by the Court at its discretion (4 B.L.R. 113, F. B., *R.*), and, on principle, no distinction can be drawn between mesne profits for the period from the date of suit up to that of the decree and that for the period after the decree and before delivery of possession (14 M. 32, *Diss.*). As regards s. 373 of the Code, the word "claim" in that section means such a claim as, if the allegations on which it is based are true, gives the plaintiff a cause of action *quoad* that particular claim and not a claim, which is not a cause of action and which the Court may, in any event, in the exercise of its discretion, either grant or refuse. KUPPUSAWMY AIYAR v. VENKATARAMIER, **15 M.L J. 462, F.B.**

(97)—*Civ. Pro. Code*, 1882, *s.* 211—*Mesne profits*—Res judicata.—Where the defendant

Res Judicata—continued.

—3.—**Cause of Action**—*continued.*

in a suit for possession was not in wrongful possession, mesne profits could not be claimed from him under s. 211, Civ. Pro. Code, and a subsequent suit for the recovery of mesne profits is not barred by *res judicata.* SUBBIER v. RANGA AIYANGAR, **9 M.L J. 163.**

(98)—*Suit for mesne profits—Subsequent suit for possession - Maintainability.*—A suit for mesne profits does not bar a subsequent suit for possession of the property in respect of which the mesne profits had been claimed, as the trespass on the plaintiff's land was a continuing injury giving a fresh cause of action. BHAIRAO PRASAD v. SANGRAM SINGH, **1 C. P.L.R. 143.**

(99)—*Second suit for same rent upon a different basis* —The landlord's first suit for rent, brought for use and occupation, having been dismissed as not having been brought upon the basis of a lease pleaded by the defendant, a subsequent suit for the same rent on the basis of the lease is not *res judicata*, the cause of action in the second suit not having been heard and decided in the prior suit. WATSON AND CO. v. DHONENDRA CHUNDER MOOKERJEE, **3 C. 6.**

(100)—*Causes of action —Suit to recover possession, dismissal of—Subsequent suit to enhance rent.*—In a suit to recover *khas* possession of land, of which the plaintiff alleged he had been fraudulently dispossessed by the defendant, the defendant claimed to be entitled to the possession of the land under a deed of gift at a fixed rent. The Judge found upon the facts that the deed of gift was invalid ; that the land was *mal*; and that the defendant was entitled to retain the possession, and thereupon dismissed the suit. *Held*, that the plaintiff was not precluded by the decision in that suit from afterwards maintaining a suit against the defendant to enhance the rent. NEELMONEY SINGH DEO v. SHOBHAN BEBEE, **Marsh, 606.**

(101)—*Suit by zamindar for recovery of land —Jirayati land — Temporary alienation—Resumption—Mokhasa jagir—Government order—* Res judicata —In 1856, the young zamindar of Tarla (who had attained his majority in 1853) instituted suits for the recovery of the two villages forming the subject of the present claim, on the ground that the villages were jirayati and had been temporarily alienated, and he claimed a right of resumption. It was decided that the villages had formed a Mokhasa jaghir from a date prior to that of the permanent settlement, and that, as they did not constitute any portion of the assets of the zamindari at the date of the permanent settlement, they were in no sense property appertaining to the zamindari liable to resumption. Pending this litigation, an order was made by Government which was construed by plaintiff as a transfer to him of the Government rights in these villages, and his present

Res Judicata—continued.

—3.—**Cause of Action** —*continued.*

suit was founded upon the alleged lapse of the Mokhasa to Government by the death of the last holder who was a mere tenant for life, and the order of Government creating in him the title to the villages which had so lapsed to the Government. *Held*, that the present suit was not *res judicata.* ARICHANDRANA DEO GARU v. D. RAMANNA CHANDIRI, **3 M.H.C. 207.**

(102)—*Suits for rent—Matters provable in prior and later rent suits.*—The mere failure of the defendant to prove what he tried to prove in the previous rent-suit would not prevent him from proving it in a suit for subsequent arrears of rent. Where, in the first suit, the determination as to the measurement of land alleged to be in the possession of the defendant was not general in its character, but was confined to the particular years for which the rent was claimed (no issues having been framed and no measurements having been taken), it would not bar a subsequent claim for subsequent years, the cause of action being different. NIL MADHUB SARKAR v BROJO NATH SINGHA, **21 C. 236.** (4 C. 686, 1 C. 202, *D.*) [*F.*, 4 C.W N. 43, 6 C.W.N. 589 ; *R.*, 25 B. 115, 1 C.L.J. 248.]

(103)—*Suit for rent—Ex-proprietary tenant's liability to pay rent fixed by Revenue Courts.*—Where a former suit for arrears of rent brought by the plaintiff against the defendant was dismissed on the ground that the plaintiff had failed to prove the defendant to be a tenant-at-will, *held*, that it did not operate as *res judicata* to bar a subsequent suit against the defendant as an ex-proprietary tenant. *Held*, further that a zamindar's right to claim rent against an ex-proprietary tenant at the rate fixed by the Revenue Courts accrues not merely from the date on which the rent is so fixed but from the date on which the ex-proprietary tenancy arises. BHAN PARTAB SAHI (RAO) v. SHEO DAT BAHADUR SINGH, **16 O.C. 45 = 16 Ind. Cas. 189.** (22 M. 323, *R.*; 12 O.C. 35, *F.*)

(104)—*Civ. Pro. Code*, 1882, s. 13 (=s. 11, *new Code*).—A lambardar of a *mahal* brought a suit against B and K for possession of certain property alleged to have been of M M in her lifetime ; and the finding in that suit was that K was the heir of M M. Subsequent to the institution of the suit, but before its decision, B as the heir of M M assigned some other property of M M, not the subject of the above-mentioned suit, in favour of M K who brought a suit against the lambardar for a share of the profits. *Held* that the former suit did not operate as *res judicata* as regards the claim of M K under the assignment. NIAZ-ULLAH KHAN v. NAZIR BEGAM, **15 A. 108 = A.W.N. 1892, 246.**

(105)—*Suit for measurement—Previous suit for rent—Civ. Pro. Code*, s. 13.—A suit by ryots, for a declaration of the annual rent on measurement, will not be barred as *res judicata* by a

Res Judicata—continued.

——**3.—Cause of Action**—*continued.*

prior suit between the same parties for arrears of rent, wherein the Judge had declined to try if the extent had been over stated as alleged by the tenants, and decided that suit on the basis of a *jamabandi* signed by them. RAGHOONATH MUNDUL v. JUGGOT BUNDHOO BOSE. **7 C. 214=8 C L R. 393.** [*R.*, 3 O.C. 273, 21 C. 236; *Cited*, 8 A. 282=A.W.N. 1886, 119.]

(106)—*Civ Pro. Code*, 1882, *s.* 13—*Prior suit for rent based on lease dismissed—Subsequent suit for land and rent based on title—Maintainability.*— Plaintiff sued to recover certain land with arrears of rent. The suit was based by the plaintiff on the strength of his title. In a prior suit to which the plaintiff and defendants were parties, the specific lease now sued on was relied upon, but the Court then found that no such lease had been executed. *Held* that, though the invalidity of the lease sued upon was *res judicata* by the decision in the former suit, the plaintiff, however, was at liberty to sue also on the strength of his title, independently of the lease, and he was not estopped from so suing by the fact that the former suit was based on the lease alone. If the relation of landlord and tenant were shown to have existed prior to the specific lease sued upon, it was for the tenant to prove that it had ceased to exist. In the absence of such proof, it was presumed to continue, and the tenant's possession in that case could not be adverse. ZAMORIN OF CALICUT v. NARAYANAN MUSSAD, **22 M. 323.** [*F.*, 29 M 515; *R.*, 23 M. 629, 92 P.R. 1902, 26 M. 760=13 M.L.J. 448; *D.*, 16 P.L.R. 1903.]

(107)—*Previous suit for ejectment based on lease—Subsequent suit based on trespass.*—The plaintiffs in this case had sued the defendants in ejectment in virtue of the terms of an alleged written lease or *kabuliyat* binding the defendants to quit when desired. The defendants in that suit averred that they were permanent tenants subject to a fixed rent under an agreement with the plaintiffs' ancestor and predecessor-in-title. Plaintiffs failed in that suit because the lease relied on was not proved by them. The present suit for ejectment and possession was brought by the plaintiffs to eject the defendants, alleging that they were in occupation simply as tenants paying the Government assessment and a further rent to plaintiffs, and refused to go out when desired by the plaintiffs. This suit was held not to be barred by the judgment in the previous suit. Both suits were against the defendants as tenants of the plaintiff, but that could not be taken to imply that the former suit was on a cause of action identical with the one in the present suit. What has to be seen in such cases is whether the particular contract or relation put forward in the first case was the same as that sued on in the second. A cause of action reduced to the concrete form which it must assume in a contest between individuals

Res Judicata—continued.

——**3.—Cause of Action**—*continued.*

implies a specific right and a specific infringement of the right. A judgment, that one such specific right has not been made out, is not a trial and determination of the cause of action as resting on another specific right, and the former adjudication, therefore, cannot be *res judicata* in respect of the subs quent suit. GIRDHAR MANORDAS v. DAYABHAI KALABHAI, **8 B. 174, F.B.** [*Appr.*, 14 B. 31; *R.*, 10 B. 24; 21 M. 35, 11 Bom. L.R. 921; *D.*, 25 B. 189, 2 N.L.R 94.]

(108) *Civ. Pro. Code*, 1859, *s.* 2—*Res judicata—Rent-suit.*—The plaintiff sued to recover rent at an enhanced rate after service of notice under s. 13, Act X of 1859, but eventually failed. He brought the present suit for recovery of rent at the rate admitted by the defendant for the same year. *Held* that the second suit was not barred. KHEDAROONISSA BIBEE v. BOODHEE BIBEE, **13 W.R. 317.** [*F.*, 15 C. 145, F.B.]

(109)—*Liability of ryot's holding to enhancement, decree of competent Court declaring—Subsequent suit for enhanced rent, under Act* X *of* 1859—*Ryot not entitled to benefit of presumption under s.* 4.—This was a suit to recover arrears of rent at enhanced rates brought under Act VIII of 1859. The defence was payment of rent at an unvarying rate from the date of the Permanent Settlement. The lower Courts held that, although the question of istimararee had been decided previously by the Civil Court adversely to the tenant, still the plaintiff was not entitled to demand enhanced rates. On special appeal, the defendant contended that, as the suit had been brought by the landlord under Act X, he (the tenant) was entitled to all the benefit conferred on him by law, and that, as he had paid an unvarying rate for 20 years, his holding was not liable to enhanced rates. The High Court, however, *held* that the above two matters were altogether different. The landlord having sued under Act X cannot have the effect of doing away with the previous decree of the competent Civil Court which long ago had declared the defendants' holding to be one the rent of which could be enhanced. Also, the defendant having, in the previous case, stood on his pottah, could not be allowed to shift his ground and claim exemption on the plea of 20 years' payment of uniform rent. RAKHAL DOSS BOSE v. SHEIKH GOLAM SURWUR, **2 W.R. Act X, Rul 69.** [*R.*, 19 W. R 175; *D.*, 11 W.R. 571.]

(110)—*Landlord and tenant—Suit for right to get rent—Dismissal—Subsequent suit for possession—Act* VIII *of* 1859, *s.* 2.—The fact of a landlord having failed in his suit to establish his right to get rent cannot prevent his bringing a second suit to get possession of the land. KASHEENATH BOSE v. SHARADA SOONDUREE CHOWDHRAIN, **19 W.R. 97.**

(111)—*Khas possession of land, suit for—Subsequent suit for rent*—Res judicata.—A suit for *khas* possession of certain land does not

Res Judicata—continued.

——3.—**Cause of Action**—*continued.*

operate as *res judicata* in respect of a subsequent suit for rent of the same land. BHUGWANDAS v. SHEO NARAIN SINGH, **23 W.R. 253.**

(112)—Res judicata—*Relinquishment of holding by ryot—Right of occupancy*—Seer *land.*—The decision in a former suit by the present defendant, a ryot, against the present plaintiff, to recover back his holding from which he had been dispossessed, in which the question of relinquishment of the land by defendant was in issue, is no bar to the present suit in which the question in dispute is, whether, as the plaintiff says, the land sued for is the *seer* land, formerly belonging to the defendant's father, which the plaintiff had purchased, and from which he says he is entitled to eject the defendant, or whether, as the defendant insists, the land has been cultivated and held by him for twelve years as *ryoti* land, and, therefore, that he has a right of occupancy. NAIPAL SINGH v. RAM NARAIN, **2 Agra 93.**

(113)—*Former suit to establish proprietary title—Subsequent suit as planter of trees or digger of tank*—Res judicata.—Where in a former suit it had been determined that the plaintiff had no proprietary title in the land then claimed and the Court disallowed the claim then preferred for want of proof of proprietary right in the land without reference to any right which the plaintiff might possess as planter of trees in a garden or digger of a tank, a subsequent suit by the plaintiff to have it declared that as planter of the trees in the garden and as having constructed the tank he was entitled to retain possession of the tank and garden, would not be barred by *res judicata.* GOSHIEN JUGOOPOOREE v. BABOO BISHEN DYAL CHUND, **2 Agra 32.**

(114)—*Estoppel—Decree fixing rent in previous year—Right of zemindar to enhance rent in following year.*—A zemindar is not estopped from enhancing rent in one year by a decree passed in a suit as to the propriety of enhancement in a preceding year, nor does such decree preclude a comparison of the rents paid by actual cultivators for the year in respect of which the second enhancement was made. GUNGA PERSHAD v. BULDEO SINGH, **3 Agra 310.**

(115)—*First suit on lease—Second on title.*—First suit was for possession by a lessor against a lessee. Second suit for possession on the basis of the plaintiff's title. In the first suit, the title had not been adjudicated upon. *Held*, the second suit was not barred by the first, because, the title had not been adjudicated upon in the first suit. Nor could explanation II of s. 13, Civ. Pro. Code, bar the suit as *res judicata*, because, it could not be said that the plaintiff *ought* to have put forward his title in the previous suit, in which the cause of action was the lease and the holding over by the defendant after its expiry, and plaintiff expressly limited his claim in that suit to the cause of action given him by the lease. GOPALA v. ANIA, **2 N L.R. 94.** (26 M. 760, 27 M. 102, 28 M. 406, *F.*; 6 Bom L.R. 594, *D.*)

(116)—*Discharge, pleaded in prior suit—Not proved.*—A plea of discharge which the plaintiff failed to prove in a prior suit brought by the defendant against plaintiff to recover *waram* will not constitute *res judicata* in a subsequent suit by plaintiff for the return of a loan advanced to defendant. AKILANDAM PILLAI v. CHINNASAMI MOOPAN, **M.W.N. 1912, 172=11 M. L.T. 201=13 Ind. Cas. 642.**

(117)—Res judicata—*Previous suit for rent against mortgagor, no bar to subsequent suit on mortgage.*—Decrees in previous suits for rent, instituted by the mortgagee against the mortgagors, for arrears of rent accrued due under distinct *pattamchits* executed by the latter at the date of the mortgage, cannot be taken to operate as *res judicata*, so as to preclude the former from suing and obtaining a decree for sale for recovery of the principal and interest due under the mortgage-deed. NANU v. RAMAN, **16 M. 335.**

(118)—Res judicata—*Civ. Pro. Code* (1877), *s.* 13—*Suit for possession—Subsequent suit to redeem—Civ. Pro. Code*, 1877, *s.* 43—*Act* VIII *of* 1859, *s.* 7—*Inclusion of entire claim in one suit.*—Where the claim in the subsequent suit does not arise out of the cause of action in a former suit, within the meaning of the sections of the Code of 1859, relating to the inclusion of the whole claim in a suit, the subsequent suit is not barred under s. 13 of the Code of 1877, as amended by s. 6 of Act XII of 1879. So a suit for possession of property as sub-proprietor or on a statutory right would not prevent a subsequent suit to redeem the same property. [*F.*, 27 B. 379; *Cons.*, 26 M. 760=13 M.L.J. 448; *R.*, 16 C. 137, 28 M. 406, 29 M. 153=16 M.L.J. 48, **F.B.**] A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of s. 7 of Act VIII of 1859. And therefore the omission to include the whole claim in the previous suit does not bar the subsequent suit, where the plaintiff was not aware of his right when he brought the first suit. AMANAT BIBEE v. IMDAD HUSAIN, **15 C 800=15 I.A. 106, P.C. =5 Sar. 214.** [*R.*, 9 Bom. L.R. 1020, A.W.N. 1908, 96=30 A. 225=5 A.L.J. 192.]

(119)—Res judicata—*Civ. Pro. Code*, 1859, s. 2.—Knowledge of a second ground of right when a first one is relied on in a suit does not prevent that second ground being afterwards made the basis of a second suit seeking the same relief as the first. Failure in a suit of simple ejectment does not bar a subsequent suit for redemption, notwithstanding that the defendant had asserted the existence of his

Res Judicata—continued.

—3.—Cause of Action—*continued.*

mortgage in the former suit. SHRIDHAR VINAYAK v. NARAYAN VALAD BABAJI, **11 B. H.C. 224.** [*F.*, 13 B. 326; *R.*, 1 B. 87, 3 B. 137, 7 B. 526, 20 B. 86, 21 M. 35, 9 O.C. 235, 8 B. 174, 2 O.C. 139, 12 O.C. 347, 35 B. 507=13 B. L.R. 895.]

(120)—*Civ. Pro. Code, Act* VIII *of* 1859, s. 2—Zur-i-peshgee *lease—Decree for redemption and for possession on payment of certain money found due — Non-payment of money — Subsequent suit for possession on ground of discharge by usufruct—Fresh cause of action.*—Plaintiff had instituted a suit for possession of certain property which had been mortgaged to the defendants under a *zur-i-peshgee* lease, and a decree had been passed in his favour for possession on his depositing in Court the sum found to be due on the mortgage. The plaintiff however did not pay the amount and execute the decree. An application was made by him four years after the decree was passed for possession of the property, on the ground that the mortgage money had been paid off by the usufruct of the land. This application having been dismissed, he instituted the present suit for possession on the said allegation. *Held*, that the former decree not having put an end to the relation of mortgagor and mortgagee between the parties, the plaintiff was entitled to an adjudication of the state of accounts between him and the defendant up to the date of the present suit, and s. 2, Act VIII of 1859, did not bar the present suit as there was a fresh cause of action since the date of the decree in the former suit. ROY DINKUR DOYAL v. SHEO GOLAM SINGH, **22 W.R. 172.** [*Not F.*, 24 A. 44, F.B.; *F.*, 22 W.R. 269; *R.*, 21 A. 251, 26 M. 300, F.B., 2 Ind. Cas. 662.]

(121)—*Mortgage-bond—Special Registration —Act* XX *of* 1866, *s.* 55—*Suit to enforce lien on property—Jurisdiction of Civil Court.*—S. 55 of Act XX of 1866, does not prevent the institution of a suit in the Civil Court for the enforcement of a lien on landed property mortgaged under a bond specially registered under the provisions of that Act. OOTSHUB NARAIN CHOWDHRY v. CHITTRA RECKA GOOPTA, **17 W.R. 154.** [*R.*, 23 W.R. 187.]

(122)—Res judicata—*Finding in former suit not necessary for decision.*—A decision in a former suit against the present plaintiffs as to the validity of the mortgage now in suit, where that matter was not for adjudication then before the Court, would be no bar to the plaintiff's present suit in which the question was as to the genuineness or otherwise of the mortgage by defendants to plaintiffs. BUSTEE RAM v. NEWAZ SINGH, **2 Agra 62.**

(123)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2—*Conditional decree in redemption suit—Establishment of right to mortgage property by another—Suit by such person for redemption.*—Where, subsequent to a conditional decree in a

Res Judicata—continued.

—3.—Cause of Action—*continued.*

suit for redemption, another person sued the decree-holder to establish his right to the mortgage-property and obtained a decree, he was not precluded by s. 2, Act VIII of 1859, from maintaining a suit for redemption against the said decree-holder. BHOOP SING v. NARSING RAI, **3 Agra 144.**

(124)—*Civ. Pro. Code*, 1882, *s.* 13—*Title—Suit for declaration—Title as absolute owner—Second suit as mortgagor not barred—Suit for declaration does not bar suit for possession.*—K brought a suit for a declaration of his title as an absolute owner of a certain property against B. The suit was dismissed as time barred. Subsequently a second suit was brought by the representative of K against B in respect of the same property as mortgagor: *Held*, that the second suit was not barred by *res judicata*. *Held*, further, that a suit for a declaration of title does not bar a subsequent suit for possession. SYED ABID HUSAIN v. MUSSAMAT ASUDA, **6 Ind. Cas. 696.** (5 A.L.J. 637, A.W.N. 1908, 252, 4 M.L.T. 444, *R.*)

(125)—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* II—*Redemption, Suit for—Possession, Previous suit for—Alternative relief, Right to redeem*—Res judicata.—The plaintiffs brought a suit against the defendant for possession of certain land, alleging that, on the death of S, who had a Hindu widow's estate in the said land, they succeeded to it as the heirs of her deceased husband, but were subsequently dispossessed of it by the defendant. Upon certain findings based upon a decision passed in a suit brought by T.S., father of the defendant, against S, for possession of the land in dispute, in which T.S. obtained a decree for possession as mortgagee, the Court dismissed the plaintiffs' suit. The plaintiffs then brought the present suit against the defendant for redemption of the mortgage. This suit was dismissed on the ground that the plaintiffs ought, in the former suit, to have claimed as an alternative relief, the right to redeem the mortgage, and that, as they did not do so, the suit was barred by s. 13, Expl. II of the Civ. Pro. Code. *Held*, (*following* 11 B H.C. 224) that the plaintiffs 'ought' not to have made the mortgage they now sought to redeem ground of attack in the former suit, and consequently that the second suit was not barred by s. 13, Expl. II of the Civ. Pro. Code. A claim for possession of property as owner and as mortgagee are essentially different matters, and their union is calculated to lead to confusion. BALDI SINGH v. KALKA SINGH, **2 O.C. 139.** (19 A. 517, *Diss.*)

(126)—*Civ. Pro. Code*, *s.* 13, *Expl.* II—*Matter which ought to have been made ground of defence or attack—Different suits on different causes of action with regard to the same subject-matter—Questions to be decided in execution—Civ. Pro. Code, s.* 244.—R purchased a certain property in execution of a mortgage-decree against the mother of D and B. Subsequently,

Res Judicata - continued.

—— 3.—Cause of Action —*continued.*

the same property was again sold in execution of a decree for rent obtained by the landlord against the recorded tenant (father of D and B), and was purchased by R in the *benami* of his son-in-law, and he took possession in execution of both the decrees. D and B then instituted two suits for recovery of possession. One was on the ground that the rent-decree, being fraudulent, was inoperative against them ; and the other on a declaration that the mortgage executed by their mother was without legal necessity and that the sale in execution of the mortgage-decree was not binding on them. The first suit was decreed and the second suit dismissed. D and B then transferred their right to possession under the decree in the first suit to the present defendant, who recovered possession in execution. An objection on behalf of R that he was in possession under the purchase in execution of the mortgage-decree was disallowed. R then brought the present suit for recovery of possession on the ground of his purchase in execution of the mortgage decree. *Held*, that the suit was not barred either under s. 13 or under s. 244 of the Code. Where a plaintiff brings two suits based on different causes of action with regard to the same property, it is not obligatory on a person who is a defendant in both the suits, to plead as a defence to each suit what is properly a defence to the other. KAILASH CHANDRA MANDAL v. RAM NARAIN GIRI, **4 C.L.J. 211.** [*R.*, 12 C.W.N. 292=7 C.L.J. 504.]

(127)—*Civ. Pro. Code*, 1882, *ss.* 13, 43—*Mortgage — Two simple mortgages — Suit on first mortgage Second mortgagee not impleaded—Part of hypothecated property sold—Second suit for sale of remainder not barred against second mortgagee.*—Where there are two simple mortgages on certain property, in a suit upon the first mortgage, the second mortgagee should be impleaded in order to give him an opportunity to redeem that mortgage. If he is not so impleaded and a decree is obtained and a sale held in execution of the decree, the auction-purchaser may not be competent to maintain an action in ejectment against the second mortgagee, if the latter is in possession. But a person interested in the first mortgage is not precluded from bringing a second suit for the sale of part of the mortgaged property, for the sale of which a proper decree has not been passed against his second mortgagee. The object of the suit is to afford to the latter an opportunity to redeem this property from the first mortgage, and neither s. 13 nor s. 43, Civ. Pro. Code, 1882, is a bar to this suit, inasmuch as the second mortgagee was not a party to the first suit. MUSSAMMAT SHAMDEI v. BALLIT SINGH, **7 A.L.J. 29=32 A. 119=5 Ind. Cas. 481.**

(128)—*Hindu Law—Joint family—Mortgage by co-parcener of his share—Custom—Liability of surviving co-parcener obtaining mortgagor's interests*—Res judicata.—In the absence of

Res Judicata—continued.

——3.—Cause of Action—*continued.*

any special custom applicable, the decision in the present case had to follow the Hindu law. According to the decisions of the Chief Court, in the absence of any custom to the contrary, an alienation made by a co-sharer in joint ancestral property, without the consent of his co-parceners, is under the Mitakshara, as interpreted in the Punjab, invalid even to bind the share of the alienor. The mortgage, therefore, executed by one of the several co-parceners for his private debt, was held to be invalid even as regards his own share and, on the death of the mortgagor co-sharer, the property passed by survivorship to his co-parcener free from encumbrances. Plaintiffs who paid off the mortgage should be deemed to have succeeded to whatever rights the mortgagee would have had against the surviving co-parcener to recover the mortgage-money. On the question whether when one co-sharer in joint ancestral property dies and his property passes by survivorship to another co-sharer and comes into his possession, such share is liable to be taken and sold in the hands of the latter, to satisfy a separate debt due by the deceased co-sharer, it was *held* that, though the point had not been definitely settled by judicial decision, yet in the Punjab at least the share would be liable for the debt in the hands of the survivor. Further, the present suit was held not to be barred by the doctrine of *res judicata.* MUSSAMUT ZAHRO v LALLU MAUL, **21 P.R. 1879.** [*F.*, 153 P.R 1883 ; *R.*, 58 P.R. 1880, 6 P. R. 1893.]

(129)—Res judicata—*Cause of action—Mortgage money, Suit for - Suit for possession—Act* VIII *of* 1859, *ss.* 2, 7.—The first defendant mortgaged certain lands to plaintiff by way of *zuripeshgi* lease, under which the latter entered into possession. The first defendant afterwards gave a *ticca* of the lands to the second defendant, who turned the plaintiff out of possession before the term of the *zuripeshgi* lease had expired. Plaintiff then sued the first and second defendants, basing his cause of action on the dispossession by the latter and praying for the recovery of the mortgage money by a sale of the mortgaged property. The suit was dismissed, the Judge observing that plaintiff's proper remedy was to bring a suit for possession. Plaintiff then brought a suit for possession against the same parties, and on the same cause of action. The defendants objected that the suit was barred under ss. 2 and 7, Act VIII of 1859. *Held* that the suit was not barred DEODHARI SINGH v. LALLA SEWSARUN LAL, **3 C.L.R. 395.**

(130)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *new Code*)—*Usufructuary mortgage—Suit for redemption—Conditional decree, not satisfied by mortgagor—Subsequent suit for redemption.*—Where a usufructuary mortgagor brought a suit for redemption, alleging that the mortgage had been satisfied out of the usufruct, and it was found that, at that time, the mortgage had

Res Judicata –continued.

——**3.—Cause of Action**—*continued.*

not been so satisfied, and a decree was passed that, on payment within a specified time of a sum found still due, the property might be redeemed, which payment, however, was not made, *held* that there was no bar of *res judicata* to his subsequently instituting a second suit after a further expiration of time when, by further enjoyment of the profits of the property by the mortgagee, it is alleged that the mortgage-debt has been discharged. MUHAMMED SAMI-UD-DIN KHAN v. MENNU LAL, **11 A. 386 = A.W.N. 1889, 136.** [*Diss.*, 19 A. 202; *Not F.*, 25 M. 300, F.B., 43 P.R. 1907 = 101 P.W.R. 1907 = 169 P.L.R. 1908; *R.*, 21 A. 251, 24 A. 44, F.B. = A.W.N. 1901, 194.

(131)—*Second redemption suit*—Res judicata. —When a mortgagor has obtained a decree in a suit for redemption of a mortgage, and the decree has become unexecutable in consequence of a period exceeding three years from its date having been allowed to pass without any step having been taken to execute it, and the decree contains no direction that the mortgage should be foreclosed in default of the mortgagor exercising the right of redemption thereby decreed to him, a subsequent suit by the mortgagor for redemption of the same mortgage is not barred as *res judicata* by reason of the previous decree. RAMUNNI v. BRAHMA DATTAN, **15 M. 366.** [*Overruled*, 25 M. 300, F.B.; *Diss.*, 19 A. 202; *R.*, 19 M. 40, 21 M. 18, 3 O.C. 380, 24 A. 44 = A.W N. 1901, 194, 43 P.R. 1907 = 101 P.W.R. 1907 = 169 P. L.R. 1908, 93 P.R. 1908 = 164 P.L.R. 1908 = 133 P.W.R. 1908.]

(132)—*Civ. Pro. Code*, s 13, *Expl.* II, —*Suit by auction-purchaser—Second relief for sale upon mortgage.*—A property was mortgaged first to B, then to H. Both the mortgagees brought suits for sale without joining the other mortgagee and obtained decrees and sold and purchased the mortgaged property. H executed his decree first and obtained possession. B applied for mutation of names and was resisted by H. He brought a suit for possession as auction-purchaser. The suit was dismissed. He then brought the present suit, as mortgagee for sale, making all the persons interested, including H, parties to the suit. *Held*, that the suit was not barred by the rule of *res judicata* inasmuch a B in the suit for possession, as auction-purchaser, was not litigating under the same title as he was in the present suit. *Held* further, that the relief for sale could not have been joined in the suit for possession by the auction-purchaser. RAGHUBIR SARAN v. HET RAM, **5 A.L.J. 729.** [*R.*, 12 O.C. 347.]

(133)—Res judicata—*Execution of decree—Civ. Pro. Code*, 1877, *ss.* 13, 244—*Distinct cause of action.*—The respondent brought a suit against the appellant and one G for possession of two houses, in which he eventually obtained a decree against G alone, the appellant's shares of the houses being exempted. When the respondent applied for the possession of the

Res Judicata—continued.

——**3.—Cause of Action**—*continued.*

houses in execution of his decree, the appellants objected on the ground that the whole of the house did not belong to G. This objection was disallowed, and the respondent was put in possession of the houses. He subsequently sued the tenants of one of the houses for rent. The appellants applied to be made parties to that suit, but the application was rejected. The respondent obtained a decree in the suit. The appellants next took up their residence in the house with the connivance of the tenant. The respondent sued the appellants for possession of the house. *Held*, that the respondent's right of suit was distinct from that in the former suit, and there was no bar to the present suit, with reference to the former suit, or the execution proceedings in that suit. KALKA PRASAD v. RAM RATAN, **A.W N. 1881, 64.**

(134)—*Civ. Pro. Code, ss.* 13, 43—*S.* 13, *bar by* res judicata—*Identity of cause of action—Hearing and final decision of matter in previous suit essential—Bar of suit by s.* 43—*Splitting of claim—Omission to sue in respect of portion of claim.*—M, widow of A, having succeeded to a share in the village of her husband, mortgaged the share to the defendant's predecessor in title by a deed of conditional sale. The mortgagee was put in possession under a decree which he obtained on 31st January, 1879, against the mortgagor. On the 4th of November, 1879, the widow having meanwhile died, one of the present plaintiffs, a brother of A, sued to recover from the mortgagee certain resumed rent-free lands in the village. In the plaint he stated his intention to sue separately for the recovery of the mortgaged lands as heir of A. The issue, whether the lands in suit were included in the mortgage and in the decree thereon, was decided in plaintiff's favour by the first Court which gave him a decree. On first appeal, the Court ordered a nephew of the plaintiff to be made a party, and finding that the land in suit was included in the conveyance, it dismissed the plaintiff's claim. The present suit was brought by the above plaintiff and his nephew to recover the mortgaged land from the defendant on the ground that the alienation by the widow was only valid for her own lifetime and did not bind them as heirs of A. The Commissioner dismissed the claim under s. 43 of Act X of 1877, though he found that the plaintiff really believed that the land, as sued for in the prior suit, formed no part of the mortgaged property, and was entirely separate from the present claim. The Chief Court accepted the contention on behalf of the plaintiff that the causes of action in the two cases were quite different, the former suit having been brought to recover land on the ground that it was not included in the conditional sale, while the present suit was brought to recover the land to which the conditional sale applied on the ground that the alienation did not bind the estate after the death of M, and that in the former suit there was clearly no intentional relinquishment of the present claim as the plaintiff stated that he

Res Judicata—continued.

—3.—**Cause of Action**—*continued.*

would sue for it separately. The defendant contended that, though the suit might perhaps not be barred by s. 43, it would surely be barred by the combined operation of s. 43 and Expl. 2 to s. 13. *Held*, that s. 13 did not apply to the present suit as, though the plaintiff in the former suit might have made the invalidity of the alienation a ground of attack, he did not in fact do so, and the question not having been raised in that suit, the matter cannot be said to have been *heard and finally decided by the Court*. As regards the contention based on the bar by s. 43 of the Code, it was held that there was no splitting of the claim which the plaintiff was entitled to make in respect of his cause of action and that he did not in the former suit omit to sue in respect of any portion of his claim. Also, even if the claim of the first plaintiff was barred by s. 43, such bar would not affect the other plaintiff as he was not made a party to the former suit in the Court of first instance, and it could not at all be held that there had been any splitting in the cause of action so far as he was concerned. SYED YAR KHAN v. RAMCHAND, **24 P.R. 1882.** [*R.*, 59 P.R. 1883, 168 P.R. 1882, 47 P.R. 1886.]

(135)—Res judicata—*Cause of action—Identity of cause of action.*—Plaintiff purchased an estate from L (defendant No. 1), during the pendency of a suit by L against his vendor G (defendant No. 2) for confirmation of possession and registration of name. L's suit against G was dismissed for default. Plaintiff now sued L for possession on the ground of having been dispossessed after the decision in the other case. *Held*, that the cause of action in that other case was not the same as the cause of action in the present suit. MAHABIR PRASAD v. LALA-RAM BAHADUR, **5 B.L.R. 327, Note=11 W.R. 193.**

(136)—*Ben. Act* VI *of* 1862—Res adjudicata—*Suit for money on security of deposit—Suit for setting aside attachment of deposit—Causes of action—Identity of.*—Where plaintiff sues K for a sum of money, K pledging as security certain fees in deposit in the Collectorate, and then sues K and defendant No. 2, who had meantime attached those fees in execution of a decree against K, *held*, that the causes of action in the two suits are not identical. LALA TILAK HARI LAL v. JAMES FURLONG, **2 B.L.R. A.C. 230=11 W.R. 149.**

(137)—*Suit to raise attachment—Estoppel*—Res judicata—*Priority*—In a suit to raise an attachment, the plaintiff failed in the first Court and in appeal. Thereafter the property was sold and the plaintiff sued to recover possession of it from the purchaser. *Held*, that the decision in the former suit refusing to raise the attachment did not estop him from suing. MORO BALAKRISHNA MULE v. SHEK SAHEB VALAD BADDRUDDIN KAMBLE, **5 B.H.C.A.C. 199.**

Res Judicata—continued.

—3.—**Cause of Action**—*continued.*

(138)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Suit to set aside sale.*—In a suit to recover property which plaintiff had purchased, he failed as to a portion which had been previously purchased by one of the defendants who held a sale certificate thereof. Plaintiff then brought a suit to get rid of the sale. *Held*, that this was a different suit from the former and was not barred by s. 2, Act VIII of 1859. CHANNU LAL SAHU v. MANU LAL. **5 B.L.R. 220=13 W.R. 343.** (3 B.L.R. A.C. 42, 2 B.L.R.A.C. 104, *D.*)

(139)—*First suit by reversioner during life of vendor for declaration dismissed on ground of limitation alone—Second suit after vendor's death calling in question validity of sale not barred.*—Plaintiffs were reversioners to the estate of a vendor of a certain land. Their suit, during the vendor's life, for a declaration that the sale was not binding on their reversionary rights was dismissed on the sole ground that it was barred by limitation. They now sued, after the death of the vendor, for possession of the land and the point of the validity of the land came into question. *Held*, the former suit having been dismissed on the only ground of limitation, such suit not being necessary and the question of the necessity for the sale and the validity thereof not having been decided therein, the present suit was not barred by the rule of *res judicata*. BARKET ALI v. HUSAIN KHAN, **6 P.R. 1906=61 P.L.R. 1906.**

(140)—*Joint tort-feasors—Action against one joint tort-feasor bars another action against others—Rule in* Brinsmead *v.* Harrison—*Rule does not apply to subsequent tort—Cause of action in both suits to be the same for* res judicata *to apply*—Lis pendens *does not apply to moveable property—Plea of adoption by defendant—Decision in first suit — Defendant not claiming under the parties in first suit can agitate the question in second suit — Pledge—Conversion.*—M. K. claiming to be the adopted son of M.R. took possession of certain ornaments belonging to M.R. which he wrongfully pledged in 1897 with G. Soon after J., the daughter of M. R. sued M.K. to recover the ornaments, and obtained a decree which was not satisfied. M.K. had pledged only two of the ornaments with G. before the date of the suit; while the remaining ones were pledged after the institution of the suit. Subsequently, in 1907, J sued G, the pawnee, to recover the ornaments. The defendant contended in reply that M.K. and G. being joint tort-feasors, the suit was barred under the rule in 7 C.P. 547, *R.* He also pleaded that M.K. was the validly adopted son of M. R. *Held*, that plea of *res judicata* must fail in so far as it was based upon the rule of *Brinsmead* v. *Harrison*, for a fresh assignment in respect of a tort subsequent to that originally sued upon would not come within the scope of the rule so as to bar the fresh assignment; and that the cause of action in the second suit must be precisely the same as the cause of action in the first suit, in order to make the judgment in the first suit a

***Res Judicata*—continued.**

——3.—Cause of Action—*continued.*

bar to proceedings in the second suit. That the fact that the first suit was pending at the time of the pledge of a large portion of the ornaments sought to be recovered in the second suit could not prejudice the defendant on the issue of *res judicata*, for the doctrine of *lis pendens* did not apply to moveable property. That the defendant was entitled to raise the issue about M K's adoption, for the first suit was no bar to the issue sought to be raised by the defendant as it was subsequent to the pledge, and the defendant did not claim under a person against whom the issue of adoption had been at the time of the pledge finally heard and determined. GOVIND BABA GUJAR v. SHRIMANT JIJIBAI SAHEB, **14 Bom. L.R. 9=36 B. 189=13 Ind. Cas. 849.** (15 A. 108, *F.*)

(141)—*Claim to two distinct inheritances—Causes of action not same—Circular* 95 *of* 1858. --First suit in respect of certain wells left by the grandfather of plaintiff and defendant, in which other persons were also interested. It came before the Settlement Department. Second suit (the present one) was in respect of a share in a house left by the father of the plaintiff and the defendant. *Held*, that the latter suit was not barred by the plaintiff's omission to claim his share in the house in the previous suit, as the causes of action were different and the persons interested not the same in the two suits, and moreover, the Settlement Department which took cognizance of the matter in the first suit could not have had cognizance of the second. The object of Circular 95 of 1858 is to prevent the splitting up of claims arising out of the same cause of action It is true that it prevents the splitting of a claim arising out of the same inheritance. But it cannot have the effect of compelling the joinder of claims arising from two distinct inheritances. SOOK DIAL v. LUJPUT RAI, **15 P.R 1866.**

(142)—*Dismissal of suit for redemption, plaintiffs having no* locus standi—*Suggestion in judgment that plaintiffs might sue again in certain events—Subsequent suit*—Res judicata. --A suit for redemption of mortgage was dismissed on the ground that the proper persons to sue were the sons of the mortgagor and not the plaintiffs who had no *locus standi*. But though in the decree the claim was simply dismissed, the Court in the body of the judgment threw out a suggestion that if those sons did not sue in three years' time, plaintiffs could sue again provided they were still within limitation. The sons not having sued, the plaintiffs brought the present suit for redemption. *Held* that their claim was *res judicata* under s. 13 of Act X of 1877, as the words relied upon by the plaintiffs in the former judgment must be regarded as mere surplusage and that they could not enable them to institute a fresh suit with respect to a cause of action once heard and determined. UDMI v. NEKI, **84 P.R. 1880.** [*D*, 25 P.R. 1884.]

Suit for possession of land—Subsequent conversion of moveables on the land—Second

***Res Judicata*—continued.**

——3.—Cause of Action—*concluded.*

suit for damages for conversion— *See* CIV. PRO. CODE, 1908, ss. 154, 156, 157, 158, O. II, r. 2, O. XIII, r. 9, 22 M. 197.

Res judicata—Suit for maintenance for definite period only—Subsequent suit for later period and for charging ancestral estate for future maintenance—*See* HINDU LAW—MAINTENANCE, 2 B. 494.

See JURISDICTION OF CIVIL COURTS, 3 A. 521.

See MORTGAGE—GENERAL, 32 P.R. 1910=50 P.W.R. 1910=5 Ind. Cas. 655=57 P.L.R. 1910.

Lapse of decree for redemption by non-payment of decretal money—Second suit for redemption not-maintainable by mortgagor —*See* MORTGAGE—REDEMPTION, 19 A. 202 =A.W.N. 1897, 24.

See PLAINT—REJECTION OF PLAINT, 81 P.R. 1878.

Suit for rent or in default for possession of land under Settlement Court decree entitling landlord to demand any reasonable rent at his option —Landlord and tenant, relation of—Oudh Rent Act — *See* RENT, SUIT FOR, 6 O.C. 341.

——4.—Competency of Court.

See JURISDICTION OF CIVIL COURTS.

See JURISDICTION OF REVENUE COURTS.

(1)—Res judicata—*Decision by Agency Courts —Another suit in British Courts.*—The leading conditions imposed by s. 13 of the Civ. Pro. Code, as requisite to the plea of *res judicata* are (1) that the matter in the suit in which the plea is raised should have been directly and substantially in issue in the former suit, (2) that on that matter there should have been a hearing and a final decision in the former suit, (3) that there should be identity of parties as explained in the section, and (4) that the Court which decided the former suit should be a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised. In a suit, brought in the Agency Court of Kattiaward, relating to the villages in Kattiawar, the Court decided that there existed between the parties a custom of *Motap* (*i.e.*, right to an extra share by the senior member). A second suit was subsequently brought in a British Court, as regards the villages belonging to the parties situate in the British territories, wherein plaintiffs alleged that the custom of *Motap* did not exist in their family. It was contended on behalf of the defendant that the question was *res judicata*, on the ground that the test of competency to try the subsequent suit was whether the suit was one which in respect of its subject-matter and the valuation thereof could have been tried by the Agency Court and that its exclusion on

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——4.—**Competency of Court**—*continued.*

territorial grounds was not to be taken into account. The High Court declined to accept the contention as not being consistent with the express terms of s. 13 of the Civ. Pro. Code. PRITHISINGJI v. UMEDSINGJI, **6 Bom. L.R. 98.**

(2)—*S.* 13, *Civ. Pro. Code—Object of section — Necessity for first suit being tried and decided finally by Court of competent jurisdiction.* —The object of s. 13 is to ensure that the decision in the former suit shall be that of a Court which is competent to try the subsequent suit. The jurisdiction of the Court of first instance, and not that of the Court of appeal, is what the section regards. The matter to be a *res-judicata* must have been heard and finally decided. The trial by a competent Court is what is especially made necessary because the result of the case depends so much on the trial, the Court of appeal deciding the case as a rule on the record of the first Court. Where the Court which tried the first suit could not take cognizance of the second suit on account of the limit in jurisdictional value, the decision in the first suit could not operate as *res judicata* in the second suit. BADRINATH v. LOKNATH AGARWALLA, **1 C.P.L.R. 92.** (9 B. 75, *D.*)

(3)—*Bengal Tenancy Act*, 1885, *s.* 102—*S.* 13, *Civ. Pro. Code*, 1882 (=*s.* 11, *New Code*)—*Proceeding under s.* 103, *Beng. Tenancy Act*, 1885—*Decision of Revenue Officer—Effect in subsequent suit for title and ejectment.*—In order to constitute *res judicata* under s. 13, Civ. Pro. Code, 1882, the issue with respect to which the rule is to operate must have been heard and finally decided by a Court of jurisdiction competent to try the subsequent suit in which it is sought to raise the same issue. In a proceeding under s. 103, Beng. Tenancy Act, 1885, there being a denial of the relation of landlord and tenant either by the landlord or the tenant, it is absolutely necessary for the Revenue Officer to deal with the question in order to enable him to make the necessary entries under s. 102 of the Act; but the decision of the Revenue Officer is not *res judicata* in a subsequent suit by the landlord in a Civil Court for title and ejectment. DHARANI KANTA LAHIRI v. GABER ALI KHAN, **30 C. 339=7 C.W.N. 33.** (17 C. 721, *F.*; 2 C.W.N. 491, 20 C. 249, 27 C. 167, *D.*)

(4)—*Civ. Pro. Code*, 1882, *s.* 13—"*Jurisdiction competent to try*," *meaning of.*—Where the right of the plaintiff had been decided adversely to him in a suit between him and the defendants which was within the jurisdiction of the Court of the District Munsif, and the subsequent suit brought by him, although involving the same question of right, was not within the jurisdiction of such Munsif, there could be no bar by *res judicata* under s. 13 of the Civ. Pro. Code. The terms "the Court of jurisdiction competent to try" in s. 13 must be taken to mean a Court having jurisdiction not only

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to the nature but also as to the amount of the suit. SHEIKH HASSU v. RAM KUMAR SINGH, **16 A. 183=A.W.N. 1894, 18.** (9 I.A. 197=9 C. 439, *R.*) [*D.*, 18 A. 59.]

(5)—*Civ. Pro. Code*, *s.* 13—"*Court of competent jurisdiction*," *meaning of*--The words "Court of competent jurisdiction" in s. 13 of the Civ. Pro. Code, mean a Court which has jurisdiction over the matter in the subsequent suit, in which the decision is used as conclusive, in other words a Court of concurrent jurisdiction, *i.e.*, concurrent as regards the pecuniary limit as well as the subject-matter. GANAPATHI v. CHATHU, **12 M. 223.**

(6)—Res judicata—*Civ. Pro. Code*, *s.* 13—*Construction.*—The reasonable construction of the words "in a Court of jurisdiction competent to try such subsequent suit" in s. 13 of the Civ. Pro. Code, is that it must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such Court would be conclusive under s. 13, although, on a subsequent date, by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property. GOPINATH CHOBEY v. BHUGWAT PERSHAD, **10 C. 697.** [*Appr.*, 11 C. 153, 15 M. 494; *D.*, 9 C.W.N. 656, 29 M. 65; *R.*, 10 C.P.L.R. 89, 25 C. 571, 2 O.C. 261, 22 P.L.R. 1902=36 P.R. 1902, F.B.]

(7)—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* VI—Res judicata—*Court of jurisdiction competent to try such subsequent suit, meaning and scope of expression—Judgment of Native Court, how far can be relied on by British Indian Courts.* —The expression in s. 13 of the Civ. Pro. Code, "a Court of jurisdiction competent to try such subsequent suit," means a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards pecuniary limit of its jurisdiction, or the subject-matter of the suit, to try it with conclusive effect." Expl. VI to the section must be read with the earlier part thereof so as to give it an adequate meaning. The term "Court of competent jurisdiction" is wide enough to include a competent foreign Court. The plaintiff sued the defendant to recover possession of certain property situated in the Belgaum District (British territory) by virtue of his being the adopted son of one X to whom the properties belonged. The plea of the defendants was that the adoption was false. To prove his title, the plaintiff produced a judgment of a Native Court which decided the question of his adoption in his favour, and which he had obtained against the second defendant only in a suit instituted by him to recover possession of certain other property belonging to X (his alleged adoptive father). Both the lower Courts did not admit this

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judgment in evidence and dismissed the plaintiff's suit, holding that his adoption was not proved. *Held* on appeal, that the judgment of the Native Court was passed on the merits of the case and was conclusive between the parties within the territorial jurisdiction of the Native State, and the question of the plaintiff's adoption was therefore *res judicata* between him and the second defendant. BABABHAT v. NARHARBHAT, **13 B. 224.** [*R.*, 24 B. 86; *Doubted*, 6 Bom. L.R. 98.]

(8)—*Civ. Pro. Code*, s. 13—Res judicata—*Court of competent jurisdiction.*—The words "Court of jursidiction competent to try such subsequent suit," refer to the jurisdiction of the Court at the time when the suit is heard and determined. The Privy Council have interpreted these words to mean a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the subject-matter of the suit or the pecuniary limits of its jurisdiction. KUNJI AMMA v. RAMAN MENON, **15 M. 494=2 M.L.J. 262.** [*R.*, P.L.R. 1900 at p. 435, 24 A. 112.]

(9)—Res judicata—*Civ.Pro. Code*, 1882, s. 13, *construction of*—The reasonable construction of the words "in a Court of jurisdiction competent to try such subsequent suit" in s. 13 of the Civ. Pro. Code, is that they refer to jurisdiction of the Court, at the time when the first suit was brought. (10 C. 697, *Appr.*) Although the Court in which the subsequent suit is brought, and that in which the former suit was brought, are now Courts of different jurisdictions, the decision in the former suit would be a bar to the subsequent suit, if the Court in which the former suit was brought was the only Court at that time competent to try suits of that kind, and that Court would have been the only Court competent to try the subsequent suit also, if it had been brought at that time. RAGHUNATH PUNJAH v. ISSUR CHUNDER CHOWDHRY, **11 C. 153.** [*Appr.*, 15 M. 494; *R.*, 25 C. 571, 2 O.C. 261, 24 B. 456; *D.*, 9 C.W.N. 656.]

(10)—*Civ. Pro. Code*, s. 13—"*Court of competent jurisdiction.*"—The term "competent jurisdiction" in s. 13, Civ Pro. Code, has regard to the pecuniary limit as well as to the subject-matter. There no authority for the general proposition that the competency of one Court as compared with another is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court, and in the other directly to the High Court. SUBBAMMAL v. HUDDLESTON, **17 M. 273.** (9 C. 439, *Cited and F.*; 15 M. 111, *Qualified*) [*Overruled*, 29 M. 195, F.B.=16 M.L.J. 41=1 M.L.T. 25; *F.*, 24 M. 444, 13 M.L.J. 134; *R.*, L.B.R. 1893-1900, 653.]

(11)—*Jurisdiction of the first Court.*—The bar of *res judicata* arises where the Court deciding the first suit was competent to try the same, and its inability to entertain it arose not from incompetence, but from the existence of another Court with a preferential jurisdiction. GULAPPA v. RAGHVENDRA, **6 Bom. L.R. 77 =28 B. 338.**

(12)—*S.* 13, *Civ. Pro. Code*, 1882—*Competency of jurisdiction of Court.*—The plea of *res judicata* ought to be determined with reference to the Court in which the suit was instituted and not to the Court which decided the suit on appeal. (5 C. 832, 8 M. 83, *R.*) The rule of *res judicata* cannot prevail, if the first suit had been brought in a Court of jurisdiction not competent to try the second. BHARASI LAL CHOWDHRY v. SARAT CHUNDER DASS, **23 C. 415.** (9 C. 439, *R.*; 11 C. 301, *F.*) [*F.*, 30 B. 220= 7 Bom. L.R. 821, 25 C. 571, 35 C. 353=12 C.W.N. 359=7 C.L.J. 470.]

(13)—*Civ.Pro.Code*, 1882, s. 13—Res judicata.—In order to establish the plea of *res judicata* the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised.(9 C. 439, P. C., 11 C. 301, P. C., *Rel.*; 24 B. 456, 24 M. 275, 29 C. 707, *R.*; 5 C. 832, *Not F.*) It is the competency of the original Court which decided the former suit that must be looked to and not that of the Appellate Court in which the suit was ultimately decided on appeal. SHIBU ROUT v. BABAN ROUT, **12 C.W.N.359=7 C L.J. 470=35 C. 353.** (28 C. 78, *D.*; 8 M. 83, *Nol F.*; 25 C. 571, 10 C.W.N. 529, 23 C 415, *R.*) [*R.*, 30 A. 470=5 A.L.J. 407=A.W.N. 1908, 192.]

(14)—*Civ. Pro. Code*, 1882, ss. 13, 331—*Claim of third party resisting delivery of possession—Investigation of claim by executing Court irrespective of value of property—Bengal, N.W.P. and Assam Civil Courts Act* (XII *of* 1887), s. 19—Res judicata—*Decision of former suit by Court competent to try subsequent suit.*—S. 331, Civ. Pro. Code (1882) is not controlled by s. 19 of the Bengal Civil Courts Act. Therefore, when a claim has been preferred under s. 331 of the Code, it must be investigated by the Court executing the decree, irrespective of the value of the property.(6 Bom. L R. 301, *F.*; 8 M. 548, *Not F.*) S. 13, Civ. Pro. Code, 1882, bars the trial of a subsequent suit, by reason of the decision in a former suit, only when such decision has been given by a Court of jurisdiction competent to try the subsequent suit. KADAMBINI DASI v. DAYARAM DAS, **5 Ind. Cas. 573=11 C.L.J. 478.**

(15)—*Civ. Pro. Code, Act* X *of* 1877, s. 13 *as amended by Act* XII *of* 1879—"*Finally decided by a Court of competent jurisdiction,*" *meaning of.*—The words "finally decided by a Court of competent jurisdiction" occurring in s. 13, Civ. Pro. Code, make it necessary that the Court which decided an issue relating to title in a previous suit for rent, should have been competent to decide a suit for possession of the property, in order to make its decision

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upon that issue conclusive in a subsequent suit for possession; and a Court of competent jurisdiction under Act X of 1877, means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words a Court of concurrent jurisdiction. ABDUL RAHMAN v. MULA, **163 P.R 1883, F.B.** (9 C. 439, 118 P. R. 1882, *R.*)

(16)—*Competency of Court —True test*—*S.* 11, *expl.* II, *Civ. Pro. Code*, 1908.—The true test of the competency of a Court deciding the former suit or issue is not merely the jurisdictional powers of the original Court in which the previous suit was instituted, but the jurisdiction of that Court viewed in connection with the course of appeal allowed in that particular case and the degree of finality attaching to the decision of each of the Courts, original and appellate, which may be called upon to exercise jurisdiction in the case. SHAMAS DIN v. GHULAM KADIR, **20 P R. 1891** (F B.) (145 P. R. 1888. *Overruled*). [*Disc.*, 54 P. R 1904; *D.*, 111 P. R. 1907; *R.*, 57 P. R. 1907, 97 P. R. 1910=142 P.W R. 1910.]

(17 & 18)—*Competency of the Court in which suit was instituted.*—In considering the competency of a Court for the purpose of deciding on a question of *res judicata*, one must look to the powers of the Court in which the suit was instituted and not to the powers of the Court by which that suit was decided on appeal. MALUBHAI v. SURSANGJI, **7 Bom. L.R. 821=30 B. 220.**

(19)—Res judicata—*Civ Pro. Code*, s.13.—In order to make the decision of one Court final and conclusive in another, it must be the decision of a Court, which would have had jurisdiction over the matter raised in the subsequent suit, in which the decision is given in evidence as conclusive; and such jurisdiction must be such as not to be ousted by the pecuniary limits imposed on Courts in India. In other words the two Courts must have had concurrent jurisdiction. MISSER RAGHUBARDIAL v. SHEO BAKSH SINGH, **9 C. 439=12 C L.R. 520=9 I A. 197, P.C.=4 Sar. 395** [*F.*, 17 M. 273; *Appl.*, 11 C. 301, P C.=12 I.A. 23; *R.*, 9 B. 75, 8 A 324, 13 B 224, 14 B 206, 15 M. 111, 35 C. 353=12 C W.N. 359=7 C.L.J. 470, 15 M 494, 16 A. 183=14 A W N. 18 16 A. 464, =14 A.W N. 137, 18 A 59, 23 C. 415, 25 C. 571, 24 B. 456, 28 C. 78, P L R. 1900, 431, 29 M 65, 29 M. 195, F.B.=1 M.L.T. 25=16 M.L J 41, 57 P.R. 1907=66 P.W.R. 1907.]

(20)—*S.* 13, *Civ Pro. Code*, 1882—*Plea of* res judicata.—Under s 13, a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue but also the subsequent suit itself, in which the issue is subsequently raised. (*N.B.*)—In this respect the enactment goes beyond s. 13 of the previous Act X of 1877, and also beyond the law laid down by the Judges in the *Duchess of Kensington's case* (1776, 2 Smith's L.C. 10th Ed., 713). GOKUL MANDAR v. PUDMANUND SINGH, **29 C. 707, P.C.=29 I.A. 196 =6 C.W.N. 825=4 Bom. L.R 793=8 Sar. 823.** [*F.*, 25 A 138, 35 C. 353=12 C.W.N. 359=7 C.L.J. 470; *Expl.*, 31 M. 62=17 M.L.J. 601 =3 M.L.T. 186; *R.*, 10 C.L.J 527, 31 C. 95=8 C.W.N. 30 4 N.L.R. 61, 10 Bom. L.R. 1113, 11 Bom. L.R. 335; *Diss.*, 29 A. 601=1907 A. W.N. 189=4 A.L J. 545]

(21)—*Court of competent jurisdiction.*—To satisfy the requirements of s. 13, Civ. Pro. Code, 1882, it is necessary that the two Courts shall have concurrent jurisdiction as regards the pecuniary limit as well as the subject-matter, and the extent of the jurisdiction depends on that of the Court in which the first suit was instituted at the time the first suit was brought. RAMDAYAL v. JANKIDAS, **2 Bom. L.R. 415=24 B. 456.** [*R.*, 7 C.L.J. 470=35 C. 353=12 C.W.N. 359.]

(22)—*S.*13, *Civ.Pro. Code*, 1882 - Res judicata —*Earlier suit in a subordinate Court—Subsequent suit in a superior Court but triable by subordinate Court—Different courses of appeal.* —S. 13, Civ. Pro. Code, cannot be so used as to bind the superior Courts by decision of inferior Courts, which were not, and could not have been, considered on the merits by the superior Courts; and a decision by an officer presiding in a Court passed in the exercise of a certain jurisdiction cannot be *res judicata* in a subsequent case, triable by that officer, but not triable in the exercise of the same jurisdiction, but under what might be called a superior jurisdiction. Where an earlier suit was tried by a Subordinate Judge of the first class, which was also triable by a single Judge of the Chief Court, a subsequent suit before a single Judge of the Chief Court, on the same issue, which suit could be entertained by the Subordinate Judge also, would be barred by the earlier suit, although, the course of appeal would be different in the two cases. GIRDHAR LAL v DEOKI NANDAN, **111 P.R. 1907** (20 P.R. 1891, F.B., 27 P.R. 1879, 157 P.R. 1889, F.B., *R.*)

(23)—*Civ Pro. Code* (*Act* V *of* 1908), *s.* 11, *Exps.* 1, 2—Res judicata—*Date of institution or date of decision—Competency of Court—Competency of first Court and not that of appeal determines* res judicata.—The date of decision and not that of commencement of the litigation has to be considered in determining the question of *res judicata*. (11 A. 148, F.B., *F.*) The fact that an appeal lay to the Civil Court from the decision of a Revenue Court in one of the suits, and to the Commissioner in the other, cannot affect the question of *res judicata*. It is the competency of the Court of first instance to entertain the two suits, which regulates the application of the rule of *res judicata*. The application of the rule is irrespective of any

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provision as to the right of appeal from the decision of the Court of first instance. BENI MADHO v. MUNSHI INDAR SAHAI, **3 Ind. Cas. 707=6 A.L.J. 991.**

(24)—*Material issue tried by competent Court —Form different.*—Trial by a competent Court of a material issue between certain parties bars a subsequent trial between them of the same question, though in a different form. KRISHNA BEHARI ROY v. BUNWARI LALL ROY, **1 C. 144, P.C.=25 W.R. 1=2 I.A. 283=3 Sar. 559 =2 Suther 213.** (12 B.L.R. 304, *R.*; 1 B.L.R. A.C. 68, *Overruled.*) [*Expl.*, 25 W.R. 225; *F.*, 5 C. 832; *Compare*, 11 C. 301=12 I.A. 23, P.C., 6 C. 319=7 C.L.R. 227, F.B.; *Cons.*, 4 C. 190=5 I.A. 149, P.C., 18 B. 597; *D.*, 7 M. 145, 9 B. 75, 24 C. 83; *R.*, 3 B. 3, 6 C. 406, 8 M. 219=12 I. A. 16, P.C., 8 M. 348, 11 M. 204, 13 B. 25, 13 M. 287, 15 B. 89, 17 A. 174, 6 Bom. L.R. 288, 12 C.W.N. 739, 9 C.L.J. 597.]

(25)—*Civ. Pro. Code*, 1882, *s.* 13—"*Court of Jurisdiction competent to try such subsequent suit.*"—Where both the suits were cognizable by a Munsif of the first class, and the appeal against the decrees in both the cases could be preferred to the Divisional Court, but, in consequence of the matter in dispute in the first suit having been referred to arbitration, no appeal lay, *held* that the matter decided in the first suit could not be re-opened, and that the decree based on the award operated as *res judicata*. MEHAR ALI v. GANESH DAS, **3 P. L.R. 1900.** (20 P.R. 1891, F.B., *D.*)

(26)—*Decision on question of title—Court of competent jurisdiction—Consideration of question of* res judicata—*Competency of what Court to be looked to.*—The decision on a question of title by a Court of competent jurisdiction with reference to the value of the subject-matter involved in the suit, will be *res judicata* between the parties, though the effect of such decision might be the determination of the title to an estate or estates the value whereof exceeds the jurisdiction of the Court of institution. (1 C. 144=2 I.A. 283, *R.*) [*R.*, 20 B. 86, 6 C. 406=7 C.L.R. 251.] In deciding upon a question of *res judicata*, the competency of the Court wherein the suit was instituted and not that of the Court in which it was decided on appeal has to be considered. *Per White, J.* TOPONIDHEE DHIRJ GIR GOSAIN v. SREEPUTTY SAHANEE, **5 C. 832=6 C.L.R. 305.** [*R.*, 6 C. 406=7 C.L.R. 251, 23 C. 415; *F.*, 30 B. 220=7 Bom. L.R. 821; *D.*, 35 C. 353=12 C.W.N. 359=7 C.L.J. 470.]

(27)—*Act* VIII *of* 1859, *s.* 14—*Suit for land* — Res judicata—*Jurisdiction.*—A former decision by the Courts in India confirmed by the Privy Council, adjudging the land in dispute to be an accretion to the respondent's settled estate in Shahabad, was held to be a bar, under s. 14, Act VIII of 1859, to the jurisdiction of the Ghazipore Courts to try the present suit for the same land. PAHALWAN SINGH v. MAHARAJA MUHESHAR BUKSH SINGH BAHADUR, **12 B.L.R. 391, P.C.=18 W.R. 182=2 Suther 660.** [*Appr.*, 6 C.L.J. 621.]

(28)—*Act* XX *of* 1866, s. 84—Res judicata.—A suit to have a registered Kobala declared fictitious and void as against plaintiff was held to disclose no good cause of action, seeing that, on a petition preferred according to the provisions of s. 84, Act XX of 1866, a competent Court had already decided that the defendant was entitled to obtain registration of the deed. RAM CHANDRA PAUL v. BECHARAM DEY, **8 B.L.R. App. 28 Note=10 W.R. 329.** [*Not F.*, 7 C. 736=9 C.L.R. 471; *Expl.*, 8 B.L.R. App. 26=15 W.R. 487.]

(29)—*Rent-suit—Decision of title—New Rent Law.*—The rulings of the Privy Council and of the Full Bench regarding the incompetency of the Revenue Courts to conclusively determine questions of title in a suit for rent under Act X of 1859, do not apply to suits for rent instituted in a Civil Court under the New Rent Law. RAM DOSS NUSHKUR v. RASH MONEE DOSSEE, **25 W.R. 189.**

(30)—*Decision of rent suit by Deputy Collector—Determination of issue adversely to defendant—Suit by defendant relying on arrangement covered by issue*—Res judicata.—Plaintiff sued the defendant, a zemindar, seeking for a decree by the Deputy Collector that, as regards the lands in question, he was, by the terms of a certain arrangement come to between him and the defendant, only liable to pay a rent of 42 rupees and odd. When, on a former occasion, the present defendant as zemindar sued the present plaintiff as tenant, plaintiff set up the very arrangement relied on by him in the present suit, and the Deputy Collector then decreed in favour of the plaintiff and determined, in express terms, adversely to the defendant, the issue that was then raised as to the abovementioned arrangement. *Held* that the very same issue having been tried between the same parties and by the same Court, the present suit was liable to dismissal as not maintainable again in that Court. KALEEDASS GHOSAL v. MUDDOOSOODUN ROY, **10 W.R. 465.**

(31)—*Suit for rent in Revenue Court—Dismissal—Another suit for damages in the Civil Court—Sustainability.*—The dismissal of a suit for rent due on a putnee lease in the Revenue Courts bars another suit for damages to the same amount in the Civil Court. GOPAL KISTO MOOKERJEE v. MUDHOOSOODUN PAUL CHOWDHRY, **W.R. 1864, Act X, Rul. 82.**

(32)—*Suit by tenant for possession from alleged sub-lessee—Dismissal of previous suit against same person by Collector*—Res judicata. —Plaintiff stated that he was a tenant entitled to the occupation of the suit-land, and that the defendant, who was the farmer representing the landlord, had dispossessed him from his land under a sub-lease extorted from the plaintiff by

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the defendant by force. It appeared that the plaintiff had, upon this very cause of action, sued the same defendant in the Court of the Collector, alleging that he had been illegally dispossessed from the land in dispute, and the Collector had dismissed the suit on the ground that the lease set up by the defendant was good and valid. It was against this very dispossession that the plaintiff brought the present suit before the Civil Court. *Held*, that the suit having once been dismissed by a Court of competent jurisdiction, could not again be entertained by the Civil Court. MR. F. HOLLOWAY v. ASMAN ROY, **10 W.R. 325.**

(33) — *Court which tried first suit not competent to try subsequent suit — Rent suits.*—A judgment of a Court not competent to try a subsequent suit in which the former judgment is pleaded as *res judicata*, is nevertheless the judgment of a Court of competent jurisdiction so as to operate as *res judicata* in the latter suit. [*R.*, 9 B. 75.] The rule of *res judicata* ought to be held to apply to judgments in rent-suits, at least until interventions in such suits are authoritatively prohibited. RUN BAHADOOR SINGH v. LUCHO KOER, **6 C. 406=7 C.L.R. 251.**

(34)—*Civ. Pro. Code*, s. 13—Res judicata—*Rent Recovery Act—Decision of Revenue Court as to landlord's title.*—The decision of a Revenue Court in a previous suit, that the defendant is the plaintiff's tenant, operates as *res judicata* in a subsequent suit when the plaintiff sues under s. 9 of the Rent Recovery Act, to enforce the acceptance of a patta, and the defendant denies the plaintiff's title as landlord. VENKATACHELLAPATI v. KRISHNA, **13 M. 287.** [*F.*, 30 M. 498=17 M.L.J. 433=3 M.L.T. 17; *R.*, 2 M.L.J. 36, 30 M. 510=17 M.L.J. 518=2 M.L.T. 455.]

(35)—*Suit for rent in Revenue Court—Applicability of rule of* res judicata *to proceedings in Revenue Courts—Civ. Pro. Code*, 1882, s. 13.—The Revenue Courts, in matters on which the Rent Act is silent, are bound by the rules of the Civ. Pro. Code. So a plea of *res judicata* is an essential principle applying to all adjudications by the Courts, and to that general rule, the jurisdiction of the Rent Act is no exception. The question whethe rthe defendants are tenants of plaintiff or hold the land as *sir* under an agreement in lieu of the profits of their zemindari share and without any liability to pay rent, is a matter which a Revenue Court is competent to try and decide for the purpose of adjudicating on a claim for rent which is brought in that Court, and the Revenue Court cannot, in a subsequent suit for rent for a subsequent year, try the same issue again. Whether or not the former adjudication affects the question as to title to the land between the parties, it operates as *res judicata* so far as the question of rent and the jurisdiction of the Revenue Court is concerned. The question of liability of the defendant to pay rent for a subsequent year may be raised on other grounds in a subsequent suit, but not on the one already heard and decided in the former suit. FATIMA BIBI v. SARJU SINGH, **A.W.N. 1885, 159.**

(36)—*Civ. Pro. Code*, s. 13—Res judicata—*Question of title decided in former suit by Revenue Court—Former suit instituted wrongly in Revenue Court—Appeal to the Civil Court—Suit to be deemed as instituted in right Court.*—In a suit for an annuity for certain years, the defendants denied the title of the plaintiffs. In a previous suit in the Revenue Court between the same parties for arrears of revenue of certain other years, it was decided, upon the admission of the defendant, that he was liable. *Held*, that the decision of the Revenue Court operated as *res judicata* upon the question of the title and the defendant was estopped from re-opening the question in the present suit and the plaintiffs were entitled to receive the amount of the annuity. DWARKA DAS v. AKHAY SINGH, **5 A.L.J. 407=A.W.N. 1908, 192=30 A. 470.** [*R.*, 30 A. 405, Note=5 A.L.J. 484=A.W.N. 1908, 185.]

(37)—*Civ. Pro. Code*, s. 13—*Jurisdiction of Civil and Revenue Courts—Suits for profits in Revenue Court—Previous suit between the parties—Question of title decided adversely to the present plaintiff.*—M sued for profits due to her as owner of a share in the *mahal* of which D was the lambardar. In a suit between the parties, it had been decided by a Civil Court of competent jurisdiction that M had no title to the share in question. D pleaded that M was not the owner, and the question of ownership was *res judicata*. The District Judge overruled the plea and decreed the claim, holding that the decision of the Civil Court in the previous suit could not operate as *res judicata* inasmuch as that Court could not have tried the present suit for profits. *Held*, that, when as between parties to the revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff, who claims profits, the Revenue Court is not competent to ignore that decision, and that decision being binding upon the Revenue Court, M's suit should be dismissed. DURGA SHANKAR v. GUR CHARAN, **2 A.L.J. 834=A.W.N. 1906, 1.** (22 A. 1, F.B., *R.*) [*R.*, 6 A.L.J. 145, F.B.; *F.*, 31 A. 253, F.B.]

(38)—*Civ. Pro. Code*, 1882, s. 13—Res judicata—*Suit for profits by under-proprietor—Jurisdiction, Civil and Rent Court's—Decree in terms of compromise.*—*Held*, that the decision of a Civil Court on a question of proprietary title to land is binding upon a Rent Court in a subsequent suit between the same parties, or their representatives, even though that same question may have been previously determined by a Rent Court in a different manner; and when upon that question the Court has to choose between conflicting decisions of Civil and Rent

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——4.—**Competency of Court**—*continued.*

Courts, the decision of the Civil Court must be accepted as conclusive, provided that the conditions have remained unchanged. *Held*, further, that a decree passed in accordance with the terms of a compromise is binding upon the parties to the compromise and constitutes a *res judicata*. MUHAMMAD ISMAEL KHAN v. ABDUL RAHMAN KHAN, **2 O.C. 28.** [*Cons. and R.*, 7 O.C. 169.]

(39)—*Previous decree of Revenue Court—Finding against defendant's istimirari rights—Subsequent suit not maintainable in Civil Court to establish such rights.*—Plaintiff sued in this case for the establishment of his istimirari-talukdari rights, alleging his cause of action to arise from the decision by the Collector in a former suit for assessment brought under Act X of 1859. The High Court *held* that the present suit was not maintainable, as the issue raised in it was precisely the issue which was raised and determined in the former suit before the Collector, and, which the Collector was legally competent to decide. MAHOMED AZIM v. RAM KANT CHOWDHRY, **6 W.R. Act X, Rul. 101.**

(40)—*Competent Court--Suit in Reveuue Court to set aside attachment--Subsequent suit in Civil Court to assess rent on same land.*—A suit was brought in the Revenue Court to set aside an attachment for rent, on the ground that such attachment was for rent at a higher rate than was due. The landholder claimed the higher rate under an alleged assessment of Batwara Ameen. The Collector made a decree setting aside the attachment, on the ground that the landholder failed to prove that the higher amount was due. *Held* that the landholder could not maintain a suit in the Civil Court to assess the land at the higher rate claimed for the year for which the attachment had issued, on the ground of prior service of notice of demand of the higher rate, under Bengal Regulation V of 1812, that question having been already adjudicated upon by a Court of competent jurisdiction. REAZOONNISSA KHANUM v. DOYANAUTH JHA, **Marsh, 638.**

(41)—Res judicata—*Former suit under Act* X *of* 1859—*Subsequent suit in Civil Court.*—Where the right to possession as evidenced by the title of the parties was in issue in a former case under Act X of 1859, and the right to possession as between the same parties under their several titles is also the point in issue in the present case in the Civil Court, the causes of action are identical in the two cases and the present suit is barred under s. 2 of Act VIII of 1859. TARA CHAND GHOSE v. RADA MONEE DOSSEE, **5 W.R. Act X, Rul. 9.**

(42)—*Question whether land is rent-free or liable to rent—Decision of Collector—Subsequent suit in Civil Court*—Res judicata, *plea of—Second appeal.*—A decision of the Collector in a suit for rent brought by the Zemindar of a revenue paying estate against an under-tenant, to the effect that the disputed land is *lakhiraj*, is conclusive in a subsequent suit in a Civil Court for a declaration that the land is liable to pay rent. The High Court, in special appeal, ought not to refuse to allow a plea of *res judicata* to be taken before it, by reason of its not having been taken in the Courts below, if it is one which the lower appellate Court ought to have taken up and decided for itself. MOHESH CHUNDER BUNDOPADHYA v. JOYKISHEN MOOKERJEE, **15 B. L. R. 248, Note=22 W.R. 362.**

(43)—Res judicata—*Decision of Revenue Court—Subsequent Civil suit.*—The plaintiff in this case was the proprietor of a resumed *malik* which he purchased from the former owners by a private sale. He took possession and ejected the defendants who brought a suit under the provisions of s. 23, Act X of 1859, to recover possession on the ground that they held the land under a potta from the plaintiff's vendor and that the period of the potta had not expired. The Collector found that they held the land under a potta as alleged by them and directed that they should be restored to possession. The plaintiff brought the present suit in a Civil Court to recover possession of the land, and to set aside the potta propounded by the defendants. *Held* that the present suit was *res judicata* on account of the previous decision by the Collector. HURO LALL SAHA v. SREE TIRTHANUND THAKOOR, **11 B. L. R. 437, Note=13 W.R. 417.** [*R.*, 11 B.L.R. 434.]

(44)—*Act* X *of* 1859, *s.* 27—*Order of Collector for registration of* Shikmee *talookdars—Suit not maintainable in Civil Court to set aside.*—Plaintiffs sued to set aside an order of registration made by the Collector under s. 27 of Act X of 1859 to register the names of the defendants as *shikmee* talookdars in the sherishta of the plaintiff. *Held*, that the determination of the Collector was a decision by a Court of competent jurisdiction and therefore the Court was precluded from taking cognizance of the present suit between the same parties, by s. 2 of Act VIII of 1859. MOONSHEE MAHOMED NOOR BUKSH v. MOHUN CHUNDER PODDAR, **6 W.R. Act X, Rul. 67.**

(45)—*Act* X *of* 1859, *s.* 28—*Reg.* II *of* 1819, *s.* 30—*Resumption and assessment of invalid* Lakhiraj — Res-adjudicata. — That a ryot's holding was of a date prior to 1790 once decided in a zemindar's suit under s. 28, Act X of 1859, is a *res adjudicata* in a subsequent suit under s. 30, Reg. II of 1819, by a zemindar (not being an auction-purchaser). KALEEPERSHAD HOLDAR v. SREEMUTTY SOOBHOGEE DABEA, **1 W.R. 218.**

(46)—*Rent suit*—Res judicata — *Act* VIII (*B.C.*) *of* 1869.—The decision of an ordinary Civil Court in a suit for rent cognizable under Act VIII (B.C.) of 1869 is binding in a subsequent suit between the same parties, for a declaration that the land, the rent of which was the subject-matter of the former suit is

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lakheraj, which raises the same question in a different form. MOHIMA CHUNDER MAZOOMDAR v. ASRADHA DASSIA, **15 B.L.R. 251, Note = 21 W.R. 207.** [*F.*, 22 W.R. 362, 24 W.R. 403 = 1 C. 202; *R.*, 15 B.L.R. 238; *D.*, 9 B. 75]

(47)—*Ss.* 104 (2), 107, *Bengal Tenancy Act* (VIII *of* 1885).—A decision in a proceeding under s. 104 (cl. 2), Bengal Tenancy Act, in consequence of an application made by a landlord for the settlement of rent has, under s. 107, the effect of a decree. The matters decided by such a decision can only be re-opened on an appeal to the special Judge. DURGA CHURN LAL v. HATEEN MANDAL, **29 C. 252 = 6 C W. N. 238.** (23 C. 257, 24 C. 711, *D.*)

(48)—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 106—A question decided by a Revenue officer under s. 106 of the Bengal Tenancy Act is *res judicata* between the same parties in a subsequent suit in the Civil Court. JOYPAL DHOBI v. MOHUNT PALUKDHARI DAS, **2 C.W.N. 491.** (21 C. 378, *D.*; 17 C. 721, *Rel. on*) [*F.*, 27 C. 167; *D.*, 30 C. 339]

(49)—*Act* XVIII *of* 1873 (*N.W.P. Rent Act*), *s.* 95, *cl.* (*n*)—*Decision of title by Revenue Court*—Res judicata.—The determination of a question of title by a Revenue Court, on an application under cl. (*n*), s. 95 of the Rent Act, by a dispossessed tenant, for recovery of the occupancy of land, is *res judicata*, and cannot again be raised in a Civil Court, as the Revenue Court could not have disposed of the application without determining such question of title. (*Per Pearson* and *Turner, JJ.*) *Per Spankie, J.*, and *Oldfield, J., contra.* The jurisdiction of the Revenue Court in the matter of an application under cl. (*n*), s. 95 of the Rent Act, is confined to the determination of the immediate matter of the application, the dispossession of the tenant—otherwise than by law. SHIMBHU NARAIN SINGH v. BACHCHA, **2 A. 200, F.B.** [*F.*, 3 A. 81; *Appr.*, 15 A. 387, F.B.; *R.*, 7 A. 148, 18 A. 270, F.B.]

(50)—*Settlement Officer—Determination of nature and extent of interest of holder of land—Jurisdiction of Civil Courts*—Res judicata—*N.W.P. Land Revenue Act*, XIX *of* 1873, *ss.* 62, 241—*N.W.P. Rent Act, Act* XVIII *of* 1873, *ss.* 19, 95.—The determination by a Settlement Officer as to whether certain lands were held by a person as inferior proprietor at a fixed rent or as a lessee was held to operate as *res judicata* to the same question being raised in the Civil Courts. RUP SINGH v. SUKHDEO, **A.W.N. 1882, 111.** [*Overruled*, 7 A. 224, F.B.]

(51)—*N.W.P. Land Revenue Act, s.* 113—*Decision of Revenue Court*—Res judicata *in subsequent civil suit—Civ Pro Code, s.* 13.—The position given by law to Courts of Land Revenue when determining questions in dispute relating to titles or proprietary rights, under s. 113 of Act XIX of 1873, and passing decision thereon, is the position of a Court of civil judicature of first instance. Its decisions, therefore, have the operative power of those of a Civil Court, and will operative as *res judicata* under the provisions of s. 13 of the Civ Pro. Code, so as to bar the trial, in a subsequent civil suit, of the issues decided by it. HAR CHARAN SINGH v. HAR SHANKAR SINGH, **18 A. 59 = A.W.N. 1895, 164.** [*R.*, 5 A.L.J. 151 N., 6 A.L J. 917; *D.*, A.W N. 1899, 190]

(52)—*N.W.P. Land Revenue Act* (XIX *of* 1873), *ss.* 113, 114, *competency of Revenue Court to decide question of title to rent under—Subsequent civil suit barred by* res judicata—*Civ. Pro. Code, s.* 13.—On an application for partition of common land, under the N.W.P. Land Revenue Act, previously made by the defendant in the present suit, the present plaintiffs had unsuccessfully objected, in the Revenue Court, that the applicant had a right to share only with regard to the proportionate extent of their pattis and not to devide the land into as many equal shares as there were pattis. The present suit was thereon brought in the Civil Court to ascertain the rights of the plaintiffs in the common land. The contention raised by the defendant, on the ground that the proceedings in the Revenue Courts came within s. 113 of the Land Revenue Act (XIX of 1873) and that the decision therein was one under s. 114 of the same Act, was upheld and the suit was held to be barred by *res judicata* under s. 13 of the Civil Procedure Code, because the question of title or proprietary right had been raised and decided in the Revenue Court in its decision on the previous objection made before it by the present plaintiffs. AMIR SINGH v. NAIMATI PRASAD, **9 A. 388 = A.W.N. 1887, 53.** [*R.*, 17 C.P.L.R. 10, 129; *D.*, 16 A. 464.]

(53)—*Rent and Civil Court—N.W.P. Tenancy Act* (II *of* 1901), *ss.* 58 *and* 199—*Orders of ejectment.*—When a Rent Court orders the ejectment of tenant upon one of the grounds mentioned in s. 58 of the Tenancy Act deciding itself under s. 199 of the Act the question of title against him, he is barred, by the rule of *res judicata* from opening the question of title in a Civil Court. SALIG DUBE v. DEOKI DUBE, **2 A.L.J. 334.** (A.W.N. 1904, 100, *Rel. on.*) [*F.*, 4 A.L.J. 53 = A.W.N. 1907, 6 = 29 A. 160.]

(54)—*Bombay Act* VI *of* 1862—*Talukdari village—Alienation thereof—Civ. Pro. Code*, 1859, *s.* 246—Act VI of of 1862 (Bom.) was not passed with the intention of, and furnishes no means for, enforcing forfeitures to Government occasioned by the non performance of conditions in what have been called leases from Government to the Talukdars, but for the purpose of relieving the Talukdars of their debts by vesting the management of their estates temporarily in an officer of Government who is, during that period of management (which could not in any case exceed twenty years—s. 16), to make an allowance out of the annual income of the estate for the decent support of the Talukdar and his family, and to apply the

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balance towards the liquidation and settlement of his debts and liabilities. A mere recital in an Act of Parliament "(and therefore in a Bombay Act)" either of fac or law is not conclusive, and the Court is at liberty to consider the fact or the law to be different from the statement in the recital " (*per Lord Campbell*, C. *H*, in *Reg* v. *Haughton*, (1 El. & Bl. 501, 516.) In Bombay Acts, recitals of facts of a public nature are only *prima facie* evidence of the truth of those facts. It is well-settled law that, if an enactment be good in part and bad in part, and the bad be divisible from the good, the latter shall be regarded as valid and binding. The effect of holding s. 21, cl. 1, in purporting to exclude the jurisdiction of Courts established by Royal Charter, to have been thus far *ultra vires* on the part of the Bombay Legislature, would have been simply to have left the jurisdiction of those Courts untouched. The rest of the Act is most easily separable from that provision, and was, therefore, not in anywise invalidated by it. The question has, however, recently been settled by the Legislature of India: Act XV of 1871, s. 26. *Held*, that the Talukdari Act (Bombay Act VI of 1862) did not affect Talukdari villages, the right title and interest of the Talukdar in which had been sold before that Act came into operation though possession of such villages had not then been obtained by the purchaser. The plaintiff, as mortgagee of a talukdari village, obtained against his mortgagors, the Talukdars, a decree for his dues to be realized by sale of the village, under which decree the village was attached with a view to a sale, on notice of which attachment the Collector presented a petition under s. 246 of the Civ. Pro. Code seeking a removal of the attachment and prevention of the sale. On the Collector failing to appear when the matter came on for adjudication, his application was dismissed. The village was then sold under the decree and was purchased by the mortgagee. When the mortgagee sought to obtain possession of the village, he was resisted by the Collector, whereupon, he after proceedings ineffectually taken by him under s. 269 of the Code, filed a suit against the Collector praying to be put in possession of the village. *Held* that the right of the mortgagee to be put in possession of the village was, as between him and the Collector, *res judicata* by reason of the dismissal of the Collector's application under s. 246 of the Code (to set aside which dismissal the Collector had not filed a suit within the year allowed for that purpose), and that the mortgagee ought, therefore, to have been at once put in possession of the village without further proof of his title. THE COLLECTOR OF AHMEDABAD v. SAMALDAS BECHARDAS, **9 B.H.C. 205** [*R.*, 8 B. 105, F.B., 4 B. 611, 26 B. 757=4 Bom. L.R. 550.]

(55)—*Competency of Court to try subsequent suits.*—A suit by a mortgagee for a declaration of his right to the fruit of trees standing on the land at the time of the mortgage is *res judicata* when such right had been decided by a competent Court in previous suit. MAHSUN ALI v. NIJABAT KHAN, **145 P.R. 1888** [*Overruled*, 20 P.R. 1891, F.B.]

(56)—*Suit to establish right to standing crops on basis of title to land, not cognizable by Provincial Small Cause Court—Decision regarding genuineness of* kobala.—A suit to establish right to standing crops on the basis of title to land on which they are grown is not cognizable by a Small Cause Court. (7 A. 142, 7 C 608, *Rel. on*) A decision regarding genuineness of a *kobala* operates as *res judicata* in a subsequent suit between the same parties with regard to the title to the same land, even though no issue on this point was distinctly raised in the former suit. DHAKHYANI DABEA v. DOLEGOBIND CHOWDHRY, **21 C. 430.** (12 B.L.R 304, *R.*)

(57)—*Civ Pro. Code*, 1882, s. 43—Res judicata—*Decision in a previous suit on original side—Subsequent suit on Small Cause side.*—A decision in a previous suit on the original side of the Court may operate as *res judicata* in a subsequent suit on the SmallCause side of the Court between the same parties. RAJA SIMHADRI APPA ROW v RAMACHANDRUDU, **27 M. 63=13 M L J. 23.** [*Overruled*, 29 M. 195, F.B.=16 M.L.J. 41=1 M.L.T. 25.]

(58)—*Power of Calcutta Small Cause Court.*—The Calcutta Small Cause Court has full power and authority to determine the question of title under a mortgage over attached property, and that question is *res judicata* as between the parties DENO NATH BATABYAL v. NUFFER CHUNDER NUNDY, **26 C. 778=4 C W.N 590.** (18 C. 296, *F.*) [*R.*, 34 C 823.]

(59)—Res judicata—*Small Cause Court decision.*—The decision in a small cause suit can operate as *res judicata*, when the question is litigated a second time in an original suit which admits of a second appeal. NAMASIVAYA GURUKAL v. KADIR AMMAL, **17 M. 168=4 M. L.J 31.** [*F*, 18 M. 189; *R.*, 29 M. 195=16 M.L J. 41=1 M.L.T. 25.]

(60)—*Civ. Pro. Code*, s. 13—*Specific Relief Act* I *of* 1877, s. 42—*Suit for declaration as to membership of tarwad—Suit instituted in Subordinate Court—Prior suit in Munsif's Court—Valuation of suit to avoid jurisdiction—Maintainability of suit.*—Plaintiffs instituted a suit in a Subordinate Court for a declaration that they and defendants had no community of interest with each other and were not members of a tarwad having joint property. Plaintiffs valued the tarwad property at Rs. 3,000. The defendants contended that the suit was barred by a former decision in the Munsiff's Court in which it was held that plaintiffs and defendants belonged to the same family, and that plaintiffs had enhanced the value of the tarwad property so that the present suit might be brought in the Subordinate Court and the effect of the

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—4.—**Competency of Court**—*continued.*

Munsiff's judgment as *res judicata* might be avoided. Defendants further contended that the suit was barred by s. 42 of the Specific Relief Act. *Held* that the value of a suit to have it declared that certian persons are or are not members of the tarwad is the value of the share of the tarwad property which would be allotted to them if a partition were made by consent. In this suit the value of the entire property being Rs. 3,000, the value of the plaintiff's 2/3 share was Rs. 2,000. Plaintiff's suit was therefore triable by the Munsiff and was consequently barred by the decision of the Munsiff in the former suit. Further, the suit was barred by s. 42, Specific Relief Act, as the plaintiffs, in addition to the declaration asked for, were in a position to ask for the further relief of possession of the portion of the property which was in the enjoyment of the defendants under a claim that they were members of the family. PANGA v. UNNIKUTTI, **24 M. 275.** [*R.*, 35 C. 353=12 C.W.N. 359=7 C.L.J. 470.]

(61)—*Civ. Pro Code, s.* 13—*Decree of competent Court.*—Where a person sues for recovery of certain immoveable property, and a third party intervenes by setting up a title under a gift (to this and some other properties) and is made a party, any adjudication, as to the title to the particular property in question becomes *res judicata*, as being the decision of a competent Court; but any adjudication as to the effect of the gift as a whole, set up by the third party, will not be binding in a subsequent suit based on the gift. PATHUMA v. SALIMAMMA, **8 M. 83.** [*Appr.*, 23 C. 415; *R.*, 25 C. 571, 35 C. 353=12 C.W.N. 359=7 C.L.J. 470; *D.*, 29 M. 65.]

(62)—*Civ. Pro. Code, s.* 13—Res judicata—*Decision based upon points of law—Jurisdiction.*—The plaintiffs, on the death of their father, continued a suit originally instituted by him for a declaration that the gift of certain property made to the defendant by her father was void beyond the lifetime of the donor. The Subordinate Judge gave a decree in favour of the plaintiffs, it was affirmed by the District Judge on appeal, and the Judicial Commissioner declined to interfere with it under s. 622 of the Civ. Pro. Code. The plaintiffs subsequently brought another suit against the defendant for possession of the gifted property, or, for a declaration of their title to it, in the Court of the Subordinate Judge, who gave a decree in their favour for possession of the property. The defendant appealed to the Court of the Judicial Commissioner, because the value of the subject-matter of the suit being above Rs. 5,000, the decree of the Subordinate Judge was, under s. 18 of the Oudh Civil Courts Act, as the section now stands, appealable, not to the District Judge, but to the Judicial Commissioner. The principal point for determination was whether the decision of the District Judge in the first suit was, as regards the rights of the plaintiffs to succeed to the property of the donor and as to the validity of the gift by the donor to the defendant, *res judicata*. *Held*, that the dicision in the first suit was *res judicata*. The decision of the District Judge in the first suit was *res judicata*, notwithstanding that it was not appealable to the Judicial Commissioner; and it was none the less *res judicata*, because the District Judge could not try the appeal in the second suit, inasmuch as he could have tried it had it been preferred at the time when the appeal in the first suit was preferred. The word "competent" in s. 13 of the Civ. Pro. Code, means competent to try with conclusive effect, with reference to the jurisdiction of Court at the time the first suit was brought. *Held* further, that a decision upon a particular matter in dispute is conclusive, so far as that dispute is concerned, although it proceeds upon the points of law; but the decision as regards the points of law is not conclusive, where a different matter is in dispute. *Held*, that the plaintiffs were entitled to possession of the property and to recover it without setting aside the gift. DHARMA v. BIKRAM SINGH, **2 O.C. 261.** [*R.*, 5 O.C. 181.]

(63) — Res-judicata — *S.* 13, *Civ. Pro. Code*, 1882 — Ex parte *decree—Court of competent jurisdiction — Fresh cause of action.*—An *ex parte* decree may operate as *res judicata* when it becomes final by being executed, and the time for objections to set it aside has expired. It cannot be shown in a fresh suit that the defendants ha no notice of the previous claim when an application to set aside the decree had been rejected. It is always allowable in a subsequent suit, in which the plea of *res judicata* is set up, to show that the former decision was passed by a Court without jurisdiction. The word "Jurisdiction" as used in s. 13, Civ. Pro. Code, means competency to entertain the suit with reference to its subject-matter and to the powers of the Court. A fresh suit, on a cause of action which has arisen since the decree was passed in the former suit and which is not affected by it, is not barred. CHUNI LAL v. MUSSAMMAT AMIR BIBI, **P.L.R. 1900, p. 431. =39 P.R. 1900.**

(64)—*Court in the former suit ought to have had concurrent jurisdiction both as regards pecuniary limit and subject-matter—S.* 209, *Civ. Pro. Code, inapplicability of, to mortgage suits.*—In a suit by a puisne mortgage for sale, brought in a Munsiff's Court for less than Rs.2,500, the prior mortgagee was made a party defendant under s. 85 of the Transfer of Property Act. The decree was to the effect that, out of the amount to be realised by the sale of the property, the prior mortgagee was to be paid the principal amount due on his mortgage and interest at the contract rate up to the date of the plaint in that suit and at 6 *per cent. per annum* from that date. The property was not sold in that suit because the decree amount was otherwise paid. The prior mortgagee now sued to recover the amount due on his mortgage with interest at the contract rate, and the whole amount having exceeded Rs. 2,500,

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——4.—**Competency of Court**—*continued.*

the suit was instituted in the District Court. The District Judge held that the suit, so far as it concerned interest at the rate higher than 6 *per cent. per annum*, which was the amount awarded in the previous suit, was barred by *res judicata* by reason of the prior decree. *Held*, there was no bar by *res judicata*: *Per Subrahmania Ayyar, J.*—The doctrine of *res judicata* would not apply because the Munsiff in the previous suit was not a Court of competent jurisdiction to decide the subsequent suit, which was beyond his pecuniary jurisdiction; further, though the subject-matter, *viz.*, the mortgaged property was the same in both the suits, the matters of relief were different, because, for the doctrine to apply the Court must have had concurrent jurisdiction both as regards the pecuniary limit and the subject-matter (9 I.A. 197, 12 I.A. 23, *F.*); on the contention that, when the prior suit was decided, the present plaintiff's claim was limited to an amount below Rs.2,500, though, by the addition of subsequent interest it went over Rs 2,500, *held* that the augmentation of the claim by subsequent interest will prevent the operation of estoppel. (10 C. 697, 8 M. 83, *D*) *Obiter*—The awarding of the subsequent interest on plaintiff's mortgage in the previous suit was perhaps in the exercise of the discretion of the Court under s. 209, Civ. Pro. Code, which, however, does not apply to mortgage suits. *Per Sankaran Nair, J.*—There was no judicial determination in the previous suit that the present plaintiff was only entitled to subsequent interest at 6 *per cent. per annum.* The rate was fixed as a matter in the discretion of the Court. Further, that rate was recoverable by the present plaintiff only if the property had been sold in execution in that suit. That decision did not prevent the present plaintiff's enforcing his contract rate in a suit of his own. GIRIYA CHETTIAR v. SABAPATHY MUDALIAR, **29 M. 65.**

(65)—*Plea of* res judicata—*Competency of Court.*—The plea of *res judicata* in a suit cannot prevail when the former judgment relied on was that of a Court not competent to try the subsequent suit. VALIAPPA NAYAR v. PARU NETHIAR, **9 M.L J. 196.**

(66)—*Act* VIII *of* 1859, *s.* 2—*Court of Rajah of Independent Tipperah, not competent Court.*—The Court of the Rajah of Independent Tipperah is not a competent Court within the meaning of s. 2, Act VIII of 1859 MAHOMED AHMED v. ALIBUR GAZEE, **10 W.R. 337.**

(67)—*Evidence— Genuineness of document—Magistrate's view whether binding on Civil Court.*—A Civil Court is not bound to adopt the view of a Magistrate as to the genuineness or otherwise of a document. NITYANUND SURMAH v. KASHENATH NYALUNKER, **5 W. R. 26.** [*R.*, 23 C. 610.]

(68)—*Evidence—Suit for damages — Conviction.*—A conviction in a criminal case in respect of an act is not conclusive in a civil suit for damages in respect of the same act. BISHONATH NEOGY v. HURO GOBIND NEOGY, **5 W. R. 27.** [*R.*, 23 C. 610.]

(69)—*Suit for custody of wife—Adjudication of criminal Court on question of marriage*—Res judicata.—In a suit for the custody of one S, alleged by the plaintiff to be his wife, *held* the fact that, in a criminal case under s. 480, I.P. C., brought by the plaintiff against the defendant, the Court had found that the plaintiff was not the lawful husband of S, did not operate as *res judicata* on the question of marriage. GHOLAM HOSEIN v. MAHOMED KHAN AND MUSSUMMAT SARDARI, **56 P.R. 1877.**

(70)—*Competent Court—Agent to Governor-General, Court of—Ben. Reg.* XIII *of* 1833, *s.* 2—*Order of Agent previous to the Regulation.*—By Reg. XIII of 1833, s. 2, the Courts of Dewany Adawlut of zillahs Ramghur and Jungle Mehals were abolished. By the fourth section, the administration of civil and criminal justice was vested in an officer appointed by the Governor-General in Council, to be denominated agent to the Governor-General. By the 5th section authority was conferred on the Governor-General to determine in Council, *inter alia*, "to what extent the decision of the Agent in civil suits shall be final." In 1834, by an order of the Governor-General, it was ordered that no appeal should lie from the orders of the Agent to the Sudder Court. *Held* that the order of an Agent within the districts to which the Regulation applied, made previous to the passing of the Regulation, declaring A to be the rightful heir of B, was not affected by the Regulation, and was not judicial in its nature; and that therefore, in a subsequent suit relating to the inheritance to the same property, the heir of A could not set up the order as conclusive. BINODE KOOMAREE v. PURDHAN GOPAL, **Marsh 80 = W.R. F.B. 26 = 1 Hay 148.**

(71)—*Trial of first suit without jurisdiction—Effect of decision on such trial on second suit based on same cause of action— Political expediency, on ground for dismissal of suit—Jurisdiction of High Court to transfer suit from file of Agent to Governor at Vizagapatam—Consent of parties, how far cures defect of jurisdiction.*—A suit filed in the Court of the Agent of the Governor at Vizagapatam was transferred by the High Court (on the motion of the defendant and without any opposition on the part of the appellant) to the District Court of Vizagapatam. That Court dismissed the suit on the ground that the evidence in the case did not support the plaintiff's claim. The decree became final, no appeal having been preferred against it. Later on, the High Court of Madras held (23 M. 329, *R.*) in connection with some other proceedings, that it had no jurisdiction to order the transfer of a suit from the file of the Court of the Agent to the Governor at Vizagapatam and that no amount of consent of the parties could cure the

Res Judicata—continued.

— 4.—Competency of Court—*continued.*

defect of jurisdiction. Thereupon, the unsuccessful plaintiff in the first suit filed a suit in the Court of the Agent to the Governor basing it on the cause of action on which the first suit had been based and treating the decree of the District Court as a mere nullity because the trial was without jurisdiction, the transfer of the suit to that Court being, in its inception, one without jurisdiction. The Agent dismissed the suit on the ground of *res judicata*. An appeal preferred to the Governor of Madras in Council was dismissed on the ground of *res judicata*, as also on the ground that to allow it would be politically inexpedient. On appeal to the Privy Council, *held*, (1) that the decision of the District Court in the first suit did not operate as *res judicata*, because the District Court had no jurisdiction at all to try the suit, the transfer thereof to such Court being, according to the subsequent view of the High Court, one without any jurisdiction and (2) that the legal right to bring a suit and to have it determined by the proper Court created for the purposes of determining such suits, cannot be based upon considerations of policy or expediency which were urged by the Governor-in-Council in his judgment under appeal. SRI VIKRAMA DEO MAHARAJALU GARU v. GUNAPURAM DEENABHANDHU PATNAICK, **9 C.W.N 257=7 Bom L.R. 97=2 A.L.J. 135 =28 M. 42, P.C.=32 I.A. 45=8 Sar. 763.**

(72)—*Jurisdiction - Consent of decree* ultra vires—*Plea of* res judicata—*Competency of inferior Court to ignore decree of superior Court.*—Where the jurisdictional value of a suit was over Rs. 5,000 but the Divisional Judge entertained an appeal and passed a consent decree, and the same was subsequently pleaded as a bar to another suit. *Held*, (*i*) that the plaintiff was entitled to ignore the consent decree as a nullity and the defect in jurisdiction was not curable by consent of parties; (*ii*) (*a*) that the Divisional Judge had not definitely decided that he had jurisdiction, but under a mistake of fact assumed a jurisdiction he did not possess. However, (*b*) that "even if the Divisional Judge had definitely decided the point of jurisdiction, there was no impropriety in a decision by an inferior Court to the contrary not in the same but in a collateral proceeding." Accordingly, that the consent decree was no bar to the suit. PARWA v. MUSST. SANGARAN, **37 P.R. 1903**. (80 P.R. 1893, 13 B. 650, *R.*; 9 A. 191=14 I.A. 160, P.C., *F.*)

(73)—*Civ. Pro. Code*, 1882, s. 13—Res judicata—*Suit cognizable by inferior Court—Opinion on unnecessary issues.*—In a suit before the Munsif for recovery of land, the value of which was under Rs. 1,000, it appeared that the plaintiff had previously brought his suit for the same land in the Court of the Subordinate Judge, and the Subordinate Judge had framed issues (1) as to the value of the suit and (2) as to the sanity of the plaintiff and his possession of the property, taken evidence on all the issues and dismissed the suit

Res Judicata—continued.

—4.—Competency of Court—*continued.*

on the first issue, but expressed his *opinion* that the other issues also should be decided against the plaintiff. *Held*, that there was no decision in the first suit upon the issues raised in the case, other than the issue as to the valuation of the suit, so as to operate as *res judicata*. RAM GOBINDJHA v. MUNGUR RAM CHOWDHRY, **13 C.L R. 83.** (25 W.R 219, 5 C. 188, *D.*)

(74)—*Previous suit cognizable by Munsif tried and determined by him—Subsequent suit cognizable only by Sub-Judge and tried by him.*—The judgment in the former suit, cognizable by the Munsif and tried and determined by him is no bar as *res judicata* to the trial of the subsequent suit cognizable by the Subordinate Judge and tried by him. HARIDAS ACHARJIA CHOWDHRY v. BARODE KISHORE ACHARJIA CHOWDHRY, **27 C. 38=4 C.W.N. 87.**

(75)—Res judicata—*Property within jurisdiction of different Courts - Splitting of claim—Different suits.*—The decision of the Lucknow Civil Court in the former suit in respect of property situated within its jurisdiction is no bar to the present suit for the property situated at Allahabad. There could not, under the circumstances under which the former suit was tried in the Lucknow Civil Court, be legally any adjudication in respect of the property situated at Allahabad, and the decree passed by the Lucknow Civil Court cannot be executed in respect of that property. There was no splitting of the claim as far as the plaintiff was concerned as he sued in the former suit for his share in the entire estate situate in Lucknow and Allahabad. THAKOOR PERSHAD v. KALIKA PERSHAD, **2 Agra 104.**

(76)—*Civ. Pro. Code* (XIV *of* 1882), *ss.* 13, 43—*Suits under hypothecation bond—Previous suit in Court without jurisdiction in respect of hypotheca—Subsequent suit in proper Court to enforce security, not barred by* res judicata *or* s. 43.—The holder of a hypothecation bond instituted a suit, to recover the principal and interest thereunder, in a Court having jurisdiction, over the obligor's place of residence, where the bond had been executed, but not over the locality wherein the hypotheca was situate He asked, however, for a decree against the property as well as against the defendant personally. Awarding the plaintiff a personal decree in respect of the interest accrued under the bond, the Court dismissed the rest of his claim. The fact that he had prayed in his plaint for enforcement of the security, a relief which the Court had no jurisdiction to grant, could not preclude him from afterwards suing for such relief in a competent Court. The matter could not operate as *res judicata* under s. 13 of the Civil Procedure Code, since the above Court was not one of competent jurisdiction to have tried the suit, so far as it related to the relief against the hypotheca. Further, the plaintiff had a right to sue the obligor for the debt under the bond in the Court in whose jurisdiction the mortgagor resided, and the

Res Judicata -continued.

——4.—**Competency of Court**—*continued.*

mere fact that in such suit he erroneously claimed the relief, against the hypotheca, which the Court had no jurisdiction to give, would not bring him within the bar of s 43 of the Code. NARASINGA RAU v. VENKATANARAYANA, **16 M. 481.**

(77)—*Will—Letters of Administration—Suit by widow—Legatee made party—Subsequent grant of Letters of Administration—Suit by legatee—Whether doctrine of* res judicata *applicable.*—B executed a Will and died leaving him surviving his widow (defendant No. 1), his second sister (plaintiff) and a son of his third sister, defendant No. 3. Under the Will, plaintiff was entitled to the estate of B, and defendant No. 3 was the executor who took possession of the estate after B's death. The widow then brought a suit for possession against the nephew and the sister. The latter in her written statement said that she had heard of a will under which she was entitled to the property left by B. The widow then entered into a compromise with the nephew executor, and a decree by consent was made against the latter and an *ex parte* decree was made against the sister. The sister then obtained Letters of Administration with the copy of the Will annexed and sued to recover possession on the strength of her title as legatee: *Held*, that this suit was not barred by *res judicata*, that the Court in which the first suit was brought was not competent to determine the question of the genuineness of the Will, and as Letters of Administration were not then in existence, it was impossible for the plaintiff to establish her title thereunder. A litigant is not bound to assert his title under a Will till it has been proved. AKHIL SUNDARI DASI v. NANIBALA DASI, **8 Ind. Cas. 28.**

(78)—Res judicata — *Court of competent jurisdiction—Finding by District Munsif—Not* res judicata *in suit before District Court —Performance of service—Rights and duties—Difference between—Power to fine subordinates — Strict proof — Costs — Apportionment.*—Where, in a prior suit before the Court of District Munsif, the plaintiff's right to the Dharmakartaship was found against, and where in the present suit before the District Court, the same question arose; *Held*, that the finding in the prior suit did not operate as *res judicata*. The term 'Dharmakarta' as ordinarily understood in the phraseology of religious institutions practically means *trustee*. (22 M. 189, *R.*) Where the plaintiff laid no claim to trusteeship with the defendant or any trusteeship at all, and where he simply claimed that he is entitled to the designation of 'Dharmakartha' (the phrase being used in a special and restricted sense), and that with the designation go certain rights and duties of the kind usually associated with the office of 'Dharmakartha' in its conventional acceptation, *held*, that the term 'Dharmakarta' is susceptible of this limited interpretation (29 C. 707, *R.*). The distinction

Res Judicata—continued.

—— 4.—**Competency of Court**—*continued.*

between rights and duties is, in most cases, a distinction without a difference There is such a thing as right to perform a duty; where a duty is cast upon a man in virtue of his connection with an institution or an abstract personality (as distinguished from a specific individual who might absolve him from performance), and where it is primarily for the benefit of such an institution or personality, he may reasonably claim the aid of law to prevent his being obstructed in the performance of the same. On the other hand, in conceding such a right, it must be borne in mind that it is granted in the interests of the institution or abstract personality and not of the individual claiming it, and that, where the right has ceased to be beneficial to the former, it should be refused The right to fine a subordinate should be strictly made out and is by no means to be presumed to attach to the superior office. Owing to the peculiar nature of the disputes and the necessarily arbitrary manner in which items had to be valued in this case, *held*, it is equitable to direct each party to bear his own costs. SRIMAT PARAMAHAMSA PARIVRAJAKACHARYA PERIA KOIL KELVI APPAN SATAGOPA RAMANUJA PEDDA JIYANGAR VARU v. PRAYAGA DOSSJI VARU, **10 M.L.T. 133=21 M.L.J. 730.**

(79)—*Decision of Revenue Court - No* res judicata *in civil suit.*—The decision of a Revenue Court does not operate as *res judicata* in a civil suit. OLIVER v. MARKANDA AIYAN, **3 M.L.J. 263.** (7 M. 61, *R.*)

(80)—*Title, Suit for declaration of—Registration of plaintiff's vendor's name as joint sharer —Estoppel.*—A decree by the Revenue Courts to register the name of the vendor of the plaintiff in a suit for a declaration of title, as a joint sharer of the estate and the not taking of any steps during 12 years to set aside that decree cannot operate as an estoppel NITTANUND ROY v BYDONATH MOHAPATTUR, **W.R. 1864, 350.**

(81)—Res judicata—*Suit by lessee in Revenue Court—Subsequent suit by another lessee in Civil Court.*—Where a lessee sued the zemindar in the Revenue Court for possession and obtained a decree, and the present plaintiff was not a party to that suit, the decree passed in that suit would be no bar to the maintenance by the plaintiff, another lessee, of the present suit in the Civil Court to obtain possession against both the zemindar and the first lessee. RUN SINGH v. MAHOMED ABID, **2 Agra 127.**

(82)—*Suit for rent in Revenue Court—Dismissal—Subsequent suit in Civil Court to establish title and possession with mesne profits—Maintainability.*—The dismissal of a suit for rent brought in a Court of Revenue is no bar to a subsequent suit by the plaintiff in the Civil Court for establishing his title and for obtaining possession with mesne profits. GOUR HUREE DOSS v. MUTTEEOOLLAH, **1 W.R. 99.**

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——4.—Competency of Court—*continued.*

(83)—*Former suit in Court not competent to try subsequent suit.*—The judgment in a suit which decides merely questions of rent, pronounced by a Court not having jurisdiction to decide the question of title to the property itself, cannot be regarded as *res judicata* in a subsequent suit brought to decide the question of title. RAJAH KEHTER KRISTO MITTER v. KUMAR DINENDRA NARAIN ROY, **3 C.W.N. 202.** (12 I.A. 23, *F.*)

(84) — Res judicata — *Entries in revenue papers, based on possession—Question of title raised in Civil Court.*—Where the Revenue Court refused to amend an entry in the revenue papers, such adjudication, being necessarily based solely on the fact of possession, cannot operate as *res judicata* on a question of title subsequently raised in a Civil suit. KALIANI v. DASSU PANDE, **20 A. 520 =A.W.N. 1898, 136.** (19 A. 452, *R.*) [*R.*, 23 A. 360, 23 A. 481.]

(85)—*Decision on title by Revenue Court—Denial of tenancy—Payment of rent—Estoppel.*—The decision by a Revenue Court in favour of the existence of the relation of landlord and tenant, in a suit in which such relation is denied and an independent title claimed, is no bar to a civil suit based on such title. [*Diss.*, 13 M. 287; *R.*, 26 A. 468=A.W.N. 1904, 109.] Payment of rent in pursuance of a decision passed without jurisdiction by a Revenue Court, and omission to appeal from such decision, do not estop a person from denying his tenancy or asserting his title before a Civil Court. DEBI PRASAD v. JAFER ALI, **3 A. 40.**

(86)—*Decrees of Revenue Courts.*—The circumstances of the holding of a tenant may vary in each year, and the power to sue in Revenue Courts, to enforce the acceptance of a patta, is limited to the contract for the year, for which patta is issued, so that a decree, obtained by the landlord in a previous year, enforcing the acceptance of a patta, is no bar to a suit by the tenant, for a declaration of the rates for the next fasli. A Revenue Court in this Presidency, has no power, in suits for the enforcement of the acceptance of the patta, to determine title otherwise than incidentally to the limited jurisdiction conferred on it. RAMA v. TIRTASAMI, **7 M. 61.** [*F.*, 17 M. 106; *R.*, 3 M.L.J. 263, 20 M. 392, 21 M. 482, F.B.; *D.*, 13 M. 287.]

(87)—*Civ. Pro. Code, s.* 13—Res judicata—*Decision of Revenue Court—Second suit on title in Civil Court.*—The decision by a Revenue Court of a question of title is merely incidental and no bar to a fresh suit on title in a Civil Court. GANGARAJU v. KONDIREDDISWAMI, **17 M. 106=4 M.L.J. 24.** (7 M. 61, *R.*) [*F.*, 124 P.L.R. 1908=73 P.W.R. 1908=12 P.R. 1909; *R.*, 20 M. 392, 17 M.L.J. 553; *D.*, 21 M. 482, F.B.]

(88)—*S.* 13, *Civ. Pro. Code*, 1882—*Question of title in rent-suit.*—A decision in a rent-suit brought by a plaintiff against a person, who i

Res Judicata—continued.

——4.—Competency of Court—*continued.*

alleged to have been his tenant in respect of certain land, does not operate as *res judicata* in subsequent suit brought by the same plaintiff for establishment of title to his land, not only against the tenant, but also against the person whose title as landlord the tenant defendant had set up in the rent-suit. DWARKANATH ROY v. RAM CHAND AICH, **26 C. 428, F.B.=3 C.W.N. 266** [*F.*, 6 C.W.N. 66; *R.*, 54 P.R. 1904, 10 C.W.N. 820.]

(89)—*Revenue Court—Decision as to rent—Declaration of title, Suit for, in Civil Court—Jurisdiction of Civil Court.*—Notwithstanding the decision of a Revenue Court that, for a certain year, a party is liable as another's tenant for rent of certain lands, the tenant is at liberty to sue in a Civil Court to obtain a declaration of title on his general civil rights, either as proprietor by purchase or mokuraridar. The decision of the Revenue Court on title is binding only for the purposes of the rent suit. JUDDOONATH SEIN v. RAM COOMAR CHATTERJEE, **9 W.R. 359.** [*R.*, 18 A. 270= A.W.N. 1896, 59, F.B.]

(90)—*Revenue Court—Determination of title—Civil Court—Res judicata.*—In previous proceedings before a Revenue Court between the same parties, the Revenue Court had to decide whether the appellants were entitled to any share of the produce of a grove and whether any such share was paid in past years. For the respondents, it was contended that the trees stood on a portion of a rent-free plot, and though the land had been resumed and assessed, the grove was not. The respondents also contended that they owned the groves. The Revenue Court had held that they owned the trees. *Held* that this finding of the Revenue Court did not bar the present suit to try the question of right, with which the Revenue Court had only been incidentally concerned, not being a competent Court to determine questions of title except as to land and between persons making conflicting claims thereto. LALA MAL v. SALAR BAKHSH, **A.W.N. 1881, 82.** (2 A. 260, *D.*)

(91)— *Revenue Court deciding question of title—Res judicata.*—A question of title which has been decided in a Rent Court and which it was absolutely necessary for the Rent Court to decide before it could come to a decision between the parties to the case before it, may again be litigated in a civil suit RANI KISHORI v. RAJA RAM. **26 A. 468.** (3 A. 40, 2 A. 428, 6 A. 403, A.W.N. 1902, 220, *R.*; A.W.N. 1901, 49, 19 A. 101, *D.*) [*R.*, 7 C. L. J. 202; *D.*, 5 A. L. J. 407=A. W. N. 1908, 192 = 30 A. 470.]

(92)—*Question of title incidentally tried in revenue suit—Decision of Revenue Court declaring invalidity of title, no bar to suit in Civil Court to establish title.*—The Principal Sudder Ameen had proceeded on the ground that a decision of a Deputy Collector under Act

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——4.—Competency of Court—*continued.*

X of 1859, incidentally trying a question of title for the purposes of a suit under that Act, was final and conclusive, but, the High Court was of opinion that he was in error with respect to the weight which he allowed to such a decision, which could not be deemed to be final but to be good only for the purpose of that suit and not capable of precluding the institution of a suit in the Civil Courts founded upon a title declared bad by the Revenue Court's decision. DOSS MONEE DOSSEE v. HURONATH ROY, **4 W.R. 2.**

(93)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *present Code*)—Res judicata—*Title, question of, raised in a rent suit.*—Where the question of title was not directly and substantially in issue between the parties in the previous suit for rent in which the issue was as to whether the relation of landlord and tenant existed between the parties, the decision in the rent-suit does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title. NITYA NUNDA SARKAR v. RAM NARAIN DAS, **6 C.W.N. 66.** (26 C. 428, *F.*; 15 C. 756, *D.*) [*F.*, 54 P.R. 1904.]

(94)—*Civ. Pro. Code, s.* 13—*Rent Court deciding question of title.*—Although it is necessary for an Assistant Collector hearing a suit for profits, or for rent, or any suit which under the Rent Act he is competent to hear, to decide every question, whether of title or otherwise, which may be raised before him, he decides such questions only incidentally and for the purpose of arriving at a correct decision on the matter in dispute between the parties litigating before him, such a decision, however carefully and conscientiously arrived at, cannot be treated as *res judicata* in a subsequent suit in which the proprietary title to the land, the profits of which were in dispute before him, is in question. ASHRAF-UN-NISSA v. ALI AHMAD, **26 A. 601.** [*R.*, 27 A. 569=A.W.N. 1905, 103=2 A L.J. 283, 6 A.L.J. 527 ; *D*, 30 A. 470=5 A.L.J. 407=A.W.N. 1908, 192.]

(95)—*Collector's decision with regard to possession, civil suit to try title not barred by.*—A decision passed by a Collector on a question of possession and of the right to receive rent, does not bar an action in the Civil Courts to try the title of the parties. KALI DASS GHOSE v. CHANDRA MOHINI DASI, **8 W.R. 68.**

(96)—*Civ. Pro. Code*, 1859, *s.* 2—*Rule in* Duchess of Kingston's Case—*Applicability to India—Judgment of Revenue Court*—Res judicata.—There is nothing technical or peculiar to the law of England in the rule laid down in the *Duchess of Kingston's case.* A, as vendee of certain property, brought a suit in the Revenue Court against B the vendor for arrears of rent, the claim being based on a *kabuliyat.* B set up an *ikrarnamah* (said to have been simultaneously executed with the sale deed) under which he claimed to hold a certain portion of the land rent-free. This *ikrarnamah*

Res Judicata—continued.

——4.—Competency of Court—*continued.*

was denied by A. The *kabuliyat* not having been proved, the suit was dismissed by the Revenue Court which held the *ikrarnamah* to be valid. B subsequently sued for redemption contending that the sale-deed and the *ikrarnamah* simultaneously executed constituted a mortgage. The question arose whether the finding in the previous suit with respect to the *ikrarnamah* was not *res judicata* and whether A could not question its validity. *Held* that there was no question of *res judicata.* The ultimate decision of the claim for rent did not turn upon the validity of the *ikrarnamah.* But if the judgment of the Revenue Court had been final in the matter before it, its incidental finding that the *ikrarnamah* was a valid instrument would not be conclusive between the parties and its decision was not that of a Court competent to adjudicate on a question of title, for, it had only a special jurisdiction to try summary suits for the recovery of rent. KHUGOWLEE SINGH v. HOSSEIN BUX KHAN, **7 B. L. R. 673=15 W. R. P. C. 30=5 M.L.J. 146=2 Sar 645=2 Suther. 404.** [*R.*, 19 W. R 322, F.B., 24 W. R. 154, F. B.=15 B.L.R. 238, 6 C. 406=7 C. L. R. 251. 9 C. 439, 9 B. 75, 18 A. 270, 7 C. L. J. 202]

(97)—*Suit for rent, dismissal of, for want of jurisdiction—Subsequent suit for declaration of right to rent, whether maintainable in Civil Court.*—A previous suit for rent brought in the Collector's office had been dismissed on the ground that plaintiff did not show himself to be the *de facto* landlord in possession and that the Revenue Court had therefore no jurisdiction. The right to rent had not ever been tried in the Revenue suit and the High Court was of opinion that there was thus no reason why the declaration of right to rents for the future should not be asked for in the Civil Courts. DHURONY MOJOOMDAR v. BISSAMBUR MOOKERJEE, **2 W.R. Act X, Rul. 103.**

(98)—*Surety on behalf of lessee—Suit against lessee and surety in Revenue Court—Subsequent suit in Civil Court against surety.*—A lessee's wife became security for the rent. On default in payment of the rent, the lessor sued the lessee and the surety in the Revenue Court and got a decree for the amount. But the High Court set aside the decree as against the surety, holding that the Revenue Court had no jurisdiction under Act X of 1859. Subsequently, the lessor sued the surety in the Civil Court. *Held* that the proceedings instituted in the Revenue Court were no bar to the entertainment of the present suit against the surety. MUSSUMAT RANEE GUNESH KOOER v. MUSSUMAT OOMDUT-OON-NISSA BEGUM, **6 N.W.P. 77.**

(99)—*Jurisdiction—Civil Court—Suit for declaration of ryot's title as* lakherajdar—*Decree for rent in Revenue Court*—Res judicata.—A suit was filed in a Revenue Court against a ryot for arrears of rent under a *kabuliyat.* The ryot pleaded that the land was *lakheraj.* The Court,

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——4.—Competency of Court—*continued.*

however, passed a decree for rent against the ryot. Now the ryot brought the suit in the Civil Court for a declaration of his title as *lakhirajdar* in certain land. *Held* that the Civil Court had jurisdiction to re-open the question and try the suit. The decision of the question of the ryot's title in the Revenue Court is not final and conclusive. TARA CHAND MYTEE v. NILAMBUR MUNDUL, **3 W. R. 227.** [*R.*, 12 C.L.R. 38.]

(100)—*Evidence—Chitta—Admissibility*—Res judicata—*Rent suit—Subsequent title—Suit.*—A decision in a rent suit does not operate as *res judicata* in a subsequent suit brought for establishment of title to land HARI NARAIN v. KHETRA SARDAR, **8 Ind. Cas. 715.** (10 C.W.N. 820, 26 C. 428, 3 C.W.N. 266, *R.*)

(101)—*Civ Pro. Code, Act* XIV *of* 1882, *s* 13—*Tender of patta—Revenue Court.*—The decision of the Revenue Court in summary proceedings on a question of tender of pattas is not *res judicata* in a suit in a Civil Court for rent for the same fasli, for the Revenue Court is not competent to try the subsequent suit. RANGAYYA APPA RAU v. RATNAM, **20 M. 392.** [*R.*, 21 M. 482, F.B., 31 M. 62=3 M.L.T. 186 =17 M L.J. 601 ; *D.*, 27 M. 65.]

(102)—*Act* VIII *of* 1859—*Suit for rent—Jurisdiction of Collector*—Res judicata.—In a suit brought in the Collector's Court for rent, the defendant, the tenant, set up a *mukurrari* patta which the Collector disbelieved. *Held* that that was not conclusive in a second suit in the ordinary Civil Court between the same parties in which the *mukurrari* patta was again put forward inasmuch as the Collector had no jurisdiction to try the question of *mukurrari* right between the parties otherwise than so far as it might be incidental to the question of rent due or not due which was before him. MEER BABUR ALI v. SHAIKH DOWLUT ALI, **15 B.L.R. 242, Note=19 W.R. 217.** [*R.*, 15 B.L.R. 238.]

(103)—*Enhancement of rent—Decree fixing no term—Effect—Act* VIII *of* 1859, *s.* 2—Res judicata—*Suit for* kabuliat—*Subsequent suit for declaration of right to hold land in lieu of maintenance.*—Where a decree in a suit for a *kabuliyat* at an enhanced rent fixes no term, the *kabuliyat* executed is inoperative after the year is out. As a suit for a declaration of the plaintiff's right to hold the lands in dispute in lieu of maintenance on payment of quit-rent to the Zemindar, cannot be tried by a Collector, a suit of this nature and a suit for delivery of a *kabuliyat* do not and cannot arise out of the same cause of action, and the question of *res judicata* does not arise in such suits. RAJAH KRISTO CHUNDER MURDRAJ v. POOROSUTTUM DOSS, **15 W.R. 424.**

(104)—*Decree passed by Court without jurisdiction, not operative as* res judicata *barring subsequent suit.*—In this suit for enhanced rent, the Deputy Collector dismissed the claim for enhancement, and on appeal wrongly taken to the Collector, whereas it lay to the Judge, the plaintiff's claim was decreed in full. On an attachment for rent at the new enhanced rate, plaintiff instituted the present suit to remove it. The Deputy Collector dismissed the claim. Plaintiff appealed to the District Judge who dismissed the appeal. On special appeal, the High Court *held* that the lower Court's view of the decision of the Collector in appeal was erroneous, the same being without jurisdiction and therefore not binding on the parties. The present claim to remove the attachment based on the decree in such appeal to the Collector, which was without jurisdiction, was therefore one which should have been tried and disposed of on the merits. KALKA PARSHAD v. KANHAYA SINGH, **7 N.W.P. 99.** [*F.*, 9 C.W.N. 956=2 C.L.J. 384 ; *R.*, 38 C. 639.]

(105)—Res judicata—*Civ. Pro Code, s.* 13—*Application to eject tenant for building on land—Suit for demolition of building.*—The decision of a Revenue Court, disallowing an application by the landlord to eject a tenant because he has built on the land, cannot bar, under s. 13 of the Civ. Pro. Code, a suit in the Civil Court to have the buildings demolished. AMRIT LAL v. BALBIR, **6 A. 68=A.W.N. 1883, 212.** [*Overruled*, 23 A. 486, F.B.; *Appl.*, 8 A. 446.]

(106)—*Competency of Civil Court to decree ejectment.*—The suit was in respect of some land admittedly the holding of P. At P's death, the Zemindar leased the land to K, who held for three years, and subsequently he leased it to the plaintiff and the plaintiff put in the defendants as his *shikmis* or sub-tenants. The plaintiff afterwards took proceedings in the Revenue Court to eject the defendants. The defendants objected that they were not his tenants but tenants of the Zemindar. The Revenue Court allowed the objection and dismissed the plaintiff's claim. The plaintiff thereupon instituted the present suit in the Civil Court to have it declared that he was the tenant-in-chief. It was contended for the defendants that the decision of the Revenue Court finally decided that the defendants were tenants-in-chief of the land, and next, that assuming that the plaintiff's right was established, he could not obtain a decree in a Civil Court to eject a tenant. *Held* that neither of the pleas had any force, that the question in the Revenue Court was not as to the class of tenant, whether the defendants were tenants of a particular class but whether they were tenants at all, that by their defence they raised the question of title and of their respective rights in the land, and the Revenue Court was not competent to decide this question, that the Civil Court was quite competent to decree, ejectment in a suit brought as that was, where the defendants' own act had determined the tenancy, and he was in the position of a trespasser. ARJAN v. RATTU, **A.W.N. 1886, 122.** [*R.*, 18 A. 270, F.B.]

Res Judicata—continued.

——4.—Competency of Court —*continued.*

(107) —*Civ Pro. Code, Act* VIII *of* 1859, s. 2—*Suit for ejectment—Dismissal of suit on ground that defendant was tenant—Subsequent suit for same relief—Notice to quit not given—Maintainability of suit* —Plaintiff sued to eject the defendant from possession of certain land on the allegation that he was now a trespasser. In a previous suit against the defendant for the same relief it was decided that the defendant was not a trespasser, but a tenant rightly holding possession of the land The trespass complained of in the present suit was of a later date than that which was the cause of the complaint in the former suit. *Held*, that, though the suit was not prohibited by s. 2, Act VIII of 1859, still as the present possession was in continuation of the possession, which was held in the former suit as justified by the relation of landlord and tenant, and no notice to quit was given to the defendant putting an end to that tenancy, the suit was not maintainable and was liable to be dismissed. HEERA RAWUT v. RACHA RAWUT, **22 W.R 115.**

(108) — *Pottah — Genuineness — Decision by Collector—Civil Court to determine genuineness independent of Collector's decision.*—A Judge ought not to take into consideration the finding of a Collector as to the genuineness of a lease, together with the appearance of the document and the fact of its having been filed 28 years previously. The Judge ought to determine the question of genuineness independently of the decision of the Deputy Collector. UNNODA PERSHAD MOOKERJEE v. SURENDRA NATH PAL CHOWDHRY, **20 W.R. 105.**

(109) —*Civ. Pro. Code, Act* XIV *of* 1882, *s.* 13 —Res judicata —*Decision by Revenue Court as to genuineness of document Suit for declaration in Civil Court.*—A decision by a Revenue Court as to the genuineness of the counterpart of a lease produced in a suit for rent, is no bar under s. 13 of the Civ. Pro. Code, to a trial in a Civil Court of the same issue in a suit for a declaration that the instrument was not a genuine one, since the Revenue Court could not have tried the later suit. S. 13 of the Civ. Pro. Code is exhaustive on the subject of *res judicata.* GOMTI KUNWAR v. GUDRI, **25 A. 138=A W N. 1902 220** (A.W N 1901, 49, 6 C.W.N. 825. *R.*) [*R.*, 31 M 62=3 M L.T. 186=17 M.L J. 601, 12 P.R. 1909=73 P.W.R. 1908=124 P.L.R. 1908=1 Ind. Cas. 321.]

(110)—*Suit in Civil Court under debt-bond —Collector's decision as to genuineness of bond in previous rent-suit, whether conclusive proof as against defendant.*—Suit by A against B to recover principal and interest due on a bond. The defendant pleaded that the bond was false and fabricated. It appeared that in a previous suit for rent by B against A in the Collector's Court, A had relied on the bond as authorising him to deduct a certain portion of the rent and apply it in reduction of the amount due under the bond, and the Collector had found that the bond was genuine. The question in the present case was whether the Judge of the first Appellate Court was right in having treated the previous decision of the Collector in respect of the bond as conclusive evidence in support of its genuineness. *Held* that, in order to render a judgment between the same parties upon the same point in one Court conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. The Collector, however, had no jurisdiction to give a decree for the balance claimed in the present suit as due on the bond. He had power to give effect to it as an answer to the suit for rent, but no power to enforce it in respect of the balance. His Court was, therefore, not a Court of concurrent jurisdiction, and his decision, which was passed for another purpose, would not be conclusive on the Civil Courts. Concurrency of jurisdiction being a necessary part of the rule which creates an estoppel in such cases, the previous decision of the Collector should not have been treated by the Judge as conclusive evidence except as regards the question of rent. MUSSAMUT EDUN v. MUSSUMAT BECHUN, **8 W.R. 175=2 Ind. Jur. N S 264.** [*F.*, 8 W.R. 487; *Appr.*, 10 W.R. 22, 19 W R. 322, 11 C. 301, P.C.=12 I.A. 23; *R.*, 11 W.R 345, 13 W.R. 129, 15 W.R. 32, 24 W R 154, 6 C 406=7 C.L R. 251, 9 C 439=12 C L R 520, 9 B. 75, 25 C. 571= 2 C.W N. 297, 29 M 195, F.B =16 M L.J. 41 =1 M.L.T. 25; *D.*, 10 W.R. 75.]

(111)—*Judgment of Collector as to genuineness of pottah, whether can be treated as estoppel in Civil suit for ejectment.*—The judgment of a Collector in the matter of the genuineness of a pottah is the judgment of a Court competent to determine that question in order to the determination of the further question of rent or of ejectment; but, as it is not the judgment of a Court of concurrent jurisdiction with the Civil Courts, it cannot be pleaded as an estoppel in the Civil Court in an action for the ejectment of the defendant as a trespasser. ARADHUN DEY v. GOLAM HOSSEIN, **8 W. R. 487.** [*F*, 12 W.R. 284.]

(112)—Res judicata—*Question as to genuineness of pottah—Decision by Collector—Subsequent civil suit.*—In a former suit in the Collector's Court, the ancestor of one B sued his landlords alleging that he was entitled to possession of the land as their tenant under a mourassi potta and that they had illegally ejected him. The landlords denied the genuineness of the potta. The Collector gave possession holding that the potta was genuine. The landlords who were defendants in the former suit, thereupon brought a suit in a Civil Court to eject the heirs of B from the same land. *Held, by the Full Bench (Jackson, J., doubting)* that the decision of the Collector was not conclusive between the parties CHUNDER COOMAR MONDUL v. NUNNEE KHANUM, **11 B. L. R. 434, F B.=19 W. R 322** [*R.*, 20 W.R. 105, 20 W.R. 455, 21 W.R 57, 24 W R. 154=15 B.L.R 238. F.B., 7 C. 442, 7 C.L.J. 202; *D.*, 21 W.R. 207, 9 B. 75, 13 M. 287.]

Res Judicata – continued.

——4.—Competency of Court—*continued.*

(113) —*Mortgage—Settlement proceedings in Central Provinces*—Res judicata— *Foreclosure proceedings—Right of redemption, extinction of —Act* VIII *of* 1859, s. 2—Bai-bil-wafa—*Foreclosure proceedings — Central Provinces.*—On 10th February, 1857, G mortgaged the village in suit to the appellants and their father to secure a loan, the mortgage bond containing the following provision :—"As security for the above loan I mortgage the village on this condition that, if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village to be made with you." The interest of G in the village was described in the bond as that of a *malguzar*, and he was, shortly after the execution of the mortgage, declared by the Revenue authorities to have the proprietary interest in the subject of the mortgage; but his payments to the Board of Revenue having fallen into arrear, a lease of the village for ten years was granted to the father of the appellants. On the 3rd November 1860, the appellants, in a suit brought by them on the bond obtained the following decree:—"As the defendant acknowledges plaintiffs' claim, it is therefore ordered that the decree be given to the plaintiffs for principal and interest and costs against the defendant and the mortgaged property." The appellants in proceedings taken under this decree prayed that they might be put into possession of the mortgaged property, and in pursuance of an order of the Deputy Commissioner dated 17th July 1862, they obtained possession thereof, an appeal brought by G, being rejected by the Judicial Commissioner. Various steps were taken by G to recover possession of the mortgaged property or to obtain declaration of his proprietary right therein; but his endeavours were unsuccessful. These steps were: an application by G to the Revenue Board that the village should be restored to him was rejected; an application in 1864 to the Settlement Department for a grant of the proprietary right in the village was refused on the 8th December 1864 and the mortgagor's *potta* was cancelled and a *potta* granted to the appellants; an appeal from that decision by G was rejected by the Settlement Officer on 27th July 1865; and lastly a petition in 1867 to the Civil Court on the expiration of the ten years' lease to the appellants' father for a release to him on his satisfying the mortgage-debt was also rejected. In a suit brought by the respondents for redemption of the mortgage and for possession of the village which had been conveyed to them by deed of sale dated 12th August 1867, executed in their favour by G:—*Held* (*a*) that the order of the Deputy Commissioner dated 17th July 1862 made in the course of the proceedings taken under the decree of 3rd November 1860, did not constitute a bar to the hearing of the present suit within the meaning of s. 2, Act VIII of 1859; (*b*) that the settlement of the village made by the Revenue officers with the father of the appellants did not take away the proprietorship of the village out of G and vest it in the other party so as to make the sale by the former to the respondents utterly invalid and that the orders of the Settlement Department dated 8th December 1864 and 27th July 1865 afforded no bar to the suit; (*c*) that the effect of the document was to create a simple mortgage and that the deed was not meant to operate by way of conditional sale; (*d*) that the substantial effect of the proceedings taken in execution of the decree of 3rd November 1860 was not to destroy any right of redemption which might previously have existed. In the Central Provinces, a *bai-bil wafa* or conditional sale does not become absolute on the failure of the mortgagor to pay the mortgage-debt on the day fixed, without the mortgagee taking any proceedings by way of foreclosure. GOKUL DAS v. KRIPARAM, **13 B.L.R. 205, P. C.=3 Sar. 279.** [*F.*, 8 C.P L.R. 113.]

(114)—*Act* IX *of* 1863 — *Partition — Amendment of Collectorate record* — Res judicata—*Act* VIII *of* 1859, *ss.* 2, 8.—Suit in the Civil Court for the establishment of plaintiff's right to and possession of a share in land, by cancelment of an order passed in Revenue proceedings. It appeared that there had been two applications before the Collector in one of which the present defendants sought to obtain an amendment of the Collectorate record by expunging therefrom the names of the plaintiffs who were, it was alleged, out of possession; and upon evidence taken the amendment asked for was made. In the other application, the present plaintiffs applied for a partition under Act IX of 1863. The order of the Collector on this application was made on the day on which the first application was disposed of. It was not in form or effect such an order as may be pronounced under s. 8 of the Act, declining to grant the application until the question in dispute shall have been determined by a competent Court. On the contrary, the Collector entertained the application. But he did not follow the procedure enjoined by law (that is to say, the procedure applicable to the trial of original suits by Act VIII of 1859). He appeared to have proceeded chiefly, if not entirely, on the evidence taken on the other application for the amendment of the Revenue Records. He eventually adjudged that the applicants (plaintiffs) had not established their possession and accordingly refused their application. *Held* that such an order cannot be considered an adjudication of rights, and was not therefore a bar to the present suit. KISHUN SAHAI v. RAGHOO SINGH, **2 N.W.P. 64.**

(115)—*Determination of title by Revenue Court—Jurisdiction of Civil Court—Act* XVIII *of* 1873 (*N.W.P. Rent Act*), *ss.* 36 *and* 39.—The decision of an Assistant Collector as to the respective rights of the parties to proceedings under ss. 36, 39 of the Rent Act, can only be regarded as incidental and ancillary to the main point to be determined by him, namely, whether,

***Res Judicata*—continued.**

——4.—Competency of Court—*continued.*

assuming the relationship of landlord and tenant, the tenant is liable to ejectment, and such a decision cannot prevent the question of such rights being determined by a Civil Court. BIRBAL v. TIKA RAM, **4 A. 11=A.W.N. 1881, 103.** [*R.*, 18 A. 270, F.B., 2 O.C. 83 to 87, F.B.]

(116)—Res judicata—*Determination of title by Revenue Court—N.W.P. Rent Act*, XVIII *of* 1873, *ss.* 36—39.—The decisions of the Revenue Court on questions of title raised in applications under the N.W.P. Rent Act, are not final, and do not bar a suit in the Civil Courts. RAM PRASAD v. RAM SHANKAR, **A.W.N. 1882, 58.** (2 A. 200, 2 A. 429, 3 A. 81, 3 A. 521, A.W.N. 1881, 164, *R.*)

(117)—*Civ. Pro. Code*, 1877, *s.* 13—Res judicata—*Determination of title by Revenue Court—N.W.P. Rent Act*, XVIII *of* 1873, *s.* 39.—S. 13, Civ. Pro. Code, 1877, applies to suits, and not to applications such as those under s. 39 of the N.W.P. Rent Act. The Revenue Courts have no jurisdiction to determine questions of proprietary right otherwise than incidentally, for the purpose of deciding the suits which they are competent to decide. PARMU SINGH v. RUKKO, **A.W.N. 1881, 16.**

(118)—*Landlord and tenant—Act* XVIII *of* 1873 (*N.W.P. Rent Act*)—*Application under s.* 39—*Decision of title under lease.*—The decision of a Revenue Court on a question of title under a lease, on an application under s. 39 of the Rent Act, is not *res judicata*, in a subsequent civil suit, where the question is one peculiarly within the jurisdiction of a Civil Court, and not one which a Revenue Court is competent finally to decide on an application under s. 39, however sufficient the decision may have been for the purpose of disposing of such application. *Held*, accordingly, in a suit to have the terms of a lease corrected, by the cancelment or removal of a word fraudulently inserted in it, so as to alter its intended character, that a decision of the Revenue Court, upholding the claim of the defendants on the deed, as it stood, was not *res judicata*. HUSAIN SHAH v. GOPAL RAI, **2 A. 428.** [*F.*, 20 A. 241=A.W.N. 1898, 29; *R.*, 18 A. 270, F.B., 26 A. 468 =A.W.N. 1904, 109.]

(119)—*Suit for arrears of rent—Decision on title by Revenue Court* — Res judicata—*Act* XVIII *of* 1873 (*N.W.P. Rent Act*), *ss.* 93, 95 *and* 148—*Civ. Pro. Code*, 1877, *s.* 13.—In a suit for arrears of rent, it may be necessary for the Revenue Court to decide incidentally whether the relation of landlord and tenant exists; but such a question is not one specially within its jurisdiction; its decision on such a question therefore is not that of a competent Court, and cannot prevent such question from being re-opened in a civil suit. GOPAL v. UCHABAL, **3 A. 51.** [*R.*, 10 A. 347, 16 A. 464, 18 A. 270, F.B.]

***Res Judicata*—continued.**

——4.—Competency of Court—*continued.*

(120)—Res Judicata—*Civ. Pro. Code, s.* 13—*Act* XIX *of* 1873 (*N.W.P. Land Revenue Act*), *ss.* 56, 62, 241 (*g*).—The Settlement Officer is not competent to decide a question of right between parties; and an order by him that a certain person should be recorded as a sub-proprietor and not as a lessee as alleged by another person, cannot bar the latter from raising the question in a Civil suit. TOTA RAM v. HAR KISHAN, **7 A.224, F.B.=A.W.N. 1884, 347.**

(121)—Res judicata—*Settlement Officer—Determination of right of parties—N.W.P. Land Revenue Act* XIX *of* 1873, *ss.* 62, 63 *and* 64.—All entries in the record of rights made under ss. 62 and 63 of Act XIX of 1873 are to be founded on actual possession; and all disputes taken up by the Settlement Officer of his own motion, or upon the complaint of the party concerned, are to be investigated and decided by him on that basis; and all persons not in possession, but claiming the right to be so, must be referred by him to the Civil Court. The Settlement Officer is not competent to determine the rights of parties. His decision that one of the parties is the mortgagee and the other the proprietor is not a judicial decision but one beyond his competency. RAM PRASAD v. DALTHAMMAN, **A.W.N. 1881, 24.**

(122)—*Civ. Pro. Code*, s. 13, "*competent to try such subsequent suit*," *meaning of—Previous decision in partition case under ss.* 113, 114 *of Act* XIX *of* 1873—*Opposite parties in subsequent suit arrayed on same side in previous suit, no* res judicata *between.*—A previous decree affecting persons who had all been arrayed on the same side in the suit cannot be used for the purposes of *res judicata*, in the sense of s. 13 of the Civ. Pro. Code, as between the same persons when arrayed in opposition, the one to the other, in a subsequent suit. And no plea of *res judicata* under the section could be based on a previous decision or decree by a Deputy Collector acting as a Court of Revenue and disposing of a partition case under ss. 113 and 114 of Act XIX of 1873, such Court not having been competent to try the subsequent civil suit in which the same issue is raised. HAR CHARAN SINGH v. HAR SHANKAR SINGH, **16 A. 464=A.W.N. 1894, 137.** (9 C. 439, 12 A. 578, 6 A. 269, *R.*) [*R.*, 20 M. 392.]

(123)—*Declaratory suit—Division in rent suit*—Res judicata—*Presumption under Act* X *of* 1859, *s.* 4.—In a suit by a ryot in a Civil Court to have it declared that he had a mokururee tenure, *held*, that the lower appellate Court was wrong in raising the presumption of uniform payment under s. 4, Act X of 1859. *Held*, further that such suit was not barred by the finding of the Deputy Collector as to title in a previous rent suit. ISHAN CHUNDER ROY CHOWDHRY v. BHYRUB CHUNDER DOSS, **21 W.R. 25.**

(124)—*Collector's judgment re pottah's genuineness—Act* VIII *of* 1859, *s.* 2—*Declaratory*

Res Judicata—continued.

—4.—Competency of Court—*continued.*

decree—Estoppel—Act X *of* 1859, *s.* 23.—A Collector's judgment as to the genuineness of a *patta* cannot be pleaded as an estoppel in the Civil Court in an action for declaration of title. BHAIRO SINGH v. UDIKARAN SINGH, **3 B.L.R App. 139=12 W.R. 284.** (Case No. 137 of 1864, *overruling* 6 W.R. Act X, Rul. 22, *R.*)

(125)—*Act* X *of* 1859, *s.* 23, *cl.* 1—*Reference to Collector—Suit pending before Deputy Collector—Effect of.*—Reference to the Collector in a case pending before the Deputy Collector is obviously irregular and the Collector's opinion and order have no weight at all, and could not amount to a decision and become final, just as his order in a case originally tried by him or brought before him regularly in appeal would be. It is the duty of the Court of first instance to try the issue raised by a defendant's plea, and to base his decision on the evidence adduced before it, and not on the opinion of any other officer. SAHIB SINGH v. PUT RAM, **1 Agra Rev. 17.**

(126)—*Suit in Revenue Court under s.* 23 (5) *of Act* X *of* 1859—*Suit for removal of trees—Jurisdiction of Civil Courts.*—A suit for ejectment of a cultivator for breach of conditions of his lease under s. 23 (5) of Act X of 1859 was dismissed as barred by limitation. *Held* that such dismissal was no bar to a subsequent suit (by the plaintiff) for removal and possession of certain trees, and avoidance of a sale-deed in respect of the said trees, such suit not being one for ejectment nor one of those defined in s. 23 of Act X of 1859, and therefore not cognizable by the Revenue Court. JOGUL KISHORE v. CHUTTER SINGH, **1 Agra 27.**

(127)—*Act* X *of* 1859, *s.* 23, *cl.* 6—*Possessory suit by ryot against Zemindar—Suit by intervenor for confirmation of title not barred.*—The applicant for review in this case was an intervenor in a suit brought by a ryot against the Zemindar for illegal ejectment in the Collector's Court under cl. 6, s. 23 of Act X of 1859. The suit having been a possessory suit, the question of title had not been gone into, and it could not therefore bar the present suit for confirmation of title brought by the intervenor in the Revenue Court. The present suit was held to be maintainable as having been based on a wholly different cause of action which cannot be said to have been the subject-matter of the suit before the Collector. TARA CHAND GHOSE v. RADHA MONEE DOSSEE, **7 W. R. 469.**

(128)—*Act* X *of* 1859, *s.* 23, *cl.* 6—*Suit for possession—Illegal ejectment—Jurisdiction of Collector.*—In a suit to recover possession on the ground of illegal ejectment, the jurisdiction of the Collector is confined, under cl. 6, s. 23, Act X of 1859, to enquiring whether or not the plaintiff had been illegally ejected and so is entitled to recover possession or not. But he has no jurisdiction to enquire into any matter having reference to the rights of the parties. SHEEB CHUNDER MAHORNEEAH v. BROJONATH ADITYA, **4 W.R. 301.** [*Rel. on*, 7 Ind. Cas. 574.]

(129)—*Act* X *of* 1859, *s.* 23, *cl.* 6—*Scope—Ejectment suit—Right to possession—Collector's jurisdiction.* — *Act* VIII (*B. C.*) *of* 1869, *s.* 27.—The Collector's Court under cl. 6, s. 23 of Act X of 1859, is one of limited jurisdiction, and it has no power to determine between the parties a question of right to the land larger than the bare *right to possession.* There may be cases in which a Zemindar may have a right to eject a ryot, but may not pursue that right in a legal manner, and where possession will be restored, although, if the Zamindar had proceeded legally, he could have ejected his ryot. It is those cases which are contemplated by cl. 6, s. 23, Act X of 1859, and by s. 27 Act VIII (B.C.) of 1869. GUNGA GOBIND ROY v. KALA CHAND SURMA GANGOOLY, **20 W.R. 455.**

(130)—*Ss.* 23 (6), 25, *Act* X *of* 1859—*Suit for ejectment—Question of possession and illegal dispossession—Effect of decision under Act* X.—Where questions of title are necessarily tried, an Act X decision may be final, but it is not so in a mere ouster suit under cl. 6, s. 23 or s. 25, depending on the question of possession and illegal dispossession only. SOORJO KANT ROY v. MR. JAMES FURLONG, **6 W.R. Act X, Rul. 44.**

(131)—*Suit for rent—Ejectment—Land assigned for building purposes — Application under Act* X *of* 1859, *s.* 25 — *Order for ejectment—*Res judicata—*Act* VIII *of* 1869 (*B.C.*)—*Suit on lease.*—A suit for ejectment from land assigned for building purposes brought upon a contract is not barred by *res judicata* under s. 2, Act VIII of 1859, by reason of an order for ejectment obtained upon an application under s. 25, Act X of 1859, such an application not being a suit. The only suits for ejectment contemplated by Act VIII (B.C.) of 1869 are those consequent on the non-payment of arrears of rent, but not a suit for ejectment from land assigned for building purposes where the suit is brought on a contract by which the defendant is said to have pledged himself to give up the land, when required by the plaintiff to do so, on receipt of a year's rent *plus* a certain sum of money on account of coolie hire for carrying away the "*awlat*" or building materials. RAMNARAIN MITTER v. NOBIN CHUNDER MOORDAFARASH, **18 W. R. 208.**

(132)—*Act* X *of* 1859, *s.* 25—*Dismissal of application to Collector—Decision of competent Civil Court—Act* VIII *of* 1859, *s.* 2.—A refusal by a Collector to give assistance under s. 25 of Act X of 1859 is not a determination by a Court of competent jurisdiction in a former suit within the meaning of s. 2 of Act VIII of 1859. GOCOOL CHUNDER v. ALI MAHOMED, **10 W. R. 6.** [*R.*, 10 W.R. 295; *D.*, 3 B.L.R. App., 114.]

Res Judicata—continued.

——4.—Competency of Court—*continued.*

(133)—*Act* X *of* 1859, *s.* 27—*Application to Collector to register name—Refusal—Suit to set aside Collector's order and to register name*—Res judicata—*Act* VIII *of* 1859, *s.* 2.—The plaintiffs sued to have their names registered in the zemindar's sherista in respect of certain lands purchased by them at an auction sale for arrears of rent. They had previously applied to the Collector under s. 27, Act X of 1859, but that officer had rejected their application. *Held* that the proceedings authorized to be taken before the Collector under s. 27 of Act X of 1859 were not proceedings in a suit and consequently those proceedings were no bar under s. 2 of Act VIII of 1859 to this suit. CHANDRA NARAYAN GHOSE v. KAZI NATH ROY CHOWDHRY, **4 B.L.R.F B. 43=12 W.R. 30.**

(134)--*Competent Court--Bengal Act* X *of* 1859, *s.* 28—*Jurisdiction of Collector.*--If it was established, in a suit under s. 28, Act X of 1859, that the defendant's lakhiraj tenure was created prior to 1790, it was immaterial whether it was within plaintiff's taluk or not. Therefore, the finding upon the question of parcel or no parcel by a Deputy Collector in such a suit was not binding on the Civil Court in any suit which might thereafter be brought to resume the land as invalid *lakheraj* created prior to 1790, or in any other suit. RAMNEEDHY BOYDE v. MEAMUT, **Marsh 355=2 Hay 437.**

(135)—*Reg.* II *of* 1819, *s.* 30—*Act* X *of* 1859, *s.* 28—*Resumption—Deputy Collector, Jurisdiction of.*—A suit brought under s. 30, Reg. II of 1819 and not under s. 28, Act X of 1859, cannot be tried by a Deputy Collector who should return the plaint and refer the party to the Collector who has jurisdiction. GOUREEKANT BANERJEE v. LALL MAHOMED MOLLAH, **W. R., F.B. 70=Marsh 265=2 Hay 107.**

(136)—*Act* X *of* 1859, *s.* 28—*Dismissal of suit for ejectment—Subsequent suit for ouster in Civil Courts—No bar of suit.*—Where a suit for ejectment under s. 28, Act X of 1859, was dismissed on the ground of absence of jurisdiction, a subsequent suit in the civil Court for ouster was not barred either by the rule of *res judicata* or otherwise. BASER MAHOMED v. SUDDER GHAZEE, **7 W.R. 97.**

(137)—*Act* X *of* 1859, *s.* 77—*Intervenor—Inability to prove receipt of rent—Civil Court decree no bar to rent suit.*—S. 77, Act X of 1859, applies only to cases in which the plaintiff's right to receive the rent is disputed, and an actual and *bona fide* receipt of rent by the person claiming this right is proved. It has therefore no application to a case in which, although the plaintiff's right is disputed, no receipt of rent by the person claiming the rent has been proved. [*D.*, 11 W.R. 90.] A decree of a Civil Court, in a suit concerning the title, is not of itself in all cases a bar to a suit against a tenant for rent by the person against whom such decree has been obtained. Where a decree of the Civil Court clearly adjudicates against the plaintiff's right and the Collector sees that it relates to the property in question and is in force, he should give effect to such a decree as a bar to the plaintiff's suit for rent, notwithstanding that the plaintiff may have an actual receipt of rent prior to the time of the institution of the suit. MUSSAMUT TARINEE v. BAMUNDAS MOAKHEF, **1 W.R. 331.** [*F.*, 12 W.R. 90; *D.*, 11 W.R. 90.]

(138)—*Suit for enhanced rent*—Mokurruree *right relied on—Decree of Collector—Subsequent suit in Civil Court to establish* mokurruree *right*—Res judicata—*Jumma divided into two shares—Cause of action—Splitting up of claim.*—A suit in the Civil Court by a tenant to establish his *mokurruree* right brought subsequent to the passing of a decree by the Collector in favour of the landlord in a suit brought by him for enhanced rent, in which the tenant relied on his *mokurruree* right, is maintainable unless the *mokurruree* right is the subject of adjudication in the Revenue Court. [*R.*, 7 W.R. 92, 9 W.R. 592, 13 W. R. 129=12 B.L.R. 282 Note, 21 W.R. 57; *D.*, 10 W.R. 6.] A claim for rent in respect of a jumma which has become divided into two shares should be included in one suit. The fact of the division of the jumma does not of itself justify a splitting of the cause of action. OOMA CHURN DUTT v. J. BECKWITH, **5 W.R. Act X, Rul. 3=1 Wym. 58.**

(139)—Res judicata—*Parties accidentally same but legally different with different rights and interests.*—Where the parties are accidentally the same persons, but are legally different with different rights and interests, the decision in a former suit brought under Act X of 1859 against the defendants as the plaintiff's tenants is no bar to the present suit brought in the Civil Court against the defendants as the plaintiff's vendors. SHAIK GOLAM AHMED v. SHAM SOONDUR ROY, **5 W.R. Act X, Rul. 9.**

(140)—Res judicata—*Dictum of Revenue Court as to* bona fides *of pottah—Suit in Civil court.—Quaere*:—Whether the dictum of a Revenue Court under the provisions of Act X of 1859 with reference to the *bona fides* or otherwise of a pottah is in any way binding upon the Civil Court in a suit in which the *bona fides* of the pottah is put in issue. KUMUR ALI v. DHOYA BIBEE, **5 W.R. Act X, Rul. 61.**

(141)—Res judicata—*Pottah—Genuineness—No adjudication in suit under Act X of* 1859—*Subsequent suit for declaring it a forgery if maintainable—Court's power to grant less relief than that prayed for.*—Where in a suit under Act X of 1859 the genuineness of a pottah was not formally adjudicated upon, though the Collector accepted it as genuine, a subsequent suit for a declaration that the pottah was a forgery was not barred. [*F*, 15 W.R. 415.] Where a plaint asked for more than the plaintiffs were entitled to, the Court could give

Res Judicata—continued.

—4.—Competency of Court—*continued.*

them such relief as was within its jurisdiction and as it deems them entitled to. PITAMBUR SHAHA v. RAM JOY GHOSE, **7 W.R. 92.**

(142)—*Collateral issue—Estoppel.*—The fact of a *mokurrari pottah* coming collaterally in issue in an Act X suit for the purpose of enabling the Court to adjudicate upon the question of the amount of rent due, does not imply such a decision upon the validity or otherwise of the *mokurrari* as would be an estoppel to a suit in a Civil Court. JANESWAR DAS v. GULZARI LAL, **5 B.L.R. 666, Note = 11 W.R. 216.** [*R.*, 18 A. 270, F.B.]

(143)- Res judicata—*Incidental finding by Revenue Court—Effect.*—Where, in a former suit under Act X of 1859 between the same parties, it has been decided by a Revenue Court that a pottah is a genuine instrument, and that finding has not been come to upon any distinct issue regularly laid down as to the genuineness or otherwise of the pottah, but is a mere incidental finding, a Civil Court will not be debarred from going into the question of the genuineness or otherwise of the pottah in a subsequent suit to cancel the pottah on the ground that it was a forgery. SHIB PERSHAD PANAH v. MUDDUN MOHUN DOSS, **15 W.R. 415.**

(144)—*Rent suit*—Res judicata—*Act* VIII (*B.C.*) *of* 1869.—After Act VIII (B.C.) of 1869 came into force, the plaintiff sued in a Civil Court to recover from the defendants rent which he claimed to be due in respect of certain land at enhanced rates. The defendant pleaded (among other objections) that a portion of the land was *lakhiraj* or rent free land. The plaintiff relied on the decision in a previous suit in the Collector's Court, under the old Rent law, Act X of 1859, by which it was expressly determined that this land was not *lakhiraj*, and that the plaintiff had a right to enhance the rent, although it was held that no decree for rent at an enhanced rate could be given in that suit, as the evidence on the question of rates was defective. The question referred for the decision of the Full Bench under these circumstances whether the decision in that former suit in the Collectorate Court, that the land was not *lakhiraj*, was conclusive as regards that issue in the present suit. *Held* by the *Full Bench* (*Jackson J., dissenting*) that the decision was not conclusive, but was evidence, and that the Civil Court was of course bound to give weight to the decision of the Collector's Court. *Per Jackson, J.*—A decision in a previous and similar suit, upon an issue raised substantially in the same manner by parties in Revenue Courts, is binding upon them as evidence in a subsequent suit, which, but for the passing of Act VIII (B.C.) of 1869, would also have been brought in a Revenue Court. HURRI SANKER MOOKERJEE v. MUKTARAM PATRO, **15 B. L. R. 238 = 24 W.R. 154, F.B.** [*F.*, 3 C. 145 = 1 C. L.R. 35, F.B.; *R.*, 7 C.L.J. 202; *D.*, 17 C. 721].

Res Judicata—continued.

—4.—Competency of Court—*continued.*

(145)—*Civ. Pro. Code, s.* 13 — *Court of competent jurisdiction.*—The defendants in this case sued in the Revenue Court to set aside a mortgage executed by one Jumma, an occupancy tenant, in favour of the present plaintiff. The present plaintiff then denied the ownership of the defendants. The Court found the issue as to ownership in favour of the then plaintiffs and decreed their claim. The present plaintiff brought this suit in the Civil Court for a declaration that the land was his property. *Held*, that the present suit was not barred by s. 13 of the Civil Procedure Code. The former suit was exclusively triable by the Revenue Court under s. 77 (3) (*h*) of the Punjab Tenancy Act, for the proper trial of which the Court had to decide incidentally every point, *e.g.*, that relating to the right of ownership of the then plaintiffs in the disputed land which was challenged, which required to be disposed of before the main question before the Court could be taken up, but the decision on such a point was not binding on the Civil Court, the Revenue Court not being competent to try the present suit. SULTAN HABIB-ULLAH KHAN v. MOHABAT KHAN, **170 P.L.R. 1901 = 68 P.R. 1901.** (8 W.R. 175, F.B., 11 C. 301, P.C., *F.*) [*R.*, 54 P.R. 1904, 12 P.R. 1909 = 73 P.W.R. 1908 = 12 P.L R. 1909, 92 P.R. 1902, F.B. = 16 P.L.R. 1903; *Disc.*, 54 P.R. 1904.]

(146)—*Civ. Pro. Code, s.* 13—*Suit for declaration of plaintiff's right as lessee.*—A suit was brought to obtain a declaration of the plaintiff's right, as lessee of the zemindar, in respect of a certain portion of the tank land. The suit was resisted by the defendants on the ground that they were entitled to the land as occupancy tenants. It appeared that in a former suit between the parties, in which the question at issue was a right to damages for price of certain water-nuts, the produce of the tank, a decision was given that the plaintiff was entitled to the damages claimed by him. *Held* that the former suit was a suit of the nature cognizable by the Small Cause Court, that the only decree that could be given in that case was a decree for the damages claimed, and that the mere fact that there was an incidental determination as to the rights or position of the parties in respect to the land, furnished no bar to the entertainment of the present suit. CHET RAM v. GANGA, **A.W.N. 1886, 44.** [*F.*, 4 A.L.J. 517 = A.W.N. 1907, 218.]

(147)—*Suit for rent of a Small Cause nature —Incidental determination of title therein*— Res judicata.—The incidental decision on a question of title in a suit for rent of a Small Cause nature is not *res judicata* when the same question arises in a subsequent suit on title. INAYAT KHAN v. RAHMAT BIBI, **2 A. 97.** [*F.*, A.W.N. 1907, 218 = 4 A.L.J. 517.]

(148)—Res judicata—*Previous Small Cause suit—Incidental determination of title—Subsequent suit for declaration.*—A decision in a former suit which was of the nature of a suit

Res Judicata—continued.

——**4.—Competency of Court**—*continued.*

cognizable by a Court of Small Causes, on a question of title incident to the determination of the suit, is not conclusive or a bar to the parties raising the issue in a subsequent suit. RAHAT ALI v. ALLADI, **A.W.N. 1883, 203.** (2 A. 97, *R.*) [*R.*, 4 A.L.J. 517=A.W.N. 1907, 218.]

(149)—*Civ. Pro. Code, s.* 13—*Suit of the nature cognizable by a Small Cause Court—Incidental determination of a question of title.*—*Held* that the incidental determination, in the course of a suit of the nature cognizable by a Court of Small Causes, of a question of title, does not operate as *res judicata* and prevent the same question being litigated afresh in a Court competent to decide it. ANWAR ALI v. NUR-UL-HAQ, **A.W.N. 1907, 218=4 A.L.J. 517.** (A.W.N. 1888, 203, A.W.N. 1886, 44, 2 A. 97, *F.*)

(150)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13—'*Competent to try such subsequent suit,*' *meaning of—Prior suit not appealable, decision of issue in, not* res-judicata *in subsequent appealable suit.*—A previous judgment delivered by a District Court in a Small Cause suit between the same parties, cannot, for the matters and purposes of a subsequent original suit between them, be deemed to operate as *res judicata.* For the purpose of establishing a prior decision as *res judicata*, the whole series of possible proceedings up to the highest available ordinary tribunal must be looked to; the words "competent to try such subsequent suit" in s. 13 of the Civ Pro. Code, must be construed to mean competent to try the suit or issue on account of its nature with conclusive effect, since, otherwise, the higher jurisdiction provided by the Code would be excluded by the lower. In the present case, the former decision in the Small Cause suit, passed by the District Court, could not be appealed against the High Court, and thus though the District Court was in one sense competent to try the subsequent suit, and did try it, yet it was not competent to try the subsequent original suit as it had tried the earlier one. BHOLABHAI v. ADESANG, **9 B. 75.** [*Diss.*, 25 C. 571=2 C.W.N. 297; *Not F.*, 28 C. 78=5 C.W.N. 483; *F.*, 5 Bom. L.R. 742; *Appr.*, 29 M. 195, F.B. =16 M.L.J. 41=1 M.L.T. 25; *R.*, 1 C.P.L. R. 92, 13 B. 224, 11 A. 148, 15 B. 104, 15 M. 111, 2 M.L.J. 36, 1 C.W.N. 687, 24 B. 456, L.B.R. 1893—1900, 653, 25 B. 625, 54 P.R. 1904, 57 P.R. 1907=66 P.W.R. 1907.]

(151)—*Previous decisions on Small Cause suits*—Res judicata.—Decisions in previous suits in the nature of small causes, in which there was no right of second appeal, could not operate as *res judicata* in subsequent suits. GOVIND *bin* LAKSHMAN SHET ANJORLEKAR v. DHONDBARAV *bin* GANBARAV TAMBYE, **15 B. 104.** [*Not F.*, 28 C. 78; *F.*, 29 M. 195= 16 M L.J. 41=1 M.L.T. 25; *R.*, 15 M. 111, 17 M. 168, 18 M. 189, 1 C.W.N. 687, 5 Bom. L. R. 742, 54 P.R. 1904, 57 P.R. 1907=66 P.W. R. 1907.]

Res Judicata—continued.

——**4.—Competency of Court**—*continued.*

(152)—*Suit for declaration of title—Dismissal of suit for damages by Small Cause Court, effect of, on plaintiff's title.*—A suit for damages in the Small Cause Court, alleging that the defendant had cut down a tree standing on plaintiff's land was dismissed on the ground the plaintiff had no right to the land. In a subsequent suit by the plaintiff for declaration of his title to the land, *held* that the decision of the Small Cause Court did not conclude the plaintiff in the matter of his title, but that it clearly gave him a new cause of action by the defendant setting up an adverse title. CHUNDER NARAIN MOJOOMDAR v. PRITHANUND ASRAM, **12 W. R. 290.**

(153)—*Mortgage—Suit to enforce lien—Prior decree on mortgage-bond by Small Cause Court—Right of vendee of mortgagor to question mortgage.*—Suit by a mortgagee to enforce his lien on the mortgaged property. The defendant was the purchaser of the mortgaged property from the mortgagor. The point for consideration was whether the defendant was precluded from questioning the mortgage by reason of the existence of a decree in a suit on the mortgage-bond brought by the plaintiff against the mortgagor in a Court of Small Causes prior to the sale to the defendant. *Held* that as a Small Cause Court has no jurisdiction to decide as to any lien upon immoveable property, the decree passed by that Court was only relevant as showing that the defendant at that time owed the money in question to the plaintiff. It was therefore open to the present defendant to question the execution and *bona fides* of the document as affecting the property which he had purchased. POHOLI MULLICK v. FUKEER CHUNDER PATNAIK, **22 W.R. 349.**

(154)—Res judicata—*Civ. Pro. Code, s.* 13—*Jurisdiction to try subsequent suit—Decision of title in a rent suit.*—*Held* that an incidental decision on a question of title given in a suit for rent does not constitute a *res judicata* on a question of title to the property itself, when the Court which came to that decision had no jurisdiction to try the subsequent suit. JIWAN DAS v. UMAR, **54 P.R. 1904.** (25 C. 136, 26 C. 428, F. B., 9 B. 75, 15 B. 104, 15 M. 111, 18 M. 189, 6 C.W.N. 66, 20 P.R. 1891, F.B., 68 P.R. 1901, *R.*)

(155)—Res judicata—*Decision incidentally of matter in issue in Small Cause suit—Binding character of decision in subsequent suit relating to different matter.*—Where in a Small Cause suit a matter in issue was incidentally decided, the decision did not operate as *res judicata* in a subsequent suit relating to a different subject-matter, inasmuch as there was no appeal from a decision of a Small Cause Court. RAMAN NAMBIAR v. PAKAR, **2 M.L.J. 36.**

(156)—*Jurisdiction—Suit for money—Suit to determine right to extra share of offerings—Small Cause Court*—Res judicata.—Where a suit, though ostensibly launched for the recovery of

Res Judicata—continued.

——4.—**Competency of Court**—*continued.*

a sum of money on account of an extra share of offerings of a certain shrine, claimed by the plaintiff, was in reality instituted for the purpose of establishing a right to such extra share, held that it was not one that could be heard in a Small Cause Court. Though the right of the plaintiff's father to an extra share in the offerings of a certain shrine formed a part of the claim in a previous suit decided by the Political Agent at Ambala, yet, as the jurisdiction of the Political Agent did not extend to territory under the rule of Ranjit Singh, and as the shrine in question was then subject to the Lahore Government, a right to share in its offerings could not be established by the judgment in the previous suit. The plea of *res judicata* based on the previous decision was therefore untenable. SODI BRIJ BULLAB SINGH v. SODI KARTAR SINGH. **41 P.R. 1872.** [*R.*, 71 P.R. 1876, 74 P.R. 1886; *D.*, 73 P.R. 1877.]

See BEN. ACT VIII OF 1869, s. 38, 10 C. 507.

Decision of a Court of Revenue as to propriety of patta or landlord's title, when *res judicata*—*See* MAD. ACT VIII OF 1865, s. 11, 17 M.L.J. 518 = 2 M.L.T. 455 = 30 M. 510.

Collector's decision under s. 13 of Madras Act III of 1895 Subsequent civil suit barred —*See* MAD. ACT III OF 1895, 30 M. 320.

See U. P. ACT XIX OF 1873, ss. 63, 68, 1 A. L.J. 9.

Partition, suit for—Question of title, decision of Revenue Court upon, jurisdiction of Revenue Court—*See* U. P. ACT XVII OF 1876, ss. 74 and 75, 2 O C. 351.

Proprietary title—Decision of Revenue Court —Subsequent suit in Civil Court—*See* U.P. ACT XII OF 1881, 1 Ind. Cas. 517.

Decision of question of title by Court of Revenue—Subsequent civil suit for declaration of title—*See* U.P. ACT XII OF 1881, ss. 36, 39, 95, 96, 18 A. 270, F.B. = A.W.N. 1896, 59.

See U.P. ACT XII OF 1881, s. 43, 25 A. 282 = A.W.N. 1903, 40.

Suit for profits in a Revenue Court—Determination of title by the appellate Civil Court—Subsequent suit in Civil Court as to title—Decision of appellate Court is no bar to the subsequent suit—*See* U. P. ACT XII OF 1881, s. 93, A.W.N. 1905, 103 = 2 A.L.J. 283 = 27 A. 569.

Determination by Revenue Court of question of proprietary title—Suit in a Civil Court—*See* U. P. ACT II OF 1901, s. 199, A. W. N. 1907, 1.

Competency of original Court which decided the former suit must be looked to—*See* EJECTMENT, SUIT FOR, 13 C.L.J. 568.

Res Judicata—continued.

——4.—**Competency of Court**—*concluded.*

See KABULIAT—GENERAL, 6 W.R. Act X, Rul., 93.

Decision in Munsiff's Court will not bar suit cognizable by Sub-Court only—*See* RENT, 9 C. W.N. 656.

——5.—**Estoppel by Judgment.**

See ESTOPPEL.

(1)—*Jurisdiction of Court passing former judgment—Enquiry into.*—The Court in which the plea of *res judicata* may be urged can enquire into the jurisdiction of the Court which passed the former judgment, so far as to see whether that judgment is, on the facts on record, not void on the ground of want of jurisdiction. MULVIE ROWNAE ALLY v. THE BURMA RAILWAY COMPANY, LTD., **2 L.B.R. 24.** (22 W.R. 361, 6 C.W.N. 825, *F.*)

(2)—*Bar of decision based on erroneous view of law.*—A decision is no less a *res judicata* though it may have been founded on an erroneous view of the law or a view of the law which has been subsequently overruled. PARMU SAO v. GOBRYA, **14 C.P L R. 109.** (10 C. 1087, *F.*)

(3)—*Prior suit determining legal effect of document—Bar of subsequent suit for rectification.*—Where the legal effect of a document has been put in issue and determined in a prior suit, a subsequent suit for the rectification of it does not lie. ADANKI GOND v. KANHAIYALAL, **15 C.P.L.R. 167.**

(4)—*Raising value of suit to avoid bar of* res judicata.—It is not open to a litigant to get rid of the bar of *res judicata* by raising the value of the suit to an amount exceeding the jurisdiction of the Court which first disposed of it. CHAODHARI DAL CHAND v. THAKUR SHAM SINGH, **10 C.P.L.R. 89.** (8 B. 31, *F.*; 8 C.P.L.R 86, 8 M.H.C. 14, 2 M. 400, 1 I.A. 84, 10 C. 697, *R.*)

(5)—*Civ. Pro Code*, 1882, *ss.* 13, 522—*Decree in terms of award whether operates as* res judicata.—A judgment and a decree of a Court passed under s. 522 of the Civ. Pro. Code according to an award, can constitute *res judicata*. It has often been held that a judgment by consent cannot be re-opened because such a judgment is intended to put a stop to litigation between the parties just as much as a judgment which results from the decision of the Court after the matter has been fought to the end. *A fortiori*, a judgment and decree passed, after solemn investigation by arbitrators, on the award, may constitute *res judicata*. VYANKATESH CHIMAJI v. SAKHARAM DAJI, **21 B. 465.** [*Appl.*, 2 O.C. 28.]

(6)—*Decision as to status of endowment—Suit for possession.*—In 1801, A, the *shebait* and proprietor of the *gadde* of a *debsheba* at K, alienated part of the land by deed of gift to B, for the purpose of founding a *sheba* at C, which was accordingly done. In 1823 the then

Res Judicata—continued.

——5.—Estoppel by Judgment—*continued.*

shebait of the *debsheba* at K filed a suit for the recovery of the gifted lands against the *shebait* of the *sheba* at C and, in that suit, it was declared that the *sheba* was independent of the *debsheba*, and thus the plaintiff was referred to a regular suit. In 1861, the then *shebait* of *debsheba* brought a suit for recovery of the lands against the then *sheba* of the *sheba*. *Held* that the decree in the former suit operated as an estoppel against the plaintiff. KISSNONUND ASHROM DUNDY v. NURSING DOSS BYRAGEE, **Marsh 485.**

(7)—*Landlord and tenant—Regular suit to establish right to rent dismissed—Rent not paid subsequently—Suit for rent.*—Where the plaintiff, having in 1853 endeavoured to establish his right to take rent from the defendant by a regular suit, failed to establish his right, and from that period no rent had been paid by the defendant nor had he in any way recognized the title of the plaintiff, a subsequent suit for rent does not lie. SOOKHA NUND v. NUNDOO SINGH, **2 Agra 221.**

(8)—Res judicata—*Rent suit—Rate of rent—Decree for rent of previous years—Decree for amount admitted by defendant.*—In a former suit for rent, the Court came to a decisive finding as to what was the proper amount of rent payable by the defendant to the plaintiff, and gave the plaintiff a decree not for the amount claimed by him but for the amount and at the rate admitted by the defendant. In a later suit brought by the plaintiff for rent of subsequent years at the same rate as in the former suit, *held* (*Mitter, J., dissenting*) that, unless it was shown by the plaintiff that something had occurred since the former decision to alter the rate of rent, he was only entitled to the rate of rent decreed in the former suit, and that the decree in the former suit operated as *res judicata* as to the proper rent payable by the defendant. JEO LAL SINGH v. SURFUN, **11 C.L.R. 483.** (7 C. 298=8 C.L.R. 310, *D.*; 23 W.R. 85, 3 C. 383, 4 C. 790, *R.*) [*R.*, 19 C. 656.]

(9)—*Suit for refund of excess of rent after suit for arrears of rent.*—The defendant (a zamindar) refused to receive rent from the plaintiffs, *talukhdars*, at the rate asserted by the latter, who therefore deposited the amounts from time to time in the Zillah Court. The Zamindar, having drawn out these amounts, sued for arrears of rent, alleging that the money paid into Court covered only the principal and interest for a certain period, and obtained an *ex parte* decree. In a suit brought for a refund of the money paid into Court, which had without the plaintiff's consent been irregularly carried to the account of interest,—*held* that the claim was barred as *res judicata*. GOBINDNAUTH SUNDYAL v. ROMANAUTH THAKOOR, **1 Hay 501.**

(10)—*Judgments not "inter partes", admissibility in evidence of—Evidence Act* (I *of* 1872).

Res Judicata—continued.

——5.—Estoppel by Judgment—*continued.*

—It was held by a majority of the Full Bench (*Mitter, J., dissenting*) that a judgment in a former suit, which is neither a judgment *in rem*, nor one relating to matters of a public nature, is not at all admissible in evidence under any section of the Evidence Act in a subsequent suit, not between the same parties or those claiming under them, though the party against whom the judgment is offered in evidence was a party to the prior suit. *Mitter, J.*, however, held that such a judgment would be admissible in evidence under s. 13 and also under s. 11 of the Indian Evidence Act. GUJJA LALL v. FATTEH LALL, **6 C. 171=6 C.L.R. 439.** [*F.*, 4 A. 92=A.W.N. 1881, 137, 11 C. 562, 12 C. 207, 13 C. 352 F.B., 11 M. 116, 12 A. 1, F.B., *D*; 12 M. 9, 10 A. 585=A.W.N. 1888, 242, 15 M. 19, 18 M. 73, 23 C. 693; *Appl.*, 11 C.L.R. 528; *R.*, 10 B 439, 15 C. 233, 25 C. 522, F.B., 24 B. 591, 9 C.W.N. 403, 56 P R. 1906, 8 C. 985.]

(11)—*S.* 13—*Act* XIV *of* 1882, *Civ. Pro. Code*—Res judicata—*Cause of action.*—A second suit brought by the plaintiffs, for ejectment and declaration of title to certain land, against a purchaser of the same from a Municipality would not be barred on account of the dismissal of a prior suit brought by the plaintiff's predecessor in title to recover possession of the same land from the Municipality, which had stacked stones thereon. MODHU SUDAN KUNDU v. PROMODA NATH ROY, **20 C. 732.**

(12)—*Mesne profits—Details of amount not set forth—Right to deduction*—Res judicata.—Where the Court allowed a certain sum in the decree as the annual mesne profits of the land, but the details of the sum were not set forth in the judgment of the Court, and it was therefore impossible to say that the right to a particular deduction claimed by the defendant was adjudicated on by the Court, *held* that the rule of *res judicata* had no application to the question as to the particular deduction claimed by the defendant. KACHAR ALACHELA v. SHA OGHAD BHAI THAKARSHI, **17 B. 35.**

(13)—*S.* 13, *Civ. Pro. Code*, 1882—*Prior decrees awarding cess at certain rates—Value of.*—The amount of cess payable by landlords and tenants is not fixed for all time. It is a variable quantity changing from year to year according to circumstances. Therefore, decrees for cesses obtained in previous suits, at a certain rate for a particular year, do not have the effect of *res judicata*, in a subsequent suit for cess for other years, at a higher rate. But these decrees are admissible in evidence, and may raise a presumption in favour of the defendants. RICKETT v. RAMESWAR MALIA, **28 C. 109.**

(14)—*Decree for rent in previous suit*—Res judicata—*Landlord and tenant.*—A decree in a previous rent-suit by an *ijardar* does not operate as *res judicata* on the question of the existence of the relationship of landlord and tenant arising in a subsequent suit for rent brought by

Res Judicata—continued.

——**5.—Estoppel by Judgment**—*continued.*

the superior landlord. The decision in that suit, where the rate of rent was not in issue, does not operate as *res judicata* in the subsequent suit against the tenant regarding the amount of the rent claimed. BALARAM MONDUL v. KARTICK CHANDRA ROY CHAUDHURI, **4 C.W.N. 161.** (19 C. 656, 20 C. 505, *F.*)

(15)—*Civ. Pro. Code*, 1859, *s.* 2—*Rule in Duchess of Kingston's Case—Applicability to India — Judgment of Revenue Court* — Res judicata. — There is nothing technical or peculiar to the law of England in the rule laid down in the *Duchess of Kingston's Case.* A, as vendee of certain property, brought a suit in the Revenue Court against B the vendor for arrears of rent, the claim being based on a *kabuliyat.* B set up an *ikrarnamah* (said to have been simultaneously executed with the sale deed) under which he claimed to hold a certain portion of the land rent free. This *ikrarnamah* was denied by A. The *kabuliyat* not having been proved, the suit was dismissed by the Revenue Court which held the *ikrarnamah* to be valid. B subsequently sued for redemption contending that the sale-deed and the *ikrarnamah* simultaneously executed constituted a mortgage. The question arose whether the finding in the previous suit with respect to the *ikrarnamah* was not *res judicata* and whether A could not question its validity*a*. *Held* that there was no question of *res judicata.* The ultimate decision of the claim for rent did not turn upon the validity of the *ikrarnamah.* But if the judgment of the Revenue Court had been final in the matter before it, its incidental finding that the *ikrarnamah* was a valid instrument would not be conclusive between the parties in the present litigation. For the question before it was not the issue now raised between the parties; and its decision was not that of a Court competent to adjudicate on a question of title, for it had only a special jurisdiction to try summary suits for the recovery of rent. KHUGOOWLEE SINGH v. HOSSEIN BUX KHAN, **7 B.L.R. 673=15 W.R. P.C. 30=6 M.J. 146=2 Suther 404=2 Sar. 648.** [*R.*, 19 W.R. 322, 24 W.R. 154, F.B.= 15 B.L R. 238 6 C. 406=7 C.L.R. 251, 9 C. 439, 9 B. 75, 18 A. 270, F.B., 7 C.L.J. 202.]

(16)—*Decision as to amount of land held as tenant.*—In an action for rent, defendant pleaded, by way of estoppel to part of the plaintiff's claim, that, in a prior action for rent previously due, brought by the plaintiff against the defendant, it had been found that the defendant was tenant to the plaintiff of a less quantity of land only than that in respect of which the plaintiff claimed rent in his suit. *Held* that there was no estoppel, and that the plaintiff might show, notwithstanding such previous judgment, that the defendant was in occupation of the larger quantity. OJOODHYA PERSAD v. BHUGWANTAJAH, **Marsh, 12**; BHUGWANTAJAH v. OJOODHYA PERSAD, **Hay. 31.**

Res Judicata—continued.

——**5.—Estoppel by Judgment**—*continued.*

(17)—*Act* XIX *of* 1863—*Widow—Receipt of fixed money by—Effect.*—Plaintiff (a widow), who was in receipt of a fixed sum of money for many years, sued for partition of her share. The lower appellate Court, on the strength of a former decree which declared that she had no claim to share in the profits after having accepted a fixed maintenance, decided that she was not entitled to any share. *Held*, that the former decree decided nothing more than that the widow could recover no more in the share of profits in respect of the share claimed; and that it did not rule that such fixed payment represented a mere claim to maintenance and no substantial right or interest in the property itself, so that, on partition, she must be regarded as having no claim to share in the land; that the question should be investigated afresh, whether the alleged payment represented merely a right to an amount, with no right to a share in the land, in which case the widow as well as her son would be bound, or was merely a matter which the widow herself had assented to, in which case the decree establishing it should not be extended beyond her life. MUSSUMAT MAN KOONWAR v. DILAWUR HOSSEIN KHAN, **1 Agra Rev. 36.**

(18)—*Adopted son of Hindu widow—Title.*—A plaintiff who sues to obtain property which belonged to a Hindu widow, on the ground that he is the adopted son of a brother of the deceased husband, is not barred from setting up his title, because, in a former suit against the same defendant for other property, it was decided that he was not the adopted son of that brother. KRIPARAM v. BHAGWAN DAS, **1 B.L.R. A.C. 68=10 W.R. 100.** [*Overruled*, 1 C. 144; *Disappr*, 4 C. 199, P.C.]

(19)—*Civ. Pro. Code*, 1882, *s.* 433—Res judicata—*Suit for maintenance—Tipperah.*—The Maharaja of Hill Tipperah which is an independent Sovereign State, was sued for maintenance It was found that in a former suit tried in British India in respect of the same claim, the Court had ordered the amount of the maintenance, for which it gave a decree, to be paid by the Maharaja and from his estate of R which was in British India. *Held* that the suit not being a suit for immoveable property would not lie; and, further, that the decree in the former suit was not *res judicata* to show that the maintenance claimed in the present suit was a charge on the zamindari of R so as to give the Court jurisdiction under cl. (*c*) of s. 433 of the Civ. Pro. Code. BIR CHUNDER MANIKHYA v. ISHAN CHUNDER TAGORE, **12 C L.R. 473.**

(20)—*Proceeding under Probate and Administration Act, nature of—Construction of will, finding of Court on*—Res judicata—*Ss.* 19 *and* 59, *Act* V *of* 1887 (*Probate and Administration*)—*S.* 41, *Act* I *of* 1872 (*Evidence*).—In a proceeding upon an application for probate of a will, the only question which the Court is called upon to determine is whether the will is

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***Res Judicata*—continued.**

——5.—Estoppel by Judgment—*concluded.*

true or not, and it is not the province of the Court to determine any question of title with reference to the property covered by the will. A proceeding under the Probate and Administration Act is not a suit properly so called, but takes the form of a suit according to the provisions of the Civil Procedure Code. (4 C. 1, *R.*) That being so, the finding of a Court on the construction of a will being incidental and for the purpose of determining the question of the representative title of the applicants, cannot be regarded as concluding a party to an application for probate, by *res judicata*, from obtaining a construction of the will in a suit brought by him. ARUNMOYI DASI v. MOHENDRA NATH WADADAR, **20 C. 888**. [*Appr.*, 19 A. 458=A.W.N. 1897, 106; *R.*, 25 C. 354, L.B.R. 1893—1900, 653, 28 B. 644=6 Bom. L.R. 966; *F.*, 5 L.B.R. 78.]

(21)—*Application for probate — Refusal to grant probate, effect of—Subsequent suit by executors, whether barred by* res judicata—*Probate and Administration Act* (V *of* 1881), *ss.* 12, 59.—The circumstance that a Court has refused grant of probate of a will cannot render probate necessary in cases in which it may be optional for the party interested under the will to apply for it or not. It merely relegates the parties to their former position. The High Court, therefore, refused to uphold the contention of the appellant's pleader in this case, that, as the grant of the probate under the Act is conclusive proof, so long as such grant remains unrevoked, of the title of the executors and of the genuineness of the will admitted to probate, a similar consequence, in the opposite sense, must flow from the refusal of the Court to grant probate. From a refusal to grant a probate, it by no means follows that, in the opinion of the Court, the will propounded is not the genuine will of the testator. Under the provisions of Act VII of 1889, such a refusal, until a fresh application has been successfully made, may operate to prevent the executor recovering the debts due to the deceased, but it cannot have any other disabling effect such as that of barring a subsequent suit by the executors filed as persons beneficially entitled under the will for a declaration that the property of the deceased belonged to them and for an injunction to restrain interference in their enjoyment of it. The conclusive nature of probate granted rests on the declaration by the Legislature as expressed in ss. 12 and 59 of Act V of 1881. There is, however, no section declaring that any corresponding result, in an opposite sense, shall flow from the refusal to grant it. GANESH JAGANNATH DEV v. RAMCHANDRA, **21 B. 563.** [*F*, 2 N.L.R. 123; *R.*, 14 C.W.N. 924=12 C.L.J. 185=7 Ind. Cas. 126.]

See EVIDENCE ACT, 1872, ss. 13, 40, 41, 42, 43, 3 B. 3.

See GRANT—CONSTRUCTION, 18 W.R. 469.

***Res Judicata*—continued.**

——6.—Judgments on preliminary points; Effect of.

(1)—Res judicata—*Former suit not tried on merits—"Heard and determined"—Act* VIII *of* 1859, *s.* 2.—Where the former suit, *has not been tried on the merits* but was summarily dismissed, a subsequent suit, though on the same cause of action, and between the same parties, is not one on a cause of action which has been *heard and determined* by a Court of competent jurisdiction in a former suit. SHOKHEE BEWAH v. MEHDEE MUNDUL, **9 W.R. 327.** [*F.*, 12 M. 500; *R.*, 6 B. 482; 8 A. 282=A.W.N. 1886, 119, 3 C.P.L.R. 3; *D.*, 12 C. 563.]

(2)—*Civ. Pro. Code, s.* 13—*Dismissal of previous suit on preliminary point—Second suit not barred by* res judicata.—To conclude a plaintiff on the ground of *res judicata*, it is necessary to show, not only that there was a former suit between the same parties, for the same matter, and upon the same cause of action, but also that the matter in issue has been heard and decided in the former suit. So, where the former suit itself had been summarily dismissed as premature without being tried on its merits, the second suit for the same purpose cannot be barred by *res judicata*. RAMIREDDI v. SUBBAREDDI, **12 M. 500.**

(3)—Res judicata—*Heard and finally decided—Deciding on mere perusal of evidence in a prior suit.*—To support a plea of *res judicata*, it is not enough that the parties are the same, and that the same matter is in issue. The matter must have been "heard and finally decided." A subsequent suit is not barred, if the prior suit was dismissed by reason of defective parties and because a declaratory decree could not be made. [*R.*, 20 A. 110, F.B.] *Quære*.—Whether the High Court were right in assuming on the mere perusal of the evidence in the first suit to decide a case which was not before them and on which they could not have heard any argument. SHEOSAGAR SINGH v. SITARAM SINGH, **24 C. 616, P.C.=24 I.A. 50=1 C.W.N. 297=7 Sar. 124.**

(4)—*Reg.* XXVI *of* 1814—*Civ. Pro. Code*, 1859, *ss.* 2, 148—*Dismissal of suit for default*—Res judicata.—Where a suit under Reg. XXVI of 1814 was struck off the file on default, *held* that there was no decision of the suit such as was contemplated by s. 148 of the Civ. Pro. Code of 1859, and as the suit was not 'heard and determined' by the Court, a subsequent suit between the same parties, and founded on substantially the same cause of action, would not be barred by s. 2 of the Code. GUNGA RAM v. KHEM NARAIN POOREE, **11 W.R. 250.** [*R.*, 8 C.L.J. 196.]

(5 & 6)—*Dismissal of rent-suit for default—Subsequent suit for possession.*—The dismissal, for default, of a suit for rent, in which the title of the plaintiff was also questioned by the tenant, would not bar a subsequent suit for possession of the land. GOBIND CHUNDER ADDYA v. AFZUL RABBANI, **9 C. 426=12 C.L.R. 29.**

Res Judicata —continued.

——6.—Judgments on preliminary points, Effect of —*continued.*

(7)—Res judicata—*First suit disposed of on technical point.*—Where the former suit brought by the plaintiff against the defendant on the same cause of action, though decided on its merits in the Court of first instance, was decided on appeal on a purely technical point, it cannot be said that the cause of action has already been heard and determined so as to operate as *res judicata.* RAJAH MOKOOND NARAIN DEO v. JONARDUN DEY BURNICK, **15 W.R. 208.**

(8)—Res judicata—*First suit struck off on ground of discrepancy.*—Where in a former suit there was no evidence taken, no orders passed and no decision come to on the merits, but the case was struck off on the ground of discrepancy between the petitioner's plaint and his deposition, this will not operate as *res judicata.* GUNGA NARAIN DASS v. PUNCHANUNEE DASSEE, **W.R. 1864, 163.**

(9)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Splitting of causes of action—Civ. Pro Code,* 1859, *s.* 7.—Dismissal of a former suit for non-joinder of parties does not bar a subsequent suit. [*R.*, 3 C.P.L.R. 3.] A suit for arrears of rent is not estopped under Act VIII of 1859, s. 7, by the fact that plaintiff has split his claim, *i. e.*, the jumma, but the circumstance that a part of the jumma has been omitted would be a bar to plaintiff's suing subsequently for such part. PURSUN GOPAL PAUL CHOWDHURY v. POORNANUND MULLICK, **21 W.R. 272.** [*R.*, 3 C.P.L.R. 3.]

(10)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata.—The dismissal of a former suit on the ground of some technical defect or irregularity and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or dismissal which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is also necessary to show that there was a decision finally granting or withholding the relief sought. (8 A. 282, *Appl.*; 9 A. 155, *D.*) For the purposes of *res judicata*, no adjudication can be final unless the parties between whom the doctrine is to be applied were arrayed on opposite sides in the former litigation. MUHAMMAD ZAHIA KHAN v. MIRDAD KHAN, **A.W.N. 1887, 246.**

(11)—*Dismissal of suit "in present form"—Nature of order—Subsequent suit*—Res judicata—*Civ. Pro. Code*, 1882, *s.* 13, *expl* III.—The plaintiffs had brought a suit for possession of a pond against the defendants which suit was dismissed in the form in which it had been brought on the ground that all the persons who should have been made parties were not joined in the suit. Thereupon, the plaintiffs brought the present suit for joint possession of the bond against the defendants, who objected that the suit was barred by the rule of *res judicata.* The lower appellate Court held the suit was barred

Res Judicata—continued.

——6.—Judgments on preliminary points, Effect of—*continued.*

under s. 13, Civ. Pro. Code, 1882, as contended for by the defendants. The plaintiffs appealed to the High Court. *Held* that the suit was not barred. In the former suit, there was nothing heard and finally decided within the meaning of s. 13, Civ. Pro. Code, 1882, so as to operate as a bar to the present suit. It was dismissed on a preliminary and technical point and there was no hearing or decision of the matter in issue in that suit. With reference to the contention urged on behalf of the defendants that the suit was barred under explanation III to s. 13, it was *held* that, in the former suit, there was no intention on the part of the Court of either granting or refusing any relief, nor was there any adjudication of the matter in issue. SALIG RAM PATHAK v. TIRBHAWAN PATHAK, **A.W.N. 1885, 171.** [*R.*, 8 A. 282; *Expl.*, 11 A. 187.]

(12)—*Dismissal of suit on technical ground—Subsequent suit in respect of same matter not barred.*—When a suit has been dismissed for misjoinder or multifariousness or because all the proper parties have not been joined in it or when it has been dismissed on a purely technical point, a subsequent suit is not barred. So where a mortgagee brought a suit for foreclosure against one of several mortgagors in respect of a portion of the mortgaged property, and the suit was dismissed on the ground that the mortgagee could not split his mortgage, a suit by him subsequently brought against all the mortgagors for the foreclosure of the entire mortgaged property was neither *res judicata* under s. 13 nor was barred under s. 43. GANPAT RAO v. DOMA PATEL, **3 C.P. L.R. 3.**

(13)—*Former judgment on technical ground and not on merits—Subsequent suit for same cause of action not barred.*—A part of the rent claimed in this suit had been previously sued for, and though that suit was decided in plaintiff's favour by the Court of first instance, the lower appellate Court, proceeding wholly on a trivial technical defect or irregularity, reversed the first Court's decision. *Held* that the present suit was not barred by the judgment in the previous suit. The cause of action was the same and the former judgment was pronounced by a Court of competent jurisdiction, but the judgment was inconclusive and could not be a bar to the present suit, because it had proceeded wholly on a technical ground and was not determined upon the merits. RAMNATH ROY CHOWDHRY v. BHAGPUT MOHAPUTTER, **3 W. R. Act X, Rul. 140.** [*Appl.*, 8 A. 282.]

(14)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *new Code*)—Res judicata—*Judgment on preliminary point.*—Failure of the judgment-debtor, despite notice, to appear and oppose an application for attachment and sale in execution of a conditional mortgage decree, which application, however, was dismissed for want

Res Judicata—continued.

——6.—Judgments on preliminary points, Effect of—*continued.*

of prosecution, was *held* not to operate as *res judicata* in a subsequent application for execution by the decree-holder, as to the question whether the conditional decree was capable of execution before being made absolute, because this question was never before in issue and was not judicially treated on the occasion of the former application. RAM LAL v. NARAIN, **12 A. 539 = A. W. N. 1890, 97.** [*R.*, 5 O.C. 251.]

(15)—*Judgments on preliminary points—Dismissal of joint claim on ground of several liability—Civ. Pro. Code*, 1859, *s.* 2.—Where a suit against several defendants for a joint *jumma* is dismissed on the ground that the *jumma* is several, and not joint, the plaintiff is not precluded by Act VIII of 1859, s. 2, from afterwards suing each of them severally for the separate *jumma*. TELOKDHAREE SAHOO v. BISSENDRO NARAIN SAHEE, **Marsh 418 = 2 Hay, 528.**

(16)—Res judicata—*Civ. Pro. Code* (*Act* X *of* 1877), *s.* 13—*Dismissal of suit for want of jurisdiction.*—Where the Court, before dismissing a claim for want of the Collector's certificate under s. 6 of the Pensions Act, inquired into all the issues and even recorded its opinion on every one of them, *held*, that the opinion so expressed did not operate as *res judicata* upon a subsequent suit on the same cause of action, as there was no legal pronouncement on the merits of the former case. PUTALI MEHETI v. TULJA, **3 B. 223.** [*Appl.*, 18 M. 466; *R.*, 17 A. 174 = A.W.N. 1895, 47.]

(17) - Res judicata — *Former suit dismissed for want of cause of action and for want of jurisdiction — Subsequent suit after accrual of cause of action.*—One of the sons of an undivided Hindu father governed by the Mitakshara law of the Bombay Presidency sued for a partition of the moveables and immoveables belonging to the family; and the suit was dismissed as regards the moveables on the ground that he could not compel a partition of them during his father's lifetime, and as regards the immoveables on the ground of want of jurisdiction. On the death of the father, the same person brought a suit against his brother for partition of the same properties. *Held*, that the former suit did not operate as *res judicata* because in that suit there was no adjudication between the brothers as to their rights in the estate arising on their father's death. LAKSHMAN DADA NAIK v. RAMACHANDRA DADA NAIK, **5 B. 48, P.C. = 7 C.L.R. 320 = 7 I.A. 181 = 4 Sar. 173.**

(18)—*Suit against several defendants— Suit dismissed for want of jurisdiction against two subsequent suits against them in different Courts on same cause of action*—Res judicata, *Civ. Pro. Code*, 1882, *ss.* 42, 43. — The property in suit (situated in Surat) was mortgaged by defendants 1, 2, 3 to plaintiff who sued all

Res Judicata—continued.

——6.—Judgments on preliminary points, Effect of—*continued.*

of them in the High Court of Bombay for recovering the mortgage-debt. The liability of the defendants under the suit-bond was joint and several. On the contention of defendants 2 and 3 that the Court had no jurisdiction as against them, they being residents of Surat, the suit was dismissed as against them and decreed against the 1st defendant only (who resided in Bombay). The present suit was, thereupon, instituted by the plaintiff on the same mortgage in the Court at Surat against defendants 2 and 3, who contended that the suit was barred by reason of the previous suit against them in the Bombay High Court having been dismissed. *Held* that, there being no decision on the merits in the previous suit and consequently the proceedings therein in the Court at Bombay against defendants 2 and 3 being a nullity, the present suit against them was not barred. BHUKANDAS VIJBHUKANDAS v. LALLUBHAI KASHIDAS, **17 B. 562.** [*R.*, 24 B. 77 = 1 Bom. L.R. 534, 22 A. 307.]

(19)—*Usufructuary mortgagee—First suit for mesne profits—Second suit for possession.*—Where a usufructuary mortgagee brought a suit for mesne profits, which was dismissed on the ground that his mortgagor was not in possession of his share in the property which belonged jointly to an undivided Hindu family, *held*, that it did not operate as *res judicata* against a subsequent suit by the mortgagee for the possession of his mortgagor's share in that property. KRISHNAJI LAKSHMAN RAJVADE v. SITARAM MURARRAV JAKHI, **5 B. 496.**

(20) *Former suit dismissed for want of jurisdiction—Subsequent suit not barred.*—The dismissal on the ground of want of jurisdiction, by the Civil Court, of a suit to eject the defendants from the fishing ground of the plaintiffs, situate below low water-mark, does not operate as *res judicata* so as to bar a subsequent suit by the plaintiffs to recover damages from the defendants for fixing their fishing stakes and nets too near to those of the plaintiffs. BABAN MAYACHA v. NAGU SHRAVUCHA, **2 B. 19.** [*R.*, 2 B. 457, L.B.R. 1872—1892, 233.]

(21)—Res judicata—*First suit rejected in appeal as being improperly valued—Second suit on same cause of action—Act* VIII *of* 1859, *ss.* 2, 31, 36.—Where the first suit has been rejected by the District Court in appeal on the ground that the claim was improperly valued, the plaintiff is not precluded from presenting a fresh plaint in respect of the same cause of action, and the case comes within the spirit of s. 36 of Act VIII of 1859. The former suit was not heard and determined, for it failed by reason only of an informality. There is no express power given by the Civ. Pro. Code, to reject a plaint, after it has been registered, on the ground that the claim had been improperly valued. When a suit is, therefore, rejected at any subsequent stage of the proceedings on that account, the rejection ought to have only the same effect, as if the plaint had been originally

Res Judicata—continued.

——6.—**Judgments on preliminary points, Effect of**—*continued.*

rejected, in accordance with s. 31 of the Act, when it was presented for registration. DULLABH JOGI v. NARAYAN LAKHU, **4 B.H.C. A.C 110.** [*F.*, 12 Bom. L.R. 766=35 B. 38; *Appl.*, 8 A. 282=A.W.N. 1886, 119; *R.*, 19 B. 507, 23 B. 122.]

(22)—*Indigo trade—Advances of money - Suit for balance of accounts—Suit for proceeds of indigo.*—The dismissal of X's suit against Y for a balance due as regards advances made to Y and the brothers on account of indigo is no bar to the institution of a suit by Y to recover the proceeds of indigo consigned to X. PUNCHANUN ROY v. MODOOSOODUN ROY, **W.R. 1864, 245.**

(23)—*Res judicata—First suit under deed of sale—Second suit under deed of mortgage.*—A suit will lie for plaintiff's rights under a deed of mortgage, although a former suit for the same property, brought on the allegation that it was a deed of sale, was dismissed without permission to the plaintiff to bring a new suit. RAMKISTO SHAHA v. NEMY CHURN CHOLHAI, **W.R. 1864, 110.**

(24)—*Remand — Right of suit—Act* VIII *of* 1859, *ss.* 2, 110—A suit in which the plaintiff obtained a decree, was made the subject of an appeal and resulted in a remand; on the remand, no one appeared either for plaintiff or defendant, and the suit was dismissed on default. *Held* that the plaintiff was not precluded by s. 2, Civ. Pro. Code, from bringing a fresh suit. RAGHUNATH SINGH v. RAMKUMAR MANDAL **5 B.L.R. App. 64=14 W.R. 81.**

(25)—*Act* VIII *of* 1859, *s.* 2—*Res judicata—Previous suit by co sharer.*—In a suit to recover possession of a portion of land, of which the Municipal Commissioners had deprived the plaintiff by heaping stones thereon, and evicting his ryot therefrom, *held*, that a decision passed in a similar suit brought by a 10-annas sharer in this property against the Commissioners, in which the present plaintiff had been made a *pro forma* defendant, was not binding in the present suit for any right which the present plaintiff might have with regard to the land. H. PRICE v. KHILAT CHANDRA GHOSE, **5 B.L.R. App. 50=13 W.R. 461.**

(26)—*Suit for profits—Previous suit for same period dismissed as defendant not served—Effect of such dismissal.*—Where a suit for profits against three defendants was dismissed owing to a failure of the plaintiff to cause one of the defendants to be served, *held* that a second suit for profits, for the same period, against the same defendants, was maintainable. The former judgment, not being a decision on the merits, did not bar the subsequent claim. The principles embodied in s. 99 (A) of the Civ. Pro. Code applied to a case like this. SITA RAM SINGH v. POKHPAL SINGH, **3 A.L.J. 576, F.B.=A.W.N. 1906, 233=1 M.L.T. 447=28 A. 749.**

Res Judicata—continued.

——6.—**Judgments on preliminary points, Effect of**—*continued.*

(27)—*Res judicata—Civ. Pro. Code, s.* 13—*Suit on hundis, before cause of action dismissed—Subsequent suit after cause of action.*—Where a suit on hundis brought by the drawees before their presentation, and before objection or refusal of payment had been dismissed as premature, the cause of action not having arisen then, a subsequent suit by the same parties after presentation and refusal of payment, was held not barred by s. 13, Civ. Pro. Code. BUTA MAL v. RAMCHAND, **72 P.R. 1885.** (148 P.R. 1883, *R.*)

(28)—*Act* VIII *of* 1859, *ss.* 86 *and* 227—*Claim rejected as presented too late—Subsequent adjudication of claim not barred—Admissibility of claim even after proclamation sale.*—Where, on the presentation of a claim to attached property, no adjudication has been made, but the claim rejected simply on the ground that it had been presented too late, there can be no bar, in law, to the claim of the person to the property being adjudicated upon when it is again advanced after attachment made under the decree. Although s. 86 read with s. 227 of Act VIII of 1859 requires that the claim of such a nature should be advanced at the earliest opportunity, yet, no period of time has been prescribed by law within which such claim must be made and, therefore, it may be admitted even after proclamation of sale has been issued, provided that the claim has not been designedly and unnecessarily delayed with a view to obstruct the ends of justice. MAHOMED MUBSON v. SUMPUTTEE SAHOON CHOWDHRAIN, **10 W.R. 305.**

(29)—*Act* VIII *of* 1856, *s.* 2—Res judicata—*Suits based on different causes of action—Several properties held under one title—Cause of action on dispossession—Decree for rent, effect of, on title to land—Rejection of claim in execution—Suit by claimant against third parties—Limitation—Sale for arrears of revenue—Benami purchase—Adverse possession by beneficial purchaser—Sale under Act* XII *of* 1841—*Suit to oust nominal purchaser—Act* I *of* 1845, *s.* 21—*Act* XI *of* 1859, *s.* 36.—The dismissal of a suit for possession of lands based on an alleged act of dispossession does not operate as a bar, under s. 2, Act VIII of 1859, to a different suit by the same person to recover other lands, based on a different act of dispossession, though the title set forth by the plaintiff in both the suits is identical. The title upon which a particular property is claimed does not constitute the cause of action. Where several properties are held by a person under one and the same title, a cause of action does not accrue to him with reference to them all, simply because he has been dispossessed of one of them on a particular date. A decree for arrears of rent against ryots does not affect the title to the property itself, the operation of such decree being restricted to the particular rent which it purports to cover. So a suit to

Res Judicata—continued.

——6.—Judgments on preliminary points, Effect of—*continued.*

establish the plaintiff's title to certain lands was held not barred under cl. 5, s. 1, Act XIV of 1859, by reason of its having been brought more than one year from the date of a rent-decree obtained by a third party against the ryots. Where the rejection of a claim in an execution case was not followed by the sale of the properties attached, a suit by the claimant in respect of the same properties, against a person other than the decree-holder, brought for quite a different purpose and upon quite a different cause of action, was held not barred by reason of its having been brought more than one year from the date of the order rejecting the claim. Where property sold for arrears of revenue is purchased *benamee*, and the beneficial purchaser remains in adverse and undisturbed possession for more than twelve years from the date of sale, such possession is not only sufficient to extinguish the title of the nominal auction-purchaser, if he had any, but also to create in the beneficial purchaser a title capable of devolving upon his heirs and representatives. Neither s. 21 of Act I of 1845, nor s. 36 of Act XI of 1859, is applicable to a purchase under Act XII of 1841. BOOA RUSSOOLEE v. THE NOWAB NAZIM OF BENGAL, **11 W.R. 382.** [*Appr.*, 13 W.R. 347.]

(30)—*Suit for correction of Settlement Record, dismissal of, as barred by time—Subsequent suit for declaration of proprietary rights—Civ. Pro. Code*, 1877, *ss.* 13, 43.—Where a suit for the correction of the Settlement Record instituted in the Settlement Courts under the Punjab Government Notification then in force has been dismissed on the sole ground that it was barred by time, without any adjudication upon the merits of the claim, neither the form of claim in that suit nor the decree therein, is a bar under s. 43 or s. 13 of the Civ. Pro. Code (Act X of 1877) to the maintenance of a subsequent suit for the declaration of proprietary rights in the same land. HAMAD v. WAHAB, **190 P.R. 1883.**

(31)—*Dismissal of prior suit on same cause of action on ground of limitation.*—The dismissal of a suit for a *mourasi mokurari* title to land and for mesne profits, as having been barred by limitation would not, the cause of action not having been heard and determined by a competent Court, bar a subsequent suit on the same cause of action under s. 2 of the old Civ. Pro. Code (of 1859) = s. 13 of the present Code. BRINDHABUN CHUNDER SIRCAR v. DHUNUNJOY NUSHKUR, **5 C. 246 = 4 C.L.R. 443.** [*D.*, 7 C.L.R. 103.]

(32)—*Civ. Pro. Code*, s. 13—Res judicata—*Decision on a preliminary point—Appeal—Set aside—Remand for trial on other issues—Suit dismissed for default of parties.*—In a former suit for rent between the same parties the Collector on appeal held that a certain lease was inoperative and remanded the case for trial. It was then dismissed for default. *Held* in a

Res Judicata—continued.

——6.—Judgments on preliminary points, Effect of—*continued.*

subsequent suit for rent that the finding, although it was not embodied in the decree, operated as *res judicata* inasmuch as it was the basis of the Collector's order. SHEIKH ALAM v. PARAMANAND, **5 A.L.J. 48 = A.W.N. 1908, 41 = 3 M.L.T. 205.**

(33)—Res judicata—*Former suit dismissed for failure to produce evidence, with reservation to bring new suit—Fresh suit—Act* VIII *of* 1859, s. 2—A suit brought in the year 1856, to set aside an auction sale of a *putnee* taluk for arrears of rent, under Beng. Reg. VIII of 1819, was dismissed for want of evidence on the part of the plaintiffs, with a reservation by the Court that the order made was not to be a bar to the plaintiffs, or any other persons who might substantiate their rights, from proceeding to recover. On a fresh suit by the same parties for the same matter, *held* that such reservation was of no effect as, under s. 2 of Act VIII of 1859, the former suit was a bar, and a plea of *res judicata* allowed. There is no power in the Courts in India similar to that exercised by Courts of Equity or Common Law in England, to dismiss a suit with liberty for the plaintiff to bring a fresh suit for the same matter, or to enter a non-suit. Such power of the Indian Courts is limited to questions of form, as (1) in the case of misjoinder of parties or of the matters in suit, (2) where a material document has been rejected for not bearing a proper stamp, and (3) if there has been an improper valuation of the subject-matter of the suit; but not to a case where the issue has been joined and the plaintiff fails to produce the evidence he is bound to give to support the issue. WATSON v. THE COLLECTOR OF JILLA RAJSHAHYE, **3 B.L.R. P.C. 48 = 13 M.I.A. 160 = 12 W.R.P.C. 43 = 2 Suther. 269 = 2 Sar. 500.** [*F.*, 21 W.R. 291, 12 M. 500, 35 C. 924 = 12 C.W.N. 921; *R.*, 3 A. 528, 9 A. 155, 9 A. 690, 14 B. 31, 19 B. 571, 9 C.W.N. 679, 6 Bom. L.R. 594, 29 B. 219 = 7 Bom. L.R. 90, 29 A. 471 = 4 A.L.J. 375, 18 M.L.J. 198, 11 Bom. L.R. 1109; *Cons.*, 8 A. 282; *Observed on.* 16 W.R. 276; *D.*, 23 W.R. 345, 3 C.L.R. 447.]

(34)—*Plaintiff's failure to produce evidence on date of hearing—Effect—Civ. Pro. Code (Act* VIII *of* 1859), s. 114.—A plaintiff neglecting to produce evidence on the date of hearing is precluded from bringing a fresh suit in respect of the same cause of action, in the same way as he would be if the suit were dismissed for default under s. 114, Act VIII of 1859. MOFIZOODDEEN v. SHAIKH AMOODDEEN, **23 W.R. 58.** [*Appl.*, 9 C.W.N. 679; *D.*, 12 C. 563.]

(35)—Res judicata—*Failure to prove case—Adjudication.*—Where a suit for removal of an alleged nuisance is dismissed because the plaintiff has not produced his witnesses, and has failed to prove his case, there has been an adjudication so as to operate as *res judicata* to

***Res Judicata*—continued.**

——6.—Judgments on preliminary points, Effect of—*concluded.*

bar another suit on the same cause of action. SAHADEO PANDEY v. NOKHID PANDEY, **15 W.R. 573.**

(36)—*Civ Pro. Code*, 1877, *s.* 13—Res judicata—*Former suit for declaration—Limitation.*—Where the appellants had sued the respondents, the mother and the adopted son, for a declaration that the latter was not the adopted son of the deceased, and the suit was dismissed as barred by limitation, *held* that the appellants could not raise the same contention in this suit. MANNU LAL v. HIRA LAL, **A.W.N. 1881, 13.**

Suit to evict *de facto* manager of charity by plaintiffs as *de jure* trustees—Dismissal of suit as barred by time, whether operates as—against subsequent suit by Advocate General. *See* CIV. PRO. CODE, 1908, ss. 92, 93, **22 B. 216.**

See CIV. PRO. CODE, 1908, O. XVII, rr. 2 and 3. 80 P.R. 1899.

——7.—Matters in Issue.

(1)—Res judicata—*S.* 13, *Civ. Pro. Code—Matter not in issue in prior suit.*—The law as to estoppel by a judgment is stated in s. 6 of Act XII of 1879 and s. 13 of Act XIV of 1882. It is that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree according to the Code of Procedure is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground and does not afford any information as to the matters which were in issue or have been decided. [*F.*, 21 M. 344=25 I.A. 102, 8 C.W.N. 30=31 C. 95; *Rel. on*, 1 M.L.J. 313; *D.*, 15 A. 3, 17 M.L.J. 423, 9 C.W.N. 679; *R.*, 14 B. 31, 12 M. 500, 15 B. 625, 16 B. 1, 3 O.C. 273, 17 A. 174=15 A.W.N. 47, 11 C.P.L.R. 130, 11 C.P.L.R. 150, 27 B. 418, 27 A. 37, P.C., 1 C.L.J. 337, 57 P.R. 1907=66 P.W.R. 1907, F.B.] Where the matter in issue in the subsequent suit was not directly and substantially in issue in the prior suit and was excepted from the decree therein, the subsequent suit is not barred under s. 13. KALI KRISHNA TAGORE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **16 C. 173=15 I.A. 186, P.C.=5 Sar 237.** [*F.*, 21 M 344=25 I.A. 102, 8 C.W.N. 30=31 C. 95; *Rel. on*, 1 M.L.J. 313; *D.*, 15 A. 3, 17 M.L.J. 423, 9 C.W.N. 679; *R.*, 14 B. 31, 12 M. 500, 15 B. 625, 16 B. 1, 3 O.C. 273, 17 A. 174=A W.N. 1895, 47, 11 C.P.L.R. 130, 11 C.P L.R. 150, 27 B. 418, 27 A. 37, P.C., 1 C L.J. 337, 57 P.R. 1907=66 P.W.R. 1907, F.B.]

(2)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 2—Res judicata—*Same cause of action—Parties in direct contest and with full opportunity.*—Where

***Res Judicata*—continued.**

——7.—Matters in Issue—*continued.*

the cause of action is the same in substance in both suits and the former suit was so constituted that the parties to the present suit were in direct contest with each other, and had full opportunity of asserting their rights, the decision in the former suit, which disposed of the same matter and substance as in the present suit, is *res judicata*. Where, in a suit for rent, the jumma payable was distinctly put in issue and decided, the decision barred the question of the rate of jumma being raised in a subsequent suit between the parties. RAKHAL DOSS SINGH v. SREEMUTTY HEERA MOTTEE DOSSEE, **22 W.R. 282.** [*F.*, 1 C. 202=24 W.R. 403; *R.*, 34 A. 172=9 A.L.J. 111=13 Ind. Cas. 154.]

(3)—Res judicata—*Act* X *of* 1877, *s.* 13, *expl.* I (*Amended by Act* XII *of* 1879), *s.* 6.—In order to constitute the bar of *res judicata*, it is not sufficient merely that an issue on the same point should have been raised in the former suit, although that issue may have been incidentally decided; but it must appear that the matter referred to was alleged by one party and either denied or admitted, expressly or impliedly, by the other. SHAMA CHURN CHATTERJEE v. PROSUNNO COOMAR SANTIKAREE, **5 C.L.R. 251.**

(4)—*S.* 13, *Civ. Pro. Code*, 1882—Res judicata—*Matter, directly and substantially in issue, being the same, though the subject-matters are different—Bengal Tenancy Act*, *ss.* 48, 29 (*b*), 85, *sub-s.* 2—*Contract for rate in excess of the maximum prescribed, validity of—S.* 66—*Suit for ejectment for non-payment of rent—Waiver—Act* VIII (*B. C.*) *of* 1869, *s.* 22.—For the application of the principle of *res judicata*, it is not necessary to show that the subject-matter of the former suit was the same as that of the subsequent suit, in which it is sought to be applied, but that the question, the trial of which is sought to be barred in the subsequent suit, was directly and substantially in issue in the former suit, subject to the specified qualifications. A contract for a rate of rent in excess of the maximum rate prescribed is not wholly void, but nothing in excess of the prescribed rate can be recovered. Such a contract is different from one contemplated by s. 29, cl. (*b*) and s. 85, sub-s. 2 of the Bengal Tenancy Act. (26 C. 199, 26 C. 199 Note, *R.*) Where a landlord sues for arrears of rent for four successive years, the landlord's claim for ejectment for non-payment of arrears for the first three years must be held to have been waived, and a decree for ejectment can be made for non-payment of the arrears due only for the year immediately preceding that in which the suit is brought. SITANATH MIDDA v. BASUDEB MIDDA, **2 C.L.J. 540.** (14 C. 33, *F.*) [*R.*, 12 C.W.N. 739=9 C.L.J. 597.]

(5)—*Civ. Pro. Code*, 1882, *s.* 13, *exp.* 2—*Scope of.*—S. 13, Civ. Pro. Code, 1882, expl. 2 refers to the title litigated in the former suit as contradistinguished from the relief claimed, and where several independent grounds of action

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are available, a party is not bound to unite them all in one suit, though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action. ALLUNNI v. KUNJUSHA, **7 M. 264.** [*Appr.*, 13 M.L.J. 448; *Rel. on*, 12 C.W.N. 292=7 C.L.J. 504; *Cons.*, 25 B. 189; *R.*, 15 M. 336, 26 M. 760.]

(6)—Res judicata—*Civ. Pro. Code*, s. 13—*Parties suing in different capacities—Plaintiff not bound to assert all his claim at once.*—The plaintiffs, jointly with certain others, first instituted a suit for pre-emption against the defendants. That suit having been dismissed, the plaintiffs then brought a second suit in their own right to recover possession of some of the plots sold, alleging that they belonged to them. *Held* that the omission of the plaintiffs to claim possession of the suit plots in their previous suit did not bar their present claim for them, firstly, because the capacity in which they now sued setting up a private and exclusive title was different from their previous one where they claimed a right jointly with others, and secondly because, under s. 13, cl. 2, Civ. Pro. Code, a plaintiff is not bound to assert at once all his titles to property or to be estopped from thereafter advancing them. MUHAMMAD DIN v. RAHIM GUL, **6 P.R. 1886.** [*R.*, 156 P.R. 1889, 146 P.R. 1890, 12 O.C. 347=4 Ind. Cas. 763.]

(7)—*Matters which might and ought to have been made ground of defence—Law and custom.*—A person, who is entitled to succeed both by law and custom, is bound to make both as his grounds of attack in the first suit. PALA MAL v. MAYA, **146 P.R. 1890.** [*Rel. on* and *F.*, 55 P.R. 1907.]

(8)—*Matter which ought to have been made alternative ground of attack—Omission to raise in former suit—Effect in subsequent suits.*—An omission to put forward an alternative ground of attack in the first suit bars a subsequent suit based on that ground. KANHYA LAL v. CHARATI LAL, **4 P.R. 1899.** [*R.*, 55 P.R. 1907.]

(9)—*Decision of unnecessary issue*—Res judicata—*Final decision.*—Decision in a former suit of question not essential to the decision of a case could not be regarded as a final decision of that question between the parties. FATTA v. HAJI AHMAD, **50 P.R. 1899.**

(10)—*S.* 13, *Civ. Pro. Code*, 1882, *explanation*—Res judicata—*Matter which "ought" to have been made ground of attack—Estoppel—Judgment—Findings essential to sustain judgment.*—Whether a ground of attack, which might have been taken in a previous suit, ought to have been so taken, depends upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important. (19 I.A. 234, 20 C. 79, *F.*; 16 I.A. 107, 16 C. 682, 31 C. 79, 26 M. 645, 24 B. 189, *R.*). A

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—7.—Matters in Issue—*continued.*

plaintiff, having striven to establish his claim by one means and failed, cannot establish that claim by other means, which were equally at his command when the former suit was tried, and so connected with the grounds on which he in that case relied that they ought to have been submitted for consideration together. (3 B. 137, *F.*) A judgment operates by way of estoppel, as regards all the findings which are essential to sustain the judgment. SOLIMUNNISA v. SHAIKH JONAB ALI, **1 Ind. Cas. 808.** (6 C.L.J. 621, *F.*)

(11)—*Matter in issue—Test of* res judicata—*Issue incidental.*—The true test of *res judicata* is to see whether the matter has been *directly* and *substantially* in issue in the former suit and had been heard and finally decided. Matters, which may have been directly, though not substantially, but rather incidentally, in issue and may have been heard without finally being decided do not constitute *res judicata.* No matter can be said to be directly and substantially in issue or to have been finally decided, unless a decision thereon is necessary for the decision of the case upon the ground on which the final decision ultimately proceeds. NARAIN DAS v. FAIZ SHAH, **157 P.R. 1889, F.B.** (6 C. 301, *Diss.*; 2 C. 321, 4 M. 134, 7 M. 145, 7 A. 606, 7 B. 464, 29 P.R. 1884, *R.*) [*R.*, 57 P.R. 1907, 84 P.R. 1908; *D.*, 111 P.R. 1907.]

(12)—*Matter directly in issue—Test to determine*—Pro forma *defendant — Dismissal of prior suit as barred by limitation—Other issues considered*—Res judicata.—A practical test for settling whether any matter has been directly in issue in a former suit is to make a separation of the discussions and findings on the various classes of issues dealt with in the judgment, and, after the elimination of all but one such class, to see if the judgment still remains intelligible and self-sufficient for the adjudication of the suit and the decree is in entire harmony with it; if the result of the examination is affirmative, the matter so dealt with has been directly and substantially in issue. A *pro forma* defendant in a suit, who neither appeared nor defended it and from whom no relief was asked, no decree being given either for or against him, may subsequently sue as plaintiff, although the matter at issue in the second suit, had also been in issue and formally determined in the suit in which he was a *pro forma* defendant. The decision in a suit dismissed after full consideration on the merits where a finding is given on each of the issues framed, is *res judicata*, though the suit was also dismissed on the ground of limitation. LABHU v. HIRA SINGH, **41 P.R. 1899.** [*R.*, 57 P.R. 1907.]

(13)—*Amount of rent annually payable—Challenging decree on the ground of fraud—Tests.*—Whether or not a decision in a suit for rent operates as *res judicata* upon a question of the amount of rent annually payable, depends upon the scope of the issues raised and decided.

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——7.—**Matters in Issue**—*continued.*

If the question raised and decided relates to the amount recoverable for the particular years in dispute, the decision does not operate as *res judicata*. On the other hand, if the question raised is as to the amount of rent annually payable, the decision operates as *res judicata*. (1 C.L.J. 248, *R.*) The tests to be applied in determining whether a party ought to have challenged the decree on the ground of fraud in the previous suit are, whether the party who seeks to re-open the matter in controversy could have with reasonable diligence raised the matter, whether he had a fair opportunity to obtain an adjudication upon the matter and whether the question was one which formed the proper subject of litigation in the previous suit. PRABHU NARAIN SINGH v. SUNDAR PANDEY, **16 C.L.J. 41=16 Ind. Cas. 447.**

(14)—*Civ. Pro. Code (Act* XIV *of* 1882)—Res judicata—*What was in issue—Judgment and not decree, to be looked at.*—In order to ascertain, for the purpose of deciding a question of *res judicata*, what was in issue in a suit or what has been heard and decided, the judgment must be looked at, and it would be wrong to look only at the decree. SRI RAJA RAO LAKSHMI KANTAIYAMMI v. SRI RAJA INUGANTI RAJAGOPAL RAO, **2 C.W.N. 337, P.C.=21 M. 344=25 I.A. 102=7 Sar. 325.** (15 I.A. 186, *F.*) [*R.*, 17 M.L.J. 423, 8 O.C. 124; *D.*, 9 C.W.N. 679.]

(15)—Res judicata—*Decree couched in general terms.*—Where the final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters in controversy in the cause. AMRITESWARI DEBI v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **24 C 504, P. C.=24 I.A. 33=1 C.W.N. 249=7 Sar. 101.**

(16)—*S.* 13, *Civ. Pro. Code*, 1882, *expl.* 2 — *First suit decided on a preliminary point—Second suit on a point not decided in the first suit.*—Explanation 2 to s. 13 of the Civ. Pro. Code, 1882, must be read in conjunction with and as part and parcel of the leading provisions of the section itself. According to those provisions, several conditions are necessary to constitute a matter *res judicata*. Two of those conditions are (1) that the matter must have been in the former suit directly and substantially in issue; and (2) that it must have been heard and finally decided in that suit. The explanation does no more than lay down that if a matter, which might and ought to have been made a ground of defence in the former suit, is not made such a ground, it shall be dealt with as falling within the first of the above mentioned conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence. But to constitute *res judicata*, a second condition is necessary; it must have been finally decided. And if the former suit went off on a preliminary ground, not calling for adjudication on any other gounds of defence, whether raised or not, those grounds remain undecided. The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit as must be given to a matter which was made a ground of defence in the former suit. ABDULLA KHAN v. KHANMIYA, **10 Bom. L. R. 380=32 B. 315.**

(17)—"*Any matter*"—*Court giving leave to bring a fresh suit*—A man cannot be deprived of his rights as they exist, merely because he put forward rights that did not exist. There is nothing in s. 13 or its expl. 2 of the Civ. Pro. Code, to show that "any matter" means "matter arising out of the same cause of action." The expl. 2 applies to a defendant as well as a plaintiff. The mere fact that the Court refers the party in its judgment to a fresh suit or gives liberty to bring a fresh suit, is not sufficient to take the case out of the bar of *res judicata*. TARACHAND v. BAI HANSLI, **6 Bom. L.R. 594.** [*Not F.*, 2 N.L.R. 94; *R.*, 8 O.C. 74.]

(18)—*Civ. Pro. Code*, s. 13, *expl.* II—Res judicata—*Matter of attack or defence in former suit*—Explanation II of s. 13, Civ. Pro. Code applies to a plaintiff to the same extent as to a defendant. MATHURA PRASAD v. SAMBHAR SINGH, **A.W.N. 1892, 224.** [*F.*, 19 A. 517.]

(19)—*Rent, rate of—Previous suit for rent—Civ. Pro. Code*, s. 13—*Directly and substantially in issue—Expl.* II—*Constructive* res judicata—*Heard and finally decided.*—The question whether an issue as to the rate of rent generally is a direct or indirect issue in a suit for arrears of rent must be determined with reference to the frame of such suit, and cannot be determined upon any general a priori grounds, if the rent is claimed at a certain annual rate on the simple ground of rent having been paid at that rate in the preceding year, it cannot be said that an issue as to the annual rate of rent generally, is a direct issue in such a suit. On the other hand, if the rent is claimed at an annual rate alleged to have been stipulated for in a binding contract between the parties, either written or oral and the Court proceeds to try the question what is the yearly rent payable according to the contract set up, the general issue must be taken to be a direct one. Exp. II, s. 13, Civ Pro. Code, which provides that any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit, is applicable only when the subject-matter of the two suits or of the issues raised therein is identical. (16 C. 682, 20 C. 79, P.C., *D.*) *Quære*:—Whether, in order to bar the subsequent suit or the trial of a issue therein, under expl. II, s. 13, Civ. Pro. Code, it is necessary to show not only that the matter which might and ought to have been made ground of defence or attack was directly and

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——7.—**Matters in Issue**—*continued.*

substantially in issue in the previous suit, but also that it had been heard and finally decided. *Quaere further* :—Whether the observations in 24 C. 711 that both these elements must be proved, are consistent with the decisions of the Judicial Committee in 6 C.W.N. 889. RAJENDRA NATH GHOSE v. TARANGINI DASI, **1 C.L.J. 248**. (24 C. 711, 6 C.W.N. 889, *Expl.*) [*Expl.*, 35 C. 979=12 C.W.N. 862=8 C.L.J. 82 ; *R.*, 1 C.L.J. 337.]

(20)—Res judicata—*Subject-matters, if not heard and decided are not* res judicata—*Expl.* 2, *s.* 13, *Civ. Pro. Code*, 1882.—Expl. 2, s. 13, is comprehensive in its terms. Even if the matter in issue might and ought to have formed a ground of defence or attack in a previous suit, the same will not be *res judicata* in a subsequent suit, unless it has been heard and finally decided in the previous suit. Expl. 2, s. 13, Civ. Pro. Code, 1882, does not, therefore, preclude a defendant in a rent-suit from raising the plea that the plaintiff is a *benamidar*, notwithstanding that he did not raise this plea in a previous rent-suit. KAILASH MONDUL v. BARODA SUNDARI DASI, **24 C. 711= 1 C.W.N. 565**. (24 C. 83, *F.*) [*F.*, 28 C. 17, 107 P.R. 1906=76 P.L.R 1907, 96 P.W.R. 1907= 55 P.R. 1907=65 P.L.R. 1908; *R.*, 20 A.110=17 A.W.N. 1897, 157, F.B ; 21 M. 91, 25 B. 189 =2 Bom. L.R. 872, 1 C.L.J. 337, 4 C.L.J. 211, U.B R (1906), C.P.C., 46, *Cons.*, 12 C.W. N. 862=8 C.L.J. 82=35 C. 979 ; *Doubted*, 1 C. L.J. 248; *D.*, 29 C. 252=6 C.W.N. 238.]

(21)—"*Matter which might and ought to have been made ground of defence*"—*Scope of expln.* IV *to s.* 11, *Civ. Pro. Code.*—This explanation enacting that any matter which might and ought to have been made ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit, gives no warrant for saying that such matter shall also be deemed to have been heard and finally decided ; and it will not entitle a party to consider as having been decided in his favour, a point not actually so decided. Where a defendant has a defence, which, if he had wished, he might have pleaded, but where, by his not doing so, the suit was decreed against him, this explanation is applicable SAIFUL RAHMAN v. UMAR-UD-DIN, **124 P.R. 1892.**

(22)—*Decree in favour of plaintiff*—Res judicata *against all including* pro forma *defendants.*—A decree passed in any suit must be treated as an adjudication of right as between the plaintiff on the one side, and the defendants collectively and severally on the other, except only so far as the decree itself contains any modification or reservation in regard to any of the individual defendants. The rule of law is that any issue which is material to the rights of the parties in the matter of suit between them, whether actually contested or not, shall not be afterwards raised in a subsequent suit between the same parties, and the necessity of putting some term to litigation is the foundation

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——7.—**Matters in Issue**—*continued.*

of this rule. In this respect, a defendant brought in *pro forma* is in exactly the same situation as any other defendant. DEOKEE NUNDUN ROY v. KALEE PERSHAD, **8 W.R. 366.** [*D.*, 19 W.R. 219.]

(23)—Res judicata—*Operation of.*—A matter which has been directly adjudicated upon by a Court of competent jurisdiction can be treated as *res judicata* in a subsequent suit, but not matters determined for incidental or collateral purposes only. So it was *held* that, where a suit for arrears of rent at enhanced rates was dismissed for want of notice, but it was also found that the patta set up by the defendant was not genuine, the decision was no bar to the defendant pleading the patta in a subsequent suit for rent for a subsequent year. JARDINE SKINNER AND CO. v. DWARKANATH CHUCKERBUTTY, **14 W.R. 412.**

(24)—*Act* VIII *of* 1859, *s.* 2—Res judicata.—Unless the cause of action in a suit was put in issue and directly determined, it cannot be said to have been heard and determined in a former judgment. Any opinion incidentally expressed canot be considered to be a finding upon the issue. A decree in a former suit against one of the two defendants in that suit, after the determination of that person's liability alone, would not bar a subsequent suit against the other defendant. SHIB NATH CHATTERJEE v. NUBO KISHEN CHATTERJEE, **21 W.R. 189.**

(25)—*Collateral issue—No finality.*—Where the issue as to the rights of the parties was only collateral upon the claim which was then preferred for enhancement of rent, any decision on such collateral issue is not a bar to another suit, directly on the point so decided. SALAHMUNISSA KHATOON v. MOHESH CHUNDER ROY, **16 W.R. 85.**

(26)—Res judicata—*Reasoning on findings of fact—Estoppel.*—Such matters only as are decided between the parties by the decree in the suit ought to be treated as binding against them in subsequent litigation. No part of the reasoning on the findings on fact which have induced the Court to come to its decision, are binding as between the parties further than for the purposes of the particular decision. AUKHIL CHUNDER MOOKERJEE v. SHIB NARAIN GHOSE, **15 W.R. 527.**

(27)—*Suit dismissed as premature—Finding on issue not necessary to decision, not* res judicata *in subsequent suit.*—Where a suit is dismissed as premature, the finding of the Court on any issue on the merits would be unnecessary to the determination of the suit, and would not therefore be conclusive upon an issue involving the same point in a subsequent suit. KANHYA SINGH v. DEWA SINGH, **27 P.R. 1879, F.B.** [*R.*, 41 P.R. 1899 ; *D.*, 146 P.R. 1890, 111 P.R. 1907.]

(28)—*Finding in previous suit, when conclusively binding—Identical material issue in*

Res Judicata—continued.

—7.—**Matters in Issue**—*continued.*

subsequent suit, trial and decision of, in previous suit.—Against the decision passed by the lower appellate Court in favour of the plaintiff in this case, defendant appealed on the ground that that Court had based its judgment exclusively on a previous decision which it wrongly held was necessarily conclusive against the appellant merely because he was a party to it, but, which, however interpreted, could in no way be binding or conclusive as against him in respect of the subject-matter of the present suit. The High Court remanded the case because the lower Court's decision, besides being exceedingly confused, had omitted to state the facts of the case, the issues tried, and the finding of the Court thereon with the distinctness with which they were required by law to be stated. The decree in the previous suit contained no such finding of fact as the lower Court supposed that it did. Further, even assuming that it did contain such a finding, the lower Court, while declaring such finding conclusive in the present suit, ought to have given its reason for considering it to be so; for, the mere existence of a finding in another suit to which he was a party would be no bar as against the appellant, unless it be shown that the issue in question in the latter suit was distinctly raised and tried in the other suits and was a material issue in it. DAHOO MUNDER v. GOPEE NUND JHA, **2 W. R. 79.**

(29) - Res judicata, *force of.*—The force of *res judicata* attaches not only to the bare condemnation or discharge of a defendant, but to all the objective grounds distinctly found by the Judge as the basis of his decision. RAMASAMI PADEIYATCHI v. VIRASAMI PADEIYATCHI, **3 M.H.C. 272.**

(30)—*Civ. Pro. Code (Act X of 1877), s. 13—Decision in previous suit of matter essential for its decision—Issue relating to same matter in subsequent suit*—Res judicata.—The decision in a former case between the same parties of a matter of which the decision was necessary to the decision of the former suit, is conclusive upon the same matter when it comes in issue in a subsequent suit between the same parties in the same Court, both being equally within the competency of such Court. MUHAMMAD BAKSH v. NAMDAR KHAN, **18 P.R. 1882, F.B.** [*R.*, 163 P.R. 1883, 145 P.R. 1888, 20 P.R. 1891.]

(31)—*Civ. Pro. Code, s.* 13—Res judicata—*Suit to declare adoption invalid.*—Where the daughter of a deceased Hindu sues for a declaration that the defendant is not her father's adopted son as he claims to be, and her suit is dismissed on its being proved that the alleged adoption was valid, the same question cannot be raised a second time in a suit by the adopted son to recover possession of certain properties transferred to the daughter by way of gift. VENKATARAGHAVA v. RANGAMMA, **15 M. 498.**

Res Judicata—continued.

—7.—**Matters in Issue**—*continued.*

(32)—*Civ. Pro. Code*, 1877, *s.* 13—*Adoption.*—Where the question of an adoption which a person was interested in denying, was decided in the negative and in his favour by a competent Court, such decision would be *res judicata* in a subsequent suit by his son claiming through him, in which the son is interested in establishing the adoption, even though the suit should relate to different properties. PITTAPUR RAJA v. BUCHI SITAYYA, **8 M. 219, P.C.=12 I.A. 16=4 Sar. 598.** [*F.*, 11 A. 148; *R.*, 13 B. 25, 14 B. 206, 26 M. 760, 27 A. 37, P.C., 9 C.L.J. 597=12 C.W.N. 739; *D.*, 1 C.L J. 337.]

(33)—*Act* VIII *of* 1859, *s.* 2—*Res judicata—Cause of action.*—A and B were brothers. After their father's death, A, who was in possession of a portion only of the family estate, sued B, who was in possession of the remainder, for the recovery of his share therein. The suit was decreed. Subsequently, B came forward to claim partition, in his favour, of a portion of the same family property on the ground that A held more than his share. *Held*, that the suit was barred. If what A sought, in the provious suit, was more than he was entitled to, then B might and ought to have urged that fact as a ground of defence in that suit. MUKTUN VALAD MOHIDIN v. IMAM VALAD MOHIDIN, **10 B.H.C. 293.** [*R.*, 1 A. 75.]

(34)-*Suit against Hindu widow and her daughter for recovery of property.*—Two brothers, on a division of the family estate, agreed that the villages of the shares of both of them should, in future, descend only to the sons and grandsons, and so on, of them both, but must not go to any others. On the death of one of them, the other brother sued his widow to recover the property which she had taken as heir to her husband. This suit was dismissed, as the shares had descended according to law. In a subsequent suit, brought by the surviving brother, against the daughter of the other, to whom the widow had transferred the property, the question of the title of the widow would be *res judicata.* VENKATADRI APPA RAU v. PEDA VENKAYAMMA, **10 M. 15, P.C.**

(35)—*Civ. Pro. Code*, 1882, *s.* 13—*Decision on issues raised necessary for proper adjudication of suit—No specification as to issue on which decision was based—Decision on one of the issues necessary in determining subsequent suit*—Res judicata.—On the death of a widow, the reversioner sued to recover the lands alienated by her, during the widow's lifetime, plaintiff had instituted a suit for a declaration that the alienation was not beyond her lifetime. In that suit, two issues had been raised: one was whether the suit had been barred by limitation and the other as to the binding character of the alienation. The Court decided both the issues against the plaintiff and dismissed the suit. It did not however say on the decision of which of the issues the suit was dismissed. The question now was whether the prior suit was a bar to the maintainability of the present suit.

Res Judicata—continued.

——7.—Matters in Issue—*continued.*

Held, that the question as to whether the alienation by the widow was binding on the reversioner was necessary for the decision of the previous suit in the same way as the question of limitation. As the decision of that question was between the same parties and binding on them all, it operated to make that decision *res judicata*. NANJAPPA GOUNDAN v. NANJAPPA GOUNDAN, **7 M.L.J. 274.**

(36)—*Alienation by widow—Suit by reversioners to set aside -Former suit to set aside earlier alienation — Decision regarding plaintiffs' position as reversioners*—Res judicata—*Act X of* 1877, *s.* 13. *Expl.* II.—The reversionary heirs of one W, sued for a declaration that a mortgage of his land made by his widow J, in favour of her brother's son-in-law K, was not binding upon them. The suit was against J and K, and the first question which arose was, whether the plaintiffs were the reversioners and entitled to bring the suit. It was contended by the plaintiffs that the above question had been raised in a former suit in 1866 between the same plaintiffs, and J, and decided in favour of the plaintiffs, and that, as the co-defendant K claimed under a title derived from J, it was not competent to the Court, with reference to s. 13, Act X of 1877, to try the same question again in the present suit. The former case in 1866 was in respect of a mortgage by J, in favour of her brother G, and the present plaintiffs had sued her and G to have the mortgage set aside on the ground that it had been made without necessity. One of the questions raised and decided in that suit in favour of the plaintiffs was whether the plaintiffs were entitled to raise the objection, with the result that a decree was passed in favour of the plaintiffs for cancellation of the mortgage. The defendants in the present case contended that the question of the plaintiffs' *locus standi* as reversioners was only raised incidentally in that case and that, not having been "a matter directly and substantially in issue in the former suit" within s. 13 of the Civ. Pro. Code the Court was not debarred from raising and trying it again in the present suit and ought to do so. *Held* that, though the object of the former suit was not to try the question whether the plaintiffs were reversionary heirs to the land, yet it was a question which had necessarily to be decided in that suit, and as the allegation by the defendants that the plaintiffs were not the reversioners and therefore not entitled to sue to set aside the mortgage, would, if proved, have been a good defence to the suit, under expl. II to s. 13 of the Code, the competency of the plaintiffs as reversioners to contest the validity of the alienation by J. was directly and substantially in issue in the former suit, so that the decision passed on it would be binding upon the parties to the present suit KHAIRDIM v. AHMED, **95 P.R. 1881.**

(37)—"*Matters directly and substantially in issue*" *Will, Revocation of—Hindu widow, will*

Res Judicata—continued.

——7.—Matters in Issue—*continued.*

executed by, in accordance with husband's wish. —The plaintiff was the widow of G, who was the son of a daughter of H by his wife S. H died in 1870 and his two widows S and B obtained possession of his villages. S died in 1885. In 1887 B sued G in the Court of the District Judge for possession of B's half share in the villages, on the allegations that the heirs of H were his two widows, that they had executed the will, dated the 21st December, 1872, in favour of G under undue influence, that they had cancelled that will, &c., &c. G admitted that H died leaving his two widows as his heirs, but alleged that the widows had executed the will in his favour in accordance with the verbal will of H, that he was entitled to possession under the will &c., &c. The District Judge framed among others the following issues :— (1) Did H, prior to his death, express a wish that his widows should execute a will in G's favour of his estate? (2) Was the will dated the 21st December 1872, executed in accordance with H's wishes or was it executed without his authority? (3) Did B and S revoke the aforesaid will and could they legally do so? The District Judge dismissed the suit in January, 1888, holding that H, prior to his death, had verbally expressed a wish that his widows should execute a will in favour of G of his estate, that the will, dated the 21st December, 1872, was executed by the widows in accordance with such wish, and that the widows did not revoke that will. B died in 1895 and G in 1896. The plaintiff claimed as his widow sued the defendants, who claimed under a deed of gift, dated the 15th September, 1890, executed by B for possession of B's halfshare in the villages on the allegati on that in his lifetime H expressed the wish that, after his death, his two widows S and B should have possession of the villages, and that as each of them should die, G should take her share, that on the 21st December 1872 both the widows, in accordance with the wish of their husband, executed a will in favour of G, who under the will on B's death succeeded to her half share. The defendants denied that H had expressed any such wish as was alleged by the plaintiff, that his wish was not binding on his widows, and that B had revoked the will in 1890. *Held*, that the determination of the questions, whether H expressed a wish that the widows should execute a will in G's favour and whether the will, which they executed, was executed in accordance with such wish, was material and necessary for the right decision of the previous suit, and those questions were consequently "directly and substantially in issue" in that suit. *Held* therefore, that in the second suit the matters, whether H had expressed a wish that his widows should execute a will in favour of G, that the will which the widows had executed was executed in accordance with such wish, and that the widows had not revoked the will, were matters which the Court was prohibited by s. 13, Civ. Pro. Code, from trying, by reason of the decision of the District Judge in the

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

former suit. It having been found that the property in suit was the separate and divided property of H, which by custom his widows had power to alienate by way of "sale, mortgage or gift," *held* that B was competent to revoke the will, dated the 21st December, 1872, that the will was not the will of H but of the widows, and that the fact that it was executed in accordance with H's wish could not make it his will. KISHAN DAYAL v. MUSST. CHAMPA KUAR, **4 O.C. 145 (B).**

(38)—Res judicata—*Matter in issue decided in former suit—Will, validity of.*—Where the question of the validity of a will was decided in a former suit in which the plaintiff and the defendants in the subsequent suit were the defendant and plaintiffs respectively, the same question cannot be raised in the subsequent suit. KAMINI DEBI v. ASUTOSH MUKERJEE, **16 C. 103=15 I.A. 159=5 Sar. 246.** [*R.*, 14 B. 206, 8 C.L.J. 369.]

(39)—*Sivaganga sanad of* 1803—*Failure of suit alleging fraud — Possession known and acquiesced in prior to adjudication.*—The High Court of Madras dismissed, on the facts, a suit brought in 1886, grounded on fraud attributed to the lineal ancestor of the principal defendant, in obtaining in 1803, the grant of the sanad of the Sivaganga zemindari, to which the plaintiff claimed title. The plaintiff's case was that the defendant's ancestor, the younger of two brothers, had fraudulently caused the sanad to be made out in his own name, whereas it was intended to be, and ought to have been, a grant to the elder brother, who was the plaintiff's lineal ancestor. Those through whom the plaintiff claimed had not made any such charge, although they had knowledge of all the facts connected with the grant of the sanad of 1803 to the younger brother and with the long possession by him and his descendants, among whom there had been litigation, resulting in a decision as to the ownership. In these circumstances, a suit could not be maintained to re-open the question. BALA GAURI VALLABA TEVAR v. PERIASAMI UDAYAR TEVAR, **17 M 384=21 I.A 93=4 M.L.J. 139, P.C.=6 Sar. 466.**

(40)—*Civ. Pro. Code, s. 2—Claim to estate against person in possession.*—When a plaintiff claims an estate, and the defendant, being in possession resists it, he is bound to resist it upon all the grounds that it is possible to him, according to his knowledge, then, to bring forward: if he fails to do so, he is estopped from asserting any of them thereafter. The facts are exactly similar to those in 1 A. 75. JADU LAL v. RAMGHOLAM, **1 A. 316.** (1 A. 75, *F.*) [*Overruled*, 26 A. 61, F.B.; *F.*, 3 A. 189.]

(41)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 2—*Claim to estate—Defence.*—When a plaintiff claims an estate, and the defendant, being in possession, resists it, he is bound to resist it upon all the grounds that it is possible to him, according to his knowledge, then, to bring forward; if he fails to do so, he is estopped from asserting any of them thereafter. Where, therefore, in a former suit for possession brought by the defendants against the plaintiff, the latter unsuccessfully pleaded his title as auction-purchaser, but did not set up the right of pre-emption with respect to the property, which had already accrued to him, *held* that the subsequent suit, based on such right of pre-emption, was *res judicata.* BALDEO SAHAI v. BATESHAHAR SINGH, **1 A. 75.** [*Overruled*, 26 A. 61 =A.W.N. 1903, 106; *F.*, 1 A. 316, 3 A. 189, 20 A. 516; *R.*, 11 B. 708.]

(42)—*Civ. Pro. Code* (1859), *s.* 2—*Title.*—Where, in a former suit between the same parties, the whole question of the plaintiff's title to the plaint property as against the defendant was laid open by the pleadings and decided against him, *held*, in a subsequent suit for the same relief brought by the plaintiff in a different capacity, but a capacity that had already accrued at the time of the former suit and was also inconsistent with his capacity in the first suit, that the suit was *res judicata.* RADHIA v. BENI, **1 A. 560.**

(43)—*Title—Former suit--Estoppel.*—Where, in a former suit, a decree-holder sought to establish his right in execution to a taluk as belonging to his judgment-debtor T, and S, one of the defendants in that suit, set up a plea that the taluq belonged to him by virtue of a *hibbanamah* executed in his favour by T, and it was then decided that the taluk did not belong to S and was liable to be sold, *held* that S was estopped from suing, in a subsequent suit, for a declaration of his right to the taluk as against the decree-holder. MOONSHEE ABDOOL GUNNEE v. KISHNANUND DOSS ALIAS KEBUL RAM DOSS, **17 W. R. 350.** [*D.*, 22 W. R. 349.]

(44)—*Civ. Pro. Code, s.* 13, *Expl.* 1—Res judicata—*Suit for possession of portion of property.*—Where, in a former suit for possession of a portion of certain property, the plaintiff alleges that he is entitled to the other portion as well, and the defendant denies the same, and an issue being framed on this point, the question is decided against the plaintiff, such decision is *res judicata*, as between the same parties in a subsequent suit. WILAITI BEGAM v. NUR KHAN, **5 A. 514=A.W.N. 1883, 110.**

(45)—*Suit for possession.*—In 1852, one Tiery acquired a plot of land, lot No. 104, under a Government grant. In the year 1851, the Nawab Nazim, claiming then to be the owner of lot No. 100, adjoining to lot 104, granted a lease of it to one Bhart Chunder Roy, and in the year 1853, one Nazir Ali granted a lease of the same lot to Nund Lall Ghose, but it was not clear under what the title of Nazir Ali was. In 1859, Nand Lall Ghose instituted a suit against Tiery on the ground that the latter, trespassing beyond his bounds, had appropriated

Res Judicata—continued.

——7.—Matters in Issue—*continued.*

a parcel of lot 100, and obtained a judgment in his favour against which Tiery appealed to the Privy Council on the 14th August, 1862. In the meanwhile, Bharut Chunder, the lessee of lot 100 from Nawab Nazim, brought an action against Nand Lall Ghose, Ghose's lessor Nazir Ali, and Tiery, suing Tiery not as the owner of lot 100, but as a manager for the purpose of obtaining possession of lot 100. Tiery disclaiming any interest, Bharut Chunder succeeded in both the Courts and obtained judgment for lot 100 on the 30th of August, 1862. Pending his appeal, Tiery died, and one Belchambers was substituted as the appellant. Nand Lall Ghose did not take active measures to contest the appeal, because of the judgment of 30th August, 1862. During this time, Bharut Chunder failed to pay his rent, and lot 100 was sold by Court auction and was brought by Dhur. Dhur applied to be made the respondent in the appeal to the Privy Council, and was accordingly made the respondent. The Privy Council *held* that Nand Lall Ghose had not proved that the disputed lot belonged to lot 100; and that the land in dispute belonged to lot 104, but stated that they did not adjudicate upon any question of title between Dhur and the other respondent. Gobind Chunder, a representative of Nand Lall Ghose, or any other person who might be interested in lot 100. Thereafter, Dhur sued, as the owner of lot 100, and claimed the disputed land as part of lot 100. *Held* that the plaintiff's claim was *res judicata* by reason of the previous judgment of the Privy Council. BELCHAMERS v. ASHOOTOSH DHUR, **7 C.L.R. 308, P.C.=5 Sar. 736.**

(46)—*Matter which ought to have been made ground of defence—Suit for possession.*—Where, although in the first suit plaintiff did not expressly plead his right of possession as a non-proprietor, he should have done so, and where, even, without his doing it, the suit was of such a nature that the Court was satisfied in considering the point without its being specially urged, the second suit for possession as non-proprietor is barred. NEK MUHAMMAD v. SATTAR MUHAMMAD, **6 P.R. 1896.**

(47)—*Civ. Pro. Code*, 1882, *ss.* 13 (*Expl.* III), 211, 244—Res judicata—"*Future*" *mesne profits.*—Where the plaintiffs had put the question of future mesne profits in issue in the former suit, and have specifically asked for relief in respect thereof, and the decree was silent on the subject, such relief must be deemed to have been refused (See s. 13, Expl. III of the Civ. Pro. Code, 1882). And the provisions contained in s. 211 and the last paragraph of s. 244 of the Civ. Pro. Code, 1882, do not contemplate a case in which the plaintiff has directly insisted on a decision upon his right to future mesne profits, or override the rules laid down in s. 13 of the Code. NARAIN DAS v. KHAN SINGH, **A.W.N. (1884) 159.** (*Overruled*, **21 A. 425, F.B.=A.W.N. 1899, 153.**)

Res Judicata—continued.

——7.—Matters in Issue—*continued.*

(48)—*Civ. Pro. Code*, 1877, *s.* 13, *Expls.* I *and* II—*Suit for possession by donee—Mortgage.*—Where a previous suit, for possession by the donee of certain property, against the defendant who was alleged to have trespassed upon it, was dismissed on the ground that the defendant held under a mortgage executed by the donor as guardian of the donee, a subsequent suit by the donee claiming under the gift and alleging that the mortgage to the defendant was invalid, would be barred as *res judicata* unedr Expls. I and II to s. 13 of the Civ. Pro. Code, inasmuch as the mortgage was matter substantially in issue in the previous suit. NIRMAN SINGH v. PHULMAN SINGH, **4 A. 65 =A.W.N. 1881, 117.** [*R.*, 13 B. 25.]

(49)—*Civ. Pro. Code*, *s.* 13, *Expl.* II—Res judicata—*Title which might have formed alternative ground in previous suit, not to be relied on in subsequent suit.*—A claim to possession under an absolute title and claim to possession under a mortgage title are not such dissimilar claims as would cause confusion by being pleaded in the alternative. In the present case, the plaintiff's claim to hold as mortgagee was one that he not merely might, but ought to, have added, as an alternative ground of attack against the defendant, to the prayer in the former suit brought by him against the defendant, for possession of the property, claiming merely on his title as owner thereof. Consequently, the plaintiff's alternative claim to possession as mortgagee not having been made the ground of attack in the former suit, as it ought to have been done, such claim would be barred, from being set up in the subsequent suit, by the principle of *res judicata* laid down in expl. II, s. 13 of the Civ. Pro. Code. IMAM KHAN v. AYUB KHAN, **19 A. 517=A.W.N. 1897, 143.** (A.W.N. 1891, 132. A.W.N. 1892, 224, 16 A. 252, 16 M. 117, 19 I.A. 234, *R.*) [*Diss.*, 2 O.C. 139, 55 P.R. 1907=65 P.L R. 1908=96 P.W.R. 1907, 12 O.C 347; *F.*, 20 A. 516; *R.*, 4 P.R. 1903, 2 A.L.J. 342.]

(50)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *present Code*)—Res judicata—*Prior mortgagee's omission to plead his charge in a suit by a subsequent mortgagee—Decree for sale—Subsequent suit by him on mortgage, not maintainable.*—If, in a suit by a subsequent mortgagee for sale of the mortgaged property, a prior mortgagee who is impleaded as defendant, fails to plead his prior mortgage, and his right to have it redeemed, and a decree is passed for sale of the mortgaged property, but not subject to his prior charge, a subsequent suit by him on his prior mortgage will be barred by Expl. II to s. 13, Civ. Pro. Code. SRI GOPAL v. PIRTHI SINGH, **6 C.W.N. 889, P.C.=4 Bom. L.R. 827=29 I.A. 118=24 A. 429=8 Sar. 293.** [*F.*, 2 C.L.J. 574, 12 C.W.N. 862=8 C.L J 82; *Rel. on*, 31 C. 428; *Expl.*, 1 C.L.J. 248, 1 C.L.J. 337; *Appl.*, 17 M.L.J. 301=2 M.L.T. 330=30 M. 353; *R.*, 13 M.L.J. 448=26 M. 760, 5 C.L.J. 611, 12 C.W.N. 292=7 C.L.J. 504.]

Res Judicata—continued.

——**7.—Matters in Issue**—*continued.*

(51)—*Sale of mortgaged property by mortgage —Purchaser suing for possession—Sale impeached by mortgagor—Decree in favour of purchaser — No finding whether the sale was* bona fide—*Mortgagor subsequently suing mortgagee for redemption -- Maintainability of suit*—Res judicata.—T mortgaged certain property to A and B in 1874 who subsequently sold it to one X. The latter brought a suit against the mortgagor T for possession. The defendant in that suit pleaded that the sale to X was fraudulent and void, because the mortgagees had been in possession of the property and in receipt of the rents and profits since the sale. A decree was passed in favour of X, but no finding was recorded whether X was a *bona fide* purchaser for value or not. The present suit was instituted by the son of T against the mortgagees A and B for redemption of the mortgaged property and for a declaration that the sale by the mortgagees was not *bona fide* and as such void as against him. The defendants (mortgagees) pleaded that the decision in the previous suit operated as *res judicata* and that the present suit could not be maintained. *Held* that the issues raised for decision and the decree in the previous suit operated as *res judicata* and barred the present suit. In the previous suit, the purchaser of the mortgaged property (X) gave evidence that his purchase was *bona fide.* Though no actual finding was recorded on that issue, it must be taken that the issue was decided in the affirmative because a decree was passed in favour of X (in the previous suit). RAMKRISHNA JAGANNATH v. VITHAL RAMJI, **15 B. 89.** [*R.*, 25 B. 115, 6 Bom. L.R. 288.]

(52)—*Suit on mortgage — Plea as to property being* waqf *not raised by defendant—Decree—Attachment of mortgaged property—Suit to release property as being* waqf—Res judicata.—The plaintiff in the present suit was defendant in the former suit which was based upon two mortgage bounds, and the prayer of the former plaint was in the alternative either for payment of the principal and interest due under the mortgage or for possession of the mortgaged property. The present suit was for a declaration that the mortgaged property which the plaintiff in the former suit had caused to be attached in execution of his money decree was *waqf*, and for its release from attachment. In the former suit, the fact of the mortgage was not denied, but no plea was raised that it was inoperative as against the property on the ground of its being *waqf*. *Held*, that the defendant in the former suit might and ought to have pleaded in the alternative that the mortgage was inoperative to bind the property of which the plaintiff therein sought possession, and that the present suit was therefore liable to be dismissed on the ground of *res judicata.* BANNE SHAH v. KARM CHUND, **89 P.R. 1881.**

(53)—*Civ. Pro. Code*, s. 13—Res judicata —*Matter which might have been made ground of attack in former suit.*—Where a puisne incumbrancer, who as such might have claimed redemption of a prior incumbrance, sued only for a declaration, as against the auction purchasers under a decree on the prior mortgage, of his right to bring the property purchased by them to sale in virtue of his mortgage, *held* that he could not subsequently sue for redemption of the prior mortgage. JHAMMAN v. DWARKA PRASAD, **A.W.N. 1897, 100.**

(54)—*Decree for redemption of mortgage—No provision for foreclosure or payment within fixed time—Mortgagee subsequently suing for sale of mortgaged property*—Res judicata—*Civ. Pro. Code*, 1882, s. 13, *Expl* II - *Limitation.*—Where a decree for redemption does not provide that the mortgage-money should be paid within a fixed time and that, in default, the mortgaged property shall be foreclosed, it operates of itself as a foreclosure decree, if it is not executed within three years. When once such a decree is passed, the mortgagee cannot subsequently institute a suit for sale of the mortgaged property, because s. 13, expl. II of the Civ. Pro. Code, bars such a suit. The defendant obtained on 12-11-1883 a decree for redemption, which did not provide for payment of the mortgage-money within a fixed time or for foreclosure in case of default. On 26 11-1884, the plaintiff (mortgagee) instituted the present suit against the mortgagors for sale of the mortgaged property. Money was paid into Court by the mortgagor on 8-4-1885. The mortgagee refused to accept it and insisted that the property should be sold. *Held*:—(1) That no time having been fixed for redemption, the defendants (mortgagors) who obtained the redemption-decree in the previous suit, had, under the Limitation Act, 1877, three years within which they could execute it, and that, as they had paid the money within 3 years, they were entitled to recover the property, (2) That the decree made in the redemption suit would practically be a decree for foreclosure if not executed within three years and would therefore effectually determine the rights under the mortgage both of the mortgagee and the mortgagors, and (3) That the plaintiff (the mortgagee) having failed to obtain a provision for sale in the redemption decree in the former suit, as he might and ought to have done if he wished to preserve the right of sale, that right must be held to have been a matter directly and substantially in issue in the former suit within the meaning of expl. II to s. 13, Civ. Pro. Code, 1882; and to have been, in effect, negatived by the judgment. MALOJI v. SAGAJI, **13 B. 567.** [*Diss.*, 93 P.R. 1908=164 P.L.R. 1908=133 P.W.R. 1908; *Not F.*, 15 M. 366; *F.*, 19 A. 202, 23 B. 592; *Appr.*, 3 O.C. 371, 25 M. 300; *Rel. on*, 10 C.L.J. 115=1 Ind. Cas. 71; *R.*, 16 B. 243, 26 B. 661, 24 A. 44, 43 P.R. 1907=169 P.L.R. 1908=101 P.W.R. 1907.]

Res Judicata—continued.

——**7.—Matters in Issue**—*continue d.*

(55)—*Suit for redemption decreed—Subsequent suit for recovery of the amount not taken into account—Transfer of Property Act* (IV *of* 1882), *ss.* 92 *and* 94.—In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee, right up to the date of the redemption. Where, therefore, a mortgagor obtained a decree for redemption, and paid up the amount found due, and subsequently brought a suit for recovery of the amount, which, he alleged, the mortgagee had collected during the time he was in possession, and which was not taken into account in the previous suit, *held* that the suit was barred. KASHI PERSHAD v. BAJRANG PERSHAD, **4 A.L.J. 763=A.W.N. 1907, 281=30 A 36** [*R.*, 30 A. 225=A.W.N. 1908, 96=5 A.L.J. 192, 12 O.C. 152=2 Ind. Cas. 834.]

(56)—Res judicata—*Some issue in two suits—Finding in one incorporated in the other—Appeal against one decree only — Effect of* —In two suits for sale upon different mortgages, one of the defendants, a prior mortgagee, pleaded that his mortgage had not been satisfied. The Subordinate Judge found in the one case that the mortgage had not been satisfied and incorporated that finding in the other case. The plaintiff appealed in the one case against that finding, but allowed the decree in the other to become final. *Held*, that the judgment in the case not appealed against operated as *res judicata*. DAKHNI DIN v. SYED ALI ASGHAR, **7 A.L.J. 995=7 Ind. Cas 909.** (7 A.L.J. 816, F.B., *F.*)

(57)—*Civ. Pro. Code*, s. 13, *Expl.* II—Res judicata—*Matter which might have been made a ground of defence in former suit.*—A R and C P, in three separate suits, obtained decrees against C L and others for sale of certain hypothecated property. C L never appeared to defend those suits; but, when execution of the decrees therein was sought, he filed objections, which objections were overruled. C L then brought a separate suit for a declaration that the property against which the decree-holders A R and P G held decrees was not liable to sale by reason of the want of title on the part of the mortgagors to mortgage the same. In this suit, he got a decree in respect of the property dealt with in two of the former suits, but, as to the property dealt with in the third, his suit was dismissed. He then appealed and the decree-holders also appealed as to the other two suits. *Held*, that the matters alleged by the judgment-debtor, plaintiff, were matters which might and ought to have been made a ground of defence in the former suits in which he was a defendant and the present suit was, therefore, barred by the principle of *res judicata*. AMOLAK RAM v. CHAMPA LAL, **A.W.N. 1891, 132.** [*F.*, 19 A. 517.]

(58)—*Code of Civil Procedure*, 1908, *s.* 11—*Rent, rate of—Quantity of land or area—Issue, incidental or going to the root—Authorities,*

Res Judicata—continued.

——**7.—Matters in Issue**—*continued.*

review of.—The question of *res judicata* in rent suits is one of constant recurrence and the decision must depend on the circumstances of each case. In all such suits where questions of *res judicata* arise, what is necessary to see is this, namely, whether the decision in the former rent suit was given on an incidental point or on a question that went to the very root of the case. Where, in a previous suit for rent, one of the issues was "what is the *jama* payable by the defendants for the lands in arrears and for the period of action," and the decree in that suit with regard to the rate of rent was in the following terms, "that the rent in respect of the land claimed by the defendants be fixed at Rs. 16 per annum," and, the plaintiffs and defendants of the rent-suit were respectively plaintiffs and defendants in a subsequent suit, and the land for which rent was claimed in the rent suit included the land in the subsequent suit, in which the plaintiffs' case was not that there was any alteration effected with regard to the annual rental fixed by the decree in the previous suit: *Held*, that the issue in the rent-suit involved three questions, namely, (1) what was the *jama* payable by the defendants for the land in arrears; which therefore included, (2) what was the land in arrears, and (3) what was the *jama* for the period in question, and all those points were, therefore, directly and substantially in issue between the parties in the previous suit and could not be regarded as incidental only, and that the question as to the area of the land was the sole question that was in controversy between the parties at the hearing and was the point on which the whole decision turned, and that it went to the very root of the case and the decision of it must, therefore, be regarded as conclusive between the parties, and the subsequent suit is barred by the rule of *res judicata*. MANE MAHAMMED v. DHANI MAHAMMED, **17 C L.J. 71=16 Ind. Cas. 22=17 C.W.N. 76.** (21 C. 236, *D.*)

(59)—*Rent suit—Scope of issue—Incidents of tenancy—Not relating to claim for particular year* — Raikumat — *Legally recoverable if payable, under custom—Decision that* raikumat *payable, whether* res judicata.—The decision in a rent suit may operate as *res judicata*, where it is upon a question as to the incidents of the tenancy, not merely in relation to the claim for that particular year, but from a wider point of view *Raikumat* is legally recoverable if it is payable under a custom. Therefore, a decision that *raikumat* was payable in a previous rent suit, involved, by implication at any rate, a decision that the *raikumat* claimed was payable under a custom; and the decision, being upon a mixed question of fact and law, operates as *res judicata*. BECHA RAM SAHU v. CHAMRU URAON, **15 Ind. Cas 837.**

(60)—*S.*13, *Civ. Pro. Code*, 1882—Res judicata—*Decree in rent suit—Question of annual rent payable* — Ex parte *decree.* — Whether the decision, as regards the amount of rent payable

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

annually, in a previous suit, operates as *res judicata*, must be determined with reference to the question whether the issue in the previous suit related to the amount of rent payable for a particular period, or to the rent payble for the full term of the lease. In the former contingency, the decision is not *res judicata*: in the latter event, it is (11 C.L.J. 248, 28 C. 318, *F.*) an *ex parte* decree operates as *res judicata*, not only as regards questions which were substantially and directly in issue and had been decided, but also as regards points which ought to have been taken in defence and were not taken in defence by the absent defendant. BEPIN BEHAR DAS v. HARA CHANDRA BAIRAGI, **2 Ind. Cas. 11.** (31 C. 79, *F.*; 16 C. 300, F. B., *R.*)

(61)—*Previous rent suit — Decree at certain rate—No subsequent change—Subsequent rent suit—Whether previous decree* res judicata.—In a previous rent suit, an issue was to the effect: "At what rate is the plaintiff entitled to get rent." The first Court gave a decree at a rate between the rates alleged by the parties. The Appellate Court gave a decree at the rate admitted by the defendant. Subsequently, there was a title suit which was taken up to the High Court and in which it was held that the question of the *jama* payable was *res judicata*: *Held*, that, there having been no change alleged, the rate at which rent was decided to have been payable in the previous suit was *res judicata* in subsequent rent suit. KASIMADDI MUHAMMAD v. SHIB PROSAD DAS CHOWDHURY, **16 Ind. Cas. 590.** 19 C. 656, 20 C. 505, 6 C.W.N. 589, *R.*)

(62)—Res judicata—*Evidence—Decision on merits—Act* VIII *of* 1859, *s.* 2.—A suit for arrears of rent was dismissed by the Munsiff on the ground that, in a former suit between the same parties, the kabuliat on which the plaintiff sued was declared inadmissible in evidence, and that this decision was a bar to the plaintiff's claim under s. 2, Act VIII of 1859. The Judge, on appeal, considered that the Munsiff was wrong in holding the claim of the plaintiff barred as *res judicata*, but held that the former decision was a strong piece of evidence against the plaintiff and he upheld the decree of the Court below. *Held* that there had been a decision on the merits. KUMMEN KISHEN SEN v. MR. J. P. WISE, **18 W.R. 196.**

(63)—*First suit for rent for one year—Abatement of rent claimed to a smaller extent and decided—Second suit for abatement of rent to a larger extent in the future barred.*—Where, in a suit for a year's rent, the tenant claimed abatement and a judgment was passed determining the amount to be abated on materials applicable to one year as well as to another, *held* that the question of abatement was once for all decided and became *res judicata* NUBO DOORGA DOSSEE v. FYZ BUKSH CHOWDRY, **24 W.R. 403=1 C. 202.** [*Appr.*, 3 C. 383; *D.*, 3 C. 271, 21 C. 236; *R.*, 13 M. 287, 9 B. 75, 1 C.L.J. 248.]

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

(64)—*Act* X *of* 1877, *s.* 13, *Expl.* II—Res judicata—*Ejectment.*—In a suit for arrears of rent ejectment, and defendant pleaded that his tenure was *istemrari* and so he was not liable to be ejected. The Judge found that the *istemrari* character of the tenure was not established, and gave a decree for the rent claimed and for ejectment of the defendant on failure of payment within fifteen days from the date of the decree. The defendant saved his tenure by paying off the arrears. In a subsequent suit by the same plaintiff against the same defendant for ejectment, the defendant cannot urge that his tenure is both transferable and *istemrari*. DINOMOYI DEBIA CHOWDHRAIN v. ANUNGO MOYI, **4 C.L.R 599.** [11 B.L.R. 158, *F.*]

(65)—*Civ. Pro. Code, s.* 13, *Expl.* II—Res judicata—*Matter which should have been made a ground of defence in previous suit—Subject-matter, if must be identical—Rent suit*—Ex parte *decree—Plea of payment not raised—Claim of set off in subsequent rent suit.*—In a suit for rent, the defendant claimed a set off for a certain sum which, he said, he had paid on account of previous arrears of rent, but for which no credit had been given by the plaintiffs in a suit for the rent of that period. That suit had been heard *ex parte* and decreed in the plaintiff's favour. *Held*, that the plea of payment now raised should have been made a ground of defence in the previous suit, and the defendant was precluded from claiming a set off in regard to it by Expl. II of s. 13 of the Civ. Pro. Code, (1 C.W.N. 565=24 C. 711, 1 C.L.J. 248, *Cons.*; 20 A. 110, *F.*; 6 C.W.N. 889=24 A. 249, *R.*) *Semble, per Ryves, J.*—The Privy Council in 6 C.W.N. 889=24 A. 249 has by implication overruled the decision in 1 C.W.N. 565=24 C. 711. JAMADAR SINGH v. SERAZUDDIN AHAMAD CHOWDHURY, **12 C.W.N. 862=8 C.L.J. 82=35 C. 979.**

(66)—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* II. —*Suit for enhancement — Compensation for improvements accrued due previous to prior suit for enhancement defendants, not competent to plead non-payment of.*—In this case, the lower Courts had held that the defendants were at liberty to plead in answer to the present suit for enhancement of rent the fact that the plaintiffs, the landlords, had not paid compensation for improvements made prior to the institution of a former suit for enhancement between the same parties, decided on 2nd March 1872. *Held* that the defendants might and ought to have pleaded in defending the former suit that they had not been compensated for improvements as required by ss. 37 and 38 of the Tenancy Act, and since they had omitted to raise such a plea in answer to the previous demand, Expl. II, s. 13 Civ. Pro. Code, applied, precluding them from relying on the same matter of defence again. KESAR SINGH v. JAWAND SINGH, **142 P.R. 1884.** (96 P.R. 1881, *Cited*) [*R.*, 76 P.R. 1897, 55 P.R. 1907 =65 P.L.R. 1908, 12 O.C. 347=4 Ind. Cas. 763.]

Res Judicata—continued.

——7.—Matters in Issue—*continued.*

(67)—Res judicata—*Suit for malikana.*—A subsequent suit for malikana (which substantially raises the question of the proprietary right to the estate) would, where the question of proprietary right has been decided in a previous suit, be barred as *res judicata*. GOPINATH CHOBEY v. BHUGWAT PERSHAD, **10 C. 697.** [*R.*, U.B.R. (1897-1901), Vol. II, 535.]

(68) — Res judicata — *Parties — Remand— Question of title* —Lands held under a *jote* tenure were sold in execution of a decree for rent obtained by the landlord, and they were purchased by one J who was put in possession in 1839. Another suit, which was pending between the tenants and their mortgagee, in which a question arose whether those *jote* lands were included in the mortgage, was decided in favour of the mortgagee in 1841. To this suit J was no party, but was in possession of the lands. Subsequently, by an order in 1845, the mortgagee succeeded in getting possession of the same lands. In 1856, the representatives of J, who were not bound by the decision in 1841, sued to recover possession of the *jote* lands. The Privy Council remanded the case in order that the issue whether the land was parcel of the *jote* or not might be tried. *Held* that this order of remand was conclusive and that the question of the title of the representatives of J to the *jote* lands could not be re-opened. JUGGODUMBA DASEE v. TARAKANT BANERJEE, **6 C.L.R. 121, P.C.**

(69)—*Arrears of rent, suit for*—Res judicata —*Civ. Pro. Code, s.* 13—*Interest— Rent Act, Oudh, s.* 141— *Discretion of Court in awarding interest — Breach of contract — Contract Act, s.* 73.—In a dispute between G. B. who had obtained the *sanad* of a taluka, and B. B. and U. P., with reference to the taluka, a *razinamah* was executed on the 4th May 1864 under which the taluka was divided between these three persons; G. B. taking one-half, and B. B. and U P. taking one-quarter each. Certain villages were allotted to each of them, and three villages, namely, K, G, and H were held in common. The *razinamah* provided that B. B. and U. P. were to pay to G B. the government revenue until the assessment of the regular settlement *jama*, to which G. B. was to add his half share of the *jama*; that after the regular settlement the *jama* assessed on each village, whatever its amount, was to be paid by the party in possession above mentioned, but that in respect to the villages held in common, B. B and U. P. were to pay half and G. B. the other half; and that U. P. and B. B. were to pay to G. B., along with the instalment, Rs. 10 per cent on account of talukdari right on the Government revenue which might be assessed from time to time. The village G, one of the villages mentioned in the *razinamah* as held in common, was acquired under a mortgage. B. B. died in 1865, and was succeeded by his widow, on whose death U. P. obtained possession of B. B.'s share.

Res Judicata—continued.

——7.—Matters in Issue—*continued.*

After the death of B. B. the mortgage of the village G was redeemed and the village B was purchased with the consent of B. B's widow, U. P. and the plaintiff, who had succeeded to the taluka on the death of his father, G. B. The plaintiff, as talukdar or superior proprietor, brought a suit against the defendants, the son and grandson of U. P., as under-proprietors, for arrears of rent for 1305 Fasli in respect of the villages held by them. The main points in dispute were (1) whether the defendants were jointly liable to pay rent; (2) whether they were liable to pay the Rs. 10 per cent. mentioned in the *razinamah* in respect of the village B; (3) whether they were only liable in respect of half the Government revenue assessed on the villages K and H; and (4) whether they were liable to pay interest on the arrears. *Held*, that the question (1), (2) and (3) raised in this suit were *res judicata*, and that the defendants were precluded from re-opening them. A decision upon a particular matter in dispute is conclusive so far as that dispute is concerned, although it proceeds upon points of law, but the decision as regards the points of law is not conclusive where a different matter is in dispute. *Held* further, that the defendants were liable to pay interest on rent which was not paid on the date fixed for the payment of revenue. The *razinamah* was proof of a contract between the parties under which rent was payable by the defendants to the plaintiff, and the breach of the contract rendered the defendants liable to pay interest for such breach. The Court below did not exercise its discretion unsoundly in awarding interest on arrears of rent at the rate recognised by s. 141, Oudh Rent Act. GANESH BAKHSH SINGH v. HARI HAR BAKHSH SINGH, **3 O.C. 22 (B).**

(70)—*Notice of ejectment — Landlord bound to tender amount due as compensation for improvements—Punjab Tenancy Act, ss.* 25, 37, 38 —*Suit to contest notice—Ground of non-payment of compensation to be urged—Subsequent suit for compensation*—Res judicata—*Act* X *of* 1877, *s.* 13, *Expl.* II.—Where compensation for improvements is due to a tenant under ss. 37 and 38 of the Punjab Tenancy Act, he is entitled under s. 37 to retain possession of the land until such compensation is paid to him by the landlord, and cannot, until then, be ejected from his holding. The payment of compensation being a condition precedent to the ejectment of the tenant by notice, the landlord is bound to tender the full amount due, before notice of ejectment is served upon the tenant and when the plaintiff sues under s. 25 to contest his liability to ejectment under the notice, he both may and ought to make the non-fulfilment of the condition precedent a ground for contesting his liability to ejectment under the notice, and the Court is bound in such a suit to make an absolute and unqualified decree either that the plaintiff is not liable or that he is so liable and that his suit is dismissed. Consequently, a tenant who, being in fact entitled

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

to compensation, sues under s. 25 of the Act and omits to contest his liability to ejectment upon the ground that the compensation has not been paid, cannot, if his suit is dismissed, maintain a subsequent suit claiming the compensation due at the time of the service of the notice of ejectment. The right to compensation at the time of the service of notice of ejectment was a matter which might and ought to have been made a ground of attack in the former suit brought by the tenant under s. 25, and therefore, under Expl. II to s. 13 of the Civ. Pro. Code, it must be deemed to have been directly and substantially in issue in the former suit, and consequently the trial of the second suit would be barred under the provisions of s 14. KAKA v. BHOLA, **96 P.R. 1881.** (39 P.R. 1871, 149 P.R. 1879, *R.*) [*F.*, 18 P.R. 1883, 39 P.R. 1883 ; *Appr.*, 142 P.R. 1884 ; *R.*, 111 P.R. 1883, 136 P.R. 1883; *D.*, 55 P.R. 1907, 13 P.R. 1882.]

(71)—*Civ. Pro. Code*, 1882, *s.* 13—*Suit for declaration of agriculturist's land being liable to attachment and sale—Matter which might have been ground of objection in previous suit—Punjab Land Alienation Act*, 1900, *s.* 16 (1).—A third person, alleging himself to be the mortgagee of the share of an Arain Zemindar, resisted the attachment made thereof by a decree-holder in execution proceedings. The third person withdrew the objection founded on his mortgage and put forward a conveyance, in consequence of which, the objection based on the sale deed was held to be sufficient to release the share from the decree holder's attachment thereof. The latter then sued to have it declared that the share was attachable and succeeded in both the courts. But when this decree-holder proceeded in execution, the sons of the third party successfully opposed the execution on the ground of their mortgage. The original decree holder next sued the third party's sons for a declaration like the one he got in his second suit. *Held* that the sons of the third party mortgagee were barred from putting forward the mortgage in this suit, as it was a matter which ought to have been made a ground of defence in the previous suit and as it must, therefore, be deemed to have been a matter substantially in issue in such former suit ; *held* further, that s. 16, Punjab Land Alienation Act, does not prohibit an agriculturist's land from being attached in execution proceedings and that a decree-holder may ask for a declaration as to certain land being liable to attachment and for being dealt with under s 326. Civ. Pro Code, 1882. BADAR DIN v. BURA MAL, **4 P.R. 1903.** [*Rel. on*, 55 P.R. 1907.].

(72)—*Suit for possession—Right of pre-emption not set up by defendant – Subsequent suit for pre-emption if maintainable*—Res judicata.—In a former suit for possession of certain land by the purchaser thereof, the present plaintiff (as defendant) failed to set up his rights of pre-emption and the suit was consequently decreed.

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

Held that a subsequent suit to enforce the right of pre-emption was barred by the principle of *res judicata*. ASGUR MAHOMED v. NUZEEMA BIBEE, **14 W.R. 272.** [*R.*, 2 O.C. 9.]

(73)—*Civ. Pro. Code*, 1877, *s.* 13—Res judicata—*Pre-emption, right of, as a ground of defence.*—The appellant purchased certain property from the widow of one Chunni on the 18th November 1874, and brought a suit against his vendor for possession of such property. The respondent, who represented himself to be the nephew of Chunni, and one Chedi Lal, the daughter's son of Chunni, were made defendants in the suit. They contended that the widow was not competent to alienate such property. The respondent subsequently brought the present suit against the appellant in which with reference to such sale, he claimed to enforce his right of pre-emption in respect of such property. *Held* that the suit was barred by the provisions of s. 13 of Act X of 1887 as the claim for pre-emption might and ought to have been made a ground of defence in the former suit, and must be deemed therefore to have been a matter directly and substantially in issue in such suit. TIWARI GANDHARAP v. PITAM, **A.W.N. 1881, 47.**

(74)—Res-judicata — *Matters in issue — Defence not raised in previous suit—Civ. Pro. Code, s.* 13, *Expl.* II — *Pre-emption — Mahomedan Law—Sale in execution of decree.*—Where the plaintiff, in a suit for pre-emption, had, in a former suit in which the present defendant had obtained a decree against her for possession of the property now in question, omitted to assert her pre-emptive right as ground of defence. *Held* that the suit for pre-emption was barred by s. 13, expl. II of the Civ. Pro. Code. A sale in execution of a decree does not give rise to a right of pre-emption under the Mahomedan Law. RAJ BIBI v. SUKHI, **A.W.N. 1889, 175.**

(75) — *Right of pre-emption as ground of claim and of defence—Civ. Pro. Code.* 1877, *s.* 13, *Expl.* II.—Where the right of pre-emption, though available as a defence, was not pleaded in a former suit, a subsequent suit between the same parties to enforce such right would be barred under s. 13 of the Civ. Pro. Code, Expl. II. NARAIN DAT v. BHAIRO BUKSHPAL, **3 A. 189.** (1 A. 75, 1 A. 316, *F.*, *but doubted.* [*Overruled*, 26 A. 61, F B. = A.W.N. 1903, 196; *R.*, 14 B. 31.]

(76)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *new Code*)—Res judicata—*Former suit for possession by purchaser resisted on ground of ownership—Subsequent suit for pre-emption by former defendant barred.*—A who purchased a certain property brought a suit against B who was in possession thereof, and the suit was resisted by B on the ground that he was the owner of the property. The Court, however, made a decree in favour of A. Subsequently,

Res Judicata—continued.

—7.—**Matters in Issue**—*continued.*

A brought a suit against B for pre-emption in respect of the same property. *Held*, that the subsequent suit was barred under Expl. II to s. 13, Civ. Pro. Code, because B ought to have raised in the former suit the defence in the alternative that he had a right of pre-emption. PULANDER SINGH v. JWALLA SINGH, **20 A. 516 = A.W.N. 1898. 134.** (11 M.I.A. 50, 20 C. 79, 1 A 75, *R.*) [*Overruled*, 26 A. 61, F.B.; *Not F.*, 1 A.L.J. 426 = 27 A. 78; *R.*, 55 P.R. 1907 = 65 P.L.R. 1908 = 96 P.W.R. 1907.]

(77)—Res judicata—*Civ. Pro. Code*, 1882, s. 13—*Question of title raised incidentally in Small Cause suit, how far* res judicata *in subsequent original suit.*—In a suit for declaration of plaintiff's right to carry an idol in procession during certain festivals, the decision in a previous suit between the same parties on that question will operate as *res judicata*, where it appears that, although there is some variance between the details of the ceremonies set out at length in the plaint in the previous suit and in the present suit, the relief in respect of the right of procession is substantially the same. *Per Kernan, J.*—Where in a suit of a Small Cause nature a question of title is decided incidentally, the decision on that question does not operate as *res judicata* in a subsequent original suit between the parties where the question of that title is in dispute, as there could be no second appeal in the former suit. (3 M. 192, *F.*) *Per Wilkinson, J.*—Where in the previous suit the parties were the same, and they were litigating under the same title and the Court which tried the case had jurisdiction finally to decide the question, the mere fact that the question was decided incidentally in the former suit would not bar the judgment in the previous suit from operating as *res judicata*, as the question of *res judicata* has nothing to do with the question of second appeal. SINGARA CHARIAR v. KRISHNASAWMY, **1 M.L.J. 313.** (10 C. 173, *F.*)

(78)—Res judicata—*Denial of sonship in prior suit—Subsequent suit based on same title—Bar of suit.*—Where, in a suit for a declaration of the plaintiff's right to certain properties on the ground of his being the son of the deceased owner thereof, a person alleging himself to be the illegitimate son of the said owner intervened as a co-defendant and the Court held against him on the question of sonship, a subsequent suit by the same person for maintenance, on the ground that he was such illegitimate son was barred by the rule of *res judicata*. RAM SOOKH v. TARA SINGH, **3 Agra 40.**

(79)—*Civ. Pro Code*, 1882, s. 13 (= s. 11, *new Code*)—*Decree for partition not acted upon—Subsequent suit for the same*—Res judicata, *how far applicable.*—When a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for them, or any of them, if they still continue to be interested in the joint property, to bring another suit for

Res Judicata—continued.

—7.—**Matters in Issue**—*continued.*

the declaration of their right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. The former decree may, however, operate as *res judicata* as regards any claim or defence which was or might have been raised in the suit in which it was passed. NASRAT-ULLAH v. MUJIBULLAH, **13 A. 309 = A. W. N. 1891. 117.** [*F.*, 10 C. W. N. 839, 28 A. 627 = A. W. N. 1906, 142 = 3 A. L. J. 379; *D.*, 3 Bom. L. R 94.]

(80)—*Suit for dower amounting to money claim—Claim to establish lien for dower on specific property—Distinct nature of causes of action*—Res judicata.—Plaintiff, the widow of a Mahomedan, instituted this suit against his heirs for recovery of money being the amount of dower payable on the dissolution of marriage to the plaintiff by her late husband. The dissolution of the marriage had occurred on the death of the husband, and if the plaint merely amounted to a money claim, it was clearly barred by limitation. The High Court was of opinion that the claim for the money amount of dower and a claim to establish a lien on specific property in respect of such amount constitute distinct causes of action; but even assuming that the plaint in the present case sought enforcement of a right of lien on the property of the husband, the decree in ejectment that had been obtained by the heirs, the present defendants, was an absolute decree of right in them as against the present plaintiff; and it was given in a suit in which she might or ought, if she ever relied upon it, to have raised as a defence the very right of lien now sought to be set up as a substantive claim on her part but never did so. Consequently, as between the parties, the right of lien was *res judicata*. MUSSAMUT WAFEAH v. MUSSAMUT SAHEEBA, **8 W.R 307.** [*F.*, 14 W.R 272; *R.*, 3 B.L.R. 175, 12 C.W.N. 292 = 7 C.L.J. 504; *D.*, 19 W.R. 219.]

(81)—*Civ. Pro. Code*, s. 13—Res judicata.—*Agreement to sell.*—The plaintiff agreed to sell to the defendant a house in consideration of a payment of Rs. 41, and also of the transfer of a plot of land to build a shop to be held rent-free by the plaintiff as long as the business was carried on; the plaintiff refusing to perform his part of the contract was sued for possession of the house on payment of Rs. 41 and in it he stated as his defence that the agreement was not binding on him; but did not plead that the consideration of the sale was not Rs. 41, but Rs. 41 and possession of the plot of land. The suit was decreed against the present plaintiff He thereupon sued to enforce the agreemen tas regards the plot of land. *Held*, that he was barred by the operation of the rule of *res judicata* as in the previous suit, no such defence was set up. BADLI v. GAURI DIAL, **A.W.N. 1881, 18.**

(82)—*Matter in issue—Sale-deed being fictitious.*—Where a house and land were sold by one sale-deed, the finding in the first suit in

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

respect of the house that the sale-deed is void is conclusive in the subsequent suit in respect of the land, the material issue, *viz.*, whether the sale deed conveyed a title or was fictitious being identical in both suits though the subject-matter was different. ZAFARYAH KHAN v. FATEH RAM, **100 P.R. 1898, F B.** [*R*, 79 P. R. 1905; *Rel. on*, 55 P.R. 1907.]

(83)—*Code of Civil Procedure* (1908), *s.* 11, Res judicata—*Former suit—Two suits instituted on same day—Same question raised—Abatement of one appeal—Effect of.*—Two suits were instituted by the same plaintiff on the same day in the same Court for the same reliefs, one against A alone and the other against A and S, raising the same questions and were decided by one judgment, but separate decrees were passed on the same day allowing the plaintiff's claim. In the case in which there were two defendants only S preferred an appeal, and in the case in which A alone was the defendant an appeal was also preferred, but, during the pendency of the first appeal and before the decision of the latter, the appellant S, having died and the appeal having abated, the decision of the Court became final. *Held* that the decree in the case against S and A having become final, before the decision of the appeal preferred by A, it operated as *res judicata* for the purpose of the other case. ANANT DAS v. UDAIBHAN PARGAS, **11 A.L.J. 214=19 Ind. Cas. 76=35 A. 187.** (33 A. 51, F.B., *F.*)

(84)—*Oaths Act—Adjudication on oath in previous suit—Binding in subsequent suit.*—An adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties, though the subject matter of the suit is different. SANYASI BARITYA v. ARTASWARO, **13 M.L.T 261=M.W.N. 1913, 220=24 M.L.J. 321=36 M. 287=18 Ind. Cas. 835.**

(85)—*Finding between co-defendants—Act* V *of* 1908, *s.* 11.—*Held*, that necessary findings on an issue regarding consideration in a previous suit by reversioners against a widow's alienees, to which widow was also a party as a defendant, are *res judicata* as between the alienees and the widow, in a subsequent suit by the alienees against the widow for possession of the land sold. (140 P.R. 1890, *F*; 25 B. 74, 11 B. 216, 31 C. 95, 11 M 205, *R.*) *Held*, also, that ownership does not pass independently of the payment of consideration, if there is proof of intention to that effect. DHANNA SINGH v. MUSSAMMAT BUDHI, **157 P.W.R. 1912=188 P.L.R. 1912=103 P.R. 1912=16 Ind. Cas. 80.** (55 P.R. 1911, *F.*)

(86)—*Civ. Pro. Code*, 1859, *ss.* 2, 139—*Issues framed on pleadings—Findings on some issues—Effect.*—If, in a suit in which a number of issues are framed on the pleadings, the findings on some of the issues are enough to dispose of the suit, the Court is not bound to refrain from determining the other issues, nor can its adjudication on them be treated as a nullity. And its findings on such issues will be *res judicata* and cannot be reopened in a subsequent suit between the same parties or their representatives. MAN SINGH v. NARAYAN DAS, **1 A. 480** [*R.*, 7 A. 606, F.B.=A.W.N. 1885, 89, 17 A. 174.]

(87)—*Decision on question of law in previous suit—Same subject-matter in issue in subsequent suit.*—Defendant executed a bond to plaintiff promising to pay the amount due under a decree in certain instalments. He did so without obtaining the permission of the Court under s. 257 A of the Civil Procedure Code. Thereafter, a suit was brought on the bond for two instalments and it was dismissed on the ground that the bond was invalid because it contravened the provisions of s. 257 A of the Civ. Pro. Code. Sometime after, a second suit was brought, on the basis of the same bond, for some more instalments. The defence was that the judgment operated as *res judicata*, on the question of the validity of the bond. *Held*, the second suit was barred by the rule of *res judicata*, even though the decision in the first suit might be erroneous, the validity of same bond being in issue between the parties in both suits and the other conditions, as regards *res judicata*, having been satisfied in the case. It is not every decision of a question of law between the parties, which is binding upon them in a subsequent suit, but a previous decision of a question of law, which affects the subject-matter of the subsequent suit or creates a legal relation between the parties or defines the status of either of them, is as binding upon them as a previous decision of a question of fact, if the other requirements of the rule of *res judicata* are satisfied. M. MOHAMMAD BAHADUR v. RAM PERSHAD, **8 O.C. 37.** (5 M. 304, *Diss.*; 22 B. 669, 10 C. 1087, 15 C. 756, P.C., 15 M. 403, 11 M. 393, 15 A. 327, 1 C.W.N. 687, 28 C. 218, *R.*) [*R.*, 10 O.C. 145.]

(88)—*Knowledge of party—"Might"—Claim to be barred must be within knowledge of person during first suit.*—The plaintiff first brought a suit as heir of her father, claiming that an account should be taken of the partnership between her father and the defendants. The suit was dismissed as barred by limitation under art. 106 of the Limitation Act. She then brought another suit against the same defendants claiming as heir of her father and mother, and alleging that on her father's death, the mother was admitted into the partnership; and she prayed for an account of both the partnerships:—*Held*, (1) that so far as the partnership with the father was concerned, the claim was barred as *res judicata* by the decision in the previous suit: (2) that the claim relating to the partnership between her mother and the defendants cannot be rejected as *res judicata* unless it was shown that during the previous suit she was aware of

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——7.—**Matters in Issue**—*continued.*

the claim. The word "might" in explanation II to s. 13 of the Civ. Pro Code, 1882, pre-supposes that the person defending or attacking in the former suit had knowledge of the matter at the time of that suit and could have made it a ground of defence or attack therein. MANIKBAI v. VIRCHAND, **9 Bom. L.R. 1020.** [*F.*, U.B.R. 1910, 4th Qr., p. 66; *R.*, 9 A.L.J. 111.]

(89)—*S.* 13, *Civ. Pro. Code*, 1882 - Res judicata—*Explanation* 2—*Might and ought.*—The defendant brought a suit for settlement of accounts against the plaintiff and obtained a decree. The plaintiff thereupon brought this suit for recovery of a sum of money, on the ground that the defendant had received it on his behalf in the years for which the defendant had brought the previous suit. *Held* that the plea might and ought to have been raised in the previous suit and the present suit was barred by the rule of *res judicata*. JAGAN NATH v. BALKISHAN, **4 A.L.J. 675=A.W.N. 1907, 275.**

(90)—*Civ. Pro. Code*, 1877, *s.* 13—"*Matter in issue*"—"*Subject-matter*" *of suit.*—In s. 13 of the Civ. Pro Code, it is the "matter in issue," not the "subject matter" of the suit, that forms the essential test of *res judicata*. Therefore, where, in two suits for two different instalments due upon the same bond for money, the question whether interest on such instalments was due from the date of bond or from the date of default was in issue between the parties and was decided in the first suit, such decision would be *res judicata* in the second suit. PAHLWAN SINGH v. RISAL SINGH, **4 A. 55=A.W.N. 1881, 110.** [*F.*, 13 B. 25, 15 M. 494; *Appl*, 23 A. 5; *R.*, U.B.R. 1892-1896, Vol. II, 214, 24 A. 112; *D.*, 14 B. 206.]

(91)—*Civ. Pro. Code, s.* 13— Res judicata—*Matter directly and substantially in issue.*—*Meaning of the term* "*suit*".—In a suit for the recovery of four bonds, on the ground, that all of them had been satisfied, the decision in a previous suit on two of them, in which the defence, that all the four had been discharged was found against, is *res judicata* only in respect of the two bonds therein sued on, and not in respect of the other two, which were not directly and substantially in issue in that suit, as the only issue to be decided therein was, whether the two bonds in suit had been satisfied or not. [*R.*, 28 B. 338.] The word "suit" in s. 13. Civ. Pro. Code, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civ. Pro. Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit. (*Mahmood, J.*) SHEORAJ RAI v. KASHINATH, **7 A 247, F.B.=A.W.N. 1885, 15.** [*R.*, 8 A. 324, 12 C.P.L.R. 91.]

(92)—*Civ. Pro. Code*, 1882, *s.* 13 (=*Civ. Pro. Code*, 1908, *s.* 11)—*Defence not allowed to be*

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——7.—**Matters in Issue**—*continued.*

taken in prior suit—Bar in a subsequent suit—Estoppel—Where, in a former suit the defendant was not allowed to deny the plaintiff's title, but it was not found that the plaintiff had any title, *held* that, in the present suit, no question of estoppel arises, and that the defence on title was not barred. BHADRA RAJAYYA v. MACHABATHUNI LAKSHMI DEVAMMA, **7 M.L.T. 107=5 Ind Cas. 815.**

(93)—Res judicata—*Finding in prior suit, not material to the decree therein.*—Where a decree dismissing a suit is not based upon a finding adverse to the defendant therein, but in spite of it, such finding would not bind the parties in a subsequent suit. NUNDO LALL BHUTTACHARJEE v. BIDHOO MOOKHY DEBEE, **13 C. 17.** (6 C. 319 impliedly *overruled* by 11 C. 301 =12 I.A. 23. [*Rel.*, *on*, 18 C. 647; *R.*, 18 B. 597, 7 C.P.L.R 139, 17 A. 174=A.W.N. 1895, 47, 24 C. 900, 25 B. 115, 9 C.W.N. 60, 5 C.L.J. 611=36 C. 193.]

(94)—Res judicata—*Civ. Pro. Code, s.* 13—*Joint trial of two issues.*—Where two suits are tried together, the decision of an issue in one of them, which is not appealed against, cannot be regarded as *res judicata*, so far as that issue is concerned, in an appeal from the decision in the other suit, and s. 13, Civ. Pro. Code, does not apply. ABDUL MAGID v. JEW NARAIN MAHTO, **16 C. 233.** [*F.*, 23 P.R. 1897, 31 P. R. 1898, 29 M 333=16 M.L.J. 63, F.B., 4 C L.J. 149=10 C.W.N. 934=33 C. 1101; *Cited*, 85 P.R. 1905=151 P.L.R. 1905, F.B.; *D.*, 5 O.C. 384; *Diss.*, A.W.N. 1908, 211=4 M.L.T. 172.]

(95)—*Defendants having had no right of appeal in first suit—Matter in issue not being same in the first suit and the second suit.*—First suit was brought by plaintiff for recovery of certain mortgaged property on the allegation that the mortgage had been discharged by payment partly to the mortgagees and partly to the defendants in the present suit. Present defendants were made supplemental defendants to the former suit after settlement of issues. The decree was to the effect that the present defendants had no interest in the property and that payment made to them was of no avail. The decree further directed possession to be given to the plaintiff on his paying to the original defendants, the sum which he alleged to have paid to the present defendants. The present defendants were accordingly exempted from liability in the first suit. Hence the present suit to recover, from the present defendants, the amount alleged to have been paid to them. The plaintiff pleaded that the decree in the first suit operated as *res judicata* against the present defendants and that he (plaintiff) was entitled to a decree without going into the merits. *Held*, the former decree did not operate as *res judicata* against the present defendants. The defendants were exempted from liability in the former suit and they had, therefore, no right of appeal. It would,

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——7.—**Matters in Issue**—*continued.*

under such circumstances, be inequitable to hold that they were concluded by the decree. Further, the matter in issue in this suit had not been gone into between the present defendants and the plaintiff in the previous suit. MALHI KUNWAR v. IMAM UD-DIN, **27 A. 59 =1 A.L.J. 363.** (12 C. 580, *F.*)

(96)—*Civ. Pro. Code, ss.* 13, 43—*Omission by plaintiff to raise contentions as defendant in prior suit, effect of.*—Where the plaintiff in a suit was defendant in a previous suit which had been brought against him by the father of the present defendant, the fact that he had omitted to make certain averments and to raise contentions thereon, as defendant in the previous suit, would not debar him from making those averments as plaintiff in the latter suit. where the averments in question were not of a nature material to his defence in the former suit. MUTTUVADUGANATHA TEVAR v. PERIASAMI, **16 M. 11=2 M.L.J. 265.**

(97)—*Finding of lower Court on an issue which is not dealt with in appeal, whether.*—The finding of a lower Court, on an issue which is not dealt with in the Court of appeal, is no more *res judicata* than if the finding were reversed. JIWANMAL WD. THAROMAL v. RADHOMAL THAROMAL, **1 S.L.R. 171.** (6 B. 110, *R.*)

(98)—*Civ. Pro. Code*, 1882, *s.* 13, *expl.* II —Res judicata—*Party not interested—Applicability of expl.* II *to s.* 13.—A judgment in a suit in which a person not interested in its subject-matter is made a defendant, is not *res judicata* in a subsequent suit between him and the plaintiff in the prior suit. When a party to a suit could not have raised the matter on which the present plaint is founded as a ground of defence in the former suit to which he was also a party for the simple reason that it would have been no defence at all to that suit so far as his interests were concerned (which were nil) in the properties for the recovery of which that suit was brought, it is clear under expl. II that the "matter" of the present suit could not be deemed to have been "a matter directly and substantially in issue in such suit" between the parties to the suit. GOVINDASAMI THEVAN v. GOPALASAMI SIVAJI MOHITHEI, **14 M.L.J. 281.** (12 I.A. 23, *F.*)

(99)—*Issue not decided—S.* 13, *Civ. Pro. Code* (1882) (=*s.*11, *Present Code*).—Where a certain matter was not really dealt with and decided in a previous suit, although an issue was raised in regard to that matter, a subsequent suit involving the same matter would not be barred as *res judicata* by reason of the previous suit. UMESH CHUNDER DEY v. SHRABESSUR CHUNDER, **5 C.W.N. 304.**

(100)—*Absence of issue.*—The decision in a previous suit that certain alienations were not binding on the plaintiff will not constitute the question, *e.g.*, whether such alienations were

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——7.—**Matters in Issue**—*continued.*

bogus transactions, *res judicata* in a subsequent suit between plaintiff and the alienee. A mere assertion by the plaintiff in the former suit that the transfers were nominal cannot, in the absence of an issue on that point, be treated as evidence on that question. RAYI KRISHNAYYA v. GANGA BAI, **M.W.N. 1912, 380=16 Ind. Cas. 357.**

(101)—*Former suit—Question not raised.*—Where the question at issue in the subsequent suit did not arise in the former suit, it could not be held to be *res judicata.* RANJHA MAL v. BHADAN SINGH, **16 P.R. 1897.**

(102)—Res judicata—*Decision on collateral facts.*—When a Court of competent jurisdiction, in deciding upon a particular subject, thinks it necessary to go into collateral facts for the purpose of that decision, the opinion of that Court on those collateral facts is not conclusively binding in a subsequent suit which relates to a different subject-matter. MODHOO RAM DEY v. BOYDONATH DOSS, **9 W.R. 592.** [*R.*, 15 W.R. 424.]

(103)—*Issue not essential to decision—Determination of issue whether can be deemed final*—Res judicata.—In a previous case the present plaintiff, by his mother as next friend sued the present defendants for rent in kind alleging that they were tenants of his father H. On appeal the Judicial Assistant found that the plaintiff was the son of H, but, instead of proceeding to decide the suit on the merits, dismissed the appeal on the ground that the plaintiff should first sue for possession of the land and then for mesne-profits or should sue for both together. The present suit for possession of the land was then brought by the plaintiff through his mother as next friend. The defendants, as before, denied that he was the son of H, but both the Courts below held that the previous decision made the question *res judicata* in the plaintiff's favour and decreed the plaintiff's claim. On second appeal, the Chief Court was of opinion that the Judicial Assistant, in the previous case, had merely decided that the suit would not lie as framed, that, therefore, no conclusion come to by him upon any question of fact arising in the case which was not essential to that decision, could be regarded as a final decision of that question between the parties and that, consequently the previous decision, as to plaintiff being the son of H, did not render the same question *res judicata* in favour of the plaintiff in the present suit. GAMA v. AMERA, **29 P.R. 1884.** [*R.*, 151 P.R. 1889, 146 P.R. 1890, 41 P.R. 1899, 50 P.R. 1899.]

(104)—*Matter in issue—Decision of unnecessary issues—Appeal in one of two suits regarding same subject.*—Where a plaintiff brought her own suit in which the question of her right necessarily and directly arose, she could not be held to have acquiesced in the same issue being treated as a material one in another suit, in

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the same Court, in which she was impleaded only as a member of the family, the two suits being tried together. Decision in a former suit of a question not essential to the decision of a case could not be regarded as a final decision of that question between the parties. The decision of an issue in one of two suits tried together and decided by the same judgment, which is not appealed against, cannot operate as *res-judicata*, so far as the same issue is concerned in the appeal preferred against the decision in the other suit. MALIK RAHIM BAKSH v. MT. FAKHAR-UN-NISSA, **31 P.R. 1898.** (16 C. 233, *F.*; 6 C. 319, 11 A. 148, *D.*) [*R.*, 85 P.R. 1905=151 P.L.R. 1905, 57 P.R. 1907.]

(105)—Obiter dicta—*Eevidence.*—Apresumption made in a former case, being only a *dictum* in a matter immaterial to the decision of the suit, cannot be proof of the thing presumed. HURO DOSS DOSTEEDAR v. SREEMUTTY HURO PRIA, **21 W.R. 30.**

(106)—*Unexecuted decree for redemption—Fresh suit for redemption*—Res judicata—*Civ. Pro. Code (Act* VIII *of* 1859), *s.* 2.—Where a mortgagor who obtained a decree for redemption conditional on payment of the mortgage amount into Court within 15 days, took no steps to redeem the property, and brought a second suit for redemption some six years after the decree in the first suit, *held* that the decision in the previous suit did not bar the second suit. SHIBBU MUL v. PAIRA SINGH, **86 P.R. 1877.** [*F.*, 93 P.R. 1879, F.B., 14 P.R 1881, 93 P.R 1908=164 P.L.R. 1908=134 P.W.R. 1908, F.B.; *R.*, 78 P.R. 1878, 132 P.R. 1882, 20 P.R. 1887, 100 P.R. 1905=16 P.L.R. 1906, 100 P.R. 1909=152 P.L.R. 1909; *Doubted*, 43 P.R. 1907=169 P.L.R. 1908.]

(107)—*Suit by mortgagee against mortgagor—Decree for possession--Subsequent suit for redemption*—Suit for redemption. In 1869, the mortgagee the present defendant, had sued the mortgagor and some others to set aside their obstruction to the mortgaged property and for confirmation of his possession, and obtained a decree. It was pleaded that that decree was a bar to the present suit for redemption brought by the mortgagor. *Held* that the decree for possession obtained by the mortgagee could not preclude the mortgagor from suing for redemption. The previous suit and the decree were directed to the relief of possession only, and no opportunity was given to the mortgagor to pay off the debt. The relationship arising out of the mortgage was not the matter submitted to the adjudication of the Court in the previous suit and the contract of mortgage did not become merged in the decree. NARASINHA MANOHAR v. BHAGVANTRAV, **14 B. 327.** [*Appr.*, 20 A. 506=A. W.N. 1898, 139.]

(108)—*Mortgage — Decree for redemption—Second suit for redemption—Civ. Pro. Code, ss.* 13, 244.—A decree for redemption of a mortgage which remained unexecuted for three years, is no bar to a fresh suit for redemption. KARUTHASAMI v. JAGANATHA, **8 M. 478.** (6 M. 119, *Appr.*, 7 B. 476, *Diss.*) [*Overruled*, 25 M. 300, F.B., *F.* 15 M. 366. *R.*, 13 B. 567, 16 B. 243, 19 M. 40, F.B., 21 M. 18, 21 A. 251, 3 O.C. 371, F.B., 34 A. 44, F.B.=A.W.N. 1901, 194. 100 P.R. 1905=16 P.L.R 1906, 93 P.R. 1908, F.B. =164 P.L.R. 1908=133 P.W.R. 1908.]

(109)—*Ss.* 13 & 43, *Civ. Pro. Code*, 1882—*Redemption of* kanom—*Prior suit to redeem—Subsequent suit based on the* kanom *and on title not barred.*—This suit was brought to redeem certain items of lands, demised under a *kanom* by the plaintiff's ancestor and the plaintiff set up also his claims to the lands based on his title to them as a distinct cause of action. A previous suit, by him, to redeem four out of the six items mortgaged under the *kanom* and another suit in respect of the other two items had both been dismissed. The lower appellate Court decided that the present suit is barred by ss. 13 and 43, that it was barred by s. 13 because, so far as the present defendants were concerned, this suit was merely a repetition of the first of the previous suits and it was barred by s. 43 for the reason that, in the latter of the said suits, based on the *kanom* now sued on, whereas plaintiff could have claimed redemption of all the six items of land he sought to redeem only two omitting the other four. *Held*, reversing that decision, that the former suits by the plaintiff were not based on his title but on the *kanoms* only. In the present suit, however, the plaintiff based his claim also on his title—a ground of a claim entirely separate and distinct from the claims upon which those suits had been based. Also, the causes of action in the former suits based on the *kanom* only had arisen *ex contractu* and such suits, therefore, could be no bar to the present suit, where there is also the claim on title, against the defendant as trespasser, founded on tort. Neither s 13 nor 43, therefore, can operate as a bar to the present suit. Estoppel by judgment cannot operate where the subsequent suit includes a ground of relief neither arising out of, nor dependent on, any right or title set up in the former suit. PARAMBATH MANAKKAL v. PUTHENGATTIL MOOSAMU, **28 M. 406.** (27 M. 760, *F*; 22 M. 259, *Diss.*; 3 M.H.C. 320. 7 M.H.C. 160, *R. and Appr.*) [*Appr.*, 2 N.L.R. 94.]

(110)—*Ss.* 13, 258, *Civ. Pro Code*, 1882—Res judicata—*Matter in issue in the first and second proceeding different—Part payment—Limitation Act* (XV *of* 1877), *s.* 20—*Part payment should appear in the hand-writing of the judgment-debtor—Burden of proof—Decree-holder should prove part-payment to be in the hand-writing of the judgment-debtor.*—The decree-holders obtained two decrees on foot of two mortgages. They applied for execution of one of the decrees, which had apparently become time-barred, alleging that the judgment-debtor had paid the proceeds of certain timber in part payment of the decree. Payment was not

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proved and the application was rejected. Then the decree-holders made an application to execute the other decree. Here also they made an allegation that a part payment had been made out of the sale proceeds of the timber. *Held*, that the plea as to part payment by sale of the timber was not barred by *res judicata*, by reason of its having been adjudicated upon when the application for execution of the former decree was disposed of. *Held*, further, that a part payment of a decree could be recognised, although the same had not been certified to the Court under s. 258, Civ. Pro. Code, (1882). (26 A. 36, *R.*) For the purposes of s. 20 of the Limitation Act, 1877, the part payment must be in the hand-writing of the judgment-debtors. It must be proved to be so by the decree-holder. OUDH BEHARI PANDE v. MAHABIR SAHI, **2 Ind. Cas. 524=6 A.L.J. 836=31 A. 590.**

(111)—*Civ. Pro. Code*, s. 13, *Expl.* II—Res judicata—*Successive purchase of the same land at two execution sales—Suit to set aside one such sale—Purchaser's defence—Whether he is bound to set up title acquired at the other sale—Ground of defence which "ought" to have been taken.*—A purchased village S in execution of a decree obtained by him against C in the Small Cause Court. Subsequently A through B instituted a mortgage suit against C and in execution of the decree obtained therein purchased some lands in the same village S. C instituted two suits, one to set aside the sale in execution of the Small Cause Court decree and the other to set aside the decree and sale in the mortgage suit. The latter suit was dismissed for default but the former succeeded. In this suit, A did not set up as a ground of his defence the title obtained by him at the mortgage sale. *Held*—that A was not bound to do so, and a suit by A to recover the lands in village S purchased at the mortgage sale is not *res judicata* under Expl. II of s. 13 of the Civ. Pro. Code. *Per Brett, J.*—Expl. II of s. 13 of the Civ. Pro. Code refers to the title litigated in the former suit as distinguished from relief claimed. When several independent grounds of action are available, a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action. This rule equally applies to the converse case of a defendant when pleading in his defence. MOHABIR TEWARI v. PURBHOO NATH CHOWBEY, **12 C.W.N. 292 =7 C.L.J. 504.** (12 I.A. 116, 26 M. 760, *Rel. on.*) [*R.*, 12 O.C. 354.]

(112)—*Ss.* 13, 43, *Civ. Pro. Code*, 1882, *Res judicata—Matter which ought to have been made ground of defence or attack, meaning of—Litigating under the same title.*—One B obtained a decree for sale on his mortgage. The mortgaged property was sold, but was found insufficient to pay the amount due under the decree. B died in the meantime. The name of his widow

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——7.—Matters in Issue—*continued.*

P was brought on the record as legal representative of B and as guardian of the plaintiff who was alleged to be her adopted son. On her application an order for execution against other property of the judgment debtor was made In accordance with this the equity of redemption in 10 annas of the village in suit was put up for sale and purchased by P. P died about 18 years ago. In 1904, plaintiff brought a suit for redemption of the mortgage. The suit was dismissed on the ground that the alleged adoption had not been proved. The plaintiff then brought the present suit for the same relief on the grounds, *first*, that the purchase by P was for and on behalf of the plaintiff, *secondly*, as one of the heirs of P irrespective of adoption, and, *thirdly*, as an heir of B. In the latter two cases based on relationship the plaintiff was entitled to redeem one moiety of the estate on his own account and the other moiety for his co-owner. All these three titles were available to plaintiff when he brought his first suit. *Held*, that the present claim for redemption as co-owner with another was inconsistent with the former claim to full ownership as an adopted son, and their combination would have led to confusion and embarrassment, and therefore the present claim as a co-owner was not one which "ought" to have been joined in the former suit. *Held* further, that a plaintiff sought, except under very special circumstances, to join all grounds on which he can claim the same relief against the same defendants; such grounds may be cumulative, each entitling him to the relief claimed, or may be urged in the alternative. He, however, ought not to be compelled to add a ground which he could not urge without the addition of some other party as a co-plaintiff or as an additional defendant. DAYA SHANKAR v. GANGA SAHAI, **12 O.C. 347=4 Ind. Cas. 763.**

(113)—*Civ. Pro. Code*, 1882, s. 13, *Expl.* II —"*Matter which might and ought to have been made ground of attack or defence in former suit.*"—Under a bond, dated 13th May 1870, T mortgaged nine villages to the defendants' ancestor M, who, on 4th May 1874, obtained a decree for sale of all the villages. In 1875, he purchased in execution of this decree seven out of the nine villages, leaving two villages named P and K unsold. In the meantime, on 5th January 1871, T had, by another bond, hypothecated the same nine villages to the present plaintiff. Plaintiff sued on this bond in 1879, impleading M also as defendant. But the village P was not made the subject of this suit, so far at least as M's interest in it was concerned. The plaintiff obtained a decree on 13th August 1879. Subsequently, the defendants (the representatives of M) filed a suit against the plaintiff in respect of two of the villages J and L, asserting their rights therein by virtue of the previous mortgage to and purchase by M. But the suit was dismissed on the ground that this question ought

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——7.—**Matters in Issue**—*continued.*

to have been raised in the suit of 1879 (Civ. Pro. Code, 1882, s. 13, Expl. II), the defendants' ancestor M having already obtained possession, and therefore being bound to defend that possession. In his present suit against the defendants for the village P, plaintiff sought to apply the same rule of *res judicata* against the defendants. But this contention was held rightly to have been overruled by the lower Courts, for, at the time of the former suit of 1879 M, the ancestor of the defendants, had not obtained possession of the village P. He only held a decree, in execution of which he might, if he chose, take proceedings against that village, on the basis of his decreed lien of 1870. In other words, he was no more than a decree-holder, with a charge on P prior to that of the plaintiff. There was no necessary rivalry between his rights and the plaintiff's pretensions regarding P in that case, and the plaintiff did not therefore raise any case against M which he was bound to defend or might have defended. JAMUNA KUAR v. BALDEO SAHA, **A.W.N. 1885, 265.**

(114)—*Civ. Pro. Code*, s. 13—Res judicata—*Matter directly and substantially in issue—Different causes of action—Custom—Hindu Law—Succession—Daughters — Collaterals — Sarsut Brahmans of Gopalpura Village, Amritsar District—Mortgage with possession—Duty of mortgagee to keep account of rents and profits—Interest.*—A person suing for possession of land as mortgagee is not required to put forward in the suit his claim, to succeed to the property as a reversioner, and his omission to do so does not prejudice his right in any way, as s. 13 of the Civ. Pro. Code is not applicable to such cases. *Held*, that the parties to the suit, Sarsut Brahmans of Gopalpura Village of Amritsar District, though owned land for generations, were governed by Hindu Law, and not by custom, and that daughter's sons excluded near collaterals according to Hindu Law. In a suit for redemption, the Chief Court held that interest and profits realised by the mortgagee balanced each other, where the mortgagee had failed to keep accounts of the profits realized from the mortgaged property. AMIN CHAND v. TIRATH RAM, **95 P.L.R. 1908.**

(115)—*Former suit— Issues raised but not decided*—Res judicata.—Where a reversioner sued the mortgagor and mortgagee for a declaration that the mortgage-deed should not affect his rights, a subsequent suit for possession by the mortgagee against the mortgagor is not barred. THAKUR DAS v. MUST. MANNA, **77 P.R. 1894.** (11 B. 216, *Appr.*) [*R.*, 97 P. R. 1910=142 P.W.R. 1910.]

(116)—*Matter directly and substantially in issue—Cause of action—Landlord and tenant.*—Where there is no finding as to the relationship of landlord and tenant in the former suit, but the plaint, together with the plaintiff's statement at the close of the case, disclosed a case cognizable by the Revenue Court, the subsequent suit which is not based on any allegation of tenancy between parties but is merely for the recovery of land on the strength of plaintiff's title as owner, is not the same as the former suit and is not barred. RAM SINGH v. JOWALA SINGH, **55 P.R. 1896.** [*Cons.*, 92 P.R. 1902, F.B.=16 P.L.R. 1903; *R.*, 44 P. R. 1908, 45 P.R. 1907.]

(117)—Res judicata—*Suit for possession of share of jote—Purchaser of portion of tenancy made defendant—Whether bound to plead under-tenancy.*—In a previous suit for recovery of possession of a certain share in a *jote*, the defendant was made a party on the ground that he had purchased a portion of the tenancy in suit. In that suit the plaintiff was declared to be entitled to rent, and her prayer for *khas* possession was dismissed on the ground that the defendant was entitled to actual possession as an under-tenant under the vendor of the plaintiff. In a subsequent suit for recovery of possession: *Held*, that the defendant is not precluded from pleading his under-tenancy by the rule of *res-judicata*, as he was not bound to put forward as a ground of defence, in the previous suit, any under-tenancy which he might have. FAZAR PRAMANIK v. URMAN BIBEE, **9 Ind. Cas. 585.**

(118)—*Civ. Pro. Code, Act X of* 1877, *s.* 13, *expl.* II.—*Issue—Estoppel*—Res judicata.—In a former suit, the present plaintiff sued the present defendants for damages for carrying away some crops which were standing on the land, the subject of the present suit, and he put his claim in two ways:—(1) he claimed the land and the crops on it as being the transferee of the *jote* itself, and (2) whether he was transferee of the land or not, he claimed to have purchased the crops. The defendants pleaded in that suit that the tenure was not transferable. But that defence turned out to be immaterial, because, without going into the question of the plaintiff's title to the *jote*, the Court decided in his favour on the ground that he had purchased the crops. Now the present suit was brought by the same plaintiff against the same defendants for the recovery of possession of the *jote* on the ground that he was a transferee from the original *jotedar*. The defendants again contended that the tenure was not transferable. *Held*, that the defendants were not estopped under s. 13, exp. II of the Code; because the question of the transferability of the *jote* was immaterial in the first suit and had not in fact been determined. CHURN MANJEE v. ISHAN CHUNDER DHUR, **9 C.L.R. 474.**

(119)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Issues heard and finally decided by a Court in a previous suit.*—In a suit to eject the defendants, from land claimed by the plaintiffs, who were the *ticcadars*, as *majhes* land, that is land ordinarily cultivated by the landlord himself or by the *ticcadars*, the defendant pleaded that he had a right of occupancy in that land as a raiyat, and could not be turned out of it.

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—7.—Matters in Issue—*continued.*

The lower Court held that this matter was *res judicata*, and the defendant was no longer entitled to be heard in respect of it, upon the ground that, in a previous suit brought by the plaintiffs to eject the defendant, the same objection was taken and the Munsif decided it in favour of the plaintiff, but dismissed the plaintiff's suit, because they had not given the defendant a proper notice to quit *Held*, that the defendant was not barred from raising the same plea in this suit, inasmuch as the decree in the previous suit was not finally decided and as there could be no appeal against the decision on that point, because the decree in that suit was in favour of the party against whom the finding was recorded. THAKUR MAGANDEO v. THAKUR MAHADEO SINGH, **18 C. 647.** [*R.*, 18 B. 597, 7 C.P.L.R. 139, 17 A. 174=A.W.N. 1895, 47, 24 C. 900, 23 B. 296, 9 C.W.N. 60, 56 P.R. 1904=84 P L.R 1904, 5 C.L.J. 611=36 C. 193; *F.*, 9 C.L.J. 493.]

(120)—*Decision in previous suit*, res judicata *as to same question in future litigation—Identity of question affected by difference in subject of litigation.*—In this suit by an inamdar of a village against a *khot* in respect of certain cultivated lands therein, a judgment in a previous suit *inter partes* deciding that the inamdar had proprietary rights in *forests and waste lands*, was held not to operate as *res judicata* barring the defendant from pleading his own proprietary title so far as regards the *cultivated lands* the subject-matter of the subsequent suit. An adjudication or a material element of an adjudication between two parties is generally *res judicata* between them as to the same question arising in a future litigation. The identity of the question however, may be affected by a difference of the *corpus* or object of the litigation, and also by a difference of the alleged infringement of the right (*causa petendi*), as well as of the right (*jus*) alleged by the plaintiffs or of the persons or the character in which they take part in the litigation. The difference of the law applicable to the forest as waste and to the cultivated lands, constituted such a distinction that the decision in the prior case would not necessarily bind them in the subsequent suit. MORO ABAJI v. NARAYAN DHONDBHAT PITRE, **11 B. 355.**

(121 & 122)—Res judicata--*Issue not decided in previous suit—Suit for arrears of rent.*--A and B were co-sharers in a certain talook to the extent of 7 annas and 4 annas respectively. B died in 1868, and in 1872, A who used to collect the rents on behalf of B, brought a suit against one of the ryots for the rent of the 11 annas. An issue having been raised as to the extent of A's share, omitting that of B, it was decided to be 7 annas only and he got a decree accordingly. In a subsequent suit by A's widow against the same tenant for the rent due for the 11 annas share, *held* that the decision in the former suit did not debar her from showing that she was

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entitled to the rent due on account of B's 4 annas share. SHAMADANISSA BEEBEE v. FERRASUTOOLLAH SIRDAR, **2 C.L.R. 23.**

(123)—*Civ. Pro Code, Act* XIV *of* 1882, *s.* 13—*Matter incidentally in issue in previous suit—Rent suit—No rent found due—Land declared liable to pay rent.*—The primary issue in a rent suit is, whether the rent claimed for the particular period is due. Where, in a rent suit, the suit was dismissed as no amount was found due by the defendant to the plaintiff, a further declaration by the Court that the land was held subject to payment of rent, was only incidental and could not operate as *res judicata* in a subsequent suit *inter partes* for assessment of rent. HARIHAR PANDE v. CHOWDHURY KARAMUT HOSSEIN, **9 C.L.J. 493=4 Ind. Cas. 175.** (18 C. 647, 11 C. 301, P.C., *F.*)

(124)—Res judicata—Bona fides *of pottahs.*—The *bona fide* of pottahs respecting which no issue was raised in former suits cannot be regarded as *res judicata.* KAILAS CHANDRA ROY v. HIRALAL SEAL, **2 B.L.R.A.C. 93=10 W.R. 403.**

(125)—*Suit to obtain declaration of* lakhiraj *nature of lands—Previous decree for rent, how far can operate as estoppel.*—The present suit by the plaintiff-respondent for a declaration that certain land was *lakhiraj*, was *held* not to be barred by reason of estoppel on account of a previous suit that had been brought by the appellant for the rent of the lands which were sought in the present suit to be declared to be *lakhiraj*; in the former suit, the question whether the land was *lakhiraj* or not had not been put in issue and decided. And the rent-decree in that suit would stand good only so far as regards the rent to which it referred. DUKHEENAH MOHUN ROY CHOWDHRY v. KASHEENATH CHATTERJEE, **6 W.R. 37.**

(126)—*Point not directly and substantially in issue—First suit to declare the land was exclusive property of plaintiff and not* shamilat—*Second suit for possession on the ground defendants are not* khewardars.—*Held*, that a point not directly and substantially in issue in the previous case is not *res judicata* in a subsequent suit relating to the same property between the same parties, particularly when it was neither put in issue nor decided in the former suit. On the first occasion, the plaintiffs, at the time of partition of *shamilat* land, sued for declaration that certain land was their exclusive property and not *shamliat*, and, therefore, was not liable for partition. Three of the defendants had pleaded that the land was *shamilat* and as *khewatdars* they were entitled to get its share. It was then decided that the land was *shamilat* and consequently the plaintiff's suit was dismissed. But the question whether the defendants were *khewatdars* in the village was not touched. After partition, the same persons who were plaintiffs on the previous occasion sued for recovering the land allotted to defendants, on the ground that they were

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not *khewatdars* and consequently they were not entitled to get a share therein. The question for decision now is whether defendants are *khewatdars*. *Held*, that the present suit was not *res judicata*. JAN KHAN v. AHMAD, **24 P.W.R. 1912=134 P.L.R. 1912=13 Ind. Cas. 445.**

(127)—*Act* VIII *of* 1859, *s.* 2—*Estoppel—Suit to contest Revenue award.*—A suit to have a declaration of right, and to set aside a *thakbust* proceeding in respect to certain lands, is not estopped by s. 2, Act VIII of 1859, by reason of a decision in a previous suit for the value of fruit growing on such lands, in which the question of title to the lands came collaterally in issue. A suit by a plaintiff in possession to contest a *thakbust* award and map made under Reg. VII of 1822, and IX of 1825 is barred, unless brought within three years, whether plaintiff is legally bound by it or not. MAHIMA CHANDRA CHUCKERBUTTY v. RAJKUMAR CHUCKERRUTTY, **1 B.L.R. A.C. 1=10 W.R. 22.** [*R.*, 9 C.L.R. 305.]

(128)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Point not in issue in former suit—First suit to set aside* theeka—*Second suit for possession.*—A former suit brought by the present defendant to set aside a *theeka* of the property in suit granted by the present plaintiff as *surburakhar* and in which no issue raising the question of joint ownership now in dispute was framed is no bar to the present suit for a moiety of the property and also for mesne profits on the allegation that the property was purchased with joint funds. NANA v. MUSSUMAT JUMNA BAEE, **2 Agra 192.**

(129)—*Act* X *of* 1859, *s.* 23, *cl.* 6—*Suit for possession after a suit for kabooleut—Estoppel*—A suit for re-possession under cl. 6, s. 23, Act X of 1859, is not barred by a previous suit for a kabooleut in which the fair rate of rent was the substantial matter decided and the question of the right of occupancy was not the main point and was not legally adjudicated. KHODA BUKSH v. AKOOL GAZEE, **9 W.R. 595.**

(130)—*Rent, Enhancement of—Holding, Share of—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 3 (9), 30—Res judicata—*Decision in former suit must have been necessary to the determination of that suit—Parcel of land.*—Where a decision has been passed on two grounds either of which is sufficient to support the decree, the decision upon each of the grounds is conclusive between the parties. But where the decision of a ground is not the basis of the decree, and the judgment is passed in spite of it, the decision of that ground does not operate as *res judicata* in a subsequent suit between the same parties. (18 C. 647, *R*; 24 C. 900, *D.*) A parcel of land is land defined by metes and bounds, and consequently a share in a parcel of land cannot be deemed to be a parcel of land within the meaning of the definition of the term 'holding.' An undivided share of a *howla* does not come within the definition of the term 'holding' in s. 3, cl. (9) of the Bengal Tenancy Act, and therefore does not fall within s. 30 of the said Act. PARBATI v. MATHURA, **16 C.L.J. 9=15 Ind. Cas. 453=16 C.W.N. 877.** (25 C. 917, 2 C.W.N. 680, 2 C.L.J. 10, 3 C.L.R. 140, 8 C.W.N. 751, *R.*)

(131)—*Civ. Pro. Code, s.* 13—Res judicata—*Matter directly and substantially in issue—Bengal Tenancy Act* (VIII *of* 1885), *s.* 69, *applicability of—Rent, deposit of—Bengal Tenancy Act* (VIII *of* 1885, *sch.* III, *art* 2 (*a*)—Onus—*Notice, service of by post, presumption—Fact, question of—Order-sheet,* ex parte *entry in, evidentiary value of—Joint Hindu family, members of, rent due to—Co-owners, suit by some of, maintainability of—Addition of parties after limitation period—Claim joint and indivisible—Limitation Act* (XV *of* 1877), *s.* 22—Abwabs—Bata *usual,* Dustur, Hazzatnama, Sonari, Selami, Percentage, *and* Batta *Company.*—The Court is not precluded under s. 13 of the Civ. Pro. Code from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, as it was not directly and substantially in issue in a previous litigation between the same parties, where the substantial relief sought was a declaration that the appraisement made by the Collector under s. 69 of the Bengal Tenancy Act was invalid. S. 69 of the Bengal Tenancy Act is applicable upon the assumption that the rent is taken by appraisement or division; the only matter in controversy between the parties is as to the quantity, value or division of the produce; the section ceases to be applicable when there is a *bona fide* dispute as to the character of the holding itself. (4 C.W.N. 239, *F*) If a tenant relies upon clause (*a*) of art. 2 of sch. III of the Bengal Tenancy Act, he must prove that there was an application which fulfilled the requirements of s. 61, sub-s. (2) of the Bengal Tenancy Act, and that a deposit was made under s. 61 after the arrear had fallen due; he must also show that notice under s. 63 was served on the landlord and prove the date when the service was effected. There is no presumption that a letter, which was posted, was properly addressed, and the presumption, that the letter reached the addressee, has no application till it is established that the letter was properly addressed. (9 A. 366, *R.*). Before the presumption of due service can be applied, it is necessary to prove that the notice was sent in a cover which was properly addressed. The presumption that a notice sent by post was duly served is not a conclusive presumption of law; it is merely a presumption of fact; and whether it arises in a particular case or not depends upon all the circumstances. (3 Bom. L.R. 420, *R.*; 15 C. 681, *D.*) An *ex parte* entry in the order sheet is by no means conclusive evidence, if it is admissible in evidence at all, as against the landlord, who was not a party to the proceedings for deposit under s. 61 of the Bengal Tenancy Act. When

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rent is due to the member of a joint Hindu family, it is not open to the *karta* alone to maintain a suit for rent without joining the other members either as plaintiffs or as defendants, except when the tenant has dealt with such *karta* as sole landlord (3 M. 234, *F.*; 15 M. 111, 10 B. 32, 12 W.R. 478, 7 B. 217, 21 B. 154, 28 B. 11, 32 I.A. 23=1 C.L.J. 584=32 C. 296=7 Bom. L.R. 1, *R.*) When the co owner landlords were not unwilling to join as co-plaintiffs but did so with the utmost readiness as soon as objection was taken by the tenant defendants, they should have been joined as plaintiffs in the first instance and if they are brought on the record after the expiry of the period of limitation, their claim is barred by limitation and the entire claim is barred as the claim was joint and indivisible (5 C.L.J. 242, F.B., 6 C. 815=8 C.L.R. 457, 29 A. 311=4 A.L.J. 194, *R.*; 26 C. 409, *D.*) The *batta usual Dustur, Hazzatnama, sonari chanda, salami and percentage* are *abwabs.* (11 C. 175, F.B., 17 C. 726 F.B., *R.*) If the tenancy was created before 1836, *Batta Company* is *prima facie* not an *abwab*, but if the creation of the tenancy is of subsequent date, it is *prima facie* an *abwab.* MIR TAPURAH HOOSEIN v. GOPI NARAYAN, **7 C.L.J. 251.** (7 C.L.J. 202, *R.*) [*F.*, 7 C.L.J. 262; *R.*, 36 C. 726=10 C.L.J. 189=1 Ind. Cas. 549; *Expl.*, 9 C.L.J. 623=1 Ind. Cas. 530.]

(132)—*Expl.* II, *s.* 13, *Civ. Pro. Code*, 1882—*Scope and application—Rent-suit—No objection re illegal cess in prior suit—S.* 74, *Bengal Tenancy Act* (VIII *of* 1885).—Although, upon a literal interpretation of the words of Expl. II, s. 13, Civ. Pro. Code, 1882, it might be contended that a point not raised and not decided in a previous litigation might still be taken as conclusive in a subsequent suit between the parties, yet, upon a proper construction of the section, the question ought not to and cannot be treated as *res judicata* unless there is a judicial determination, express or implied, on the matter not put directly in issue. A previous rent-suit, wherein the legality of a certain cess was not questioned, does not preclude the defendant from questioning its legality, in the absence of a judicial determination of the point in the former suit. WOOMESH CHANDRA MAITRA v. BARADA DAS MAITRA, **28 C. 17.** (24 C. 711, *F.*; 17 C. 726, *R.*) [*F.*, 107 P.R. 1906=76 P.L.R. 1907; *Appr.*, 1 C.L.J. 337; *R.*, 55 P.R. 1907=96 P.W.R. 1907=65 P.L.R. 1908; *D.*, 35 C. 979=8 C.L.J. 82=12 C.W.N. 862.]

(133)—*S.* 13, *Civ. Pro. Code* (1882)—*S.* 158, *Act* VIII *of* 1885 (*Bengal Tenancy*)—*Dispute as to tenancy between landlord and tenant.*—In a proceeding under s. 158 of the Bengal Tenancy Act, an issue relating to a dispute as to the existence of the relation of landlord and tenant between the parties can only be decided collaterally, and does not arise between them in such a manner as to make the decision upon it *res judicata* between the parties in a subsequent regular suit. PEARY MOHUN MUKERJI v. ALI SHEIKH, **20 C. 249.** [*R.*, 21 C. 378, 30 C. 339.]

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—7.—**Matters in Issue**—*continued.*

(134)—*U.P. Land Revenue Act* (III *of* 1901), *s.* 185—*Decision of the Deputy Commissioner as to the amount of rent and cesses payable by an under-proprietor to a superior proprietor—Summary proceedings to recover rent, effect of—Oudh Land Revenue Act* (XVII *of* 1876), *s.* 158—*Rural Police rate—Effect of neglecting to enforce right for some time—Want of inclusion in settlement amount.*—The decision of a Deputy Commissioner in a proceeding held under s. 185 of the United Provinces Land Revenue Act or s. 158 of the Oudh Land Revenue Act, 1876, does not render the question of the amount of rent and cesses payable by an under-proprietor to the superior proprietor *res judicata.* S. 185 of the United Provinces Land Revenue Act, like s. 158 of the Oudh Land Revenue Act of 1876, provides a summary remedy for the recovery of rent and other sums payable by the under-proprietors. Such proceedings do not result in a decree and cannot have the force of *res judicata.* A superior proprietor cannot be deprived of his rights merely because for some years he had neglected to enforce them. A claim for rural Police rate cannot be rejected on the ground that it was not included in the amount fixed as rent by the Settlement Officer at the revision of Settlement, where the Settlement was revised before the rural Police rate was imposed. RAJPAL SINGH v. PARTAB BAHADUR SINGH, **12 Ind. Cas. 331.**

(135)—*Civ. Pro. Code*, 1877, *s.* 12—Res judicata—*Suit for confirmation of possession.*—Where, after obtaining a decree for confirmation of possession of land and for the recovery of the value of the produce of one of the plots constituting the suit land, which was alleged to have been wrongfully carried away by the defendants, the same plaintiff brought the present suit against the same defendants, again asking for confirmation of possession, alleging that, while the first suit was pending, the defendants dispossessed the plaintiff, and also for the recovery of the produce which had been raised since the institution of the prior suit, *held* that s. 12, Civ. Pro. Code, was no bar to the present suit. BISSESSUR SINGH v. GUNPUT SINGH, **8 C.L.R. 113.** [*R.*, 11 A. 148.]

(136)—*Grant—Suit for mesne profits of* Jirayati *village—Law of limitation.*—A suit brought by V against N in the Court of the Agent at Vizagapatam to recover, with mesne profits and other incidents, a *jirayati* village alleged by V to form part of his zamindari and to be wrongfully held by N by virtue of the execution of a decree of the Commissioner of the Northern Circars passed in 1844. N pleaded that he held on a permanent lease subject to a fixed quit-rent, that he and his ancestors had held on that tenure since and previously to the permanent settlement, and that the quit-rent had been

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——**7.—Matters in issue**—*continued.*

received from him by V. The Agent dismissed the suit on the ground that the matter had become *res judicata* against V by a former decree of 1807. *Held* that the matter of the present claim was not *res judicata*, because the question of the existence and validity of the alleged grant of which N relied was not determined in the previous decree; that as N in his written statement relied on the right to hold the village in perpetutity under a grant made before the date of the permanent settlement, subject to a kattubadi or quit-rent payable to V, the amount of which N distinctly stated that V had received from him since 1857, V's claim to eject could not now be disposed of absolutely on the ground that it was barred by the Act of Limitation, and that, as the plaint prayed for the recovery of possession and proceeded on the ground, amongst others, of the invalidity of the grant relied on by N, the question as to the validity of the permanent kattubadi tenure claimed by N was properly open for determination in the present suit. NARAYANA RAZ BAHADUR, ZAMINDAR OF KURUPAM v. B. PATANJALI SHASTRI, **3 M.H.C. 120.**

(137)—*Civ. Pro Code, s.* 13 -*Suit for partition by adopted son.*—An action was brought by the descendant of a person who claimed to be the adopted son of one S against the son of S. to obtain a partition of S's property. It appeared that a previous suit was brought by this plaintiff against the defendant, and in it the plaintiff claimed partition of a particular portion of the property left by S. The defence to this suit was (1) that the suit could not succeed as the plaintiff sought partition of only a portion of the estate left by S, whereas he should have brought the whole property into suit, (2) that the plaintiff's ancestor was not the adopted son of S. The first Court held that the suit was maintainable in its then form and decided upon the merits and gave a decree in favour of the plaintiff. The appellate Court held that the suit was not maintainable in its then form, because it were of opinion that the plaintiff was bound to sue for a partition of the whole estate and could not sue for partition of a portion only of it. Upon this ground alone the appellate Court dismissed the suit. It appeared that the appellate Court proceeded to record its opinion upon various other points in the suit. It was contended in the present (second) suit that the matter in dispute was *res judicata* by reason of the decision in the previous suit. *Held* that the decree in the previous suit was the decree of the appellate Court and that the appellate Court should not be considered to have decided the question at all as it was not substantially in issue at that stage of the suit, and that therefore the second suit was not barred by *res judicata.* UMRAO SINGH v. PIARE LAL, **A.W.N. 1886, 53.**

(138)—*Suit to set aside adoption and for declaration of title—Previous suit deciding in favour of adoption—Effect.*—G brought a suit to

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——**7.—Matters in issue**—*continued.*

set aside the adoption of R, to declare G's title to certain lands and for possession. It appeared that previous to this suit, there had been a suit by G's son against G and R to obtain a moiety of the family property, in which it had been decided that R was the adopted son of G's brother. *Held* that the decision in the prior suit did not operate as *res judicata* in the later suit. GOPALAYYAN v. RAGHUPATHI AYYAN, **3 M.H.C. 217.** (1 M.H.C. 45, 2 M.H.C. 131, *D.*) [*R. & F.*, 14 M.L.J. 404=28 M. 457, F.B.]

(139)—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* II, —*Suit by widow and alleged adopted son in alternative—Defendant not bound to dispute validity of adoption set up—Effect of decision in favour of alleged adopted son.*—Where a Hindu widow and her alleged adopted son sued in the alternative and one of them, in the circumstances of the case, was bound to succeed, an adjudication in favour of both the plaintiffs did not bar a subsequent suit by the defendant to set aside the alleged adoption, because in that suit there was no issue with reference to the question of adoption and the defendant was not bound to make it a ground of defence that no adoption had taken place. ADILAKSHMI v. VENKATARAMAYYA, **13 M.L.J. 359.** [*Not F.*, 29 M. 390=16 M.L.J. 307=1 M.L.T. 183.]

(140)—Res judicata—*Certificate under Act* XXVII *of* 1860—*Application for letters of administration—Suit to set aside order granting certificate—Will.*—K died leaving a widow M as his heir. M also died leaving a Will in favour of B. One G applied under Act XXVII of 1860 for a certificate to collect debts due to the estate of M, and B applied for letters of administration with the Will annexed. The Judge granted certificate to G and refused the application of B Thereupon B sued for the establishment of the Will and for setting aside the order granting the certificate to G. The Court held that, though the Will of M was genuine, the property which was disposed of by it to B was the property of her husband, and that in consequence the Will passed nothing to him, and that, although the evidence as to G having been the heir of M's husband, was doubtful, yet the Court could not say that he was not her heir. G now sued for the rents of those properties accruing for the period subsequent to the death of M and contended that the decision in the previous suit brought by B operated as a bar to the hearing of the question of title. *Held*, that the principle of *res judicata* did not apply. GOOROO CHURN SIRCAR v. BRIJA NATH DHUR, **24 W.R. 111.**

(141) -*Finding in previous suit in respect of will—Opinion of Court* ultra vires—*Object of previous suit different —Judgment conclusive only as regards points then in issue—Will by Hindu — Formalities — Intention of testator, Ascertainment of — Mitakshara law — Son's right to profits of ancestral estate.*—It was contended that the finding in a previous suit

Res Judicata—continued.

——**7.—Matters in Issue**—*continued.*

between the parties with regard to the Will and petitions in question was *ultra vires* and could not be binding on the parties in the present appeal. The High Court *held* that the above contention was sound, observing that the real object of the previous suit was different from that of the present one and was not for a declaration on the present point, *viz.*, how far the Will and the petitions were officious and operative and the appellant was therefore entitled to a fresh declaration with regard to the effect of the Will and of the petitions. The judgment in the previous suit should be deemed to have conclusively dealt only with the points then in issue; and, as, in the present case, the Court had to go further on to determine how far the Will and petitions were officious and operative and how far they were not, the matter now legitimately before the Court was a difierent matter entitling the plaintiff to a specific decision thereon. In order to constitute a valid Will in India, no formalities have been laid down by law as having to be necessarily gone through, and all that is required for the purpose is that the intention of the testator should be ascertained in whatever way it may be ascertained, whether by word of mouth or in writing, clearly and unmistakeably. Under the Mitakshara law, the son gets, from the moment of his birth, a vested right in ancestral property, and is entitled, equally with his father, as well to the profits of the ancestral property as to the property itself, from the moment of his birth or of his adoption (as in the present case); and so, property which has been acquired out of the proceeds of ancestral property is to be deemed ancestral equally with that actually inherited from ancestors. SUDANUND MOHAPATTUR v. SOORJOO MONEE DEBEE, **8 W.R. 455.**

(142)—*Suit by reversioners—Act* VIII *of* 1859, *s.* 2—*Declaratory order—Contingent rights.*—A suit by reversioners against a childless widow as being without title, where the answer was that she had a title as next of kin to her brother, was held to be no bar, under s. 2, Act VIII of 1859, to a suit by the same plaintiffs, after the death of the widow, to obtain possession of the same lands held by defendant as the alleged adopted son of the widow. BABOO MOHAN LAL BHAYA GYAL v. LUCHMAN LAL, **5 B.L.R. 663=14 W.R. 73.** [*R.*, 16 W.R. 179, 11 C.W.N. 147.]

(143)—Res judicata—*S.* 13, *Civ. Pro. Code,* 1882—Ex parte *decree—Court of competent jurisdiction—Fresh cause of action.—Held,* that an *ex parte* decree may operate as *res judicata* when it becomes final by being executed, and the time for objections to set it aside has expired. It cannot be shown in a fresh suit that the defendant had no notice of the previous claim when an application to set aside the decree had been rejected. *Held*, also, that it is always allowable in a subsequent suit, in

Res Judicata—continued.

——**7.—Matters in Issue**—*continued.*

which the plea of *res judicata* is set up, to show that the former decision was passed by a Court without jurisdiction. The word 'jurisdiction' as used in s. 13, Civ. Pro. Code, means competency to entertain the suit with reference to its subject-matter and to the powers of the Court. *Held*, further, that a fresh suit, on a cause of action which has arisen since the decree was passed in the former suit and which is not affected by it, is not barred. CHUNI LAL v. MUSST. AMIR BIBI, **P.L.R. 1900, p. 431=39 P.R. 1900.** [*R.*, 57 P. R. 1907.]

(144)—*Civ. Pro. Code, s.* 13, *Expl.* II—*Suit for possession by right of inheritance—Defence—Possession under deed of gift and for satisfaction of dower-debt—Suit dismissed—Subsequent suit to recover the plaintiff's share on payment of dower-debt—Matter which might and ought to have been made a ground of attack in the former suit.*—A suit was brought by the plaintiffs, appellants, to recover their share, by right of inheritance, of the property of a deceased Mahomedan in the hands of his widow. The widow set up the defence that she was in possession of the property under a deed of gift from her husband and was also entitled to hold the same until her dower-debt, which remained unpaid, was discharged. It was held in that suit that the deed of gift was not true, but she was entitled to possession until payment of her dower-debt. The present suit was instituted by the plaintiffs to recover their share upon payment of the dower-debt. *Held*, that the suit was not barred by the provisions of s. 13 of the Code, as the cause of action in this suit was distinct from the cause of action in the former suit. Under the section, a plaintiff was only bound to make, as a ground of attack in the suit, a matter which not merely might, but ought to, have been made a ground of attack. ZIANT-UN-NISSA v. RAJAN, **27 A. 142=A.W.N. 1904, 191=1 A.L.J. 498.** (A.W.N. 1886, 69, *F.*)

(145)—*Unnecessary finding*—Pro forma *defendants—Court's power to examine former decision—Burden of proof.*—A person died leaving sons and daughters. One of the sons sued to enforce an award and to have the deceased's property awarded to himself and his brothers in accordance with it; in the alternative, to partition the property, *if the award was not binding on any one*, among the brothers, on the ground that the daughters were excluded by custom; but that, if this was not proved, then, to partition the property among all the issues, male and female, of the deceased, according to Mahomedan Law. The daughters were impleaded in that suit, because they were alleged to have consented to the reference. But the lower Courts found that the daughters have been duped into consenting to the reference and were, therefore, not bound by the award. The Courts also held that the daughters were excluded by a custom and, consequently, their consent to the

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

reference being immaterial, gave a decree in accordance with the award in favour of the brothers alone. Subsequently, some of the daughters sued for possession by partition of their shares in their father's property under the Mahomedan Law. The defence pleaded that this suit was *res judicata* under the decree in the prior suit, on the ground that the Courts found that the daughters were excluded by custom. *Held* that there is no *res judicata*. In the previous suit, all that the Court below had to do was to pass a decree against the male defendants in the terms of the award, on the finding that it bound them, and the decision on the question of status of the daughters with reference to Mahomedan Law or custom was *ultra vires*, inasmuch as that issue did not arise and, therefore, the finding on the issue cannot be pleaded in bar of the present suit. When the question arises whether an issue was a necessary one, the finding on which is set up as a bar to a fresh trial of the same issue, the Court has power to examine the pleadings and the facts of the former case and the grounds of decision and to see for itself whether the issue was a necessary one, or, in other words, whether the matter pleaded as *res judicata* was directly in issue before. The fact that the Court in the former suit thought the issue to be a necessary one is not conclusive. The party setting up the plea of *res judicata* has to establish and to satisfy the Court trying the later suit that it is substantiated. RAJAB-UN-NISSA v. HABIB BAKHSH, **57 P R. 1907 = 66 P.W.R. 1907.** (157 P.R. 1889, F.B., 7 A. 606, 92 P.R. 1895, *R.*)

(146)—*Widow suing for share of her husband's property and declaration that she was lawfully wedded wife—Denial of her marriage—Reference to arbitration—Decree on award—Subsequent suit by widow*—Res judicata—*Release—Civ. Pro. Code*, 1882, *s.* 13.—One H, a Cutchi Memon Mahomedan died intestate in 1878, leaving him surviving 2 widows (F and A) and other members of his family. F had a daughter M. In 1879, a suit (No. 616 of 1879) which A filed against the executors of her father-in-law's Will to recover certain money belonging to her husband was decreed in her favour and was afterwards referred to the Commissioner for certain enquiries being made. In 1882, F and her daughter M sued the other widow A, in No. 227 of 1882, to recover a certain share in the estate of H and also for a declaration that F was the lawful wife and M, the lawful daughter of H. The plea set up by the defendant in that suit was that F was only a mistress kept by H and as such entitled to no share in his property. By consent of parties, both the suits were referred to arbitration and a decree was passed on the award. The decree gave F Rs. 55,000 in full satisfaction of all her and her daughter's claims on the estate of H and declared A to be entitled to the remainder of the estate. In 1882, A filed a suit (No. 198 of 1882) against

Res Judicata—continued.

——7.—**Matters in Issue**—*continued.*

the executors of her father-in-law and obtained certain ornaments which she claimed as her *stridhanam* property. In October 1886, A remarried. Thereupon F instituted the present suit against her for a declaration that, according to the custom obtaining among Cutchi Memons, A had forfeited all rights to her husband's estate, and that she (F) was solely entitled thereto, being the only surviving widow of H. The defendant contended (1) that the award and the decree passed in the two previous suits was a bar to the present suit. (2) that the plaintiff's present claim to be the widow of H was *res judicata*, because her prayer in the previous suit for a declaration that she was the lawful wife of H must be taken to have been refused, under s. 13, Civ. Pro. Code, the decree in the suit containing no such declaration, (3) that Rs. 55,000 having been awarded to the plaintiff in full satisfaction of all her claims against the estate of H by the decree in suit No. 227 of 1882, she was precluded from bringing the present suit, and that her (defendant's) re marriage did not give the plaintiff any right to sue, and (4) that, under the decree in the previous suit, the plaintiff had released all her claims to the property in suit in favour of the defendant. *Held* (1) that the former suit (No. 227 of 1882) was no bar to the present suit under s. 13, Civ. Pro. Code. Although F litigated in the former suit as widow of H the matters substantially in issue in the two suits were quite distinct. In the former, F claimed her share in the estate of H as one of his lawful heirs entitled to succeed to him on his death. In the present suit her claim was based on a subsequent event by reason of which she contended that the defendant's (A's) share was, by custom and law, forfeited and reverted to the estate of H; (2) that the status of plaintiff as widow of H was not *res judicata*. In suit No. 227 of 1882, the declaration which had not been made, that she was the lawful wife of H, not having been sought for by the plaintiff by way of specific relief, but simply as the ground for the real and substantial relief, to obtain which the suit was instituted, *viz.*, the payment by the defendant of plaintiff's share in the estate of H. S. 13, Expl. III, Civ. Pro. Code, 1882, was not intended to apply to such a case. With reference to the contention that the award and decree in the previous suit constituted a valid and binding release or final settlement of all claims whatsoever, whether present or future, which the plaintiff might have on the estate of H, *held* that, when the award and decree were properly construed and read with reference to the character in which the parties were litigating as widows of H, claiming to succeed to his property on his decease, there was no such clear intention shown to include in the settlement effected by them a future contingent claim of the special nature now put forward, as to prevent the plaintiff from setting it up in the present suit. FATMABAI v. AISHA BAI, **13 B. 242.** [*R.*, 25 B. 115.]

***Res Judicata*—continued.**

—7.—Matters in Issue—*continued.*

(147)—*Plea of non-liability not raised in prior suit—Bar of plea in subsequent suit in Court not having jurisdiction to entertain same.*—Where in a suit for interest due under a bond a defendant did not raise the objection that he was not liable under the bond, in a later suit on the same bond for principal and interest due subsequently, in a Court not having jurisdiction to entertain it, the defendant was not debarred from setting up the plea of non-liability. BADI BABI SAHIBAL v. SAMI PILLAI, **2 M.L.J. 235.**

(148)—Res judicata—*Finding on collateral issues—Limitation.*—In a suit for possession of certain lands, it was considered necessary to find the boundary between two villages one of which belonged to the plaintiff and the other to the defendant, and a decree was passed in favour of the defendant on the ground that the suit lands fell within the defendant's village. In a subsequent suit between the same parties for possession of some other lands, the defendant contended that the suit lands fell further towards his village than the lands in the former suit, and that consequently the present suit was barred by *res judicata. Held* that the decision in the former suit was conclusive only with regard to the particular land then in dispute; and although the Judge may, for his own purposes and as one of the means of arriving at a decision in that suit, have thought proper to ascertain the boundary line between the two villages, that does not make his decision conclusive as regards the boundary line or as regards any other lands than the lands then in suit. The merging of an issue of limitation in an issue as to possession is not an error in law. MONI ROY v. MUSST RAJBUNSEE KOOER, **25 W.R. 393.** [*R.*, 12 C.W.N. 739=9 C.L J. 597, 16 C.W.N. 317=14 C L.J. 578=10 Ind. Cas. 376.]

(149)—*Contract for sale of land and execution of sale-deed—Suit for specific performance of contract—Decree—Sale-deed executed by Court—Civ. Pro. Code, s. 262—Subsequent suit for possession*—Res judicata—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* II *and s.* 43.—The defendant contracted to sell his land to the plaintiff and received the purchase-money. The plaintiff, who was given possession of the land, having been subsequently dispossessed, sued the defendant for specific performance of the contract, and had the sale deed executed in his favour by the Court on behalf of the defendant under s. 262, Civ. Pro. Code. He thereupon brought the present suit for possession on the strength of the sale-deed. The defence set up was that the suit was barred under the provisions of s. 13, Expl. II and s. 43 of the Civ. Pro. Code, 1882. *Held* that the present suit was not barred by s. 43, which was not applicable to the present case because the alleged cause of action in the present suit was not the breach of the contract but a new and distinct one arising from the deed of sale itself, which the defendant had contracted to pass. Nor was the suit

***Res Judicata*—continued.**

—7.—Matters in Issue—*continued.*

barred under Expl. II to s. 13, because the object of that explanation would seem to be to compel the plaintiff to rely on all the grounds which were open to him in support of the claim made by his plaint which in the first suit was confined to obtaining a regular deed of sale. NATHU *valad* PANDU v. BUDHU *valad* BHIKA, **18 B. 537.** [*Diss.*, 22 M. 24=8 M.L.J. 147; *F.*, 4 N.L.R. 14; *Cons.*, 37 C. 57=14 C.W.N. 527=5 Ind. Cas. 205; *Appr.*, 8 Ind.Cas. 9; *Appl.*, 5 Ind. Cas. 439=13 O.C. 19.]

(150)—*Water kept out of fishery—Obstruction—Damages—Fresh suit*—Res judicata.—Where the plaintiff's damages occurred at a time when the defendant, notwithstanding the decision in a previous suit, thought fit to maintain the obstruction whereby water was kept out of the plaintiff's fishery, and whereby he was precluded from receiving the profits of such fishery, *held*, that there was nothing to prevent the plaintiff from recovering further damages by a fresh suit. LALL MOHUN BANERJEE v. KADUMBINEE DOSSEE, **24 W.R. 471.**

(151)—*Principal and agent—Previous suit against Government as representing principal dismissed—Subsequent suit against agent and principal*—Res judicata.—A lent money to B as agent of C. Government having confiscated C's property. A sued Government for this debt, but the suit was dismissed. He then sued B and C. It was admitted by the plaintiff that B was only the agent of C, but the plaintiff stated that he looked to B alone for payment as he had no hope of getting the money from C. *Held* that the suit must be dismissed as against A who was admittedly an agent, and that, as against C, the suit was not barred by the dismissal of the previous suit. For, the issue in the previous suit was as to the liability of Government as having confiscated his property; it had no reference to C's own liability; whereas, in the present suit, the issue was as to the liability of B or C. The plaintiff's statement that he looked to B alone for the payment of the money cannot, in the face of his admission that B acted as agent of C, have the effect of exonerating C, against whom, therefore, the suit had to proceed. MAHOMED MOHKAM v. RAMZANEE, **10 P.R. 1868.**

(152)—*Punjab Laws Act* (IV *of* 1872), *decision in insolvency proceedings under, subsequent proceedings under Civ. Pro. Code, s.* 344 *not precluded by*—Res judicata.—In this case, the Judge of the Small Cause Court invested with powers under s. 360 of Act XIV of 1882 refused to grant a discharge under the Code as insolvents to the judgment-debtors, the present appellants. The refusal was based solely on the ground that in a previous proceeding under the Insolvency section of the Punjab Laws Act (IV of 1872) an order of discharge had been refused to the same insolvents (the same creditors also being their opponents), and that the ground of refusal being fraudulent entries in the accounts concealment of assets, and recklessness in

Res Judicata—continued.

—7.—**Matters in Issue**—*continued.*

accumulating debts, which were also specific grounds of refusal under s. 351 of the Code, the matter was *res judicata*. *Held*, that the matter in issue was not *res judicata*, since insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a "suit" as the term is used in s. 13, Civ. Pro. Code. CHIRANJI MAL v. CREDITORS, **145 P.R. 1884.** [*Overruled*, 75 P.R. 1905=193 P.L.R. 1905; *Appr.*, 62 P.R. 1886.]

(153)—*Same issues.*—On the 12th July 1861, a decree based on mortgage was passed for Rs. 7,080 against K. In execution proceedings, the Court added to the decree a direction to pay interest over the decretal amount, on the 22nd October 1866; but this direction was set aside in appeal on the 15th September 1869. In the meanwhile, on the 22nd December 1868, K's widow M passed a sale-deed in favour of the decree holder. The consideration of the sale-deed was made up of three parts: (1) Rs. 7,080 due under the decree; (2) interest on that sum subsequent to the date of the decree; and (3) a fresh cash advance of Rs. 7,280. On the 23rd December 1869, the reversioner brought a suit against the decree-holder and others claiming a right of pre-emption in the property sold. The suit was dismissed on the ground that no right of pre-emption was proved. M died on the 31st May 1894. At her death the estate passed to the reversioner, who brought a suit on the 21st February 1899 to recover the property. Two defences were raised to the suit. (1) sale in question was justified by necessity, and (2) the suit was barred by Expl. II to s. 13 of the Civ. Pro. Code: *Held*, (1) that the defence of necessity existed in respect only of the first item of consideration but not with respect to the other two. *Held*, (2) that the suit was not barred by s. 13 of the Civ. Pro. Code. What was in question in the former suit was the right of pre-emption, in respect of what he had power to convey and did convey, that is his widow's interest, and the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to the matter of the suit. DEPUTY COMMISSIONER OF KHERI v. KHANJAN SINGH, **9 Bom. L.R. 591=5 C.L.J. 344=11 C.W.N. 474=4 A.L.J. 232=2 M L.T. 145=17 M.L.J. 233=29 A. 331=10 O.C. 117=34 I.A. 72.**

(154)—*Suit by reversioners to set aside alienation—Subsequent suit to enforce pre-emption in respect of same property — Distinct causes of action—Separate suits*—Res judicata—*Civ. Pro Code*, ss. 13, 42 *and* 43.—One M sold the house in suit to the defendant and plaintiffs brought a suit against her and the vendee to have the sale cancelled on the ground that they were reversionary heirs of her late husband and entitled as such to succeed to the house on her death, and that the sale was made without necessity. It was held that the sale was for necessity, and the suit was accordingly dismissed. Subsequently, M having died, the present

Res Judicata—continued.

—7.—**Matters in Issue**—*continued.*

suit was brought by the plaintiffs against the purchaser to obtain possession of the house in virtue of their right of pre-emption: Upon the facts above stated the question arose whether the suit was barred either under s. 13, Civ. Pro. Code, or under s. 43, Civ. Pro. Code. *Held* that the suit was not barred under either of the sections; the matter directly and substantially in issue in the present suit, that is, the plaintiffs' right of pre-emption in respect of the house in dispute was clearly not in issue in the former suit, either expressly or with reference to Expl. II, s. 13, Civ. Pro. Code, constructively, and s. 13, therefore, could not bar the suit. On the question which arose with respect to s. 43, it was held that, in the first suit, the plaintiffs sought relief for the infringement of their reversionary right *viz.*, to have the sale set aside as against them. In the second case, they sought, by enforcing their right of pre-emption, to obtain possession of the house. Two different cases were thus set up by the plaintiffs in the two suits and the subject-matter and scope of each were different. The plaintiffs in the first case cannot therefore be said to have omitted to sue in respect of any portion of the claim which they were entitled to make in respect of the cause of action in that suit; nor must the claim in the present suit be necessarily regarded as a portion of the claim which they were entitled to make in respect of the cause of action sued upon in the first suit. KHAIRATI v. AKKO, **108 P.R. 1882.** [*R.*, 47 P.R. 1886, 55 P.R. 1907=65 P.L.R. 1908.]

(155)—*Civ. Pro. Code (Act X of 1877), ss* 12, 13—Res judicata—*Suit for restitution of conjugal rights—Issue as to liquidation of dower, determination of by district Court—Bar of second trial of same issue in another Court.*—A Mahomedan having instituted a suit for restitution of conjugal rights in a District Court against his wife, the latter sued him for payment of dower in the Small Cause Court. The question about the liquidation of dower being in issue in both suits, the Small Cause suit was postponed till the disposal of the suit in the District Court. The latter Court subsequently decided that the dower had been paid. *Held* that the issue regarding the payment of dower could not be tried by the Small Cause Court, as its trial there was stayed by consent of parties pending decision of the same issue in the District Court, whose decision was, under s. 13 of the Civ. Pro. Code, a bar to the second trial of the same issue in the Small Cause Court. MUSSAMMAT GAITIARA BEGAM v. MUSSITA BEGH, **118 P. R. 1880.**

(156)—Res judicata—*Adoption—Act* VIII *of* 1859, *s.* 2.—Where, in a former suit between the present plaintiff and the defendant, the question as to the validity of the adoption of the latter had been substantially tried, a subsequent suit for setting aside the alleged adoption was held to be barred by *res judicata*

***Res Judicata*—continued.**

——7.—Matters in Issue—*concluded.*

under s. 2, Act VIII of 1859. KRISTO BEHAREE ROY v. BUNWAREE LOLL ROY, **19 W.R. 62.**

(157)—*Civ Pro. Code, (Act X of 1877), s. 13, Expl.* V—Res judicata —*Held* that s. 13, Expl. V. of the Civ. Pro. Code (Act X of 1877), barred a suit by certain proprietors in a *Thulla* for possession of land, where a former suit by other proprietors in the *Thulla* litigating for all, of which the plaintiffs in the second suit had notice, had been dismissed, the point at issue being the same. CHET RAM v. BAHAL SINGH, **108 P. R. 1880.** [*D.*, 111 P. R. 1882, 38 P. R. 1897.]

See HINDU LAW—INHERITANCE, W. R. 1864, 20.

See RIGHT OF OCCUPANCY—MISCELLANEOUS, 5 P. R. 1892.

——8.—Parties.

See PARTIES TO SUIT—ADDING PARTIES TO SUITS.

(1)—*Plea of, maintainability of.*—To maintain the plea of *res judicata* it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit. A mere intention on the part of one of the parties that it should be for his benefit is not enough to support the plea. CHAUDRI AHMED BAKHSH v. SETH RAGHUBAR DAYAL, **7 Bom. L. R. 912=2 C.L.J. 413, P.C.=15 M. L. J. 407=10 C.W.N. 115 =2 A.L.J. 813=9 O.C. 7 = 28 A. 1=32 I. A. 229=8 Sar. 882.**

(2)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata —"*Under whom they or any of them claim*" *meaning of—Privity—Landlord and tenant—Estoppel.*—For the purposes of *res judicata*, the ground of privity is property and not personal relation. (8 A 324, *R.*) Though the words "under whom they or any of them claim" in s. 13 are wide, there seems to be no difficulty in the way of restricting them, so as to bind the party to the subsequent suit by the decision in the former suit, only in respect of interests represented by the party to the former suit at the time of suit. Other interests, with which he had parted before the suit and which he had ceased to represent, could not properly be the subject of adjudication in the suit. As regards the interests represented, however, it does not matter whether they vested in the privy before or after the former suit. *Quaere*:—Whether a tenant may be represented by his landlord in so far as his holding subordinate. Conduct to create an estoppel must be found to have misled the plaintiff. SESHAPPAYA v. VENKATRAMANA UPADYA, **5 Ind. Cas. 732=20 M.L.J. 752=33 M. 459.**

(3)—*Benami suits—Conclusiveness of decrees.*—A decree of Court, until it is set aside, is, as between the parties to it, conclusive both as to the rights of those parties and the character in

***Res Judicata*—continued.**

——8.—Parties—*continued.*

which they sue; and it is not open to any of the parties to show for whose benefit the suit was carried on, *e.g.*, for the defendant to show that he was the plaintiff. BHAWABAL SING v. MAHARAJA RAJENDRA PRATAB SAHOY BAHADUR, **5 B.L.R. 321=13 W.R. 157.** [*F.*, 6 N.L.R. 177; *D.*, 17 W.R. 454, 12 C. 156.]

(4)—*Civ. Pro. Code, s.* 13.—A matter may be *res judicata* in a subsequent suit, although the parties in that suit between whom the matter was decided were arrayed as co-defendants in the former suit and not as plaintiff and defendant, if the matter in the second suit formed the subject of active controversy between the co-defendants in the former suit. The question of *res judicata* cannot be decided by the judgment in the former case without the decree. MADHEVI v. KELU, **15 M. 264.** [*F.*, 22 A. 386, 29 M. 515; *R.*, 24 A. 112, U.B.R. 1907, 2nd Quarter, Civ. Pro. Code, p. 5; *D.*, 18 A. 65.]

(5)—*Estoppel.*—There must be mutuality in order to create the identity of parties necessary to sustain the plea of *res judicata*, and without mutuality there can be no estoppel. GNANAMBAL v. PARVATI, **15 M. 477=2 M.L.J. 212.** [*R.*, 6 C.L.J. 621.]

(6)—*Civ. Pro. Code, s* 13.—When there is no identity of the substantial issue in the later suit with that in the former and the parties to them are not the same, the first does not operate as *res judicata* to bar the second suit. RAMAN v. NANU, **5 M. 9.**

(7)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 2 *and* 7, *whether applicable to suits under Act* X *of* 1859.—The principles of ss. 2 and 7 of Act VIII of 1859, being based on the most equitable considerations, should be applied to suit under Act X of 1859, although those sections are neither incorporated in that Act nor are specially made applicable to suits under that Act. PURBHOO TEWAREE v. RAMJEAWUN PATUCK, **1 N.W.P. 119.**

(8)—"*Same parties.*"—The decision of a matter directly and substantially in issue in a suit is *res judicata* in a subsequent suit between parties who, though they were nominally on the same array of parties in the first suit, were really opposed to each other with respect to such matter. SHADAL KHAN v. AMIN-ULLAH KHAN, **4 A. 92=A.W.N. 1881, 137.** (6 C. 171, *Concurred in*) [*F.*, 2 O.P.L.R. 52; *D.*, 8 A. 91.]

(9)—*Civ. Pro. Code, s.* 13—*Suit against two persons—One of whom was exonerated and a decree passed against the other—Subsequent suit against the exonerated defendant—Bar under s.* 13. Where in a previous suit the defendant was exonerated, and the petition as against him was dismissed with costs, and a decree for the full amount was given against the other defendant, it was held that this was a dismissal of the

Res Judicata—continued.

——8.—**Parties**—*continued.*

claim against the exonerated defendant under s.13. THIRUVENGADASAWMY NAIDU v. BALAGURUNATHA CHETTY, **4 M L.T. 413.** (23 B. 235, 32 B. 296, *D.*)

(10)—Res judicata *between co-defendants—Issue affecting defendant necessary to be decided for giving relief to the plaintiff—Civ. Pro. Code (Act* V *of* 1908), *s.* 11.—Where it is necessary to determine a certain issue, for the purpose of granting relief to the plaintiff, and the Court, as a matter of fact, decides that issue, and the decision affects the defendants *inter se*, the decision will operate as *res judicata* between the co-defendants. GOLAB SINGH v. NET SINGH, **10 Ind. Cas. 324.**

(11)—*Civ. Pro. Code (Act* V *of* 1908), *s* 11—Res judicata *between co-defendants.*—Where it is necessary to adjudicate between co-defendants the question of the title of one of the defendants in order to give relief to the plaintiff, the adjudication would be *res judicata* between the defendants as well as between the plaintiff and the defendant. PURSHOTAMA NAND GIR v. LAKHPATTI, **7 Ind. Cas. 67=8 M.L.J. 244.** (22 A. 386, 18 A. 65, *F.*)

(12)—Res judicata *between co-defendants—Conflict of interest.*—Where there is a conflict of interests between defendants *inter se*, an adjudication of rights may be *res judicata* between them as well as between the plaintiff and defendants. NEHAL SINGH v. CHANDA SINGH, **140 P.R. 1890** (11 B. 216, *F.*) [*R.*, 79 P. R. 1905, 57 P.R. 1907, 97 P.R. 1910=142 P.W.R. 1910.]

(13)—*Civ. Pro. Code, s.* 13, *Expl.* V—Res judicata *between co-defendants.*—When an adjudication is necessary to give the appropriate relief to the plaintiff in the prior suit, the adjudication is *res judicata* even as between co-defendants, when the right asserted by the plaintiff and decided in the previous suit was one so asserted and decided as common to himself and others. LATCHANNA v. SARAVAYYA, **18 M. 164.** [*Not F.*, 28 M. 457 F.B.=14 M.L.J. 404; *R.*, 9 M.L.J. 60; *D.*, 16 C.P.L R. 161.]

(14)—*Rights of parties, ascertainment of, from pleadings and judgment—Defendants* inter se, *questions between, when binding and conclusive—Constructive* res judicata.—To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment (1 C.L.J. 337 and 31 C. 95, *R.*) Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, there must be an adjudication; and in such case, the adjudication will be *res judicata* between the defendants, as well as between the plaintiff and the defendants; but, for this, there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se* (30 C. 95, 22 A. 386, 25 B. 74, 26 M. 337, *R.*) *Quaere*: Whether the doctrine of constructive *res judicata* is applicable where the subject matters of the two suits are different? (1 C.L J. 337, *R.*) GURDEO SINGH v. CHANDRIKAH SINGH, AND CHANDRIKAH SINGH v. RASH BHEARY SINGH, **5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913.** [*F.*, 10 C.L.J. 91=1 Ind. Cas. 677, 11 C.L.J. 461, 6 M.L.T. 313; *R.*, 7 C.L.J. 152, 6 C.L.J. 320, F.B.=11 C.W.N. 1011=35 C. 61, 6 C.L. J. 612=12 C.W.N. 107, 5 C.L.J. 653, 6 C.L J. 46, 3 M.L T. 395=31 M. 439=18 M.L J. 306, 11 C.L.J. 226=14 C.W N. 617=5 Ind. Cas. 165; *D.*, 6 C.L J. 547=12 C.W.N. 590, 35 C. 837=12 C.W.N. 849=7 C.L.J. 492.]

(15)—*When a finding in a suit is* res judicata *between co-defendants.*—The plaintiffs sued to recover certain property from the defendants. In a previous suit both the present plaintiffs and the defendant's grandfather B, were arrayed as co-defendants; and B pleaded therein that the present plaintiffs were trespassers. Issue was joined on the question of the present plaintiffs' title and it was decided in favour of the present plaintiffs. The decision of the issue was essential for giving relief to the plaintiffs in the previous suit. In these circumstances, *held*, the finding as to plaintiffs' title in that suit is *res judicata* and cannot be disputed now. RAMASWAMY REDDY v. ABBOY CHETTY, **2 M.W.N. 1911, 306=11 Ind. Cas. 17=11 M.L T. 71.** (28 M. 457, *D.*)

(16)—*Adjudication between two persons in a former suit, whether* res judicata *in a subsequent suit between one of them and the successor in title of the other.*—An adjudication, in a former suit, between two co-defendants, that one of them acquired a title by adverse possession, is *res judicata*, in a subsequent suit between one of them and the successor in title of the other. KANDIYIL CHIRYA CHANDU v. THE ZAMORIN OF CALICUT, **29 M. 515.** (15 M. 264, 22 M. 323, *F.*; 18 M. 374, *D.*) [*F.*, 17 M.L.J. 260=30 M. 447=2 M.L.T. 368, 17 M.L.J. 22, Note; *R.*, 7 M.L.T. 89.]

(17)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata *between co-defendants—Burden of proof that property in the hands of widow is part of her husband's estate.*—Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. There must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se*. (11 B. 216, *F.*; 18 A. 165, 11 M. 204, 26 M. 337, 28 M. 457, 29 M. 515, 30 M. 447, *R.*) He who claims property through some other person, must show the property to have been vested in

***Res Judicata*—continued.**

—8.—Parties—*continued.*

that person. NARASIMMA AMMAL v. SRINIVASA RAGHAVA IYENGAR AND OTHERS, 7 **M.L.T. 89=33 M. 112=5 Ind. Cas. 760.** (26 I.A. 226, *R.*)

(18)—Res judicata—*Decision of matter between co-defendants necessary to give relief to plaintiff—Effect of such decision on subsequent suit.*—A Hindu son instituted a suit for partition against his father and the alienee of the family property from the father. The plaintiff obtained a decree for his share in the property, it being held that the sale effected by his father was purely nominal and that the property did not pass. Subsequently, on the death of his father, plaintiff instituted a suit as his father's heir to get possession of the other half of the property on the ground that the sale-deed executed by his father did not pass the property. *Held* that as between the plaintiff's father and the defendant it was held that the sale was a nullity and as the adjudication was necessary in order to give the appropriate relief to the plaintiff in the prior suit the matter had become *res judicata* between the plaintiff and defendant, and that plaintiff was therefore entitled to a decree as prayed for. NAGASAMI v. SUNDARARAJAN, **2 M.L.J. 203.**

(19) — *As between defendants — Mortgage — Sub-mortgage.*—A decree in favour of a plaintiff in a suit cannot be taken to have decided the rights *inter se* between the defendants, unless for the purpose of giving relief to the plaintiff it was necessary to adjudicate and the Court by that decree did adjudicate upon the rights as between the defendants. Where there is such an adjudication it becomes binding upon the defendants and constitutes *res judicata* in a subsequent suit between them. Where a mortgagee and his sub-mortgagee are defendants in a suit for redemption of the original mortgage by the original mortgagor and a decree is passed to redeem the mortgage, the relationship existing between the mortgagee and his sub-mortgagee comes to an end; and a subsequent suit for redemption of the sub-mortgage is barred. BALWANTRAO v. NARAYANSHET, **5 Bom L.R. 97.**

(20)—*S. 11, Civ Pro. Code, 1908—Co-defendants—Mortgagor and prior mortgagee.*—In a puisne mortgagee's suit on his mortgage, the prior mortgagee was made a party defendant. The subsequent mortgagee questioned the validity of the prior mortgage on the ground that no consideration has passed. The mortgagor kept silence The Court held that the prior mortgage was a good mortgage and was for consideration. Subsequently the prior mortgagee brought a suit on his mortgage, making the subsequent mortgagee as well as the mortgagor parties to the suit. The mortgagor pleaded that it was without consideration: *Held*, that it was not open to the mortgagor in the second suit to question the validity of the prior mortgage. JAI NARAIN v. MITTHU LAL, **6 Ind. Cas. 375.**

***Res Judicata*—continued.**

—8.—Parties—*continued.*

(21)—*Estoppel by judgment—Suit for foreclosure—Prior suit between parties in respect of same matter—Finality of prior decision.*—Where in a former suit the parties were the same, and appeared in the same capacity, and the same point was in issue, the judgment on such point is conclusive on those parties. It is not necessary that the form of action should be the same in each case. Suit for foreclosure. The present second and third defendants were the plaintiffs in the former action respecting one of the two houses comprised in the present suit, and the present plaintiff was a defendant the same mortgage was set up as in the present case; the present plaintiff had claimed as mortgagee under that instrument; and the Court gave judgment to the effect that the document in question was not genuine. In the present case, nine other houses were in litigation, but under precisely the same claim of right set up in respect of the self-same mortgage. *Held* that the present plaintiff was estopped by reason of the former judgment from having the present suit heard and determined. The addition of the mortgagor who made no defence in the present suit, did not make any difference. MOHIDIN v. MUHAMMAD IBRAHIM, **1 M.H C. 245.** [*F.*, 5 C. 832, 6 C. 715 =9 C.L.R. 216.]

(22)—*Joint Hindu family — Mortgage by father—Foreclosure decree against father binding son's interest also.*—Where a Hindu father, who was undivided in interest from his son, executed a mortgage of the joint family property, which mortgage was written by the son for his father, *held* that a foreclosure decree in a suit on the mortgage against the father alone was binding on the son's interests, also in the property, although he was not made a party to that suit. MAYARAM SEVARAM v. JAYVANTRAO PANDURANG, **5 B. 683, Note (2).** [*R.*, 5 B. 685, 7 B. 467, 9 B. 198; *D.*, 10 B. 21.]

(23)—*Estoppel—Inconsistent positions, litigants if should be permitted to take up—Mortgage by Hindu widow, suit on, for foreclosure—Reversioner joined as transferee, dismissed from suit on setting up title adverse to widow—Decree for foreclosure against widow—Suit by decree-holder to eject reversioner—Adverse title set up in defence—Suit decreed—Death of widow, suit by reversioner after, to recover, if lies.*—Where a Hindu widow, B, who had executed a mortgage, was sued for foreclosure by the mortgagee, who also joined in that suit A, alleging him to be the transferee of the equity of redemption, but A, having in his written statement repudiated the mortgagor's title in the property and set up exclusive title in himself, was dismissed from the suit, and the mortgagee got a foreclosure decree against B, but, having been resisted when taking possession by A, sued A in ejectment, and A again denied the mortgagor's title and set up his own title adversely to hers, and it was held in that suit that the mortgagor B was the sole exclusive

Res Judicata—continued.

——**8.—Parties**—*continued.*

owner of the property and that A had no title in it: *Held*, in a suit by A, brought after the death of B, to recover possession, on the allegation that he was the reversionary heir of a predeceased son of B, to whom B had succeeded as mother, that the suit was barred by *res judicata*. That A could not be allowed to take up inconsistent positions. BHAGARATHI DAS v. BALESHUR BAGERTI, **17 C.W.N. 877.**

(24)—*Civ. Pro. Code* (1882), *s.* 13, *expl.* II (=*s.* 11, *expl.* IV, *new Code*)—Res judicata—*Mortgage—Prior mortgage not pleaded in suit on subsequent mortgage.*—It is not necessary for the application of s. 13, when expl. II applies, that the matter in question should have been heard and finally decided in the previous suit. (16 C. 682, P.C., 20 C. 79, 24 C. 711, *Ibid*, 616, *R.*)—In a suit by a subsequent mortgagee, the defendant who held three prior mortgages, omitted to rely on one of them. A suit, by the prior mortgagee, based on the mortgage omitted to be pleaded in the first suit, was held barred under expl. II to s. 13, Civ. Pro. Code. SRI GOPAL v. PIRTHI SINGH, **20 A. 110, F.B.=A.W.N. 1897, 216.** [*Affirmed*, 24 A. 429, P.C.; *F.*, 31 C. 428; *Cons.*, 1 C.L.J. 337; *R.*, 26 M. 760, 1 C.L.J. 248, U.B.R. 1906, 3rd Qr., C.P.C., 46, 10 O.C. 145, 35 C. 979, 8 C.L.J. 82=12 C.W.N. 862.]

(25)—*Prior and subsequent mortgages—Prior mortgagee made party to a suit on subsequent mortgage—Prior mortgage not set up—Parties—Prior mortgagee not a necessary party.*—A prior mortgagee is not a necessary party to a suit wherein a puisne mortgagee seeks to sell the property subject to the prior mortgage. Where, however, the prior mortgagee is impleaded (though as a mortgagor of other properties) in the suit of the puisne incumbrancer, and is aware of the fact that the latter is seeking to sell the property without the burden of the prior mortgage upon it, and omits in that suit to set up his encumbrance, *held*, that a suit on foot of the prior encumbrance is barred by the rule of *res judicata*. GAJADHAR TELI v. BHAGWANTA, **10 A.L.J. 244=34 A. 599=16 Ind. Cas. 8.**

(26)—*Civ. Pro. Code*, *s.* 13, *expl.* II—Res judicata—*Mortgage.*—In a suit upon a mortgage, the plaintiff made the appellants in this case defendants, because they set up a title to a portion of the mortgaged property as purchasers, and on no other ground. The defendants did not defend the suit. Subsequently, when the auction-purchaser in execution of the mortgage decree took possession, the appellants objected and instituted a suit. *Held* that this suit was barred by s. 13, expl. II of the Civ. Pro. Code. GOPINATH v. BALEO SAHAI, **A.W.N. 1883, 40.**

(27)—Benamidar, *suit for redemption by—Dismissal of suit—Second suit by beneficiary—Civ. Pro. Code*, s. 13.—The plaintiff-respondent brought a suit for redemption of certain land

Res Judicata—continued.

——**8.—Parties**—*continued.*

on the ground that the land belonging to him had been mortgaged by his sister, whom he had left in charge of it, to the defendant's ancestor about twenty years ago. In a previous suit for redemption brought by the sister against the defendant's ancestor, the suit was dismissed on the ground that the transaction amounted to a sale and not a mortgage. It was also found in that suit that the sister had no personal interest in the land and had instituted the suit *benamee* for plaintiff. *Held*, that the present suit was barred by *res judicata* as the plaintiff was bound by the decree in the former suit. NGWE GYI v. SHWE BO, **3 L.B.R. 18.** (3 A. 812, 18 A. 69, 15 M. 267, 22 B. 672, 1899 P.J.L.B. 512, *Cited.*)

(28)—*Civ. Pro. Code*, *s.* 13—Benamidar.—When a *benamidar* brings a suit with the knowledge of the true owner, for the possession of property purchased in his name, and the suit is dismissed, a subsequent suit by the true owner for the same purpose is barred under s. 13 of the Code of Civil Procedure. SHANGARA v. KRISHNAN, **15 M. 267=2 M L.J. 93.** [*R.*, 18 A. 69, 22 B. 672, 13 C.P.L.R. 33, 21 A. 380, 4 C.W.N. 283, 3 L.B.R. 18, 30 M. 245=17 M.L.J. 174, 10 O.C. 263.]

(29)—*Summons to appear—No appearance—Bindingness of decision.*—A party who has been summoned before the Judge and has not appeared is bound by such decision.—*Per Pontifex, J.* NOBODEEP CHUNDER CHOWDHRY v. BROJENDRO LALL ROY, **7 C. 406=9 C.L R. 117.** [*Doubted*, 12 C. 33.]

(30)—*Principal—Agent—Contract.*—A person, who chooses to treat a transaction as creating a contract of one description, sues upon it and fails, cannot be permitted to sue a second time upon it as creating a contract of a different description producing a different kind of liability. Accordingly, a previous suit where the plaintiff elected to sue the defendants as principals, was *held* to bar another suit on the same contract where the same defendants were charged as responsible agents under a usage of trade. DEVRAV KRISHNA v. HALAMBHAI, **1 B. 87.** (2 C.W.N. 31, P.C.=9 M I.A. 539, *F.*) [*D.*, 8 B. 175.]

(31)—*Judgment based upon award of arbitrators—Question dealt with by such award raised in subsequent suit.*—A question dealt with in an arbitration award, in accordance with which a judgment had been passed, is *res judicata* in a subsequent suit between the same parties. WAZEER MAHTON v. CHUNI SINGH, **7 C. 727=9 C L.R. 377.** [*F.*, 21 B. 465.]

(32)—*Civ. Pro. Code*, *s.* 13—Res judicata.—A purchaser at a Court sale represents the judgment-creditor in so far as he had a right to bring to sale the right, title and interest of the judgment-debtor in the property sold. Where, therefore, a plea of *res judicata* could be successfully raised in a subsequent suit, if a judgment-creditor were a party to it, it would

Res Judicata—continued.

— 8.—**Parties**—*continued.*

likewise be available if the purchaser were a party instead. KRISHNABHUPATI DEVU v. VIKRAMA DEVU, **18 M. 13.** (19 I.A. 203.) [*D.*, 1 N.L.R. 150.]

(33)—*Absence of title in vendor — Decision in previous litigation against third parties, effect of, as* res judicata *between vendor and vendee.*—When, in a previous suit for possession instituted by the vendor and vendee jointly against third parties in possession, it was found that the vendor had no title, such decision as to his want of title would be *res judicata* in a subsequent suit by the vendee for recovery of the purchase money paid up and for damages. KRISHNAN NAMBIAR v. KANNAN, **21 M. 8.**

(34)—Res judicata—*Suit by some partners for dissolution of partnership—Opposition by other partners—Order of reference by consent—Subsequent suit by defendant partners for damages—Maintainability*—Some members of a partnership business instituted a suit for dissolution, on the plea that the partnership was for a term and dissolvable at their option. The other partners opposed the suit and contended that they were entitled to damages at least for loss of profits. But, when the suit came on for settlement of issues, the defendants did not ask for an issue as to whether the plaintiffs were entitled to a decree for dissolution, and consented for an order of reference to chambers in order that the accounts of the partnership might be taken. Thereafter the defendants instituted the present suit for damages for loss of profits. *Held* that the order of reference amounted to an adjudication that, on the terms of the partnership agreement and in the event which had happened, the then plaintiffs were entitled to a decree for dissolution. It also amounted to an adjudication on the question of the right of the plaintiffs in the present suit to damages for the unexpired portion of the term of the partnership. Consequently, the present claim for damages was *res judicata.* NAGASAMY AIYAR v. RAMAIYAR, **12 M. L. J. 445.**

(35)—*Suit by Official Assignee on behalf of insolvent's creditors—Fraud of defendant, brother of insolvent—Limitation Act* (XV *of* 1877), *s.* 18—*Civ Pro. Code*, 1882, *ss.* 13, 43—*Person made party for purposes of inspection and discovery only, whether subject to* res judicata — *Several joint wrong doers, judgment obtained against one, a bar to action against the others.*—This was a suit brought on behalf of the creditors of an insolvent, by the Official Assignee against the brother of the insolvent. The Official Assignee alleged that the insolvent, before his adjudication, had arranged various fraudulent schemes with his brothers and others "for the purpose of concealing his property and defrauding his creditors. The fraud of the brother, the present defendant, was, the plaintiff alleged, only recently discovered. The main legal defences raised to the various claims were:—That the claims were barred by limitation under the Limitation Act XV of 1877, under s. 13 of the Civ. Pro. Code, 1882, the matters having been in issue and finally decided between the same parties in a former suit, under s. 43 of the Civ. Pro. Code, the plaintiffs having omitted to claim these moneys in the former suit in which the present defendant was a party, and that the two brothers were joint wrong-doers, and that the judgment against one was a bar to a suit against the other. On the question of the bar by limitation, *held* that though, ordinarily, such a suit would be barred in three years from the date when the Official Assignee became entitled to sue for the moneys due to the insolvent, there was, in this case, as alleged by the Official Assignee, evidence of fraud enough on the defendant's part to bring the case under s. 18 of the Limitation Act; the next two points turning on ss. 13 and 43 of the Civ. Pro. Code, depended on the question whether the admission of the present defendant on the record of the previous case as party for purposes of discovery made him a party for all purposes. The defendant was previously on the record only for a special purpose. He was merely a nominal defendant. No relief was asked from him, nor any decree passed against him. He was not a party to the former suit in such a way as to bring the present suit within the application of the said sections. On this point, it was held to be settled law that a judgment recovered against any one of several joint-debtors merges the remedy for the joint-debt, and is a bar to an action against a co-debtor upon the joint liability, and, similarly, in a matter of tort-feasance, a judgment against one of several wrong-doers is a bar to an action on the same matter against the others. Where judgment has been recovered against one wrong-doer, the other cannot be subsequently sued for the same matter, even if the judgment in the first action remains unsatisfied. RAHMUBHOY HUBIBBHOY v. C. A. TURNER, **14 B. 408.** [*Confirmed*, 17 B. 342; *R.*, 22 A. 307=A.W.N. 1900, 73; *D.*, 6 Bom. L.R. 697.]

(36)—*Civ. Pro. Code*, 1877, *s.* 13—"*Same parties.*"—An issue decided in a suit by a minor, by his next friend, in which the minor is only a nominal party and the next friend the real litigating party, would be *res judicata* in a subsequent suit by the next friend himself against the same defendant. KHUB CHAND v. NARAIN SINGH, **3 A. 812=A.W.N. 1881, 79.** [*R.*, 20 C. 418.]

(37)—*Parties to suit—Defendant improperly impleaded as a minor—No objection raised by defendant during suit—Subsequent suit for declaration that decree was not binding on defendant—Estoppel.*—A certain defendant was impleaded in a suit as a minor under the guardianship of his mother, who was his certificated guardian. He and his mother, jointly defended the suit, and, at no period, did the defendant raise the objection that he was not a minor

Res Judicata—continued.

——**8.—Parties**—*continued.*

when the suit was instituted. A decree was passed in favour of the plaintiff and no appeal was preferred either by the defendant or his guardian *ad litem*. *Held*, that it was not competent to the defendant to sue subsequently, to have the decree declared not binding upon him, upon the ground that he was, in fact, of full age when it was instituted and that his mother had betrayed his interests. GANGA RAM v. MIHIN LAL, **A.W.N. 1906, 73=3 A L.J. 187=28 A. 416.** (20 A. 90, A.W.N. 1905, 229, *D.*)

(38)—*Mother appearing as guardian in former suit—Minor, subsequent suit by* res judicata.—Where, in a former suit, the plaintiff's mother, appearing as his guardian, conducted the defence, and the question in the present suit had been decided in the former suit, *held*, that the matter was *res judicata*, the Court presuming that the plaintiff's mother had the permission of the Court to appear and represent the minor's interest in the former suit. BONOMALEE KESH v. HUNGSHESSUR ROY, **17 W.R. 492.**

(39)—*Suit for possession to Oudh talukdari—Representation of estate by widow of talukdar—*Res judicata—*Parties to such prior suit—Manager under Act* XXIV *of* 1870 (*U.P.*)—An order by the Privy Council, regarding the succession to an Oudh *talukdari*, in a prior suit against the widow of the last talukdar, determining the right to succeed as upon intestacy (a will by such talukdar authorising the widow to appoint a successor having been found to have been revoked), was, where a person (who had been appointed by the widow to succeed to the estate) claiming the estate in a later suit, contended that he would not be bound by such order on account of his minority at the time of the institution of the first suit, *held*, to bind such person on the ground that, the widow, holding an estate at least as large as that of a Hindu widow in husband's property, was the full representative of the estate in such first suit, the appointment made by her being such as would operate only on her death. (9 M.I.A. 604, *F*). It was held that, although the manager of the estate, appointed under the Oudh Talukdars' Relief Act (XXIV of 1870), had not been made a party to the suit, the omission would not affect the validity of the decree between the parties under s. 25 of the Act. PERTABNARAIN SINGH v. TRILOKINATH SINGH, **11 C. 186=11 I.A. 197, P.C.=4 Sar. 567.** [*Rel. on*, 10 C.W.N. 955=33 C. 1001; *D.*, 107 P.R. 1906=76 P.L.R. 1907; *R.*, 29 P.R. 1895, 9 O.C. 339, 6 C.L.J. 490.]

(40)—*Possessory suit—Whole question of plaintiff's title decided—Conclusiveness of decision*—Res judicata.—Where the whole question of plaintiff's title was raised and decided in a former suit, *held*, that that decision was conclusive between the parties as to every portion of the land held under that title. NUND KISHORE v. HUREE PERSHAD MUNDUL, **13 W.R. 64.** [*R.*, 5 C. 832=6 C.L.R. 305, 6 C. 406=7 C.L.R. 251, 9 C.L.R. 216=6 C. 715.]

Res Judicata—continued.

——**8.—Parties**—*continued.*

(41)—*Suit for property—Rights as between contesting defendant and non-contesting intervenors.*—The intervenors, in a suit for property, who were allowed to put in their claim to a portion thereof but did not press it, could not institute fresh proceedings in respect of it against the contesting defendant, who lost both in the suit and on appeal, the decree in such suit being conclusive as between them. SHEO CHURN SINGH v. FAKERA DOOBAY, **6 C. 91=7 C.L.R. 69.** (1 M. 312=5 I.A. 61, *D.*) [*Principle applied*, 9 C.L.R. 365].

(42)—*S.* 13, *Civ. Pro. Code—Same question directly and substantially in issue in former suit—Parties in subsequent suit same as in previous suit, or their representatives—Binding nature of decree in previous suit.*—A talukdar executed a deed of gift, in favour of his grandson by his first son, of nearly the whole of the talukdari estate. Differences arose, afterwards, between the talukdar and his grandson. The talukdar brought a suit for a declaration that, notwithstanding the deed of gift, the estate and the power to dispose of it by will, were vested in him. This suit was compromised. Sometime after, Rajah Rampal Singh, the grandson above referred to, conveyed by a registered deed certain villages in the estate to his wife. The talukdar and his second son filed a suit asking for the cancellation of the above deed and to displace the possession of the grantee. It was then held that, by virtue of the previous decree, Rajah Rampal Singh, above referred to, had only a life interest in the talukdari property, the subject of the previous suit. A little later on, in execution of a decree against Rajah Rampal Singh, a talukdari village was sold. Thereupon, another grandson of the talukdar, by his second son, brought a suit against the purchaser at Court-sale, the decree-holder and Rajah Rampal Singh for a declaration that, as immediate reversioner, by virtue of the first decree, he was entitled to the absolute estate in the *mouzah* sold after the death of Rajah Rampal Singh. The plaintiffs contended that they were claiming under the provisions of s. 13, Civ. Pro. Code, inasmuch as the previous suit had decided that the Rajah was entitled only to a life interest. *Held*, that the plaintiff's father was a party to the second suit and the question directly and substantially in issue was whether he had a contingent or vested interest under the compromise decree first passed. It was then held that the plaintiff's father had a vested interest in the properties in dispute and Rajah Rampal Singh only a life interest with remainder to the plaintiff. *Held*, consequently, the plaintiff was entitled to a decree by the rule of *res judicata*. RAJAH RAMPAL SINGH v. RAM GHULAM SINGH, **1 C.L.J. 46=27 A. 37=2 A.L.J. 237. P.C.=32 I.A. 17=8 Sar. 727.** [*R.*, 6 C.L.J. 621].

(43)—*Karnavan — Member of a tarwad — expl.* V, *s.* 13, *Civ. Pro. Code—S.* 30, *Civ. Pro. Code.*—A member of a Malabar tarwad

***Res Judicata*—continued.**

—8.—Parties—*continued.*

claims under the karnavan, and is, as such, bound by a decree against the karnavan of the tarwad. [*Anpr.*, 20 M. 129, F.B.; *Cons.*, 10 M. 79; *D.*, 5 M. 201, 6 M. 121.] Expl. (v) of s. 13, Civ. Pro. Code, is not limited in its language to a suit under s. 30. VARANAKOT v. VARANAKOT, **2 M. 328**. [*D.*, 6 M. 121.]

(44)—*Decree against karnavan* — Res judicata.—When a suit is instituted by the representative of the estate and on behalf of the tarwad, the junior members are constructively parties to the suit, unless fraud is shown, and they are bound by the decree passed in the suit. SUBRAMANYAN v. GOPALA, **10 M. 223**. [*R.*, 15 M. 19, 20 M. 129, F.B.]

(45)—*Civ. Pro. Code*, 1882, *s.* 13, *expl.* V—Bona fide *litigation by karnavan in representative capacity—Gross negligence in conduct of case—Non-production of necessary documents—No fraud or collusion—Operation of decision as* res judicata *on junior members.*—Where a suit *bona fide* litigated by the karnavan of a Malabar tarwad in his representative capacity was conducted by him in a careless and negligent manner and necessary documents were not produced by him, the decision in the suit was binding on the junior members of the tarwad, inasmuch as there was no fraud or collusion on the part of the karnavan in the conduct of the suit. The fact that the Judges who tried the subsequent suit by the junior members in respect of the same matter attached great importance to the documents which were not filed in the former suit, did not prevent the operation of the rule of *res judicata*. MADHAVAYA v. KERALA VARMA, **13 M.L.J. 68**.

(46)—*Decision in suit between judgment-debtor and other members of his family to which judgment-creditor was party is* res judicata *in subsequent suit between other members of the family and judgment-creditor—Right of junior members of* alyasantana *family to sue for a declaration that judgment-debtor did not represent the family.*—An *ex parte* decree was obtained against the *yajaman* of an *alyasantana* family. The *yajaman* sued the other members of his family for a declaration that the family property was liable for the payment of the above decree debt. The judgment-creditor was made party to the suit, which, however, was dismissed. The judgment-creditor, thereupon, attached certain immoveable property of the family in execution of his *ex parte* decree; but the other members of the family instituted a suit against the judgment-creditor and the judgment-debtor for a declaration that the attached property is not liable to be sold. *Held* that the decision in the prior suit was *res judicata* in the subsequent suit. The judgment-creditor had a right to appeal against the dismissal of the prior suit (7 M. 149, 28 M. 457, 29 M. 515, 9 C.W.N. 584, *R.*) and even if he had no right to appeal, that cannot have any effect upon the question of *res judicata*. It is open to the family to show that the judgment-debtor did not represent the family, when the debt was incurred. YUSUF SAHIB v. DURGI, **17 M.L.J. 260=2 M.L.T. 368=30 M. 447**. [*R.*, 17 M.L.J, 291, 7 M.L.T. 89, 9 M.L.T. 39=8 Ind. Cas. 337.]

(47)—*Suit by or against manager of joint Hindu family—Effect of decree in such suit on other members of family.*—The manager of a joint Hindu family can both sue and be sued in his representative capacity, and a decision fairly obtained against him is binding on the other members of the family and operates as *res judicata* in a subsequent suit. BINDHACHAL RAI v. GAYA RAI, **17 Ind. Cas. 290**. (9 A.L.J. 819=34 A. 549=15 Ind. Cas. 126, 9 A.L.J. 844=34 A. 572=15 Ind. Cas. 138, *F.*)

(48)—*Hindu Law—Hindu father with ancestral estate—Suit by father as representative of the estate—Subsequent suit by son with same issue raised again—Decision in previous suit how far final*—Res judicata—*Act* VIII *of* 1859, s. 2.—Although, according to the Mitakshara law, the son takes by birth, an interest in the ancestral estate, yet, until a partition has been effected the father possesses large powers over the ancestral estate which he may exercise for lawful purposes in the interests of the family independently of his son. He fully represents the ancestral estate, or rather the joint family of which he is the head, in its relations to that estate, in litigation to which he is party respecting the estate, and the subordinate, associated members of the family as well as himself are bound by the result of such litigation. The decision in such a suit brought against the father and defended by him in the interests of the family, would be binding upon the sons although the suit may not have been brought against him as representing the family. Consequently, when in any case the question arises whether a decision obtained in a former suit regarding the ancestral estate to which the father was alone a party, does or does not bind the son who, though living, was not a party to it, the point to be considered is whether in such former suit the father represented the estate. If he did, the decision is, and if not, it is not, binding upon the son. ARJUN MULL v. JHUNDA MULL, **103 P.R. 1879**. [*R.*, 141 P.R. 1908.]

(49)—*Joint Hindu family—Judgment against Hindu father—Effect—Son not entitled to bring subsequent suit on same cause of action.*—In a joint Hindu family, suits instituted by a father for ancestral property or relating to joint family business are instituted by him as a manager representing his whole family, and not in his individual capacity as a mere member. So when a Hindu father brings a partition suit for the division of the ancestral property belonging to a joint family, the judgment passed against him in such a suit is binding on his son and bars the son from bringing a subsequent suit for the same purpose, on the plea that he was

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—8.—Parties—*continued.*

not a party to the prior suit. RAMAN MAL v. HEM RAJ, **141 P.R. 1908=189 P.W.R. 1908.** (103 P.R. 1879, 68 P.R. 1903, 68 P.R. 1905, *R.*; 10 A. 411, 5 B. 685, 14 M.I.A. 367, *D.*)

(50)—*Civ. Pro. Code* (1859), *s.* 2—*Joint Hindu family—Decree against manager binds other members of family.*—A decree against the managing member of a joint Hindu family may operate as *res judicata* as against the other members, although they were no parties thereto. Where a joint Hindu family consisted of an uncle and his two nephews, with the uncle as the managing member, and a decree was obtained in a suit against the managing member in respect of a certain land of the joint family, *held* that a subsequent suit by the nephews against the decree-holder and the managing member for the recovery of that land was barred by *res judicata*, especially where the nephews had assisted their uncle in defending the former suit and no collusion was proved between the parties therein. NARAYAN COP HABBU v. PANDURANG GANU, **5 B. 685.** [*F.*, 10 B. 21; *R.*, 6 B. 703, 7 B. 467, 9 B. 198, 141 P.R. 1908; *D.*, 10 A. 411.]

(51)—*Joint Hindu family—Suit by or against one member—Decree binds other members.*—Where the interest of a joint Hindu family is at issue and one member of that family has prosecuted a suit or has defended a suit, and a decree has been made therein, such decree may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. JOGENDRO DEB ROY KUT. v. FUNINDRO DEB ROY KUT, **5 B. 687, Note 1.** [*R.*, 5 B. 685.]

(52)—*Dismissal of Hindu daughter's claim as heiress—Effect*—Res judicata.—The dismissal of a Hindu daughter's claim as heiress to a share in a certain property, will bind the reversioner (in this case her son) after her. HARI NATH CHATTERJEE v. MOTHUR MOHUN GOWSAMI, **21 C. 8, P. C.=20 I.A. 183=6 Sar. 334.** (9 M.I.A. 539, *F.*) [*F.*, 20 A. 341=A.W.N. 1898, 65, 28 A. 241=2 A.L.J. 843=A.W.N. 1905, 270; *R.*, 9 C.P.L.R. 59, 23 C. 636, 6 C.L.J. 462, 6 C.L.J. 490, 6 C.L.J. 621; *Diss.*, 5 Bom. L.R. 885; *D.*, 10 O.C. 159.]

(53)—*Hindu widow—Suit by reversioners—Daughters bound by decision*—Res judicata.—A finding in a previous contested suit brought against the widow by the reversioners would be binding on the daughters in a subsequent suit between them and the reversioners. BULCHA v. BHAWANI PRASAD, **A.W.N. 1881, 106.**

(54)—*Hindu Law—Suit against widow—Representation of estate—Suit by reversioner—Civ. Pro. Code, s.* 13—Res judicata—*Admission by widow subsequent to decree, effect of, on reversioner.*—Where a suit by an alleged adopted son against the alleged adoptive mother, in which the latter denied the adoption, was dismissed under s. 158, Civ. Pro. Code, owing to the plaintiff not adducing any evidence, he was estopped by the decree in the suit, from setting up the adoption, in a suit by a reversioner for the recovery of the estate. And the right of the reversioner could not be affected by an agreement subsequent to the decree in the first suit, in which the widow admitted the adoption. ARUNACHALA v. PANCHANADAM, **8 M. 348.** [*R.*, 9 C.P.L.R. 59.]

(55)—Res judicata—*Hindu widow—Reversioner.*—A Hindu widow succeeding to her husband's estate as heir, represents the estate fully; and reversioners, claiming to succeed after her, are bound by decrees relating to her husband's estate, obtained against her without fraud or collusion. NAND KUMAR v. RADHA KUARI, **1 A. 282.** [*Appl.*, A.W.N. 1881, 106; *R.*, 8 A. 365=A.W.N. 1886, 129, 29 P.R. 1895, 107 P.R. 1906.]

(56)—*Suit by reversioner impeaching alienation by widow—Compromise by reversioner in good faith—Whether such reversioner's son can subsequently sue to set aside alienation.*—Where a widow alienated certain property, and the whole of the reversioners then having any apparent rights sued and entered into a compromise in *bona fides*, they and their successors in title are clearly bound by their action; such action can only be attacked, by a more remote or subsequent reversioner, on the ground of *mala fides.* The principle that, in respect of ancestral land, succession is a right derived from the common ancestor who first acquired the land, is not one which interferes with the ordinary application of the principles of *res judicata*, limitation and the like. It is immaterial whether the compromise did or did not have the effect of improving the widow's estate, as regards the property left to her under the compromise. The reversioner's sons are bound by the compromise, whatever its effect might be. DEVI DIAL v. UTAM DEVI, **37 P.R. 1907=120 P.L.R 1907.** (15 P.R. 1903, 97 P.R. 1906, *Appr.*)

(57)—*Civ. Pro. Code*, 1882, *s.* 13—*Binding nature of previous judgment.*—Where a suit for partition was brought by a person against his father, and a creditor was also added as a party and the son prayed in the suit for a declaration as against the creditor that that debt was not binding on his share of the properties, and this matter was eventually decided against him, in a subsequent suit brought by the creditor against both the father and the son, *held* that the son was concluded by the decision in the former suit as to the amount of the debt due to the creditor. KRISHNASWAMI AYANGAR v. SRINIVASA AIYANGAR, **11 M.L.J. 7.**

(58)—*Hindu idol or deity—Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Suit by one* shebait, *binding nature of, on succeeding* shebait.—The

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——8.—Parties—*continued.*

decision in a suit brought by one *shebait* is binding on a succeeding *shebait*. TULASIDAS MAHANTA v. BEJOY KISHORE SHOME, **6 C. W.N. 178.**

(59)—*Civ Pro. Code, s* 13, *expl.* 5—Res judicata—*Mahomedans—Partition*— Ex parte *defendant.*—In a previous suit by certain members of a Muhammadan family for their share, one of the defendants contended that one of the properties was his own, but this plea was decided against him. In a subsequent suit by the mortgagee of one of the defendants in the previous suit (who had remained *ex parte*) to recover his share of that property, the subject of the mortgage, in which both the above defendants were impleaded, the same plea was raised by the same contesting defendant. *Held*, with reference to expl. V of s. 13, Civ. Pro. Code, that it was *res judicata*, as the interests of the plaintiffs and the *ex parte* defendant in the previous suit were identical; and that, therefore, the title of the contesting defendant must be held to have been actively contested between him and the *ex parte* defendant under whom the plaintiff claimed. CHANDU v. KUNHAMED, **14 M. 324=1 M.L.J. 529.** [*Overruled*, 28 M. 457=14 M.L.J. 404; *F.*, 15 M. 264; *Appr.*, 18 M. 164=4 M.L.J. 282; *R.*, 21 M. 373.]

(60)—*Civ. Pro. Code*, 1882, s. 13, *expl.* II (=s. 11, *expl.* IV, *new Code*)—*Mahomedan Law—Previous suit for partition among heirs—Subsequent suit for dower debt*—Res judicata *as between co-defendants.*— This was a suit by two daughters of a deceased Mahomedan for a large share of the estate of their deceased father on account of their deceased mother's dower. In a previous suit by some other daughters, the plaintiffs in the second suit, being defendants, did not set up the title of dower. It was *held* that the claim to dower was *res judicata* in the subsequent suit by virtue of expl. II to s. 13, Civ. Pro. Code, not only against the plaintiffs to the former suit, but also as against the other defendants to that suit. DOST MUHAMMAD KHAN v. SAID BEGAM, **20 A. 81=A.W.N. 1897, 199.** [*R.*, 4 O. C. 108, 8 C.L.J. 369, 12 O.C. 347; *D.*, 1 A.L. J. 394, 55 P.R. 1907=96 P.W.R. 1907=65 P. L.R. 1908; 11 O.C. 69.]

(61)— *Civ. Pro. Code, s.* 13 — *Suit by Karnam for* mirasi *land—Dismissal of previous suit by his father*—Res judicata.—Where, on a suit by a Karnam for recovering certain *mirasi* lands of his office, it appeared that a previous suit brought by his father, for the purpose, had been dismissed, the suit was held to be barred by *res judicata*, since the previous suit must be taken to have been brought by the father in the interest of all the future successors consequent on the jural relation between the office and the land. VENKAYYA v. SURAMMA, **12 M. 235.** [*R.*, 12 C.W.N. 739, 9 C.L.J. 597.]

(62)—Res judicata—Pro forma *defendant—Civ. Pro. Code*, s. 13.—The plaintiff in a suit for certain property cannot be barred by the decision in the former suit for the same property by the plaintiff's tenant (a third party), merely because he was joined as a defendant therein. 3 C. 146, F.B., not in point. BROJO BEHARI MITTER v. KEDAR NATH MOZUMDAR, **12 C. 580, F.B.** [*F.*, 13 C. 352, F.B., 6 C.P.L.R. 87, 1 A.L.J. 363=27 A. 59=A.W.N. 1904, 162; *Appl.*, 25 B. 74; *Diss.*, 15 M. 264; *R.*, 23 C. 693, 5 C.W.N. 421, U.B.R. 1907, Civ. Pro. Code, 5.]

(63)—Res judicata—*Rent suit—Intervenor.*—In a suit by plaintiff for arrears of rent against one set of tenants, defendant intervened, claiming a moiety of the whole estate. His claim was dismissed in the lower Courts and the case came up on special appeal. Meanwhile, plaintiff brought suits against another set of tenants on the same estate, in which defendant again intervened on the same ground as before. *Held* that the decision in the former set of cases, unless and until set aside in special appeal, was binding on the intervenor, even though the estate was of such value that the Court which passed the decrees in the rent suits would not have jurisdiction to try the title which was in dispute. PRAN NATH SANDYAL v. RAM COOMAR SANDYAL, **2 C.L.R. 33.** [*F.*, 9 C.L.R. 216.]

(64)—*Act* VIII *of* 1859, *s.* 2—*Question of title—Suit prior to Act* X *of* 1859.—Where a rent-suit was instituted and heard in a Civil Court before Act X of 1859 came into force, and an issue as to title between plaintiff and an intervenor was raised and decided, *held* that a subsequent suit by plaintiff for possession was barred by s. 2, Act VIII of 1859. CHOWDHARI NILKANTH PRASAD SINGH v. DIGNARAYAN SINGH, **1 B.L.R. A C. 30=10 W.R. 75.** (8 W. R. 175, *D.*) [*R.*, 13 W.R. 129.]

(65)—*Ss.* 13, 562, 578 *and* 584—*Civ.Pro.Code*, 1882—Res judicata—*Judgment not operating as* res judicata—*Value as evidence—Second appeal—Evidence, disregard of Finding of fact*—Act VIII *of* 1885 (*Bengal Tenancy*), *s.* 149—*Onus—Suit for rents in deposit—Question of title.*—Where an order of remand by the lower appellate Court was not strictly in accordance with the provisions of s. 562 of the Code, *held*, that this amounted to an irregularity, such as was covered by the provisions of s. 578, of the Code. (5 C.W.N. 509=28 C. 324, *F.*; 14 C. 537, 17 C. 829, 8 C.W.N. 248, *R.*) Where, in a second appeal, the question was whether certain lands appertained to plaintiff's tenure. *Held*, that a finding of the lower appellate Court thereon, which amounted merely to an expression of opinion, could not be accepted as a finding displacing the finding of the first Court, and, further, that the lower appellate Court had erred in law in disregarding certain evidence without giving sufficient reasons for rejecting it. Where a suit was brought under the provisions of s. 149, cl. (3) of the Bengal Tenancy Act, and the plaintiff made out a very strong

Res Judicata—continued.

——8.—**Parties**—*continued.*

case in support of his title to the rents in deposit. *Held*, that the *onus* was then shifted on the defendant, and that plaintiff was entitled to succeed, although he was not in a position to prove realisation of rents from the tenant, the plaintiff's case being that the defendant had been preventing her from realising them. Although the matter relating to the title of the plaintiff was not *res judicata* against the defendant, still the matter having been in issue in a suit, in which the defendant was a party, and that suit having been decided in favour of the plaintiff, and, in accordance with the decree passed in that suit, a conveyance having been executed in favour of the plaintiff's predecessor-in title. *Held*, that this constituted a strong case in favour of the plaintiff's title and possession, which it lay heavily on the defendant to displace. TRAILOKYA MOHINI DASI v. KALI PROSANNA GHOSE, **11 C.W N. 380.** [*R.*, 7 C.L.J. 40 Note.]

(66)—*Suit to declare that certain property is ijmalee—Dismissal—Subsequent suit for partition*—Res judicata.—Where a claim to have certain property declared *ijmalee* has been dismissed, a subsequent suit for partition against a defendant who was a party to the former suit as well as against defendant not in possession, is barred on the principle of *res judicata*. SHAIKH BESHARATOOLLAH v. SHAIKH AJOO, **14 W.R. 195.**

(67)—*Previous suit—Decision as to liability of rent—Question as to proper measuring rod in subsequent suit not barred.*—This was a suit for abatement of rent on the plea of decrease of area to the extent of certain beeghas. Defendant pleaded that, in a suit for arrears of rent decided in the year 1861, the area had been found by local enquiry and measurement not to be diminished by the amount stated by the plaintiff. The lower appellate Court, on defendant's appeal, *held* that the case was res judicata by the previous rent suit and that the plaintiff's present suit was therefore barred. The contention ofthe plaintiff on special appeal that the matter was not *res judicata* was accepted by the High Court on the ground that the rent suit did not directly decide what was now in direct issue—namely, whether 20 or 18 inches went to the cubit of the local standard of measurement; and further, the question relating to the area was as regards the area at the time of the present suit, and not as to what it was before the suit. SREEMUNT MUNDAL v. MEER ATHUR ALI, **6 W.R. Act X, Rul. 93.**

(68)—*Form of suit—Parties to suit—Effect of decision against intervenor in a rent suit.*—When once it is made clear that the self-same right and title was substantially in issue in two suits, the precise form in which the suits are brought, or the fact that the plaintiff in the one suit was the defendant in the other, becomes immaterial, and the second suit would be barred by the judgment in the first suit.

Res Judicata—continued.

——8.—**Parties**—*continued.*

(15 B.L.R. 238, F.B. = 24 W.R. 154, *F.*) [*F.*, 6 C. 715 = 9 C.L.R. 216, 9 C. 120; *D.*, 12 C. 580, 5 C.W.N. 234.] If, in a rent-suit, a third party intervenes and a question of title is raised as between him and the plaintiff, upon which the whole case depends, he (intervenor) must be bound by the decision of that question, and cannot raise it again in any subsequent suit, whether as plaintiff or as defendant. GOBIND CHUNDER KOONDOO v. TARUCK CHUNDER BOSE, **3 C. 145 = 1 C.L.R. 35, F.B.** [*F.*, 3 C. 705 ; *R.*, 5 C. 832 = 6 C.L.R. 318, 6 C. 406 = 7 C.L.R. 251, 12 C.L.R. 38.]

(69)—Res judicata—*Partition among tenants—Suit by one for possession of certain plots—Second suit for declaration that the decree is null and void.*—The parties were joint tenants of certain occupancy holding. Disputes arose between them, which were referred to arbitration. The arbitrators partitioned the tenure. In 1906 the present defendants brought a suit in the Civil Court for possession of the plots now in dispute, alleging that they belonged to them. The plaintiffs claimed some of them exclusively for themselves. The present defendants obtained a decree. The plaintiffs thereupon brought this suit for a declaration of their right, on the ground that the former decree was null and void, the Court having no jurisdiction to entertain that suit. *Held*, that the former suit was not a suit for partition, and the Civil Court had jurisdiction to entertain it. The same question could not be raised in the present suit. *Per Stanley, C.J.*—Joint tenants can agree themselves to occupy and cultivate distinct parts of the joint holding, provided their so doing in no way prejudices the land-holder. Under such an agreement, the tenants continue to be liable to the landlord for the entire rent, and the agreement between them is not a partition which is enforceable as between them and the landlord. A partition, to bind the landlord, must be a partition with his consent. RAGHUNATH KALWAR v. BALADEEN KALWAR, **7 A.L.J. 918 = 7 Ind. Cas. 398.**

(70)—*Litigating under different title—Suit not barred.*—Where a plaintiff litigates not under the same title as in the former suit, the suit will not be barred. AHMAD KHAN v. MUSST. BHAGBHARI, **142 P.R. 1892.**

(71)—Res judicata *between co-defendants.*—Where the parties to the present suit were ill-advised to ask to be made defendants in a previous suit and were accordingly added as parties but were not allowed to give any evidence therein, *held*, that the previous suit would not be binding upon them in the present case, as they were not allowed to adduce any evidence therein. AIN ALI v. JUGGUT CHUNDER ROY CHOWDHRY, **25 W.R. 416.**

(72)—Res judicata — *Judgment obtained against a dead man cannot operate as* res judicata *in a subsequent suit.*—If a judgment be improperly obtained so that it never ought to have

Res Judicata—continued.

——8.—Parties—*continued.*

been signed, there can be no doubt, when set aside, it ought to be treated as never having existed. Where, therefore, a judgment was obtained against a dead man and subsequently another suit was brought against his representatives, it was held that the former judgment must be treated as never having existed, and that it could not operate as *res judicata*. Where causes of action are different the principle of *res judicata* does not apply. HAJI NOOR MAHOMED v. MACLEOD, **9 Bom. L.R. 274.**

(73)—*S.* 11, *Civ. Pro. Code*, 1908—*Representative character.*—Even though a person claims under, in the sense of deriving title from, another who was a party to a former suit in respect of the same subject-matter, yet if such another person did not fill that character before or at the time when the first person claiming derived his title from such another person, the first person claiming is not claiming as a party to that suit within the meaning of the section and is not concluded by the decision in such former suit. SHAM SUNDER v. BHAIRON PERSHAD, **51 P.R. 1894.** (8 A. 324, *R.*)

(74)—*S.* 13, *Civ. Pro. Code*, 1882 (=*s.* 11, *new Code*)—*Parties*.—The principle of *res judicata* has no application in a dispute between parties, all of whom claim under the person in whose favour the decision in the previous suit was given. ASGHAR REZA KHAN v. MAHOMED MEHDI HOSSEIN KHAN, **30 C. 556, P.C. =30 I.A. 71=7 C.W.N. 482=8 Sar. 439.**

(75)—*Decision must be necessary for disposal of suit.*—Questions decided in a suit between a plaintiff on the one hand, and a group of defendants on the other hand, are not to be considered as *res judicata* unless the determination of such questions was absolutely necessary for the determination of the plaintiff's own rights in the suit. ANTAO v. ARDESHIR, **1 Bom. L.R. 303.**

(76)—*Judgment not* inter partes *or* in rem.—*Held*, that a judgment, which is not *inter partes* to a suit or *in rem*, does not make the question decided by it *res judicata* in a subsequent suit. But such judgment or the whole record in the previous suit is admissible as evidence that a right had in the previous litigation been set up unsuccessfully by one of the parties to the subsequent suit. AMAR SINGH v. SHANKAR SINGH, **105 P.W.R. 1912=142 P.L.R. 1912=14 Ind. Cas. 66.** (12 A. 1, F.B., 24 B. 591=2 Bom. L.R. 386, 31 B. 143=9 Bom. L.R. 65, *R.*)

(77)—Res judicata—*Judgment not* inter-partes.—A judgment in a previous suit to which the present defendant is not a party cannot operate as *res judicata* upon the question of title in the present suit. GOOL KHAN v. TETAR GOALA, **4 C.W.N. 63.**

(78)—*Party to suit—Necessary party—Nominal party.*—A judgment in a previous suit

Res Judicata—continued.

——8.—Parties—*continued.*

does not operate as *res judicata* against a person who was merely a nominal party to the previous suit and who was under no obligation to make any defence in that suit. The test which distinguishes a necessary party from a nominal one is that there must be a conflict of interests among the defendants and the judgment must define the real rights and obligations of the defendants *inter se*. BALAMBHAT v. NARAYANBHAT, **2 Bom. L.R. 511=25 B. 74.** [*R.*, 5 C.L.J. 611, 36 C. 193.]

(79)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Parties to suits.*—The question in this case was whether the present suit was barred by a decree made in a former suit which was dismissed. The plaintiffs in the prior suit were four in number. Two of them along with another were the plaintiffs in the present suit. *Held*, that the former suit could not be said to have been between the same parties or to have been brought by parties under whom the plaintiffs in the present case claimed. The present suit was therefore not barred by s. 2 of Act VIII of 1859. OOMESH CHUNDER ROY v. NOBIN CHUNDER MOJOOMDAR, **10 W.R. 457.**

(80)—*Nominal or* pro forma *defendants—Applicability to.*—Where the plaintiffs in the subsequent suit have been merely *pro forma* defendants in the former suit, the suit is not barred by reason of the former suit. (*Per Plowden, C.J., and Rivaz, J. Benton, J., Diss.*) *Per Benton, J.—Pro forma* defendants and other defendants stand on the same basis and if a *pro forma* defendant does not show that he is substantially interested in the matter, the decree will bind him. ZAMAN ALI v. MANJI, **60 P.R. 1894.** (19 C. 159, *R.*)

(81)—Res judicata—*Civ. Pro. Code*, 1882, *s.* 13, *expl.* II.—This was a claim by certain proprietors in a village, for a share of land recovered by suit by the defendants, other proprietors of the village on the death of an occupancy tenant, from persons who alleged themselves to be the tenant's representatives. It was urged in defence that the plaintiffs did not join the defendants in making the original claim. When the defendants impleaded them as *pro forma* defendants they did not defend the suit but asserted their right to share in any land which might be recovered from the original defendants; some of the plaintiffs even gave evidence for the defendants in the previous case. The Divisional Judge dismissed the suit on the ground that the decree in the previous suit was a bar to the claim. *Held*, that the judgment of the Divisional Court was wrong. There was no conflict of interests between the parties to the present suit, *inter se* and expl. II of s. 13, Civ. Pro. Code, was not applicable. SAHRI SINGH v. SHER SINGH, **P.L.R. 1900, p. 409=70 P.R. 1900.**

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——**8.—Parties**—*continued.*

(82)—*Estoppel as between co-defendants, in a suit—Objection by respondent, under* s. 348, *Act* VIII *of* 1859.—It is open to a respondent to take any objection under s. 348, Act VIII of 1859. A decision in a former suit cannot operate as an estoppel as between co-defendants in that suit or parties claiming under them. MUDHOO MOKEE DABEE v. GUNGA GOVIND MUNDLE, **W.R. 1864, 299.**

(83)—*Decision as between co-defendants—Estoppel.*—The decision of a Court as between co-defendants is not necessarily an estoppel in a subsequent suit to try their title. RAM CHAND SAMARDHAR v. KALA CHAND CHUCKERBUTTY, **1 W.R. 287.**

(84)—Res judicata—*Question in issue between plaintiff and defendant decided in former suit in which both parties were co-defendants.*—The fact that a question in issue between plaintiff and defendant was formerly decided in a suit in which plaintiff and defendant were arrayed together on the same side as co-defendants does not, except under very exceptional circumstances, constitute that question *res judicata.* BISHONATH SINGH v. BISHESHAR SINGH, **A.W.N. 1891, 34.** [*F.*, 16 A. 464; *R.*, 26 A. 386.]

(85)—*Civ. Pro. Code, s.* 13—*Adjudication as between co-defendants*—Res judicata.—Whenever an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and, in such a case, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But, for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se.* Without such necessity, the judgment will not be *res judicata* between the defendants, in any subsequent suit between them; in other words, if the relief given to the plaintiff does not require or involve a decision of any matter in contest between co-defendants, such co-defendants will not be bound as between themselves by any proceeding which may be necessary only to the decree the plaintiff obtains. AHMAD ALI v. NAJABAT KHAT, **18 A. 65=A.W.N. 1895, 156.** (11 B. 216, *F.*) [*F.*, 31 C. 95=8 C.W.N. 30, U.B.R. 1907, 2nd Qr., C.P.C. 5; *Appr.*, 25 B. 74; *R.*, 22 B. 245, 2 O.C. 303, 22 A. 386.]

(86)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *new Code*)—Res judicata, *as between defendants.*—Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be as *judicata* between the defendants as well *res* between the plaintiff and defendants. But, for this effect to arise, there must be a conflict of interests between the defendants, and a judgment defining the real rights and obligations of the defendants *inter se.* Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst

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——**6.—Parties**—*continued.*

them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. CHAJJU v. UMRAO SINGH, **22 A. 386=A.W.N. 1900, 120.** (11 B. 216, 18 A. 65, A.W.N. 1891, 34, 15 M. 264, *R.*) [*F.*, 36 C. 193=5 C.L.J. 611, U.B.R. 1907, 2nd Qr., Civ. Pro. Code, p. 5; *R.*, 16 C.P.L.R. 42.]

(87)—*S.* 13, *Civ. Pro. Code*, 1882 (=*s.* 11, *new Code*)—*Res judicata between co-defendants—Construction of "Between the same parties."*—S 13, Civ. Pro. Code, 1882, does not preclude the decision upon any issue from operating as *res judicata*, merely because the issue is raised as between co-defendants, if the matter involved was directly and substantially in issue in a former suit, and the other necessary conditions are satisfied. (3 C. 551, 11 B. 216, 18 A. 65, 29 C. 707 *R.*) [*R.*, 36 C. 193=5 C.L.J. 611, 5 C.L.J. 653, 13 C.W.N 217=9 C.L.J. 16=5 M.L.T. 274.] The words "between the parties" qualify not only the words "former suit," but the whole expression "in issue in former suit." MAGNIRAM v. MEHDI HOSSEIN KHAN, **31 C. 95=8 C.W.N. 30.**

(88)—Res judicata—*Finding as between co-defendants.*—A finding between co-defendants unnecessary for the determination of the suit or the rights of the parties involved in the suit, cannot operate as *res judicata* between them. BAPU v. BHAVANI, **22 B. 245.** [*R.*, 5 Bom. L.R. 97.]

(89)—Res judicata—*Co-defendants—Civ. Pro. Code*, 1877, *s.* 13.—Where two persons are arrayed in a suit on the same side as co-defendants, there can be no adjudication in such suit which can bind them conclusively in regard to rights *inter se.* S. 13, Civ. Pro. Code, distinctly requires that the former suit must have been "between the same parties:" and the word "between" in that section, must be understood to mean that the parties to be concluded by the former decision must have been arrayed on opposite sides in the suit in which the decision was passed SITAL PRASAD v. BANSIDHAR, **A.W.N. 1882, 168.** (12 W.R. 524, 4 A. 92, *R.*)

(90)—*S.* 13, *Civ. Pro. Code*, 1882—Res judicata *between defendants.*—Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and, in such a case, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. But, for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se.* Without necessity, the judgment will not be *res judicata.* NGA THET THA v. MI KYE GYI, **U.B.R. 1907, Civil Procedure, 5.** (11 B. 216, *F.*; 18 A. 65, 15 M. 264, 22 A. 386, 25 B. 74, 8 C.W.N. 30, 26 M. 337, 12 C. 580, *R.*)

(91)—Res judicata *as between co-defendants.*—The contention in this suit was that there had been a previous adjudication against the

Res Judicata—continued.

—— 8.—**Parties**—*continued.*

plaintiffs and the defendant jointly in favour of a third person who was decreed a share of the property in dispute as a joint family estate, and that such adjudication constituted *res judicata* against the present parties, the then co-defendants, on the point that the property was joint estate. But it was *held* that, for the previous judgment to have such effect, the adjudication therein as between the defendants must be shown to have been necessary for the grant of the appropriate relief to the plaintiff in that case. Without such necessity, which was not proved in this case, the judgment will not be *res judicata* among the then defendants, nor will it be *res judicata* against them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group. RAMACHANDRA NARAYAN v. NARAYAN MAHADEV, **11 B. 216.** [*F.*, 140 P.R. 1890, 1 Bom. L.R. 303, 16 C.P.L.R. 42, 31 C. 95=8 C.W.N. 30, U.B.R. 1907, 2nd Quarter, C.P.C., 5, 33 M. 112=20 M.L.J. 369=7 M.L.T. 89=5 Ind. Cas. 760; *Appr.*, 5 Bom.L.R. 97; *R.*, 12 A. 506 =A.W.N. 1890, 128, 2 M.L.J. 203 18, A. 65=A.W.N. 1895, 156, 22 B. 245, 20 A. 81= A.W.N. 1897, 199, 1 O.C. 215, 25 B. 74, 22 A. 386, 30 B. 250=6 Bom. L.R. 995, 79 P.R. 1905=102 P.L.R. 1905, 97 P.R. 1910=142 P.W.R. 1910.]

(92)—*Plaintiff and defendant previously defendants in a suit—Finding on issue in that suit—Issue on that fact open to adjudication*—Res judicata—*Co-defendants—Issue.*—An issue on a fact is open to determination as between the present plaintiff and defendant, although a finding on that fact has been arrived at in a former suit in which both of them were defendants. KHELUT CHUNDER GHOSE v. KISHEN GOBIND DEB, **16 W.R. 128.**

(93)—*S.* 13, *Civ. Pro. Code, Act* XIV *of* 1882 (=*s.* 11, *present Code*)—Res judicata *between co-defendants.*—In a suit for declaration of title to a certain property, when the Court makes a declaration in favour of the plaintiff as to a certain share of the property and a declaration as to certain other shares in favour of some of the defendants (*viz.*, defendants 4 to 6), the latter declaration is not binding on the other defendants. The declaration which the defendants Nos. 4 to 6 have obtained is superfluous and cannot injure the other defendants. RAJ NARAIN v. KHOBDARI RAI, **5 C W.N. 724.**

(94)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13 Res judicata—*Co-defendants—Suit for partition—Pleadings—Plea of self-acquisition not raised—Plea raised in a subsequent suit—Bar of plea.*—A previous suit for partition of the plaint properties was dismissed without any reference to the question whether they were first defendant's self-acquisitions. In that suit the present first and second defendants were co-defendants. First defendant raised that plea for the first time in the present suit: *Held*, that the former suit did not operate as *res judicata* and did not bar the plea being raised in the present suit. PALLA MARUTHI v. SAGIRRAJU BANGARAJU, **6 Ind. Cas. 889=8 M.L.T. 220.**

(95)—*Plea of co-defendants in former suit—Whether binding as between them in subsequent suit.*—Where there was no active controversy between the defendants in a former suit, either as to the *factum* or as to the validity of a deed of gift, and the gift was set up by both of them jointly with the object of defeating the suit of the then plaintiff, one of them would not be precluded in a subsequent suit from disputing the validity of the gift. RAMANUJA AYYANGAR v. NARAYANA AYYANGAR, **18 M. 374.** [*F.*, 25 B. 74 ; *D.*, 29 M. 515.]

(96)—*Civ.Pro.Code*, 1882, *s.*13--Res judicata—*Matter in issue between plaintiff and defendants and not between co defendants—Effect on right between defendants* inter se.—In a suit on a mortgage, a decree was passed in favour of the mortgagee subject to the incumbrances of some of the defendants. The rights of the defendants *inter se* were not gone into. In execution of a decree passed in favour of one of the incumbrancers, the mortgaged property was sold. The present plaintiff, who was another incumbrancer, sued for a declaration that the above said sale was not valid, and for possession of the property, on the ground that he had priority over the other incumbrancer. The defendant contended that the claim was *res judicata* by reason of the decision first named above. *Held* that though, in the first suit, the question whether each of the defendants had mortgages upon the property was a matter in issue between the plaintiff and the respective defendants, there was no such issue between the defendants themselves. The question of priority was not gone into. Consequently, there was no *res judicata* between the co-defendants so as to bar the present suit. MUHAMMAD KUNI ROWTHAN v. VISWANATHAIYAR, **26 M. 337 =12 M.L.J. 471.** [*R.*, 36 C. 193=5 C.L.J. 6 11, U.B.R. 1907, 2nd Qr., Civ. Pro. Code, p. 5]

(97)—*Assignor whether represents assignee—Parties claiming under—S.* 11, *Civ. Pro. Code*, 1908.—The phrase "parties under whom they or any of them claim" contemplates a title not in existence at the date of the prior suit. A person who has assigned away his interests in certain property cannot represent his assignee in a suit relating to that property instituted after the assignmnet. A decision, in respect of property assigned, passed in a suit filed subsequently to the assignment, to which suit the assignee was no party, will not bind such assignee. MADU v. UMAR DIN, **26 P.R. 1893.**

(98 & 99)—*Civ. Pro. Code, s.* 13, *expl.* V—*Previous* bona fide *litigation in respect of right claimed in common with others—Plea in bar to suit not taken in first Court, whether can be taken for first time in special appeal.*—In this case, plaintiffs sued one H, R D his son-in-law

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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and others, defendants, for a right of way alleged to have been closed by the defendants, and the lower Courts decreed the claim against the defendants. On appeal, it was urged that the plaintiff's claim was barred by expl. V of s. 13 of Act X of 1877 by reason of a previous decision in a suit brought by R D as plaintiff against one A N, defendant. Plaintiff then did not profess to sue on behalf of any person but himself, or to sue in any representative capacity. The decree therein was based upon the ground that, in the deed of sale by A N to R D of the land on which the latter was building, there was no reservation by the seller of any portion of the ground for a road, or, of any right of way, it being in substance the defendant's plea that there had been such a reservation. Under the circumstances, the decision was held to be no bar to the suit by operation of expl. V. s. 13 of the new Code. In order that a previous decision should be a bar under that section to the trial of a subsequent suit, it is, among other things, necessary that the former suit should have been between the same parties or between parties under whom they or any of them claim, litigating under the same title ; and, in the previous suit between R D and A N, it could not be held that they were persons litigating *bona fide* in respect to a right claimed in common for themselves and others, so as the previous decision should be a bar to a trial of the present suit in which the plaintiff desired relief chiefly against H as the true owner of the land over which the right of way was claimed. It was also doubted in this case whether the plea can be taken up on special appeal, seeing that the bar was not pleaded in the first, Court by any defendant and the case had therefore been tried out on the merits. HARGOBIND v. JOTHRAM, **59 P.R. 1879.**

(100) — *Civ. Pro. Code, ss.* 13, 283 — Res judicata — *Execution of decree — Objection to attachment — Suit to establish right of judgment-creditors — Subsequent suit by one of judgment-debtors to recover possession as against objector.*—In the proceedings necessary to establish the validity of the claim to property attached or an objection to an attachment, under s. 278 of the Civ. Pro. Code, the judgment-creditor does not represent the judgment-debtor, so as to render a subsequent claim to the property attached a matter of *res judicata* as between the judgment-debtor and the objector. The doctrine of *res judicata* does not apply in India as between persons who were co defendants in the former suit. LALLA v. MANNU, **A.W.N. 1890, 177.** (3 A. 233, *F.*)

(101)—*Suits on bond—First suit against one of several obligors personally—Subsequent suit to enforce joint liability of all executants*—Res judicata.—S. 2 of Act VIII of 1859 does not bar the institution of a second suit to enforce a joint liability under a bond against the several obligors thereof, where, in the prior suit, the plaintiff had proceeded only against one of such obligors. In the first suit, the non-payment by one of the obligors under the bond was the cause of action, and he was the sole defendant therein, whereas, in the subsequent suit, the non-payment by all of the persons so liable was the cause of action and all such persons were made defendants. RAMANATH ROY CHOWDRY v. CHUNDER SEKHUR MOHAPATTUR, **4 W.R. 50.**

(102)—*Prior decision as to inclusion of demand in settlement of accounts—Denial as to execution of a document in subsequent suit—Estoppel.*—Plaintiff sued to recover certain gold and silver jewels which his father had pledged to the defendant's father. The plaintiff alleged the existence of an account stated between his father and the father of the defendant and signed by the latter. The defendant denied the account stated and further alleged that the jewels had been returned. Prior to the present suit, the defendant had instituted two suits against the plaintiff for moneys alleged to have been due on certain documents from the father of the plaintiff to the father of the defendant. In each case, the present plaintiff (as defendant) pleaded that the demands had been included in a settlement of accounts and set out the particulars of a document alleged to have been executed by the plaintiff's father. Both the suits were dismissed for the reason that being included in the settlement, the demands sued upon no longer existed as causes of action. In the present suit, the Civil Judge considered that the defendant was estopped by the decree in the prior suits from disputing the document embodying the account stated. He further held that the document was of the same effect as a deed, and declared that the defendant was debarred from disputing any particular recital therein. Finally, the Civil Judge discredited the defendant's evidence as to the return of the jewels and gave a decree for the plaintiff. The defendant preferred an appeal to the High Court. *Held* that the defendant was not precluded by estoppel by decree or by estoppel by deed from advancing the plea set up by him. The precise issue in the prior suits was not whether the present document was true, but whether the then plaintiff's demand was included in an account stated. Consequently, there was no estoppel by decree. The present document evidencing the account stated was not conclusive evidence of a debt due and it was clearly open to the defendant to prove that the debt was not due. *Held* also that as the plea of the defendant as to the return of the jewels was not proved, the plaintiff was entitled to a decree in his favour. Under the law of British India administered in the mofussil, there is no distinction between specialties and other documents. The effect of *res judicata* discussed. TIRUMALA RAU SHAIB v. PINGALA SANKARA RAU, **1 M.H.C. 312.**

(103)—*Relief—Practice and Procedure.*—A sued B as his agent and trustee in possession of certain lands, complaining *inter alia* that B

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—— 8.—**Parties**—*continued.*

had been dealing with the lands as if he were the owner and had hypothecated the same to C. In this suit, though B and C both were defendants, A's prayer was simply confined to recovery of possession. B and C pleaded that B was the owner of the lands. The hypothecation bond provided that if at the end of one year from its date the debt was not paid, C was to be at liberty to enforce his charge. No issue was raised as to the hypothecation bond; and the Court holding that B was agent, gave A an unfettered decree for possession. B alone preferred an appeal. In the meanwhile the year of the hypothecation bond expired, and C sued A and B to recover the debt and enforce his charge. The lower Courts held that the second suit was barred under expl. II to s. 13 of the Civ. Pro. Code: — *Held*, that the second suit was not barred, since C was not necessary party to the former suit, and though he was made a party no relief was sought against him. RAMDAS v. VAZIRSAHEB, **3 Bom. L.R. 179=25 B. 589.**

(104)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Trustees—Parties.*—Where the plaintiffs in a former suit were H, R, L, and K, and the plaintiffs in the present suit O, R, and L, it was held that the former suit was not between the same parties as the latter, or brought by parties under whom the present plaintiffs claimed, and therefore, that the present suit was not barred by s. 2, Act VIII of 1859, whether some of the parties were trustees for the others or not. UMES CHANDRA ROY v. NABIN CHANDRA MAZUMDAR, **5 B.L R. 327 Note.**

105)—*Public processions—Right to take an idol in—Decision in former suit against some members of the same community—Prohibition to take out processions—No* res judicata.—In 1828 certain members of the V community brought a suit and obtained a decree against the T community, prohibiting them to worship an idol in public and to take it out in procession in the streets of the village. The streets were subsequently vested in the Local Board. Some members of the V community now brought this suit for an injunction prohibiting the T community from worshipping or taking out the idol in procession in the streets. *Held*, the streets being public streets, the T community, as members of the public, had a right to take out their idol in processions. *Held* further, that the suit of 1828 was not a representative suit binding property or designed or framed for the purpose of binding for all time the T community. It was a suit against the wrong doers in their individual capacity and the decision on that suit did not operate as *res judicata* to the decision of that issue in this suit. SADAGOPA CHARIAR v. A. RAMA RAO, **4 A.L.J. 333, P.C.=11 C.W.N. 585=5 C.L.J. 566=17 M.L J. 240=9 Bom. L.R. 663=2 M.L.T. 204=30 M. 185=34 I.A. 93.** [*R.*, 32 M. 478=19 M.L.J. 617=1 Ind. Cas. 716, 32 M. 527=6 M.L.T. 285, 8 Ind. Cas. 175.]

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—— 8.—**Parties**—*continued.*

(106)—*Civ. Pro. Code*, 1882, *s.* 13—*Suit in representative character — Claim to office in temple—Decision in favour of one sect—Subsequent suit by trustees of a shrine*—Res judicata—*Trustees not actually impleaded in the prior suit—Decision in execution proceedings in prior suit—Whether operates as* res judicata *in the subsequent suit.*—In 1896 the members of T sect of a community sued the members of V sect, to have it declared that the right to Adhyapakam Office in a temple as well as in all the shrines attached thereto vested in the members of T sect. The plaintiffs and defendants in that suit represented respectively all the members of the rival communities under s. 30 of the Code of Civil Procedure. The plaintiffs were given the decree prayed for and, in the execution proceedings which followed that decree, it was held that a certain shrine was attached to the big temple. In the present suit, the members of V sect sued for a declaration to the Adyapakam Office in the shrine in dispute, and averred that this particular shrine was not attached to the big temple, the right to the office in which was adjudicated upon in the former suit. They also maintained that the decision in the previous suit as to the right to the office in the big temple as well as in the shrines attached thereto was not binding upon them, inasmuch as they were the trustees of the shrine in question and were suing in that capacity: *Held*, (1) that, in the absence of fraud or collusion, the decision in the prior suit, in which the rights of both sections of the entire community were adjudicated upon, operated as *res judicata*, and that the circumstance of the subsequent suit having been brought by plaintiffs *as trustees* of the shrine in question did not affect the operation of the law (27 M. 243, *R.*) (2) that the decision in the execution proceedings in the prior suit that the shrine in question was attached to the big temple was not *res judicata*, because the present plaintiffs were not impleaded *actually* as defendants in the previous suit. SRINIVASA AIYANGAR v. ARAYAR SRINIVASA AIYENGAR, **6 Ind. Cas. 229=8 M.L.T. 33=20 M.L.J. 546=33 M. 483.**

(107)—Res judicata—*Dismissal of a previous suit to which defendant was no party, effect of.*—The plaintiff, alleging himself to be the duly appointed head of a *mutt*, sued to have it declared that a Court-sale of certain properties in execution of a decree passed against his predecessor was invalid as against his right as the present head. He had previously sued to obtain a declaration of his right to the *Dharmakartaship*, another claimant to that office being joined as defendant, and the present defendant not being a party. The dismissal of such previous suit was held not to bar the present suit as *res judicata*. RAMALINGAM v. THIRUGNANA SAMANDHA, **12 M. 312.**

(108)—*Limitation—Adverse possession*—Res judicata.—A took and *held* possession of land adversely to B, and afterwards let it in patni to C; B brought a suit for possession against A

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——8.—**Parties**—*continued.*

and, having obtained a decree, attempted to execute it by turning C out of possession. Between the date on which A originally took adverse possession of the land and the date on which B attempted to turn C out of possession, more than 12 years had elapsed. *Held* that B's claim against C was barred by limitation and that C was not bound by the decree obtained by B against A, not having been made a party to the suit. MOHENDRO NATH MUKERJEA v. NAFUR CHUNDER PAL CHOWDHRY, **1 C.L.R. 531.**

(109)—*Partnership debt—Dissolution—Division of assets and liabilities—Subsequent decree against firm—Suit by one partner against another*—Res judicata.—The parties to the suit were at one time partners in a trading firm, who, by a private arrangement between themselves, dissolved the partnership, and divided the assets and liabilities. A creditor of the firm sued all the partners and obtained a decree in spite of the plaintiff's plea that the particular debt sued for appertained to the defendant's share of the liabilities. The decree-holder in execution sold the joint property in satisfaction of his claim and the plaintiff then sued to recover from his partner his share of that property. *Held* that this suit was not barred by *res judicata*. MADHOO PERSHAD v. LALLJEE SHAHOO, **9 W.R. 557.**

(110)—*Partnership debt—Liability of partner for debts incurred during partnership.*—A and B were partners. C supplied the firm with some goods, and brought a suit to recover their value from both A and B. A confessed judgment; but B pleaded non-liability on the ground that, in a suit between himself and A for settlement of partnership accounts, his liability was fixed at a certain amount, and that, as to the balance, he had been released and he is not therefore liable to pay the suit debt. *Held*, that as C was not a party to the partnership suit in which the liability of B was fixed at a certain amount, he was not bound by the decision and B remained therefore liable for the outstanding debts, unless he had caused his release from liability to be publicly notified before the goods were supplied by C. ROOLDOO MULL v. JOWAHIR, **90 P.R. 1868.**

(111)—*Suit by real owner against certified purchaser for declaration of title dismissed as barred by s. 317, Civ. Pro. Code—Subsequent suit by certified purchaser against real owner for profits—Suit not barred by rule of.*—A judgment-debtor purchased, in execution of a decree against himself, lands belonging to him in the name of a third person and remained in possession. Sometime after, he brought a suit against the certified purchaser for a declaration of his rights as the real purchaser. The suit was dismissed as barred by the provisions of s. 317, Civ. Pro. Code. Subsequently, the certified purchaser brought a suit for rent and profits against the judgment-debtor. *Held*, this suit was not barred by the rule of *res judicata*, for the previous suit did not go into the merits of the case or consider rights of the parties. Hence the defendant could set up his beneficial ownership as a defence. GHAZI-UD-DIN v. BISHEN DAYAL, **2 A.L.J. 111 = A.W.N. 1905, 39 = 27 A. 443.**

(112)—*Civ. Pro. Code (Act V of 1908), s. 11 — Auction sale — Suit for possession* — Res judicata.—J and his two minor sons purchased a certain property at an auction sale K. subsequently brought a suit against J alone for possession of a portion of the property and obtained a decree. D, one of the sons of J, later on brought the present suit against K to recover possession of the property on the basis of the sale certificate: *Held*, that the suit was not barred by *res judicata*. DAO DYAL v. KALI CHARAN, **14 Ind. Cas. 745.**

(113)—*Purchaser at a sale for arrears of revenue—Not representative in interest of defaulting proprietor — Claim under paramount title.*—An auction-purchaser at a sale for arrears of revenue does not derive his title through the defaulting proprietor; but he claims under a paramount title. So a decree in a suit against the defaulting proprietor to which neither the auction-purchaser nor his predecessor in title was a party cannot operate as *res judicata* against the purchaser. GADADHAR BOSE v. RADHA CHARAN PODDAR, **34 C. 868.** (8 W.R. 222, 12 C. 82, *F.*; 2 W.R. 191, 14 W.R. 283, *Diss.*)

(114) — Res judicata — *Auction-purchaser whether a successor in interest of defaulter.*—An auction-purchaser of an entire estate for arrears of revenue cannot be considered to be the successor in interest of the defaulting proprietor so as to be bound by a judgment in a suit to which the defaulting proprietor was a party. KANTA PROSHAD HAJARI v. ABDUL JAMIR SADAGAR, **8 C.W.N. 676.** [*R.*, 9 C.W.N. 383.]

(115)—*Previous suit for custody of defendant as plaintiff's wife—Finding that marriage not proved—Subsequent suit by another for custody of same defendant as his wife—Wife not estopped by previous finding*—Res judicata.—B sued J the defendant, for the custody of J as his wife. That suit was dismissed on the ground that the marriage was not proved. Subsequently another person L brought the present suit against J and others to obtain custody of J as his wife. Denying that she was married to L, J alleged that she was B's wife at the time of the marriage alleged by the plaintiff. *Held* that the finding, in the former case against the marriage between J and B did not estop J from pleading, in the case brought by L, that, in point of fact, she was married to B at the time she was alleged to have gone through a form of marriage with L. Also L was not a party to the former suit by B and, therefore, as the parties to the present suit could not be said to have been the same as in the former suit, they

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——8.—**Parties**—*continued.*

were not bound by the decision in that case. MUSSUMMUT JIWANI v. LALL SINGH, **9 P.R. 1879**.

(116)—*Act* VIII *of* 1859, *s.* 2—*Suit by member of family—Siut by Receiver for whole family.*—A suit by a Receiver suing in the name of a whole family to recover the whole property, could not be barred by a previous decision disallowing the claim of a member of the family to a share in the property, as the issue in that suit was not technically the same as in the subsequent one. JUGUNNATH PERSHAD DUTT v. C. S. HOGG, **12 W.R. 117**. [*D.*, 34 C. 305 = 5 C.L.J. 270.]

(117)— *Malabar* tarwad — *Personal decree against individual members—Suit to enforce liability on* tarwad.—A previous decree for rent against individual members of a *tarwad* does not bar a subsequent suit to enforce the liability against the *tarwad.* GOVINDA v. MANA VIKRAMA, **14 M. 284**.

(118)—*Binding nature of a decree against karnavan on the other members of the* tarwad.—The proposition that, in the absence of fraud or collusion, a decree against the head of an illam or *tarwad* is binding against the junior members, is not warranted by law. The question whether one person is bound or not by a decree against another is one of procedure (2 M. 328, *F.*) [*Appr.*, 15 M. 333; *R.*, 11 M. 157, 10 M. 9, 20 M. 129.] Every member of the *tarwad* is interested in the joint property and ought to be made a party or have notice under s. 30. [*App.*, 15 M. 333.] Expl. 5 of s. 13, Civ. Pro. Code, does not refer to *bona fide* defences, but to *bona fide* claims. VASUDEVA v. NARAYANA, **6 M. 121**. (6 C. 31, *Appr.*) [*R.*, 20 M. 129, 24 B. 77, 16 C.P.L.R. 161.]

(119)—*Malabar Law—Karnavan, negligence of—Suit by* anandravans.—The *anandravans* of a Malabar *tarwad*, may recover or retain possession of *tarwad* lands, either by the express consent or sufferance of their *karnavan.* When fraud or breach of duty on the part of the *karnavan* is shown, his act must be treated as a fraud upon his power, and if the *karnavan's* conduct in a suit is negligent, if not fraudulent, the decision against him in that suit does not bind the *anandravans.* THENJU v. CHIMMU, **7 M. 413**. [*R.*, 10 M. 322, 20 M. 129.]

(120)— *Civ. Pro. Code*, 1882, *s.* 13, *expl.* (5) (=*s.* 11, *expl.* (6), *new Code*)—*Joint Hindu family—Suit against two members—Second suit against third member.*—A person is said to claim under another when he derives his title through that other by assignment or otherwise. A Hindu son, in a joint family, becomes entitled, by reason of his birth and in his own right, to a right which he can enforce against his father. He does not claim under his father within the meaning of the section. Accordingly, a decree obtained against the father and a son was held not to be *res judicata* in a suit against another son belonging to the joint family, on the same

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——8.—**Parties**—*continued.*

cause of action, where they neither had been sued nor defended the action as representatives of the family. RAM NARAIN v. BISHESHAR PRASAD, **10 A. 411 = A.W.N. 1888. 149**. (5 B. 685, *D.*) [*F.*, 29 A. 1 = 3 A.L.J. 644 = A.W.N. 1906, 242; *R.*, 27 A. 37; *D.*, 141 P.R. 1908.]

(121) — *Civ. Pro. Code*, 1882, *s.* 13 — Res-judicata—*Previous suit by member of undivided family dismissed—Subsequent suit by another member—No bar.*—The plaintiff sued for maintenance of possession in respect of certain lands in respect of which he alleged that the defendant had disturbed and interfered with his proprietary enjoyment of them. At the time of suit, he had a brother and an uncle and it was found that he, his brother and his uncle formed a joint Hindu family. The plaintiff was a minor and brought the suit through his mother as guardian. It appeared that his brother and uncle had previously filed a similar suit against the same defendants in respect of the same lands and their claim to the lands was dismissed. *Held* that the present suit was not barred by the rule of *res judicata* by reason of the dismissal of the previous suit, which was *res inter alias acta*, that, as the plaintiff had not been made by a duly constituted guardian a party to that suit, the decree passed therein could not bind him and that Explanation V of s. 13, Civ. Pro. Code, did not apply to such a case, where each undivided member of a joint Hindu family had his own joint proprietary interest along with the rest in the whole of the joint family property. RAMANAND v. KOLESHAR, **A.W.N. 1887, 217**. [*F.*, 10 A. 411.]

(122)—*Suit on ikrar between brothers—Decree against one brother—Subsequent suit by the son of the brother, not barred as* res judicata *by prior suit under ikrar.*—Five brothers executed an ikrar among them according to which certain talooks were to remain in the possession and under the management of one of them. The brother so appointed having refused to give the others their shares of the profits of the talooks, they sued and obtained decrees against him separately for the amount due by him to each of them. Subsequently the son of the managing brother sued one of the other brothers for the sums which his father had been compelled to pay, alleging that it was the defendant that was in possession. The lower Courts found in defendant's favour, holding that the suit was barred under s. 2 of Act VIII of 1859. Accepting the appellant's contention, the High Court *held* that the suit was not barred. The previous suits were decided against the plaintiff's father under the ikrar between him and his brothers, whereas the present suit was by the plaintiff, who was the son of one of the brothers on the allegation that, though his father had been made liable under the ikrar, still, as his father was not in possession of the property by

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——**8.—Parties**—*continued.*

virtue of it, and as that possession was wrongfully held by the defendant who appropriated the rents and profits, he was entitled to bring an action against the defendant for illegally detaining that for which he had been made liable to others. KHETTRONATH DEY v. GOSSAIN DOSS DEY, **7 W.R. 188.**

(123)—*S.* 13, *explanation (v), Civ. Pro. Code,* 1882—"*Right to relief claimed in common*"—*S.* 26—"*Right to any relief claimed*" *in previous suit essential to bar a claim as* res judicata. —Plaintiff alleged that defendants Nos. 2 to 5 (brothers) were reversioners to the estate of the deceased uncle, M and himself, claiming as mortgagee and auction-purchaser of the share of the fifth defendant in the said estate, instituted this suit for partition and recovery of possession of the share from the hands of one S, the first defendant, who denied that the fifth defendant was a reversioner and set up his own title as the adopted son of the said M deceased. A previous suit had been brought by the then plaintiff (present defendants Nos. 2, 3 and 4) as reversioners, along with their brother (present fifth defendant) to the estate of said M, who was the divided brother of their father. The then plaintiff's brother (present fifth defendant) was impleaded as a defendant in the previous suit, on his refusal to join his brothers as a co-plaintiff and he remained *ex parte* in that suit. He, thus, figured then as a co-defendant along with the present first defendant, S, from whom it was sought to recover the entire estate of M inclusive of the fifth defendant's share. S had, then, set up the plea of adoption now put forward by him and the alleged adoption was declared invalid and that suit finally resulted in a decree in favour of the plaintiffs except as to the share of the present fifth defendant, their brother. In the present suit, accordingly, plaintiff contended that the first defendant, S, was estopped by the decision in the previous suit from again relying on the above adoption. In second appeal, the question referred for decision to the Full Bench was whether the present claim of S was *res judicata*. *Held*, the fifth defendant, under whom the plaintiff claims, was not interested in, nor did he derive any benefit from, the relief sought by the plaintiffs in the previous suit. He could not, under that decree, enforce any rights of his own. (3 M.H. C. 217, 7 B.L.R. Ap. 38, 13 C. 352, *R. & F.*) Further, with reference to the shares of the plaintiffs in that suit, it must be said that their brother impleaded by them as a defendant in that suit had no "right to any relief claimed" within the meaning of s. 26 of the Code and could not have been made a co-plaintiff therein. The previous plaintiffs, therefore, could not be held to have "litigated in respect of a right claimed in common" for themselves and their brother, the present plaintiff's vendor and the latter was not a "person interested in such right" within the meaning of explanation V to s. 13 of the Code. The fifth defendant and the plaintiff, his vendee and representative, are not barred by any decision in the previous suit and the first defendant's claim therefore, cannot be held to be barred by *res judicata* under said s. 13, explanation V of the Code. SOMASUNDARA MUDALI v. KULANDAIVELU PILLAI, **28 M. 457=14 M.L J. 404.** (14 M. 324, *Overruled*; 18 M. 164, *Not F.*) [*Diss.*, 102 P. R. 1907=78 P.W.R. 1907; *Expl.*, 30 M. 447=17 M.L.J. 260=2 M.L J. 368; *R.*, 57 P.R. 1907 =66 P.W.R. 1907, 7 M.L.T. 89.]

(124)—*Hindu will.*—A Hindu owner died leaving two nephews as his heirs according to Hindu law. One M, took possession of the estate alleging herself to be entitled to the same under a will made by the deceased. One of the nephews brought a suit against M, to obtain possession of one moiety of the estate, making his brother, who appeared to have refused to join as a co-plaintiff, a defendant in the suit. The Court dismissed the suit, finding the will to be genuine. Subsequently the other nephew brought the present suit for his share as the heir of the deceased. *Held*, that the suit was not barred by the findings of the Court in the previous suit of his brother, as the plaintiff was not a party to the suit, as he could not in any manner have availed himself of a decree in that suit to enforce a claim to his share. NOBIN CHANDRA MAZUMDAR v. MUKDA SUNDARI DEBI, **7 B L.R. 38=15 W. R. 309.** [*R.*, 21 M. 373, 28 M. 457=14 M.L. J. 404.]

(125)—*Act* VIII *of* 1859, *s.* 2—Res judicata —*Adoption pleaded against widow and again as against collaterals—Privity.*—In a suit by a Hindu widow, the defendant pleaded that he had been adopted by her deceased husband, but this plea was found against. In a suit brought by the collateral heirs of the deceased against him, the defendant again raised the plea of adoption. The plaintiffs contended that the finding in the former suit being conclusive, the plea was *res judicata*. *Held* that, there being no privity in estate between the plaintiffs and the widow (as they could not be said to claim by, under, or through her), the judgment in the former suit could not be treated as conclusive between the present parties. FATTEH SINGH v. HAKIM SINGH. **82 P.R. 1874.**

(126)—*Plaintiff no party to the previous case —Decision in the previous case obtained against the widow, how far binding on the plaintiff—Adopted son—Misjoinder.*—In 1893, R and B, fathers of the present defendants, J and G, alleging themselves to be the nearest reversionary heirs of one R. S., instituted two suits for a declaration that R. S. had died intestate and that his widow had only the estate of a Hindu widow in his property. Their cause of action was that the widow had propounded a will alleged to have been executed by her husband in 1890 whereby, if genuine, they were excluded from all chance of inheriting the property. The widow abandoned that will, but set up a will of 1876 in pursuance of

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——8.—**Parties**—*continued.*

which she had adopted the present plaintiff-appellant. The present defendants refused to make him a party to the suit. It was decided in that case that the will propounded by the widow was not proved and that the adoption, although true in fact, was invalid in law The plaintiff then brought this suit claiming the entire property left by R. S. as his adopted son and impleading all persons in possession of the property as defendants. The defendants pleaded the previous decision as *res judicata* on the question of plaintiff's adoption. They also pleaded misjoinder of parties and causes of action. *Held*, that the previous decision was not *res judicata*. The widow did not conduct the previous suit for the benefit of the plaintiff inasmuch as she set up an agreement with the plaintiff's father that he should not be entitled to possession of the estate till her death, and pleaded to the effect that she had full proprietary rights even after the adoption. It was clear that in the previous suit although she did all in her power to make out title for the present plaintiff which would exclude the defendants, she was determined to make it clear that she had lost nothing by the adoption. Therefore, under these circumstances, it could not be assumed as a matter of law that she had defended the suit as guardian of the present plaintiff and the judgment passed in the previous suit, as to the adoption, was not binding on the plaintiff. *Held*, further, that there was no misjoinder. The plaintiff's right to sue for the whole estate in one suit was not affected by the passing of the estate into the hands of other trespassers, and the plaintiff was not bound to trace the property to the different defendants; it was sufficient for him to show a complete cause of action after the adoption and then say that the defendants were in possession of the property. RADHA KISHEN v. JAMUNA PARSHAD, **9 O.C. 339**. (32 I.A. 229, 3 M. I.A. 229, 16 C. 40, 7 M.H.C. 260, 24 C. 831, 25 M. 736, 27 M. 94, 9 M.I.A. 539, 11 C. 186, 6 O.C. 379, 7 M.H.C. 290, 29 C. 871, 23 B. 266, 16 A. 279, 6 C.W.N. 585, *R.*)

(127)—*Suit for possession against widow—S.2, Civ. Pro. Code*, 1859.—Where, in a former suit by a person against his brother's widow, for possession as heir of his deceased brother, it was decided, among other things, that the widow took only a life-interest in certain properties, *held*, in a subsequent suit by his son as reversioner against the same defendant for having certain alienations made by her declared invalid, that the decision in the former suit, as to the nature of the interest the defendant took in her husband's property, was not *res judicata*, as the plaintiff did not claim as heir of his father, the plaintiff in the former suit, but as the heir and reversioner of his uncle, the deceased husband of the defendant. RUDR NARAIN SINGH v. RUP KUAR, **1 A. 734.**

(128)—*Hindu widow — Reversioner's suit after widow's death.*—The failure of a Hindu widow, in a suit by her to recover her husband's estate in the hands of a stranger, will not bar a suit by a reversioner, on the widow's death, to recover the same property unless and until it is shown that the first decree was obtained after a fair trial of the right so as to bind not only the widow but also the reversioners. BRAMMOYE DASSEE v. KRISTO MOHUN MOOKERJEE, **2 C 222.** [*D.*, 11 B. 19; *R.*, 5 Bom. L.R. 885.]

(129)—*Suit though concerning absolute estate determined on ground personal to a Hindu widow—Decree in such a case not binding on reversioner.*—When a suit, though concerning the absolute estate, is determined upon a ground personal to the widow—*e.g.*, in a suit brought by her to recover possession of immoveable property appertaining to her husband's estate is dismissed on the ground of its having been alienated by her in favour of the defendant, in the absence of legal necessity being shown—the decree in such a case ought not to bind the reversioner. BRAJA LAL SEN v. JIBAN KRISHNA ROY, **26 C. 285.** [*Affr.*, 30 C. 550, P.C.; *R.*, 36 C. 753.]

(130)—Res judicata—*Hindu widow—Deed of gift—Parties to suit—Cause of action.*—In 1862, plaintiff brought a suit against a Hindu widow and other defendants, in which he stated that certain properties, X, Y and Z, belonging to him, had been given to the widow for her life, for maintenance; and that she had alienated X and Y to the other defendants. The plaintiff prayed that the deed of gift might be delivered up to be cancelled; that possession of X might be given to him; and that any alienation of Y might be restrained. No further mention was made of Z; no relief was asked respecting it, nor any assertion made that the widow had improperly dealt with it, or that the defendants were in any way connected with it; and the suit was dismissed as regards Z. After the widow's death, plaintiff again sued, for possession of Z, parties who claimed under the defendants in the previous suit against the widow. *Held*, reversing the decision of the High Court of Judicature at Madras, that the second suit was not barred as on a cause of action which was *res judicata*. A suit for recovery of possession of immoveable property, is not barred by virtue of a previous suit, under s. 2, Act VIII of 1859, where the relief sought was to restrain defendants from committing waste. THE ZAMINDAR OF PITTAPURAM v. THE PROPRIETORS OF THE MUTTA OF KOLANKA, **2 M. 23, P.C.=3 C.L.R. 265=3 Sar. 850=5 I.A. 206.**

(131)—*Decree against remote reversioner—Subsequent suit by him as next reversioner on the presumptive heir predeceasing female holder.*—The decree, in a suit by a Hindu widow and her son, who was the then presumptive heir to the property in suit, against a remoter reversioner, would not operate as *res judicata*, in a subsequent suit for possession by such remoter

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——**8.—Parties**—*continued.*

reversioner as next reversionary heir on such widow's son predeceasing her. RAMCHUNDER PODDAR v. HARI DASSEN, **9 C. 463.**

(132)—*Widow heiress-at-law of her deceased husband, not representing husband's estate, in the presence of the will left by him—Effect of decision obtained against widow.*—Where a widow, though the heiress-at-law of a deceased husband does not represent the estate of the husband in a suit (for instance, where the latter has left a will appointing an executor), a decision obtained against her (the widow) will not operate as *res judicata* against the reversioners. CHUKKEN LAL ROY v. LOLIT MOHUN ROY, **20 C. 906.** (9 M.I.A. 539, *D.*)

(133)—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* V—*T. P. Act* (IV of 1882), *s.* 85—*Mortgage—Suit for redemption—Suit to redeem by alleged karnavan of Malabar Tarwad—Subsequent suit for redemption by junior members--Bar of suit--*Res judicata — *Karnavan disputing title of junior members.*—The Karnavan of a Malabar Tarwad sued for redemption and obtained a decree. In ignorance of his suit and *before he had obtained the decree*, the junior members filed another suit for the redemption of the same property with the permission of the Court under s. 30, Civ. Pro. Code. In the first suit, however, the karnavan did not implead the plaintiffs in the latter suit and even disputed their title as members of his tarwad. *Held*, that the second suit was not barred by reason of *res judicata*, and that Expl. 5 to s. 13 of Act XIV of 1882 did not apply. MARATTIL MOOSA v. NAMPOTAN KANDYIL, **8 Ind. Cas. 129=8 M.L.T. 445.**

(134)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13—*Joint Hindu family—Suit by one member for redemption—Second suit by other members.*—The sons in a joint Hindu family governed by the *Mitakshara* become, by birth and in their own right, entitled to the family property. They can enforce this right against their father and do not claim under him within the meaning of s. 13, Civ. Pro. Code. A person is said to claim under another, when he derives his title through that other, by assignment or otherwise. (10 A. 411, *R.*) Hence, where, in a previous suit for redemption brought by the father, the sons were not arrayed as parties, a second suit, by the sons, for the redemption of their shares in the property, would not be barred. SUNDER LAL v. CHHITAR MAL, **3 A.L.J. 644=A.W.N. 1906, 242=29 A. 1.** [*R.*, 29 A. 215=A.W.N. 1907, 25 ; *Discuss.*, 7 A. L. J. 945.]

(135)—*Civ. Pro. Code*, (*Act* V *of* 1908), *s.* 11—Res judicata—*First suit by subsequent mortgagee—Prayer for redemption of prior mortgage—No relief granted—Prior mortgagee party—Second suit by prior mortgagee—Not barred.*—Certain property was mortgaged to G in 1890 and again to R in 1897. In 1897 R brought a suit on his mortgage admitting the prior mortgage and offering to redeem it. G did not

Res Judicata—continued.

——**8.—Parties**—*continued.*

appear. A decree was passed in favour of R but no mention was made of G's mortgage in the decree. The property was sold and purchased by J. The representatives of G then brought this suit for sale upon the mortgage of 1890. *Held* that the claim of the prior mortgagee having been admitted in the suit of the subsequent mortgagee, there was no occasion for him to appear and prove his claim and the suit is therefore not barred by the rule of *res judicata.* AJODHIA PANDE v. INAYAT ULLAH, **11 A.L.J. 57=35 A. 111=18 Ind. Cas. 21.** (29 M. 84, (1912) M.W.N. p. 41, *F.* ; 24 A. 429, 30 M. 353, 31 A. 428, *D.*)

(136)—Res judicata—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2, *and Act* XIV *of* 1882, *s.* 13, *Explanation V—Foreclosure proceedings under Regulation* XVII *of* 1806—*Suit for redemption after expiry of year of grace.*—The land in suit was mortgaged by the father of the plaintiff to the defendants. Proceedings for foreclosure were taken in 1865, before Regulation XVII of 1806, was brought into force in the Punjab which was done in 1872. Kale Khan, a brother of the plaintiff, sued for the redemption of the mortgage after the year of grace had expired. On appeal, the Chief Court decided (21 P.R. 1870) that the suit was not maintainable in face of the foreclosure proceedings, but the mortgagee must bring a suit to complete his title, and that in that suit the plaintiff Kale Khan would be able to raise any objection to the foreclosure proceedings or any defence on the merits, which could be raised during the year of grace. In that suit, objection was taken for the defence that Kale Khan was only one of the four sons of the mortgagor and the others were not made parties. Kale Khan submitted that he would put in a Mukhtiarnama for his brother, the present plaintiff, or produce him in person, and stated that the suit was brought on behalf of the other sharers also and with their consent, but it appeared the present plaintiff never appeared in Court, and that no formal notice was ever served on him. Later on, the present plaintiff with others sued for a declaratory decree that the mortgage still subsisted, but the suit was dismissed and the Court remarked that if the plaintiff was not bound by the former decision (21 P.R. 1870), he could bring a suit for redemption. The present plaintiff brought a suit for redemption. *Held*, that the suit was not barred by the doctrine of *res judicata* as laid down in s. 2, Civ. Pro. Code, Act VIII of 1859, which governed the case, on the ground that the present plaintiff was not a party to the first suit and he had no notice of it. *Held*, further, that the suit for redemption by the present plaintiff was maintainable ; the Court observed that the foreclosure proceedings being merely ministerial and carrying no final judicial sanction, it is open to a mortgagor to bring a suit for redemption after expiry of the year of grace, and that he would be entitled to a decree, if he proved his claim on the merits, and that the

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—— 8.—**Parties**—*continued.*

foreclosure notice was for any reason not good or conclusive against him or for other sufficient cause. GURDITTA MAL v. SANDHI KHAN, **P.L.R. 1900, p. 241=27 P.R. 1900.** (75 P.R. 1883, *R.*)

(137)—*Suit for possession—Previous mortgage, suits to which plaintiff not a party—Suit not barred.*—In a suit by the plaintiff to recover from the defendants his share in a house in their possession, it was found that in a previous suit on a mortgage created on the house two years previously, plaintiff had not appeared and joined to assert his claim, nor was made a party. *Held* that this alone would not prevent the plaintiff from having his claim to the house re-investigated now, though his reticence then may be a piece of evidence against his right. SADHU RAM v. HOSHNAK, **6 P R. 1866.**

(138)—*Decision against one heir—Effect on other heirs*—Res judicata—*Judgment—Strangers.—Independent title.*—Decisions against one heir are not final or binding against other heirs. It is impossible in this country to admit the proposition that decisions against one person are in any way conclusive or binding against other persons who do not derive their title from such person and who come into Court upon an independent title or independent rights of their own. ABDOOL GUFFOOR KHAN CHOWDHRY v. GHOLAM NUJUF, **16 W.R. 298.**

(139)—*Mahomedan widow in possession in lieu of dower—Mortgage by widow—Suit by heir for possession* — Res judicata. — A Mahomedan widow in possession of her deceased husband's property in lieu of her dower, made a mortgage of it. The plaintiff brought a suit for his share of the property as heir of the deceased on payment of his share of the dower debt, and for cancellation of the mortgage-deed. The suit was dismissed on the ground that the plaintiff was not entitled to possession until he paid the whole dower, as well as his share of the mortgage-debt which was found to be valid. The plaintiff now sued for possession of his share on payment of the whole dower and of his share of the mortgage-debt. The suit having been dismissed by the lower appellate Court as being barred by *res judicata, held* by the High Court that this decision was wrong. The present suit proceeded entirely upon the basis of the decree passed in the previous suit, and it was upon the basis of the conditions of that decree that the plaintiff brought the present suit. IMAM BAKHSH v. CHANDO, **A. W.N. 1886, 69.**

(140)—*Parties claiming under—Negligence of guardian—"Gross negligence," what.*—Where there are valid grounds for appeal, the omission by the mother who was the guardian *ad litem* of a minor to appeal was gross negligence. Every case must be judged by its own facts. Where there is such gross negligence, the minor is not bound by the decree. The Court has power to go into previous proceedings and find

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—— 8.—**Parties**—*continued.*

out whether the guardian was guilty of laches or fraud. AHMAD ALI SHAH v. AMIR SHAH, **35 P.R. 1898.**

(141)—*S.* 2, *Act* VIII *of* 1859—Res judicata—*What constitutes, minority.*—Before s. 2, Act VIII of 1859, can be pleaded in bar of a suit, it is necessary to show that the cause of action is the same as that which was heard and determined in a previous suit between the same parties or those claiming through them. The plaintiff in this suit was a minor when previous proceedings were taken, and he was not represented by a guardian *ad litem.* Though the proceedings were nominally either by or against him in conjunction with his father, he was never properly before the Courts so as to be enabled to exercise jurisdiction over his property or rights. The interests of his father are not the same as his ; and a natural guardian is not *ipso facto* a guardian *ad litem* of his infant. A decree passed against the infant and his father in such a suit could not therefore bind the infant, and he was not debarred from setting it aside when he attained his majority. KAUR SEIN v. MUSSAMUT SAMIRO, **66 P. R. 1873.**

(142)—*Parties claiming under — Guardian and minor.*—A minor cannot, in the absence of any proper representation, be held bound by a suit, the very nature of which he is incapacitated by his non-age from comprehending or taking part in, unless duly represented. GURDIT SINGH v. MUSST. CHANDO, **38 P.R. 1897.**

(143)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Minor defendant—Neglect of guardian* ad litem.—The plaintiff sued the defendant under the guardianship *ad litem* of his mother. No order constituting her as such was passed by the Court. She filed a written statement but did not enter appearance afterwards and the case was decreed *ex parte.* An appeal by a person said to be a relation of the defendant was rejected. *Held,* that the minor defendant was not bound by the decree passed against him, for, he was not properly represented in the previous suit. MANGAL v. BUTA, **4 P.L.R. 1901.** (22 C. 8 and 35 P.R. 1898, *F.*)

(144)—*Reg.* XXVI *of* 1793, *s* 3—*Proprietors of estates paying revenue—Age of majority—Act* VIII *of* 1859, *s.* 2—*Common cause of acton and material issues.*—It was urged by the special appellant in this case that plaintiffs were not proprietors under s. 3, Reg. XXVI of 1793, because they did not hold estates permanently settled paying revenue to Government and that, therefore, 18 years were not required to complete their majority. But the High Court concurred with the lower appellate Court in holding that s. 3, Reg. XXVI of 1793, does not contemplate any thing more than payment of revenue direct to Government without reference to whether the settlement of the estate was temporary or permanent. The other plea raised in this appeal, *viz.*, that the case was governed by s. 2 of Act VIII of 1859, *i.e.*, that

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——**8.—Parties**—*continued.*

it had been already decided and was consequently *res judicata*, was also held by the High Court to be untenable because, neither the subject-matter nor the cause of action in the two suits were identical, nor had the parties to the former suit actually contested any thing in that case which could be legally considered to be the same as the subject of contest in the present case. HURO MONEE DEBIA v. TUMEEZOODEEN CHOWDHRY, **7 W.R. 181.**

(145)—Res judicata—*Reservation of intervenor's right*—Obiter dictum.—In a former suit against a party and his vendee, in which an intervenor was made a defendant, plaintiffs obtained a decree with a reservation of the intervenor's rights, but there was no distinct finding as to what those rights were, and no decree was made regarding them. *Held* that, the reservation being a mere *obiter dictum*, the decree was not *res judicata* in the present suit by a purchaser from the intervenor against the said vendee. BUKSH ALI v. NITTYANUND DOSS, **5 W.R. 227.**

(146)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Defendant only an intervenor in previous suit—Purchaser wrongfully kept out of possession Title.*—Where the defendant appeared in the former suit as an intervenor, and was made a party and plaintiff's claim was dismissed as against him, s. 2, Act VIII of 1859, does not bar a subsequent suit by the same plaintiff against the same defendant to recover possession on the ground of purchase from the admitted owners, the causes of action in the two suits being different. The mere fact that, in consequence of the wrongful act of the vendors, the purchaser cannot obtain possession of the property, does not in any way affect his title to it. MUSSAMUT TUKHEA v. DEO NARAIN SINGH, **24 W.R. 248.**

(147)—Res judicata—*Act* VIII *of* 1859, *s.* 2—*Suit against surety.*—Where plaintiff has obtained a decree for rent in a suit in which defendant's surety from whom a bond had been taken was made a nominal defendant: *Held* that his present suit against the surety is not barred by s. 2, Act VIII of 1859, being on a bond never previously before a Court. RAMTANU ACHARJI v. KOMAL LOCHAN ROY, **3 B.L.R. App. 37=11 W.R. 407.** [*F.*, 9 C. 383=12 C.L.R. 577.]

(148)—*Jurisdiction — Collector —Estoppel—Question referred not arising in case.*—The Revenue Courts have no jurisdiction to try a suit for rent when the issue is not merely whether the defendant, by reason of his own possession or that of his agent, *e.g.*, (one who holds for him *benami*), is in the position of tenant, and as such liable for the rent, but whether, by reason of his having a beneficial or equitable interest of some sort in the tenure, he is in equity liable to be charged with the rent. It was not the intention of the Legislature by Act X of 1859 to empower the Collector to try questions relating to rent depending

Res Judicata—continued.

——**8.—Parties**—*continued.*

upon equitable rights or liabilities arising from circumstances other than those of the relationship of landlord and tenant. If a Zemindar sues an agent for rent due from an estate, this is no bar to the Zemindar afterwards suing the principal for rent subsequently accrued due. But he cannot in the same suit sue both the principal and the agent: he must elect which of them he will proceed against. PROSONOCOOMAR PAUL CHOWDHRY v. KYLASH CHUNDER PAUL CHOWDHRY, **B.L R. Sup. Vol. 759=8 W.R. 428=2 Ind. Jur. N.S. 327.** [*F.*, 9 W.R. 71, 11 W.R. 120, 11 W.R. 406, 18 W.R. 8, 18 W.R. 35, 9 C. 383; *R.*, 11 B.L.R. App. 31 note=13 W.R. 390, 20 C. 116; *D.*, 5 B.L.R. 234=14 W.R. 12, 16 W.R. 82.]

(149)—*Civ. Pro. Code* (*Act* X *of* 1877), *s.* 13—Res judicata—*Lessor and lessee—Ejectment suit by lessee.*—After the dismissal of a suit for ejectment brought by B's lessee against the defendant, a second suit for ejectment was brought in respect of the same property by a person who obtained title to the property on the death of B. *Held* that the principle of *res judicata* did not apply, as a lessor cannot, within the meaning of s. 13 of the Civ. Pro. Code, be considered a party claiming under his own lessee. RAMBROHMO CHUCKERBUTTI v. BUNSI KURMOKAR, **11 C.L.R. 122.**

(150)—*Ss.* 101, 102, *Act* VIII *of* 1885 (*Bengal Tenancy*) — *Decision by Revenue officer under Ch.* X, *Bengal Tenancy Act—Subsequent civil suit between same parties concerning title to land.* —Res judicata. — A decision by a Revenue Officer under Ch. X, Act VIII of 1885, as to which of two persons claiming to be tenant ought to be recorded as such, *held*, not to operate as *res judicata*, in a subsequent suit in a Civil Court between the same parties with respect to the title to the land. PANDIT SARDAR v MEAJAN MIRDHA, **21 C. 378.** (21 C. 38, *R.*; 17 C. 721, *D.*) [*F.*, 8 C.W.N. 741.]

(151)—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 106.—The plaintiffs initiated proceedings under s. 106 of the Bengal Tenancy Act against landlord and defendants Nos. 2 to 9 who claimed to be rival tenants of the land, to have their names recorded as tenants in the settlement proceedings. The Settlement Officer held that the plaintiffs were the tenants. The landlord did not appeal. In the appeal by the other defendants, Nos. 2 to 9, to the Special Judge making the plaintiffs and the landlord respondents, the Judge reversed the decision and held that defendants Nos. 2 to 9 were the tenants, and their names were ordered to be registered. *Held*, that the decision of the Special Judge was a decision between the plaintiffs and defendants Nos. 2 to 9, but not a decision between the plaintiffs and the landlord so as to operate as *res judicata* in a subsequent suit brought by plaintiffs to have their rights declared as tenants of the land. MOHUNT JAGAN-

Res Judicata—continued.

——**8.—Parties**—*continued.*

NATH RAMANUJ DAS v. CHANDRA KUMAR BOSE, **5 C.W.N. 421.** (21 C. 378, 12 C. 580, *R. & Appr.*)

(152)—*Ijaradars — Occupancy ryots—Ejectment—Suit by zamindar for rent*—Res judicata.—Certain persons holding an ijara from the zemindar sued to eject the ryots actually in possession of the lands in the zamindari. It was decided that the ryots had acquired a right of occupancy, and the plea that they were holding the lands rent-free was disallowed. In a subsequent suit by the zamindar to recover rent from the tenants, *held* that the former suit was binding on the parties, and had established the relationship of landlord and tenant between the zamindar and the tenants, empowering the former to collect rent from the latter. SUROOP SIRDAR v. MAHARAJAH BEER CHUNDER MANIKHYA, **25 W.R. 370.**

(153)—*Suit against one sharer by mistake—Release of the other sharer's share from attachment — Second suit against both sharers.*—Where one only of two co-sharers of joint property, which had been pledged for a debt by such sharer, was sued, through ignorance of the position of affairs, and the other co-sharer was able, in consequence, to get her share of the property released from attachment in execution-proceedings, *held* a second suit by the judgment-creditor against both sharers, for the purpose of making the released share also liable for the debt, would not be barred as *res judicata.* NOBIN CHANDRA ROY v. MAGANTARA DASSYA, **10 C. 924.** [*F.*, 16 M. 449 ; *R.*, 23 C. 302, 22 A. 307.]

(154)—*Decision between ryot and co-sharers—Dispute between co-sharers—Evidence.* A decision between a ryot and a body of co-sharers is no evidence as between the several co-sharers *inter se.* NOBIN CHUNDER DOSS v. NIMCHAND DOSS, **17 W.R. 191.**

(155)—*Civ. Pro. Code, s.* 13, *expl.* 5 (*of* 1877) —*Co-sharers.*—Expl. 5 to s. 13 of the Civ. Pro. Code would not make a judgment against a co-sharer, obtained in a suit to which another co-sharer was no party, binding against other in respect of common rights enjoyed by both in common property. The explanation would not also apply to a judgment under the repealed Code of 1859. HAZIR GAZI v. SONAMONEE DASSEE, **6 C. 31=6 C L.R. 516.** [*Appr.*, 6 M. 121; *R.*, 16 C.P.L.R. 161, 6 A.L.J. 527.]

(156)—*Civ. Pro. Code*, 1882, *s.* 13, *Exp.* II—Res judicata—*Civ. Pro. Code, s.* 244, *cl.* (*c*).—G. A. (plaintiff) and A.B. were co-sharers in a village. In July 1880, A.B. made a gift of certain lands in the village to W (defendant). The latter sued the former for a declaration of her title to the lands. On the 21st October 1881, a decree was passed in her favour on the basis of a compromise, for certain other lands in the village in lieu of those originally given to her. After the death of A.B in November 1884, W brought a suit against her heirs and G.A. for possession of the land specified in the decree of the 21st October, 1881, and certain other lands specified in the deed of gift and on the 10th March, 1891, obtained a decree for possession of the lands specified in the decree of the 21st October, 1881. In that suit, G.A raised the question whether any rights which he might acquire under a partition between himself and the heirs of A.B, would be affected by any decree which W might obtain. The question was not tried. Before the suit last-mentioned was brought, the heirs of A.B. had applied for partition of the village as against G. A ; and, under the partition, a portion of the lands specified in the decree of the 21st October, 1881, was allotted to G.A of which he obtained possession in 1891 ; W., in execution of her decree, dated the 10th March, 1891, obtained possession of this land, G.A.'s objections having been dismissed. In February, 1896, G.A. instituted a suit against W. and the heirs of A.B. for possession of the lands allotted to him under partition. *Held*, that the question as to G.A.'s title to the lands was not *res judicata* under s. 13, expl. II, Civ. Pro. Code. *Held* that as the decree dated the 10th March 1891, was not passed against G.A., he must be deemed to have been released from the operations of that decree, and that he, therefore, ceased to have any interest or concern in the suit, and that when W. applied for the execution of that decree, G.A. was not a party to the suit in which the decree was passed, within the meaning of s. 244, cl. (*c*), Civ. Pro. Code. *Held*, therefore, that the suit was not barred by the provisions of s. 244, Civ. Pro. Code. *Held*, that W. held the lands, awarded by the decree dated the 10th March 1891, subject to such rights as A.B.'s co sharer G.A., might acquire in them on partition of the village. *Held*, therefore, that when the lands in dispute were allotted to G.A. under the partition. W. ceased to have any interest in them. WILAETI v. GULAM ALI KHAN, **2 O.C. 51.** [*R* , 9 O.C. 65.]

(157)—*Issue as to tenure of village—Suit by one against rest of village community—Determination of issue whether* res judicata *as amongst defendants—Jurisdiction of Civil Courts—Village lands, partition of—Suit claiming proprietary rights based on possession.*—When a common question, such as the tenure of a village community arises between the members of a community, and one of such members sues the rest, the determination of such common question will not bind all the defendants as *res judicata* so as to bar the question being raised among themselves in a subsequent suit, unless they have been distinctly at issue on the point in the suit and acting as opposite parties, and the order made is one affecting the rights of the defendants among themselves. (*D.*, 27 P. R. 1883, 57 P.R. 1907, 121 P.R. 1880.) A suit by a member of a village community Court which raised the question whether in the partition of a village, ancestral shares or possession should be the measure of right, is one of a nature whose cognisance by the Civil Court was

Res Judicata—continued.

——**8.—Parties**—*continued.*

not barred by s. 65, cl. 3 of the Punjab Land Revenue Act XXXIII of 1871. GHISA v. RANJIT, **121 P.R. 1880, F.B.** [*Appr.*, 99 P.R. 1905=46 P.L.R. 1906.]

(158)—Res judicata—*Previous suit not between same parties—No bar.*—A was recorded proprietor of certain land and B brought a suit to recover it from him and obtained judgment. It was found afterwards that C was recorded as proprietor. In a subsequent suit by C against B it was contended that as the claim had already been adjudicated upon, no fresh suit would lie. *Held* that the order in the previous suit was based on a misconception. It was therefore reversed as well as the order in the subsequent suit, and the case remanded for re-trial. LEHNA v. HUMEERA, **97 P.R. 1866.**

Decree annulling illegal sale not—Secretary of State not a necessary respondent—*See* BEN. ACT XI OF 1859, ss. 3, 8, 33, 25 C. 833, P.C.=25 I.A. 151=2 C.W.N. 513.

Claim based on title for possession of immoveable property—Right of Benamidar to sue in his own name—*Res judicata—See* BENAMI TRANSACTION—GENERAL, 18 A. 69=A.W.N. 1895, 160.

See CIV. PRO. CODE, 1908, s. 60, A.W.N. 1883, 9.

See DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 8 A. 365=A.W.N. 1886, 129.

Hindu Law—Property held by widow as lifetenant—Decree against widow not binding on reversioner if collusive—Right of daughter as reversioner on alienation by widow—*See* DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 8 A. 429=A.W.N. 1886, 153.

See HINDU LAW—JOINT FAMILY, A.W.N. 1893, 168.

Hindu Law—Estate in possession of widow—Decree in suit by some of the reversioners contesting alienation by widow, if *res judicata* against other reversioners—*See* HINDU LAW, REVERSIONERS, 22 A. 382=A.W.N. 1900, 118.

Between co-defendants—*See* HINDU LAW—WIDOW, 5 A.L.J. 367=A.W.N. 1908, 173=30 A. 394.

Decree for rent—Relationship of landlord and tenant—*Res judicata—See* LANDLORD AND TENANT—GENERAL, 10 Ind. Cas. 363.

Civ. Pro. Code, s. 13—*Res judicata*—Under whom they or any of them claim—Mortgagee not representative of mortgagor—S. 13 of the Civ. Pro. Code, must be interpreted as if, after the words "under whom they or any of them claim," the words, "by a title arising subsequently to the commencement of the former suit" were inserted—*See* MORTGAGE—GENERAL, 8 A. 324=A.W.N. 1886, 101.

Suit for redemption instituted by the head of a joint family dismissed—Subsequent suit for redemption by other members whether barred by rule of—*See* MORTGAGE—REDEMPTION, 8 O.C. 233, B.

Res Judicata—continued.

——**8.—Parties**—*concluded.*

Decree against Karnavan—Suit by Anandravan—*Res judicata—See* PARTIES TO SUIT—ADDING PARTIES TO SUITS, 10 M. 322.

Partition suit—Parties in subsequent suit arranged on same side in previous litigation—Effect—*See* PARTITION—GENERAL, 7 A.L.J. 451=6 Ind. Cas. 692=32 A. 469.

Suit by mirasidars against co-mirasidars for partition—Former decree declaring impartibility of lands of village, binding nature of—*See* PARTITION—RIGHT TO PARTITION, 4 M.H.C. 285.

See POSSESSION—SUITS FOR POSSESSION, 7 O.C. 122.

——**9.—Relief not granted.**

(1)—*Former suit—Relief sought and refused—Second suit.*—A second suit does not lie for relief sought and refused in the former suit the decree wherein stands unreversed. SARDAR WASAWA SINGH v. AMIR, **79 P.R. 1887.**

(2)—*Decision on erroneous view of law*—Res judicata.—A decision is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved. GOWRI KOER v. AUDH KOER, **10 C. 1087.** [*F.*, 1 C.W.N. 687, 28 C. 318, 14 C.P.L R. 109; *R.*, 2 O.C. 261, 5 O.C. 181, 8 O.C. 37, 44 P.R. 1908; *D.*, 1 C.L.J. 176=9 C.W.N. 466=32 C. 749.]

(3)—*Civ. Pro. Code*, 1859, ss. 2, 7—*Omission to suit for portion of claim.*—The omission to sue for portion of a claim is fatal to a subsequent suit for the portion omitted. *N.B.*—In this case leave was granted to the plaintiffs to apply to the Court below for a review of the decree passed in the former suit. VYASRAV BALAJI v. SUBHAJI NARAYAN, **5 B.H.C.A.C. 173.**

(4)—*Civ. Pro. Code*, 1882, *s.* 158—*Dismissal of suit under this section, effect of—Gift of land out of holding to absentee relation—Whether* shamilat *included—Intention of parties—Status of full proprietor.*—The dismissal of a suit under s. 158 of the old Civ. Pro. Code, operates as *res judicata* in respect of the right of the plaintiff to recover by any subsequent suit the property sued for in the first suit. The ancestors of the plaintiffs and defendants originally owned a joint holding in equal shares. The plaintiff's branch, however, remained absentees for a long time. Their suit to recover their half share of the holding and of *shamilat* was dismissed in 1891. In 1897 defendants voluntarily gifted about 29 beghas to the plaintiffs out of the original holding. This area constituted about 1/5th share of the whole holding. On a subsequent partition of the *shamilat* land, the area falling to the share of the holding was allotted to defendants without giving plaintiffs any share. Plaintiffs thereupon sued for possession of one-half share of the *shamilat* area

Res Judicata—continued.

——9.—**Relief not granted**—*continued.*

allotted to defendants. *Held* (1), that plaintiffs were not entitled to one-half share, as their suit for the *shamilat* was dismissed in 1891; (2) that, in considering whether the gift to plaintiffs in 1897 included the corresponding share of *shamilat*, what the Court had to look to was the intention of the parties, and as the mutation proceedings showed that plaintiffs were restored to the position of full proprietors in respect of 1/5th share in the holding, they were ent tled to 1/5th share in the *shamilat* allotted to the holding. MUHAMMAD v. MUSSAMMAT IMAM KHATUN, **25 P.L.R. 1912 =37 P.W.R. 1912.** (113 P.R. 1902, 34 P.L R. 1902, *D.*)

(5)—*Suit to enforce a document—Decision relating to the document in a former suit between the parties.*—Where the suit was brought to enforce a document, which was held in a former suit to have no effectual binding power over the estate in question and not to affect it in any way as between the parties, *held* that the suit was barred by the rule of *res judicata.* DURGA PRASAD LAHIRI CHOWDHURI v. SRIMATI SASHIBALA DEBI, **M.W.N 1912, 73, P.C.=9 A.L.J. 165=15 C.L.J. 180=14 Bom. L.R. 177=16 C.W.N. 603=14 Ind. Cas. 463.**

(6)—*Appeal—Judgment conclusive--Pendency of appeal—Stay of execution—Review.*—A judgment of a Court of competent jurisdiction upon the same cause of action is conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding the pendency of an appeal against it; but if the Judge passes a decree in the subsequent suit for the plaintiff, he may, upon application, stay the execution of it, until the appeal is decided, and if the decree in the former suit should be reversed, he may entertain an application for the review of his own decision in the subsequent suit. BULKIRAM NATHURAM v. THE GUZERAT MERCANTILE ASSOCIATION, LIMITED, **4 B.H C.A. C. 81.**

(7)—*Suit for possession—Proper issue left untried—Fresh suit — Special appeal.*—In a suit to recover lands to which the plaintiff is entitled, if the Court gives him a decree for such lands without trying the proper issue, the proper course for the defendant is to appeal specially to the High Court and not to bring a fresh suit for the determination of the issue which was left untried in the former suit. JUGGESSUR NUNDEE v. CHUNDER GOBIND SINGH, **9 W.R. 524.**

(8)—*Civ. Pro. Code, s.* 13—*Suit for maintenance—Prayer for future maintenance,* res judicata—Where a person entitled to maintenance not contended with asking for a declaratory decree has asked for a decree relating to future maintenance, he cannot thereafter bring a separate suit to recover arrears of maintenance even though the former decree omitted to specify any fixed date for the annual payment

Res Judicata—continued.

——9.—**Relief not granted**—*continued.*

of such maintenance. VENKANNA v. AITAMMA, **12 M. 183.** (7 M. 80, *D.*) [*F.*, 22 M. 175; *R.*, 4 M.L.T. 330.]

(9)—*Expl.* 3, *s.* 13, *Act* XIV *of* 1882, *Civ. Pro. Code—Prior suit for possession and mesne profits*—Ex parte *decree for possession only—Subseqent suit for same mesne profits and for mesne profits for a subsequent period.*—The decree in a prior suit for recovery of possession and for mesne profits prior to the institution of the suit awarded possession, but was silent as regards mesne profits. Whereupon the plaintiff brought a subsequent suit wherein he claimed both mesne profits prior to the institution of the first suit and also mesne profits for a period subsequent to that suit, *held*, that the claim for mesne profits prior to the institution of the first suit was barred. (17 C. 968, *D.*) [*R.*, 21 A. 425=A.W.N. 1899, 153, 25 B. 115; *D.*, 5 C.L J. 192=34 C. 223]. There is neither reason nor authority for saying that Expl. 3, s. 13, is meant only to bar so much of the claim as is expressly dealt with in the judgment but is not referred to expressly in the decree. If any matter is expressly dealt with in the judgment, the principle of *res judicata* would apply to it, notwithstanding that the decree does not refer to it expressly. If the object of Expl. 3 was merely to prohibit the trial in a second suit of an issue already tried and determined in a former suit notwithstanding the absence of any allusion in the decree to the matter so dealt with, Expl. 3 might as well have not been given. JIBAN DAS OSWAL v. DURGA PERSHAD ADHIKARI, **21 C. 252.** [*R.*, 21 A. 425=A.W.N. 1899, 153; 25 B. 115; *D.*, 5 C.L.J. 192=34 C. 223].

(10)—*Question advisedly left undecided in prior suit.*—Where, in a prior suit, the Courts, finding themselves unable to come to a decision, by reason of errors of form in the frame of the suit, refrained from deciding the main point in the case and left it to the plaintiff to bring a fresh suit properly framed, such question, having been advisedly left undecided in the former suit, could not be said to have been *heard* and *finally decided* within the meaning of s. 13 of the Civ. Pro. Code, and would not be *res judicata.* RAM CHARAN BUHARDAR v. REAZUDDIN, **10 C. 856.** [*R.*, 14 B. 31; 3 O.C. 273; *D.*, 25 B. 115.]

(11) *S.* 13, *Expl.* 3, *Act* XIV *of* 1882 (*Civ. Pro. Code*)—*Termination of suit by the plaintiff being allowed to withdraw it without leave to bring a fresh one, effect of*—Expl. 3 of s. 13, Civ. Pro. Code, contemplates a decree being passed, which does not expressly grant the relief claimed. Where a suit terminated, by the plaintiff being permitted to withdraw it without leave to bring a fresh one, *held*, that it did not bar a subsequent suit in which the same matter was in issue. KAMINI KANT ROY v. RAM NATH CHUKKERBUTTY, **21 C. 265.**

Res Judicata—continued.

——9.—**Relief not granted**—*continued.*

(12)—*Act* VIII *of* 1859, *s.* 97, *proceeding striking off suit not a withdrawal under—Suit struck off without determination cannot bar subsequent suit as* res judicata.—The previous decision which the defendant in this suit set up as estopping the plaintiff from proceeding with the present suit was not a decision in favour of the other party, but one merely recording that, as the process of the Court could not reach one of the defendants, the Court, for that reason, put an end to the suit. The defendant could therefore not avail himself of such judgment by way of a plea of *res judicata*, since there was no determination in favour of one party or the other. It was sought to treat the case as one of withdrawal under s. 97 of Act VIII of 1859, but, as plaintiff in that suit never withdrew from the suit either with or without the leave of the Court, s. 97 was held to have no application. LUCKHEE RAM DOSS v. JOY SUNKUR GOOHO, **7 W.R. 236.** [*R.*, 6 B. 482.]

(13)—*Matter decided by lower Court, not dealt with by appellate Court.*—When the decision of a lower Court is appealed to a superior tribunal, and that tribunal for any reason does not think fit to decide the matter it is left an open question, and the matter will not be *res judicata* in a subsequent suit. CHUNDER COOMAR MITTER v. SIB SUNDARI DASSEE, **8 C. 631=11 C.L.R. 22** [*R.*, 5 C.L.J. 653; *D.*, 4 N. L.R. 98.]

(14)—*Special appeal rejected—Findings of lower Court—Effect.*—In a special appeal, the general affirmation of a judgment below can only be on the points raised by the special appellant. By rejecting a special appeal, it does not follow that the High Court necessarily affirms all the other findings of fact or of law which the lower appellate Court may have incidentally come to. SHAIKH AHMED HOSSEIN v. MUSSAMUT BANDEE, **15 W.R. 91.**

(15)—Res judicata—*Question raised but not decided in previous suit—Title—Leave to bring fresh suit.*—In a suit between A and B, a question of title was raised and decided in B's favour in the Court of first instance, but, on appeal, the Judge refused to go into it, saying that B might bring a fresh suit. *Held* that a subsequent suit by B raising the same question was not barred as *res judicata.* EMAMOODEEN SOWDAGHUR v. SHAIK FUTTEH ALI, **3 C.L.R. 447.** (12 W. R. 43, P.C., *D.*) [*R.*, 3 O. C. 273, 2 O.C. 303.]

(16)—*Civ. Pro. Code*, 1882, *s.* 108—Ex parte *decree, dismissal of application to set aside—Suit to set decree aside on ground of fraud, maintainability of.*—An application made by the present plaintiff under s. 108 of the Civ. Pro. Code, to set aside an *ex parte* decree obtained against him by the defendant was dismissed on the ground of limitation. He thereupon brought the present suit for a declaration that the *ex parte* decree and the proceedings relating to it were null and void as having been obtained by the exercise of fraud. The decree

Res Judicata—continued.

——9—**Relief not granted**—*continued*

of the Court of first instance dismissing the suit as not maintainable was set aside by the lower appellate Court, and the High Court agreed with the latter for the reason that the application under s. 108, Civ. Pro. Code, 1882, has never been heard on the merits and that the special grounds for the present suit were never considered by the Court. DWARKA PRASAD v. LACHHOMAN DAS, **21 A. 389= A.W.N. 1899, 67.** [*R.*, A.W.N. 1902, 187.]

(17)—*Suit on mortgage against Hindu widows and reversioners—Description of property.*—In a suit by the father of the appellant on a mortgage against a Hindu widow, the mortgagor, in which the plaintiffs in the present suit joined as defendants on the ground that they were the reversionary heirs of the mortgagor's deceased husband, the mortgaged property was described simply as "Mouzah Bhatta." But in the schedule to the plaint, the property was described as "Mouzah Bhatta *usli* with *dakhili*," that is, "Mouzah Bhatta Kurim and Mouzah Mokundpore Bhatta." The present plaintiffs, the reversionary heirs of the mortgagor's deceased husband, sued the appellant for adjudication of their right to, and possession of, eight annas out of the entire sixteen annas of Mouza Mokundpore Bhatta and the appellant contended that the present suit was *res judicata. Held* that in the first suit the Court was called upon to adjudicate upon the property as described in the body of the plaint, and not as described in the schedule annexed thereto, and that the question in the present suit was not therefore *res judicata.* HET NARAIN SINGH v. RAM PERSHAD SINGH, **7 C.L.R. 404, P.C.**

(18)—*Arbitration — Refusal to file award—Validity of award—Decision as to*—The refusal of an application to file an award is not a decision as to the validity of the award. MUHAMMED NAWAZ KHAN v ALAM KHAN, **70 P.R. 1891, P.C.=18 I.A. 73=18 C. 414=6 Sar. 26.**

(19)—*Civ. Pro. Code*, 1882, *s*, 13, *Expl.* III (=*s* 11 *Expl.* V, *new Code*)—"*Relief claimed,*" *meaning of*—Res judicata—*Suit for possession of land and for part and future mesne profits—Decree silent as to future mesne profits--Subsequent suit for same not barred.*—The words "relief claimed" in Expl. III to s. 13, Civ. Pro. Code apply only to something which forms part of the "claim" strictly so called, *i.e.*, something which the plaintiff may claim as of right, something included in his cause of action, 'and which, if he establishes his cause of action,' the Court has no discretion to refuse. The words do not include something which the plaintiff cannot in the suit claim as of right but can only claim in the sense of appeal to the discretion of the Court, and which the Court may refues in the exercise of its discretion on grounds of general expediency or otherwise, even if the cause of action is fully established. Where, therefore, in a suit brought for the possession of land, the plaintiff claimed past

***Res Judicata*—continued.**

——9.—Relief not granted —*concluded.*

and future mesne profits, the mere omission of the Court to adjudicate as to the claim for the future mesne profits, will not, by reason of Expl. III of s. 13, Civ. Pro. Code, bar a subsequent suit for the future mesne profits accruing due after the institution of the former suit, because under s. 211, Civ. Pro. Code, it is purely in the discretion of the Court to grant or refuse such profits. RAM DAYAL v. MADAN MOHAN LAL. **21 A. 425, F.B.=A.W.N. 1899, 153.** (17 C. 968, 21 C. 252, 4 B L.R. 113, 19 B. 532, 4 M. 308; *R*, 14 M. 328; *Disc.*, A.W.N. 1884 159, *Overruled*) [*F.*, 32 C. 128; *R.*, 2 N.L.R. 91; *D.*, 25 B. 115, 34 C. 223=5 C.L.J. 192, 30 A. 225=5 A.L.J. 192=A.W.N. 1908, 96.]

(20)—*Ss.* 13, 211, 244, *Civ. Pro. Code*, 1882, —*Recovery of possession of immoveable property and mesne profits, suit for—Decree—Mesne profits subsequent to date of suit, suit for.*—S. 211 is not imperative or obligatory; it is merely discretionary. Under s. 211 of the Code of 1882, the Court, in a suit for the recovery of possession of immoveable property and mesne profits, can award mesne profits either up to the date of the institution of the suit or up to the date of delivery of possession. Where a decree, in a suit for land and mesne profits, is silent as to mesne profits between the date of the institution of suit, and delivery of possession, a separate suit will lie for such subsequent mesne profits. Such a suit is not barred by ss. 13 and 244, Civ. Pro. Code. MON MOHUN SIRKAR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **17 C. 968.** (2 I.A. 219, 8 C. 178, 10 W.R. 486, 13 W.R. 15, F.B., 1 B.L.R. A.C., *R.*) [*F.*, 19 B. 532, 21 A. 425=A.W.N 1899, 153, 32 C. 118. *Cited*, 29 P.R. 1902=83 P.L.R. 1902; *R.*, 19 C. 615, 25 B 115, 15 M.L J. 462, 5 A.L.J 192=A.W.N, 1908, 96=30 A. 225; *Diss.*, 24 B. 149; D., 21 C. 252, 5 C.L.J, 192=34 C. 223.]

(21)—*S.* 13, *Exp.* III, *Civ. Pro. Code*, 1882, *Claim for mesne profits, omission to grant—A subsequent suit for mesne profits for a period subsequent to first suit.*—Where a claim for mesne profits for a certain period and for those subsequent to date of suit was asked for in the first suit between the parties and the Court omitted to grant the subsequent profits and the decree was silent as to it, a second suit for mesne profits for a period subsequent to the institution of the first suit cannot be said to be barred by the rule of *res judicata* contained in this section. G. S. HAYS v. PADMANAND SINGH, **32 C. 118.** (17 C. 968, 21 A. 425, 19 B. 532, 14 M. 328, *F.*) [*F.*, 2 N.L.R. 91.]

——10.—Res judicata in execution proceedings.

See CIV. PRO. CODE, 1908. s. 47,

See CIV. PRO. CODE, 1908, O. XXI.

See EXECUTION OF DECREE.

See RIGHT OF SUIT—EXECUTION OF DECREE.

***Res Judicata*—continued.**

——10.—Res judicata in execution proceedings —*continued.*

(1) — *Construction of decree — Erroneous orders.*—Although a decree does not in terms give a certain relief, yet, if it is construed in orders passed upon it as having given that relief, it is not competent to the Court, on a subsequent application, to treat those orders as erroneous and put another construction on the decree. VENKATA NARASIMHA NAIDU v. PAPAMMA, **19 M. 54=5 M.L.J. 228.** [*F.*, 20 M. 289, 24 M. 683=11 M.L.J. 432; *D.* 17 M.L.J. 423, 48 P.R. 1900=P.L.R. 1900, p. 418.]

(2)—Res judicata—*Dismissal of suit or execution application on merits and on other ground —Bar of subsequent suit or application as regards same right.*—The dismissal of a suit or of an application in execution proceedings will operate as *res judicata* when such dismissal is consequent upon an adjudication of the right litigated between the parties. The fact that the dismissal of the application or suit was consequent not only upon the adjudication of the right litigated but also upon another ground, cannot entitle the parties to re-open the question of right thus adjudicated upon. VENKATAPPIAH v. JAGANNADHA RAO, **12 M.L.J. 24.**

(3)—*Execution of decree—Applications for execution of declaratory decree erroneously granted after notice—Subsequent application, whether can be objected to.*—A decree declared that defendant was bound to pay plaintiff a certain sum per annum. Several applications were made by plaintiff for execution of the decree. All the applications were granted after notice to the defendant. On a subsequent application for execution, defendant objected that the decree was not capable of execution. *Held* that the previous orders had determined, whether rightly or wrongly, that the decree was executable. As the judgment-debtor had notice of the application on which those orders were passed, he was bound by them. SUBBARAMIER v. NAGAMMAL, **24 M. 683.** (19 M. 54, 8 I.A. 123, 8 C. 51 F.) [*R.*, 27 P.L.R. 1905.]

(4)—*Application of principle of, to execution proceedings.*—Although the use of the expression "Res judicata" in the case of execution proceedings is not strictly correct, orders in execution proceedings are governed by principles analogous to those of *res judicata* and are binding, if not appealed against, in subsequent proceedings on the same suit. Their binding force depends, not upon s. 13, Civ. Pro. Code, but upon general principles of law. IBRAHAM BAMBALA v. IMAM DIN, **U.B.R. 1907, Civ. Procedure, 1=14 Bur. L.R. 35.** (3 A. 141, 173, 6 A. 269, 8 C. 51, 11 I.A. 181, U.B.R., 1897—1901, Vol. II, 252, *R.*)

(5)—*S.* 13, *Civ. Pro. Code*, 1882 (=s. 11, *Civ. Pro. Code*, 1908)—Res judicata *in execution—Execution of decrees.*—The plaintiffs obtained a money decree against T and D personally and as legal representatives of their brother S. In execution, plaintiffs sought to attach and sell

Res Judicata—continued.

——10.—Res judicata in execution proceedings—*continued.*

certain lands of S, and though the defendants were served with notices, they failed to appear, and the Court, considering *suo motu* that the Dekhan Agriculturists Relief Act did not apply, ordered the sale of S's lands. T and D did not appeal within the time allowed but filed a suit for a declaration that S's lands were not liable to sale by reason of s. 22 of the Dekhan Agriculturists Relief Act. *Held* that the order to sell S's lands was final and cannot be set aside, and the present suit was *res judicata* by reason thereof. WAHDUMAL DHARAMDAS v. THARO, **3 S.L.R. 133=4 Ind. Cas. 478.** (8 C. 51, 6 B. 64, 19 M. 54, 27 A. 148, *F.*)

(6)—*Civ. Pro. Code, s.* 13, *Expl.* II—*Applicability of the rule of* res judicata *to proceedings in execution.*—Where a person, on his own application, was joined as a respondent in an appeal, but failed to take any steps by way of defence, on the suit having been remanded for re-trial on the merits, whereas, if he had chosen to do so, he could have filed a written statement raising any defence which he had or thought he had, it was *held* not to be open to him to raise, on the plaintiff proceeding to execute the decree, such objections as he could have previously raised by way of defence in the suit itself. The case would fall within the principle of expl. II of s. 13 of the Civ. Pro. Code. Although s. 13 may not in terms apply, by reason of the matter not having been decided in another suit, still principle of law underlying s. 13 has to be applied to proceedings in execution of decrees. KISHAN SAHAI v. ALADAD, **14 A. 64=A.W N. 1891, 221.** (6 A. 269, P.C., *F.*) [*D.*, 19 B. 821.]

(7)—*Execution of decree—Orders passed in the same application—Finality.*—Orders, passed in the same application for execution between the same parties, are final so far as that application is concerned. Where, therefore, a District Judge, on appeal, disallowed all the objections raised by the judgment-debtor to the execution of a decree, and such order of the District Judge was not appealed against, his successor in office could not, on an appeal arising out of subsequent order of the lower Court in the same proceedings, reopen the question already decided by his predecessor and direct the disposal afresh of all the objections originally urged by the judgment-debtor. BALLABH SHANKAR v. NARAIN SINGH, **3 A. 173.** [*R.*, U.B.R. 1907, Civ. Pro. Code, 1=14 Bur. L.R. 35.]

(8)—*Execution of decree*—Res judicata.—An unappealed, and hence final, order, deciding that an execution application has been barred by limitation, will operate as a bar to execution upon a subsequent application for execution of the same decree. *Quære.*—Whether the principle of *res judicata*, as enunciated in s. 13, Civ. Pro. Code, applies in all its generality to proceedings after decree? BANDEY KARIM v. ROMESH CHUNDER BUNDOPADHYA, **9 C. 65.** [*R.*, 14 B. 206.]

Res Judicata—continued.

——10.—Res judicata in execution proceedings—*continued.*

(9)—*Decision of Court in execution, nature of.*—The decision of a Court in execution is *res judicata* between the parties. Where the very same contentions were raised, in a former application to execute the decree in question, before the Subordinate Judge, and were overruled, and the order was that the decree be executed, *held*, that as there was no appeal preferred against that order, it became conclusive. FUTTEH NARAIN CHOWDHRY v. CHANDRA NARAIN CHOWDHRAIN, **20 C. 551.** (8 C. 51, *R.*) [*R.*, U.B.R. 1907, 1st Qr., Civ. Pro. Code, p. 1=14 Bur. L.R. 35.]

(10)—*Execution proceedings.*—The legality of previous proceedings cannot be questioned in subsequent proceedings. Where a previous application for execution was made before a Court having jurisdiction to entertain it, and its decision was never reversed, *held* that such order could not be impeached in a subsequent application as not having been made in accordance with law. SHUJAAT ALI v. AJUDHIA PRASAD, **A.W.N. 1882, 151.**

(11)—Res judicata—*Execution proceedings.*—Where the question raised in the present execution proceedings was heard and adjudicated upon in previous execution proceedings, and no appeal was preferred from the decision then passed, *held* that the same matter could not be raised in the present execution proceedings. SHEO SAHAI v. NAJAF KHAN, **A.W.N. 1882, 128.**

(12)—*Decree—Order rejecting objection to execution not appealed against—Re-opening question.*—A person who has not appealed from an order rejecting her objection and directing execution of the decree to proceed, is not entitled to re-open a question already decided, and with reference to which she allowed her right of appeal to pass away. RANEE EMAMUN v. RANEE MORADUN, **5 W.R. Mis. 14.**

(13)—*Order to sell properties in certain order—Subsequent application not to sell property in that order*—Res judicata.—Where, upon an objection to an application for execution of a decree, an order was made directing that the properties affected by the decree should be sold in a certain order: *Held*, that the same question could not be re-opened upon a subsequent application for execution to the same decree. MURLIDHAR v. GOMA, **5 Ind. Cas. 210=7 A. L.J. 401** (A.W.N. 1891, 33, *F.*; 4 A.L.J. 400, A.W.N. 1907, 163, A.W.N. 1897, 29, *R.*)

(14)—*Execution of decree*—Res judicata—*Civ. Pro. Code, s.* 244.—The principle of *res judicata* is applicable to execution proceedings in the same manner as to suits. Hence, where, upon an objection to an application for execution of a decree, an order was made under s. 244 of the Civ. Pro. Code, directing that the villages affected by the decree should be sold in a certain order, and that order remained unappealed, thereby becoming final, *held*, that

Res Judicata—continued.

——10.—**Res judicata in execution proceedings**—*continued.*

the same question could not be re-opened upon a subsequent application for execution of the same decree, but that execution must proceed upon the basis of the order referred to above. NAGESHAR PRASAD SINGH v SRI NIWAS PANDE, **A.W.N. 1891, 33.**

(15)—Res judicata—*Mahomedan Law—Effect of wife's conversion to Christianity—Her re-conversion to Muhammadanism—Execution of decree—Meaning of dissolution of marriage—Civ. Pro. Code*, 1908, *s.* 11. — Where execution of a decree for custody of wife was refused on the ground that her conversion to Christianity dissolved the marriage, and the decree-holder again applied for execution, contending that his marital rights were revived by her re-conversion to Muhammadanism, and that the term used in the original text of Mahomedan Law in case of apostacy means suspension or separation and not dissolution : *Held*, that the decision in the previous litigation bars the subsequent application for execution and the new contention. In applying the rule of *res judicata*, words of the former judgment are to be used in their ordinary sense. Such words as " the marriage is dissolved" can only have one meaning in English *viz.*, that the marriage tie has ceased to exist. IMAMUD-DIN v. NUR DIN, **59 P.W.R. 1910 = 6 Ind. Cas. 665 = 77 P.L.R. 1910.** (85 P.R. 1906, *F.*; 132 P.R. 84, *R.*)

(16)—*Ss.* 13 *and* 244—*Civ. Pro. Code*, 1882, —*Decree against administrator—Execution of decree against administrator—Sale by administrator with sanction of Court under s.* 257 *A—Such decree and sale binding on successor—Fraud or collusion—Procedure in creditor's suit against administrator—Court Fees Act* (VII *of* 1870), *s.* 7, *cl.* V.—Defendant brought a suit against the former administrator of a deceased person's estate in respect of a debt due from the estate and obtained a decree. In execution of the decree, the administrator executed a sale-deed conveying a portion of the deceased's estate in satisfaction of the judgment-debt, with the sanction of the Court under s. 257 A. The successor of such administrator brought the present suit in a First Class Subordinate Judge's Court, to set aside the decree obtained by defendant against the former administrator, as also the sale in pursuance of such decree in execution, alleging that they were not binding on her, and that the only remedy of the defendant was to apply for rateable distribution under s. 282 of the Indian Succession Act and not to apply for execution. It was found that neither the decree nor the sale was vitiated by fraud or collusion. *Held*, (1) that the position of an executor or administrator of a deceased person's estate is analagous to that of the *Shebait* of an idol; the administrators form a continuing representation of the estate and that, therefore, a decree had against such representative would bind his successor, in the absence of fraud and collusion. (2 I.A. 145, P.C. = 23 W.R. 253 = 14 B.L.R. 450, *Appl.*) (2) that

Res Judicata—continued.

——10.—**Res judicata in execution proceedings**—*continued.*

though the proper way for executing the decree might have been to apply for rateable distribution, still, as the decree was, as a matter of fact, executed and the sale deed was obtained in execution, such execution and sale thereunder acquired the force of *res judicata* under ss. 244 and 13 of the Civ. Pro. Code, in the absence of fraud and collusion, which did not exist in this case. Case in which it was pointed out that Mofussil Courts ought to treat a suit, by the creditor of a deceased person's estate against an administrator representing the estate, as an administration-suit and ask the plaintiff to amend the plaint on that basis. If the plaintiff is not willing to amend the plaint, and if the claim is proved, the Court ought to pass a decree simply declaring the existence of the debt and of the right of the plaintiff to obtain satisfaction thereof in due course of administration, so that one creditor may not have an undue advantage over another. A preliminary objection was taken, that no appeal lay to the High Court, on the ground that the claim was valued at Rs. 640 for the purpose of computation of Court-fees and that the suit being one for a declaration and consequential relief, was not excepted from the operation of s. 9 of the Suits Valuation Act, and that, although possession was sought for, that relief was prayed for as consequential to the principal relief of declaration and the setting aside of the sale. *Held*, that the suit fell within the scope of s. 7 of the Court Fees Act, and that the real value of the property being more than Rs. 5,000, an appeal did lie to the High Court. BAI MEHER BAI v. MAGEN CHAND, **29 B. 96 = 6 Bom. L.R. 853.** [*Expl.*, 32 B. 381 = 10 Bom. L.R. 519; *R.*, 31 B. 73, 8 Bom. L.R. 885.]

(17)—*Execution of decree—Principle of* res judicata *as applied to execution proceedings—Succession certificate Act* (VII *of* 1889), *s.* 4.—The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue, which, in that suit or in the execution proceedings in the suit, had been previously determined. The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and a plaintiff, who has got an *ex parte* decree, on proof of his title or on failure of the defendant to prove a defence, the *onus* of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. BEHARI LAL v. MAJID ALI, **24 A. 138 = A.W.N. 1897, 29.** (6 A. 269, *R.*) [*R.*, 5 O.C. 251; *F.*, 75 P.R. 1905 = 193 P.L.R. 1905; *D.*, 90 P.R. 1902 = 20 P.L.R. 1903.]

Res Judicata—continued.

——10.—Res judicata in execution proceedings—*continued.*

(18)—*Civ. Pro. Code*, ss. 13, 158—*Application for execution struck off for non-payment of* talbana—*Subsequent application for execution not barred.*—Where an application for the execution of a decree is struck off the file on an adverse decision on law or on the merits, the order, if not set aside on review or appeal, will operate as *res judicata*. But where the application is struck off, merely because *talbana* has not been paid, or because some other step is not taken, the order does not bar a further application. BIJAI SINGH v. HAIYAT BEGAM, **A.W.N. 1889, 163.** [*D.*, 12 A. 392, F.B.; *Cons.* 15 A. 49.]

(19)—*Ss.* 13, 278, 283, *Civ. Pro. Code*, 1882—*Execution of decree*—Res judicata—*Attachment, objection against—Fresh suit.*—The plaintiffs obtained a decree on the 19th December, 1899, against A. C., adopted son of H.S., and another against H. S. on the 29th June, 1900. On 21st May, 1900, before the second decree was passed, H. S. mortgaged his house to R.D.; H.S. died in October or November, 1900, leaving A.C., his heir and representative. On the decree-holder's attaching the house in execution of the second decree, the mortgagee objected, and his prior rights as mortgagee were recognised and his objection allowed on 5th February, 1902. In these proceedings, the prohibitory order directing the judgment-debtor A.C. to refrain from transferring the house recited that the order was issued as the first decree had not been satisfied and the mortgagee in objection stated that the house had been attached in execution of the first decree. The order allowing objection recited that "decree-holders obtained their decree on 29th June, 1900." No suit was filed to set aside the order passed on the 5th February, 1902. The decree-holders applied for execution of the first decree and again attached the house. The mortgagee again filed an objection which was allowed on the 13th November, 1906. On the 6th August, 1907, the decree-holders filed a declaratory suit attacking the mortgage. *Held*, that, since the order of the 5th February, 1902, was still in force against the plaintiffs-decree-holders, the suit must be dismissed. That the order was *res judicata* as regards the second decree, and it was equally valid and binding as regards the first one. RAM DAS v. MUL CHAND, **89 P.L.R. 1909=122 P.W.R. 1909=4 Ind. Cas. 970.**

(20)—*S.*13, *Civ.Pro.Code*, 1882—*Judgment debt-declared insolvent—Application for execution of decree, dismissal of, for want of jurisdiction—Dismissal order not appealed against—Fresh application for execution*—Res judicata.—An application for execution of a decree was rejected by the executing Court (Court of a District Munsiff) on the ground of want of jurisdiction inasmuch as the judgment-debtor had been declared to be an insolvent by the District Judge. No appeal was preferred against this order and it became final. There was a second application for execution, presented to the same Court, of the same decree against the same judgment-debtor. *Held*, that, in the face of the final decision, by the Munsiff, that his Court had no power to entertain such an application, a further application to the same Court to execute the same decree against the same judgment-debtor was barred by the provisions of s. 13 of the Code. NABI MUHAMMAD v. JWALA PRASAD, **27A.148=A.W.N 1904, 197=1 A.L.J. 572.** [*Appr.*, 3 S.L.R. 133.]

(21)—*Execution of decree*—Res judicata—*Liability of judgment debtor to pay interest on decretal debt not contested until after several applications for execution had been made.*—Where certain judgment-debtors allowed several applications for execution of the decree against them to be made, in which the decree-holders treated the decree as bearing interest, and orders were passed by the executing Court in accordance with those applications, *Held*, that the judgment-debtors could not, on a subsequent application for execution being made, object that no interest was payable under the decree. GHULAM MUHAMMAD KHAN v. NARAIN DASS. **A.W.N., 1901, 32.** (13 A. 564, 8 C. 51, *R.*; A.W.N, 1898, 164, *D.*)

(22)—Res judicata—*Determination of rate of interest in execution proceedings—Rate of interest not to be questioned in subsequent proceedings*—Where, after notice to the judgment-debtor, the rate of interest payable on the decree amount was fixed in the course of execution-proceedings, the rate so fixed could not be questioned by the judgment-debtor in subsequent proceedings. ALAYAKKAMMAL v. ARUNACHALA CHETTY, **12 M.L.J. 97.**

(23)—*Civ. Pro. Code*, 1882, *s.* 13, *Expl.* III—*Decree ordering possession and mesne profits—Execution application for both reliefs—Omission to grant one relief whether bar to subsequent application in respect of it.*—A decree was passed for possession of land and mesne profits. The decree-holder applied for execution in respect of both the reliefs. The Court ordered delivery of possession and made no reference to the other relief prayed for. Subsequently, the decree-holder applied for realization of mesne profits. *Held*, that the decree granting the mesne profits was still in force and effect. Plaintiff was entitled to execute it so long as it was kept alive. The decree could not be superseded by the mere omission of the Court executing it to pass orders on a claim made under it. NITYANANDA GANTAYET v. GAJAPATI VASUDEVA DEVU, **24 M. 681=11 M.L.J. 313.** [*R.*, 92 P.R. 1902=16 P.L.R. 1903.]

(24)—*Civ. Pro. Code*, 1882, *ss.* 13, 108, 244, 255—*Execution of decree—Mesne profits, assessment of—Mesne profits, decree for—Not proceeding in execution*—Res judicata—*What remedy open to defendant.*—According to the direction contained in a decree, mesne profits were assess-

Res Judicata—continued.

——10.—**Res judicata in execution proceedings**—*continued.*

ed in the execution department, and an *ex parte* final decree was made. The defendant then came in and applied in terms of s.244, Civ. Pro. Code (1882), alleging fraud on the part of the decree-holder, and asking that the enquiries into mesne profits may be re-opened. *Held*, that the final decree ascertaining mesne profits is *res judicata* between the parties until it is set aside, that, although the mesne profits were assessed by the executing Court, that procedure was not one in execution of any decree, for it resulted in a final decree being passed in continuation of the original suit, and that the remedy open to the defendant was by way of appeal from the *ex parte* decree, or by an application for review, or under s. 108 of the Code. SARAT CHANDRA ROY CHOWDHURY v. MAHOMED KHALIL MONDOL, **5 Ind Cas. 387 =11 C.L.J. 501.**

(25) *Ss.* 13, 248, 273, *Civ. Pro. Code*, 1882—*Mortgage decree, execution of—Attachment before execution by a decree-holder against the mortgagee—Attaching creditor, how should execute it—Mortgagee, substituted in place of—Irregularity, not affecting the jurisdiction of the Court--Acquiescence of the judgment-debtor, if cures it--Omission to prefer objection, if creates the bar of* res judicata.—A mortgage decree is not a decree for money within the meaning of s. 273 of the Civ. Pro. Code. The proper procedure for a decree-holder attaching a mortgage decree is to ask for a sale of it, and, if he succeeds in being the purchaser, to apply for execution as purchaser of the interest of the mortgagee decree-holder. (16 B. 522, 6 C.W.N. 5, *F.*) Where a holder of a decree against a mortgagee attached the mortgage-decree before its execution, got himself substituted in place of the mortgagee decree-holder, executed the mortgage-decree, and sold the property in execution, and the sale was confirmed, and where the judgment-debtor did not object to the substitution, or to the execution of the decree by the substituted decree-holder, but allowed the execution to proceed, and pleaded payment to the substituted decree-holder. *Held*, that although there was an irregularity in the procedure, it was cured by the long acquiescence of the judgment-debtor and the judgment-debtor is estopped by his own conduct from upsetting the whole procedure. (2 I. A. 219, 31 C. 822, *F.*, in principle.) That the judgment-debtor is also barred by the law of *res judicata* from putting forward his present plea, *viz.*, that the substitution could not be made and that the decree could not be executed by the substituted decree-holder in the way he did it, which he ought to have taken as a ground of his defence when notice under s. 248 was issued on him to show cause why the decree should not be executed. (8 I. A. 123, *R.*) That the substitution of the decree-holder was merely an irregularity and not an illegality which did not affect the jurisdiction of the Court. JOGENDRA NATH BHATTACHARYA v. HIR-NAYAKUMAR MUHURI, **2 C.L.J. 499.**

Res Judicata—continued.

——10.—**Res judicata in execution proceedings**—*continued.*

(26)—*Sale of mortgaged property in execution of decree—Objection to execution of decree taken after part of mortgaged property sold under decree—Order absolute—Mortgage—Act* IV *of* 1882, *ss.* 88 *and* 89.—In March 1889, the respondent obtained, against the appellant, a decree for sale of certain mortgaged property under s. 88, Act IV of 1882. The mortgaged property consisted of three villages, C and B, in the Fyzabad district and N in the Barabanki district. On the 6th May 1889, after the expiry of the period fixed for payment, the respondent applied to the District Judge of Lucknow for the execution of the decree by the sale of N, and for the transfer of the decree to Fyzabad in view to the sale of the two villages in that district. On the 20th March, 1890, N was sold under the order of the District Judge of Lucknow in execution of the decree. The two villages in the Fyzabad district were attached by the District Judge with a view to sale in execution of the decree. The two villages were thrice proclaimed for sale. On the 31st January, 1891, the appellant prayed that the sir land be exempted from sale. On the 6th June, 1891, he prayed for the postponement of the then impending sale. Proceedings in execution were stayed in August 1892, pending the disposal of suits brought by the appellant's brothers in connection with the attached villages. After the disposal of those suits, the respondent, on the 9th January, 1895, prayed that the proceedings in execution be revived and continued and the attached villages be sold. On the 10th April, 1895, the appellant presented a petition objecting to the proposed sale on the ground that the decree was not capable of execution, as the respondent had failed to apply for and obtain an order absolute for sale under s. 89, Act IV of 1882. The objection having been disallowed by the District Judge, the appellant preferred an appeal against the order of the District Judge. *Held* that, on the principle of *res judicata*, the appellant was precluded from objecting to the sale on a ground which he might have raised but did not raise against the order which was made by the District Judge of Lucknow for the sale of one of the mortgaged villages and against the orders which were subsequently made by the District Judge of Fyzabad for the sale of the remaining two mortgaged villages between 1890 and 1892. INAYAT-UL-RAHMAN v. SADIK HUSAIN, **5 O.C. 251 (B).**

(27)—*Hindu Law—Execution of decree*—Res judicata—*Civ. Pro. Code*, 1882, *s.* 244—G. S., the head of a joint Hindu family, made a mortgage of some of the joint family property. The mortgagee brought a suit on the mortgage and obtained a decree against G. S., without making certain members of the joint family parties to the suit. After the death of G. S., the decree-holder made these members parties to certain execution proceedings. These members

Res Judicata – continued.

——10.—Res judicata in execution proceedings —*continued.*

of the joint family subsequently brought a suit to have it declared that their shares in the joint family property were not liable to sale in execution of the decree on the mortgage made by G. S. *Held* that the suit would not lie. If the plaintiffs had raised no objections in the execution proceedings, their suit was barred by the principle of *res judicata*, while, if they had and their objections had been disallowed, their remedy was by appeal against the order disallowing their objections. LOCHAN SINGH v. SANT CHANDER MUKERJI, **A.W.N. 1899, 24.** [*Diss.*, 21 A. 356 ; *D.*, 21 A. 277.]

(28)—Res judicata—*Execution—Order.*—A, B and C were the proprietors of an estate, and they partitioned it under a butwarra by which A and B got one share and C the other. In 1847, A mortgaged his share to B. In 1851, a boundary dispute arose between the proprietors the result of which was that C surrendered 51½ beegahs. B, the mortgagee of A, took possession of the beegahs so surrendered under an *ekrarnama* executed by A in order to secure the costs of B in the dispute. In 1874, A sued to recover possession of a moiety of the lands held jointly by him with B, alleging that his debts had been paid off by the usufruct while it had been held by B. A obtained a decree for possession and *wassilat*, no specific mention of the 51½ beegahs being made in the decree. In execution of the decree, B objected that he had been charged with *wassilat* of these 51½ beegahs which really formed no part of the decree. The objection was disallowed. In 1878, B sued to recover possession of the moiety of 51½ beegahs taken by A under his decree. *Held* that this matter, having been decided under s. 11 of Act XXIII of 1861 between the parties in execution of the decree obtained by A, could not be made the subject of a suit. KALI MUNDUL v. KEDAR NATH CHUCKERBUTTY, **6 C.L.R. 215.**

(29)—*Ss.* 13 *and* 287, *Civ. Pro. Code*, 1882—Res judicata—*Property described as a permanent tenancy in decree—Execution of decree —Sale of occupancy holding—Objection not raised in suit—Right of executing Court to question the saleability of property—Particulars of sale proclamation—Execution-Court, duty of.* —The appellants, decree-holders, obtained a consent decree for payment of a certain sum of money and, in default, for the sale of certain properties. In execution of the decree, certain properties in the decree described as held by the respondent, judgment-debtor, on a permanent tenure, were put up for sale. The respondent objected to the sale on the ground that the properties were his occupancy holdings and were not saleable. The question was whether the Court executing the decree could entertain the objection as to the saleability of the property or whether it ought to have been raised in the original suit. *Held*, that the executing Court could not entertain the objection and that the judgment-debtor ought to have raised that question in the suit and, he having failed to do so, the matter became *res judicata*. (A.W.N. 1892, 5, *F.*) *Per Burkitt, J.*—If the execution Court should have reason to believe that the property, which was ordered to be sold, was an occupancy holding, it should enter that fact in cl. (*e*) of the proclamation as a warning to an intending purchaser that he might take nothing by his purchase. BASDEO PRASAD v. JUTHAN RAM, **A.W.N. 1905, 138 = 2 A.L.J. 401, F.B. = 27 A. 684.**

(30)—*Limitation Act*, 1877, *art.* 179—*Execution of decree—Omission to plead bar of limitation—Objection to subsequent application*—Res judicata.—In execution of a decree, an application was made more than three years after the prior application for execution. Execution was ordered after notice to the judgment-debtor. In a subsequent application for execution, it was contended that the above application could not save limitation, inasmuch as it was presented more than three years after the previous application. *Held* that it was not open to the judgment-debtor to raise the objection that the said application was barred, the matter being *res judicata*. LAKSHMANAN CHETTI v. KUTTAYAN CHETTI, **24 M. 669.** [*F.*, 31 C. 822 = 8 C.W.N. 672, A.W.N. 1905, 237 ; *R.*, 24 A. 282, 47 P.R. 1906 = 86 P.L.R. 1907.]

(31)—*Execution of decrees—Act* X *of* 1877, *s.* 13 - *Operation of* res judicata, *in proceedings in execution—"Suit" n s.* 13, *meaning of.*—When, upon a time-barred execution application, a Court makes an order for execution, that order amounts to an adjudication by a competent Court that the application is *not time barred* and, although such adjudication may be erroneous, it is nevertheless *res judicata*, and unless the judgment-debtor appeals and obtains a reversal of the order, the order remains valid and binding, and it is not competent to any Court to re open the question in a subsequent proceeding. So also, the same effect must be given to a decision that an application *is time barred*, for, if a decision be valid and binding, although it may be erroneous, when it is given in favour of one party, it cannot be the less so, when it is in favour of the other party. A judgment-creditor, whose decree had been declared by a subordinate, but competent Court, to be time-barred, and who had acquiesced in such decision, or had failed to get it reversed in appeal, ought not to be allowed to go again to the subordinate Court with another application for execution, and ask that Court to determine that the previous decision, though perhaps confirmed by the High Court or the Privy Council, was erroneous and of no effect. A judgment-debtor who has once obtained a decision from a competent Court declaring the judgment against him to be dead, is certainly entitled to expect that, so

***Res Judicata*—continued.**

——10 —Res judicata in execution proceedings —*continued.*

long as that decision remains unreversed, he will not be further harassed by applications for execution. [*R.*, 14 B. 206, 18 M. 482, 19 B. 675, 17 C.P.L.R. 178, 47 P.R. 1906=86 P.L.R. 1907, 14 C.W.N. 114=3 Ind. Cas. 47.] S. 2 of Act X of 1877, as amended by Act XII of 1879, declares that an order under s. 244 is a decree; and the term "decree" is defined to mean "the formal adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the *suit* or appeal. From this, it might be inferred that every proceeding which terminates in a *decree* (and a proceeding in execution is such a proceeding) is a suit within the meaning and intention of the Code. The rule of *res judicata*, therefore, applies in the case of execution proceedings. MANJUNATH BADRABHAT v. VENKATESH GOVIND SHANBHOG, **6 B. 54.** [*F.*, 6 B. 586; *R.*, 22 M. 256, 26 B. 109=3 Bom. L.R. 565.]

(32)—*Civ. Pro. Code*, 1882, *s.*373 (=*O.* XXIII, *r.* 1)—*Execution of decree—Application of principle of* res judicata.—If a judgment-debtor having had an opportunity, when a previous application for execution was pending, to take objection thereto on the ground of its being barred under s. 373, Civ. Pro. Code, failed to do so, he cannot be allowed, in a later application for execution of the same decree, to take such objection, on the principle of not going behind a proceeding in execution which has already been taken to be valid. SHER SINGH v. DAYA RAM, **13 A. 564=A.W.N. 1891, 164.** (6 A. 269, 8 C. 51, 15 I.A 171, A.W.N. 1890, 9, *R.*) [*R.*, 16 A. 390, A W.N 1901, 32.]

(33)—Res judicata—*Execution proceedings*,—When a Court, upon an application, has decided that the execution of a decree is barred by limitation, and that order has become final in consequence of no appeal having been preferred thereupon, such order will, upon a subsequent application made for execution of the same decree, operate as a bar to execution. (6 C. 203 =7 C.L.R. 61, 3 A. 141, 4 I.A. 127, 8 C. 51= 8 I.A. 123, *R.*) *N.B.*—In this case, the Court left open the question whether the principle of *res judicata* as enunciated in s. 13 of the Civ. Pro. Code, applies in all its generality to proceedings after decree. KAZEE BUNDEY KARIM v. ROMESH CHUNDER BUNDOPADHIA, **11 C.L.R. 145=9 C. 65.**

(34)—*Execution of decree — Limitation.*—Res judicata —Where an order for the execution of a decree is made by a competent Court, having jurisdiction to decide whether such execution is barred by limitation or not, such order although erroneous, must, if unreversed, be treated as valid. And it does not make any difference that the execution of the decree may have been actually barred at the date of the application for execution.

***Res Judicata*—continued.**

——10.—Res judicata in execution proceedings—*continued.*

Where, therefore, of receipt oi notice under s. 248, Civ. Pro. Code, the judgment-debtors filed objections, but on the day fixed for hearing them, did not appear, and those objections were dismissed for default, *held* that they were estopped from pleading in a subsequent application for the execution of the decree, that the former application was barred by limitation at the time it was made; and this notwithstanding that the former application was afterwards struck off for non-payment of process-fees. SHEORAJ SINGH v. KAMESHAR NATH, **24 A. 282=A.W.N. 1902, 63.** (15 A. 198, A.W. N. 1898. 96, *D.*; 8 I.A. 123, 24 M. 669, 28 C. 122, 15 A. 84, A.W. N. 1897, 29, *R.*) [*F.*, 31 C. 822= 8 C. W. N. 672, A. W. N. 1905, 237, A.W.N. 1906, 70=3 A. L. J. 198; *R.*, 27 P.L.R. 1905, 47 P.R. 1906=86 P. L. R. 1907; *D.*, 10 C.W.N. 209=3 C.L J. 240.]

(35)—*Execution of decree* — Res judicata—*Civ. Pro. Code*, 1877, *ss.* 13, 647.—The law of *res judicata* does not apply in proceedings in execution of decree. (*The Delhi and London Bank* v. *Orchard*, 3 C. 47, P.C.=4 I.A. 127, *referred to by Oldfield, J.*). Where, therefore, the question was raised on an application for execution of a decree, whether the decree awarded mesne profits, and was decided in the negative, the decision was not final, and could be reopened in a subsequent application to execute the same decree. RUP KUARI v. RAM KRIPAL SHUKUL, **3 A. 141, F.B.** [*Reversed*, 6 A. 269, P.C.; *Cons.*, 6 B. 54; *R.*, 9 C 65, U.B.R. 1907, C. P. C., 1=14 Bur. L. R. 35.]

(36)—*Execution proceeding — Attachment of allowance—Erroneous decision in a point of law, if can have the force of* res judicata — *Cause of action – Civ. Pro. Code* (1908), *ss.* 11 *and* 100.—Where a decision lays down what the law is and is found to be erroneous, it cannot have the force of *res judicata* in a subsequent proceeding for a different relief (11 C. L. J. 461, 13 C.L.J. 119, *F.*) But if it is a decision that is contrary to law, when that expression is used in the wide sense attributed to it, for example, in s. 100 of the Civ. Pro. Code, it may or may not have the force of a *res judicata*. A decision cannot alter the law of the land. BAIJ NATH GOENKA v. PUDMANUND SINGH, **16 C.W.N. 621=14 Ind. Cas. 124=16 C.L.J. 154=39 C. 848.** (1 C.W.N. 687, 28 C. 318, *R.*)

(37)—*Execution proceeding—Order permitting withdrawal of execution upon condition—Condition illegal and not bearing on any issue raised between parties—Subsequent application for execution—Right of decree-holder to disregard condition.*—Where a decree-holder, having put up certain properties of the judgment-debtor to sale in execution of his decree, bid Rs. 600 for it, but failed to deposit the earnest money and then applied to withdraw the execution; and the Court, being of opinion that this was a dodge to avoid paying

Res Judicata—continued.

—10.—Res judicata in execution proceedings—*continued.*

the earnest money, allowed the application, but subject to the condition that the same properties should be put up for sale, first at the next application for execution and the decree-holder must bid Rs. 600 for it: *Held*, that the Court had no power to make such an order and it was not binding on the decree-holder so as to preclude him from proceeding to execute the decree against the other properties of the judgment-debtor. The order did not operate as *res judicata*. JNANUDA SUNDARI CHOWDHURANI v. NOKULESSWAR ROY CHOWDHURY, **11 C.W.N. 236.** (8 I.A. 123=8 C. 51, *D.*)

(38)—*Execution proceedings, orders passed in —Orders not appealed against—Their binding nature*—Res judicata—*Decree—Application for execution — Withdrawal — Effect— Subsequent application for execution*—Res judicata.—Orders in execution proceedings are, if not appealed from, binding on the parties to the suit in all subsequent proceedings in that suit on principles analogous to those of *res judicata* strictly so called. It is, therefore necessary to constitute a bar, that there must be a hearing and a final decision. [*Appl.*, 32 B. 296=10 Bom. L.R. 374.] Where an application for execution of a decree is withdrawn by the decree-holder it must be treated as if it was not made at all and all matters in dispute therein were unheard and undecided. There could, therefore, be no *res judicata* in a subsequent application for execution in respect of such matters. HARI GANESH v. YAMUNABAI, **23 B. 35.** [*Appl.*, 32 B. 296=10 Bom. L.R. 374.]

(39)—*Purchase pending attachment—Withdrawal of attachment, effect of.*—The plaintiff having preferred a claim to certain property under attachment, it appeared that his title had accrued subsequently to the attachment, and his title, therefore, was declared to be void. Subsequently, the decree having been satisfied by payment and the attachment withdrawn, more than a year from the date of the claim being so declared void, the plaintiff sued to obtain possession on the title originally put forward. *Held* that the declaration that the plaintiff's claim was void could only be taken to mean that it was invalid against the claim of the attaching creditor, and that, on the withdrawal of the attachment, any right which the plaintiff might have acquired became valid. UMESH CHUNDER ROY v. RAJ BULLUBH SEN, **8 C. 279=10 C.L.R. 204.** [*R.*, 13 B. 72, 11 P.R. 1906=4 P.L.R. 1906; *D.*, 29 M. 225=16 M.L.J. 136.]

(40)—*Civ. Pro. Code*, s. 158—*Execution proceedings—Dismissal of application for execution —Act* VI *of* 1892, s. 4—By s. 4 of Act VI of 1892, nothing in Chap. VII or XIII of the Civ. Pro. Code, applies to execution proceedings. S. 158 being thus inapplicable to such proceedings, the dismissal of a petition for execution

Res Judicata—continued.

—10.—Res judicata in execution proceedings—*continued.*

for default does not bar a fresh application. TIRTHASAMI v. ANNAPPAYYA, **18 M. 131.** (15 A. 84, 18 B. 429 and 4 I.A. 127, *F.*)

(41)—Res judicata—*Order disallowing objection—S.* 13, *Civ. Pro. Code—Legal representative made a party—Objection of party disallowed.*—Where an objection of a party in execution-proceedings is disallowed without any adjudication of the question raised by him, it cannot operate as *res judicata*. Defendant in the present suit obtained a decree against the brother of the present plaintiff, and, in execution, bought certain property in the name of a third person. In seeking to obtain possession, she was obstructed by the present plaintiff's brother who alleged that the person in whose name defendant alleged she had purchased the property was *his benamidar*. Defendant thereupon brought a suit against plaintiff's brother to have it established that she was the real purchaser. He put in his defence and issues were settled; but he died before the trial and so the present plaintiff was brought on the record as his brother's representative; the present defendant ultimately got a decree. But, in execution of such decree, the present plaintiff objected that he was entitled to a half share in some, and to the whole of some other properties, and that his deceased brother, in execution of the decree against whom defendant had purchased, had no right thereto. This objection being overruled, in execution, on the ground of the plaintiff's not having put it forward in the original suit in which he was brought on record as representative of his brother, plaintiff brought the present suit. *Held*, the plaintiff having contested the original suit in his representative capacity, was not bound to put forward the objection now put forward, nor did the order in execution disallowing his objection operate as *res judicata* so as to bar the present suit. GOURMONI DABEE v. JEGUT CHANDRA AUDHIKARI, **17 C. 57.** (3 C. 47, *Rel on*; 6 C. 777, *F.*) [*Appl.*, 17 C. 711.]

(42)—*Execution of decree* — Res judicata — *Order not warranted by any issue raised before executing Court.*—A Court executing a decree had before it the question, whether or not a sale in execution of that decree should be confirmed owing to the decree-holders, who were also auction-purchasers, not having filed a receipt, which they were ordered by the Court to file. The Court refused to confirm the auction-sale owing to the absence of the receipt, but at the same time directed that the decree-holders should not have power further to execute their decree. Subsequently, however, the executing Court passed an order to the effect that "the auction-sale which has been cancelled will be cancelled as before, and, if the decree-holders apply again, the property will again be put up." The decree-holders made a further application for sale; but to this it was

Res Judicata—continued.

——10.—Res judicata in execution proceedings—*continued.*

objected by the judgment-debtor that the Court's previous order that the decree-holders could not further execute their decree operated as *res judicata. Held*, that the order thus relied on was superfluous and not warranted by any issue then before the Court, and did not operate as *res judicata* as to the right of the decree holders to execute their decree. NATTHU RAM v. MUHAMMAD ALI KHAN, **A.W.N. 1895, 119.**

(43)—*Attachment — Dismissal of execution petition — Preliminary issue.* — An attachment made after notice to the judgment-debtor is not discharged by the mere fact of the application for execution being subsequently dismissed for default of prosecution. A determination of one of the questions of law which may have to be decided before execution can be granted, is not an order in execution and cannot operate as *res judicata* unless it has been followed up by an order in execution. Nor need such a determination, in the absence of an order following it, be appealed against. Where an execution petition is withdrawn after the determination of one of the preliminary questions arising in the case, such determination is no more than the expression of the Judge's opinion and is of no effect for any purpose. VENKATAGIRI IYER v. SADAGOPACHARIAR, **14 M.L.J. 359.** [*D.*, 28 M. 355=15 M.L.J. 247.]

(44)—*Ss.* 13, 43, 647—(*Civ. Pro. Code*, 1882) — *Execution proceedings—Judgment-debtor's objection—Certain property not included in objection by mistake—Second objection, whether barred.*—A judgment-debtor objected to an attachment of certain property, but by mistake omitted to mention in his objection certain houses, in respect of which he filed another objection before sale: *Held* that the judgment-debtor could make the second objection and that s. 13 or 43, Civ. Pro. Code, was no bar to such objection. *Held*, further, that the objection by the judgment-debtor is a proceeding, taken in consequence of and as incidental to an application for execution by the decree-holder. LALA HAR PARSAD v. SETH RADHA KRISHAN, **2 Ind. Cas. 105.**

(45)—*Civ. Pro. Code*, 1882, *s.* 13—Res judicata—*Execution proceedings—Order passed after notice under s.* 248, *Civ. Pro. Code—No* res judicata *when such notice is silent as to relief prayed for.*—When it is endeavoured to obtain execution of something not granted by the decree, mere notice to the defendant, that further execution is to be applied for will not be sufficient to make the order *res judicata* against him. And where the application is not for the execution of something which has been directed to be done by any decree or order, so as *ipso facto* to carry information as to what the claim made and the relief prayed for are, notice to the judgment-debtor without inserting the specific prayers will not render the order made upon

Res Judicata—continued.

——10.—Res judicata in execution proceedings—*continued.*

such application *res judicata.* CHOCKALINGAM v. THE MADURA MEENATCHI SUNDARESWARER DEVASTHANAM, **5 M.L.T. 293.** (30 M. 255, *Appr.*)

(46)—*Act* VIII *of* 1859, *s.* 2—Res judicata—*Suits based on different causes of action—Several properties held under one title—Cause of action on dispossession—Decree for rent, effect of, on title to land—Rejection of claim in execution—Suit by claimant against third parties—Cause of action—Limitation.*—The dismissal of a suit for possession of lands based on an alleged act of dispossession does not operate as a bar, under s. 2, Act VIII of 1859, to a different suit by the same person to recover other lands, based on a different act of dispossession, though the title set forth by the plaintiff in both the suits is identical. The title upon which a particular property is claimed does not constitute the cause of action. Where several properties are held by a person under one and the same title, a cause of action does not accrue to him with reference to them all, simply because he has been dispossessed of one of them on a particular date. A decree for arrears of rent against ryots does not affect the title to the property itself, the operation of such decree being restricted to the particular rent which it purports to cover. So a suit to establish the plaintiff's title to certain lands was held not barred under cl. 5, s. 1, Act XIV of 1859, by reason of its having been brought more than one year from the date of a rent-decree obtained by a third party against the ryots. Where the rejection of a claim in an execution case was not followed by the sale of the properties attached, a suit by the claimant in respect of the same properties, against a person other than the decree-holder, brought for quite a different purpose and upon quite a different cause of action, was held not barred by reason of its having been brought more than one year from the date of the order rejecting the claim. BOOA RUSSOOLEE v. THE NOWAB NAZIM OF BENGAL, **11 W.R. 382.**

(47)—*Decision in an execution case*—Res judicata—*Attachment*—*S.* 67, *T.P. Act*, 1882.—If, in an execution case, a decision that a judgment-creditor cannot sell certain properties without bringing a separate suit is arrived at, such decision does not preclude him from attaching them in execution. Where a person who has obtained a decree for money with a charge on certain property attempted to bring the property to sale in execution, *held*, he could attach the property, but that if he wished to bring it to sale, he must bring a suit for sale on the charge under s. 67, T.P. Act. GOURI SUNKER PANDAY v. ABHOYESWARI DABEE, **25 C. 262.** (22 C. 859, *Expl.*; 22 C. 813, *R.*) [*D.*, 7 O.C. 314.]

(48)—*Execution—Joint decree-holders—Payment to one of them—Final decision*—Res judicata—*Appeal.*—Where an order recognizing the payment of a certain sum due on a decree to

Res Judicata—continued.

——10.—Res judicata in execution proceedings—*continued.*

one of the holders of that decree, was made behind the backs of the other joint decree-holders, such order would not bind them. The other joint decree-holders would be entitled to agitate the question in a subsequent execution petition and would be entitled to appeal against any adverse order that might be passed against them. MOTI LAL v. IBRAHIM KHAN, **A.W.N. 1883, 19.**

(49)—*Civ. Pro. Code, s. 13—Omission to raise a ground of defence in suit—No bar to raise the same in execution proceedings.*—It is competent to a party to set up in execution proceedings a claim which might have been set up by him in the suit itself, but which he had omitted to raise by way of defence in the suit. Though the plea might have been set up as a ground of defence in the suit, yet, where it was not one that ought to have been then raised by the party, his omission to have raised the plea in the suit itself would not bar him, under s. 13 of the Code of Civil Procedure, from setting up such claim anew in the proceedings in execution. ATCHAYYA v. BANGARAYYA, **16 M. 117.** [*R.*, 19 A. 517.]

(50)—*Proceedings to set aside auction-sale—Subsequent suit for recovery of property.*—The fact that the minor-plaintiff, through his guardian, had actively intervened in a proceeding to set aside, on the ground of irregularity, an auction-sale of joint property belonging to himself and his father in execution of a decree against the father, would not preclude him from suing to recover possession of the property on the ground that it could not be sold for the satisfaction of such debts of the father as were not binding on the son. THE COLLECTOR OF MONGHYR v. HURDAI NARAIN SHAHAI, **5 C. 425=5 C.L.R. 112** *on appeal* **2 I.A. 26.**

(51)—*Sale deed relating to two plots of land—Deed as regards one plot held valid in execution proceedings—Suit relating to other plot—Validity of sale deed whether* res judicata—*Decision by executing Court, how far creates estoppel by* res judicata.—In this case, plaintiff claimed certain land under a deed of sale, and both the lower Courts, holding the deed colourable, rejected the claim. In certain execution proceedings in another suit, plaintiff had intervened as claimant of the land then attached. That land he claimed by virtue of the very deed of sale now relied upon by him, in the present suit brought for the purpose of establishing his title to a different land covered by the sale deed. The above claim of the plaintiff in execution was allowed and, no suit having been brought within a year to dispute his right, that order became conclusive in favour of his right to the land then in litigation. The defendant in the present suit again pleaded that the sale was a colourable transaction and it was held that the order against him in the previous claim proceedings brought by the plaintiff could notr operate as *res judicata* so as to bar him from

Res Judicata—continued.

——10.—Res judicata in execution proceedings—*continued.*

again contesting the validity of the sale deed. Although, between the parties, the orders to which s. 283 of the Civ. Pro. Code, refers, are, subject to the result of a suit, if any, conclusive, yet, such conclusiveness would obtain only as regards the particular property in dispute. Also, if the previous decision had been a final decision in a suit as distinguished from an execution proceeding, it would have created an estoppel by *res judicata.* DINKAR BALLAL CHAKRADEV v. HARI SHRIDHAR APTE, **14 B. 206** [*R.*, 25 B. 202, 11 O.C. 220, 12 C.W.N. 739=9 C.L.J. 597=6 M.L.T. 363.]

(52)—*Dismissal of claim, in execution proceedings, to declaration of forgery of a deed, no bar to regular suit.*—The dismissal of a claim, in execution proceedings, by the judgment-debtor, alleging that the sale deed, under which a portion of the decree was sought to be executed, was a forgery, is no bar to a regular suit to have it declared that it was a forgery. FAKHAROODDEEN MAHOMED AHSAN v. POGOSE, **4 C. 209=2 C.L.R. 573.** (20 W.R. 305=2 C. 327=4 I.A. 66, *referred to.*)

(53)—*Decree declaring plaintiff's hereditary deputy vatandarship—Execution for arrears of allowance—Attachment of income from defendant's vatan, removal of, on Collector's certificate under s.* 10 *of Bombay Vatandars' Act* (III *of* 1874)—*Second application for attachment, not barred by* res judicata—*Decree capable of execution apart from Collector's certificate.*—The judgment of the District Court in this case dealt only with the plaintiff's right as a hereditary deputy vatandar, of which he sought a declaration, and pronounced in favour of it, while it rejected his claim for certain arrears of allowances. Though plaintiff was receiving monies for about ten years under the decree up to 1875, he did not get himself registered as a deputy vatandar under Bombay Act, III of 1874. An attachment by the plaintiff of the income of the defendant's hereditary vatandarship was raised by the Court on the Collector issuing a certificate for the removal of the attachment under s. 10 of the Vatandars' Act, III of 1874. Plaintiff's subsequent application to the Collector for cancellation of the certificate was also rejected. A fresh application for attachment filed in 1881 was rejected by the lower Courts, the Collector's certificate remaining uncancelled operating as a bar; but the High Court held that the decree was one capable of execution. The Collector's certificate under s. 10 of the Vatandars' Act, III of 1874, was exhausted in operating on the execution which it stopped, and the Court below should have dealt with the case apart from that certificate. GOPAL HANMANT DESHKA v. KONDO KASHINATH, **9 B. 328.**

(54)—*Execution application—Rejection.*—The ejection of an application for the execution of a decree is not an adjudication within the rule

Res Judicata—continued.

——**10.—Res judicata in execution proceedings**—*continued.*

of *res judicata.* HURROSOONDARY DASSEE v. JUGOBUNDHOO DUTT, **6 C. 203=7 C.L.R. 61.** (3 C. 47=4 I.A. 127, *F.*) [*R.*, 9 C. 65, 15 A. 84, F.B.; *Not F.*, 14 C.W.N. 114=3 Ind. Cas. 47.] *See*, also, JEETOSHUR DHURN DEB v. FOOSEE SINGH, **1 Hay, 515.**

(55)—*Execution of decree*— Res judicata—*Objections to execution dismissed for default of appearance—Subsequent application for execution.*—The dismissal of a petition of objections to an application for execution of a decree for default of appearance, neither party having appeared on the day fixed for hearing, will not operate as *res iudicata* so as to bar the hearing of similar objections to a subsequent application to execute the same decree. SHAFAAT BEGAM v. HURMAT SULTAN BEGAM, **A.W.N. 1895, 15.**

(56)—*Execution proceedings—Prior application claiming interest not awarded by decree—Failure to object to claim—Objection in subsequent proceedings—Notice on prior application silent on claim for interest.*—It is open to a judgment-debtor to put forward his objection to a claim for interest not awarded by the decree, when the sale proclamation comes up for settlement, and it cannot be held that, merely because such objection might have been raised and an adjudication had at an earlier execution proceedings, the executing Court must, by its previous order to attach the property, be held to have decided to accept the claim of the judgment-creditor for interest not given by the decree (15 M.L.J. 7, *F.*) especially so, when the notice of prior execution did not at all mention the claim for interest, such prior order is, therefore, no bar by *res judicata* to the judgment-debtor subsequently raising the objection to the claim for interest. VIYATHAN SRIDEVI v. NEELAKANTA PATTAR, **17 M.L.J. 311.**

(57)—*S. 2, Civ. Pro. Code*, 1859 —*Court executing decree—Declaration by such Court as to legitimacy—Subsequent suit as to illegitimacy if barred.*—An application for the execution of a decree, where the applicant was not upon the record when judgment was given nor when the decree was made, but subsequently to both, will not by itself make the applicant a party to the suit, and a decision by such Court on an issue as to such applicant's legitimacy will not be *res judicata* by a competent Court in a competent proceeding and will not, since it is made without jurisdiction, form a bar under s. 2, Civ. Pro. Code, 1859, to a regular suit later on, in which the said applicant's legitimacy is again put in issue. ABIDUNNISA KHATOON v. AMIRUNNISSA KHATOON, **2 C. 327 P.C.=4 I.A. 66=1 Ind. Jur. 172=3 Sar. 677** (*on appeal from* 20 W.R. 305). [*F.*, 3 C. 371, 4 C. 209, 17 M. 399, 19 B. 328; *R.*, 14 B. 206, 15 C.P.L.R. 69, 10 C.L.J. 396=3 Ind. Cas. 324=14 C.W.N. 752; *Cons.*, 17 C. 711, F.B.; *D.*, 18 M. 13.]

Res Judicata—continued.

——**10.—Res judicata in execution proceedings**—*continued.*

(58)—*Personal decree with a decree for sale—Application for personal decree dismissed—Execution of original decree against person.*—Where a combined decree under ss. 88 and 90 of the Transfer of Property Act has been passed, it is not necessary to apply for a personal decree, after the sale of the hypothecated property. If such an application is made, any order passed on that is without jurisdiction and cannot supersede the decree as originally made and cannot operate as a bar to the decree being executed. SADHO SINGH v. MAHARAJA PARBHU NARAIN SINGH, **3 A.L.J. 606=A.W.N. 1906, 251=29 A. 12.**

(59)—*Execution of decree—Order for sale of mortgaged property in execution of simple money decree—Objection by judgment-debtor—Objection overruled—Appeal*—Res judicata—*Act* IV *of* 1882, *ss.* 67, 99.—An *ex parte* order for sale of mortgaged property in execution of a simple money decree held by the mortgagees against the mortgagor, no suit for sale upon the mortgage having been brought, could not be taken as barring an appeal by the judgment-debtor from an order of the Court which passed the decree directing the Collector (who had allowed the judgment-debtor's objection to execution) to proceed with the sale. HYDER SHER KHAN v. HAR KISHEN, **A.W.N. 1894, 16.**

(60 & 61) -*Limitation Act*, XV *of* 1877, *sch.* II, *art.* 179, *cl.* (6)—*Maintenance decree—Application for execution—Prior applications held barred—Effect.*—A decree directed payment of maintenance annually on a specified date. It was passed in 1870 when Act XIV of 1859 was in force. There was an application for execution in 1873, which was within three years from date of the decree. The next application was not made till 1891. The Limitation Act then in force was XV of 1877. That application was dismissed as being time-barred. The present application was made in 1891. The lower Courts held that the question of limitation was *res judicata* by the previous decision and that the application was barred by lapse of time. *Held*, that the present claim was not *res judicata*, as the relief now claimed was distinct from that previously claimed. The prior applications were for money payable for different distinct periods. The former decisions could only affect the relief then claimed. *Held* also, that the present application was not barred by limitation. KUPPU AMMAL v. SAMINATHA AYYAR, **18 M. 482.**

(62)—*Barred decree—Order for execution by competent Court—Validity of.*—Though the execution of a decree may have been barred at the time of the application, an order for execution, if regularly made by a competent Court having jurisdiction to try the question, is valid if unreversed. MUNGUL PERSHAD DICHIT v. GIRIJA KANT LAHIRI, **8 C. 51, P.C.=11 C.L.R. 113=8 I.A. 123=4 Sar. 249.** [*F.*, A.W.N.

Res Judicata —continued.

——10.—Res judicata in execution proceedings —*continued.*

1882, 151, 7 A. 282, 19 M. 54, 24 M. 669, 24 M. 683=11 M.L.J. 432, 47 P.R. 1906 ; *Appl.*, 6 B. 586, 8 A. 492=A.W.N. 1886, 156, 13 A. 564, 3 Bom. L.R. 416, 24 A. 282 ; *R.*, 6 B. 54, 9 C 65, 6 A. 269=11 I.A. 37, P.C., 7 B 341, 9 B. 328, 11 C. 376, 13 C. 257, 11 B. 537, 14 B. 206, 15 B. 28, 15 B. 242, 13 M. 347, 20 C. 551, 15 A. 84, F.B., 16 A. 443, 89 P.R. 1894, 23 C. 374, 25 C. 789, 27 C. 210, 4 O.C. 333, A.W N. 1901, 32, 90 P.R. 1902, 31 C. 822, 1 C L J. 500, 2 C.L.J. 499, 3 C.L.J. 240=10 C.W.N. 209, 4 C.L.J. 573=34 C. 13, 14 C.W.N. 114, 47 P.R. 1906=86 P.L.R. 1907; *D.*, 7 B. 316, 10 A. 51, 22 B. 83, 28 C. 122, 5 C.W. N. 80, 6 O.C. 44, 2 C.L.J. 384=9 C.W.N. 956, 11 C.W N. 236, 17 M.L.J. 201=2 M. L.T. 167=30 M. 255, 35 C. 1060=8 C.L.J. 193=12 C.W.N. 216, N. ; *Rel.*, 14 Bur. L.R. 35=U.B.R. 1907, 1st Qr., Civ. Pro. Code, 1, 2 C.L.J. 584.]

(63)—*In execution proceedings—Maintenance decree—Construction—Limitation Act, sch.* II, *art.* 179, *cl.* 6.—Where a decree directs the defendants to pay maintenance at a certain rate per annum from the date of the plaint, 18th July, 1876, it was held that the proper construction of the decree was that payment should be made on the 18th July, 1877, and every subsequent year on the corresponding date ; and so the decree was one which "directed payment to be made on a certain date" within the meaning of cl. 6 of art. 179 of the Limitation Act. (12 B. 65, 14 M. 366, *R.*). In a petition for the execution of a maintenance decree, an erroneous decision on a point of law does not operate as *res judicata*, so as to bar a subsequent application to recover arrears of maintenance accrued due after the first application. AITAMMA v. NARAYANA BHATTAR, **17 M.L.J. 402=30 M. 504.** [*F.*, 18 M.L.J. 548=4 M.L.T. 233.]

(64)—*Dismissal of judgment-debtor's objection on a former occasion without investigation, effect of.*—The dismissal of an objection by the judgment-debtor to the execution of a decree on the ground of limitation cannot rightly be held to operate as a bar to its being urged when the decree-holder applies for execution again, when the previous objection was struck off without any judicial determination. HIRA LAL BOSE v. DWIJA CHARAN BOSE, **3 C.L.J. 240=10 C. W.N. 209.** (A.W.N. 1898, 96, 28 C. 122, 6 A. 269=11 I.A. 37, *R.*; 8 C. 51=8 I.A. 123, P.C., 24 A. 282, *D.*) [*F.*, 3 Ind. Cas. 47 ; *R.*, 35 C. 1060=8 C.L.J. 193=12 C.W.N. 216; *D.*, 1 Ind. Cas. 284.]

(65)—*Execution—Order in previous proceeding not to be questioned at later stage*—Res judicata—*General principles—Doctrine not applicable when previous order made without notice to judgment-debtor—Application for delivery of possession of property purchased at execution sale—Limitation.*—The doctrine that a decision at any stage of execution proceedings cannot be questioned at a later stage of the proceedings is based, not upon the ground that it is *res judicata*, but upon general principles of law, for if it were not binding, there would be no end of litigation. (8 C. 51, P.C., 11 C.L.R. 113, 8 I.A. 123, 6 A. 269, 11 I.A. 37, 7 A. 102, *Rel. on.*) But that principle is inapplicable to a case where the previous order was made without notice to the judgment-debtor and without knowledge on his part that execution proceedings were pending against him. In such a case, that order does not operate as a bar to the determination of the objection of limitation urged by him against the previous application for execution. An application for delivery of possession ought to be made within three years of the confirmation of the sale. MASZEM HOSSEIN MONDAL v. SARAT KUMARI DEBI, **5 Ind. Cas. 89.** (8 B. 267, *F.*)

Res Judicata—continued.

——10.—Res judicata in execution proceedings —*concluded.*

(66)—Res judicata—*Execution proceedings—Dismissal of application for execution for default —Plea of limitation.*—The principle of *res judicata* does not apply to execution proceedings, unless the objection of the judgment-debtor on the previous occasion was disallowed on the merits. (8 C. 51 P.C., *D.*; 15 A. 198, *R.*; 11 C. 301, *F.*) When the execution application is dismissed for default and an objection by the defendant that the application was barred by limitation is also rejected the defendant can raise the objection on a fresh application. BHOLANATH DASS v. PRAFULLA NATH KUNDU CHOWDHRY, **28 C. 122=5 C.W.N. 80.** (8 C. 51, P.C., *D.*; 11 C. 301, P.C., *F.*; 15 A. 198, *R.*) [*F.*, 8 C.W N. 672=31 C. 822 ; *R.*, 3 C.L J. 240=10 C.W.N. 209, 14 C.W.N. 114 ; *D.*, 24 A. 282=A.W.N. 1902, 63.]

(67)—Res judicata—*Act* VIII *of* 1859, *s.* 2 —*Limitation.*—An order, rejecting a *bona fide* application for the execution of a decree, on the ground that the period allowed by law for execution has expired, is not an adjudication within the rule of *res judicata* or within s. 2 of Act VIII of 1859. DELHI AND LONDON BANK v. ORCHARD. **7 P.R. 1878, P C.=3 C. 47=4 I.A. 127=3 Sar. 721.** [*F*, 6 C. 203; *Rel. on*, 17 C. 57 ; *R*, 3 A. 141, F.B., 6 B. 54, 9 C. 65, 15 A. 84, 18 B. 429, 10 Bom. L. R. 374 =32 B. 296, 14 C.W.N. 114 = 3 Ind. Cas. 47.]

Execution of decree — Res judicata—*See* U.P. ACT XII OF 1881, s. 9, A.W.N. 1892, 5.

If applies when previous execution application different—*See* EX PARTE DECEEE, 15 C.W.N. 370, P.C.=8 A.L.J. 332=9 M.L.T. 380=13 C.L.J. 351=13 Bom. L.R. 367.

——11.—Miscellaneous.

(1)—*Maintenance suit— Arrears of maintenance.*—Where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is

Res Judicata—continued.

——11.—Miscellaneous—*continued.*

a bar to the latter action. To constitute such former recovery a bar, however, it must be shown that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the former suit that which he seeks to recover in the second action. BHIKABHAI v. BAI BHURI, **5 Bom. L.R. 396=27 B. 418.**

(2)—*Previous proceedings should be on record.*—To give effect to a plea of *res judicata* based upon the ground that the questions in issue in a suit were formally in issue in probate proceedings, it is necessary that the probate proceedings should be in evidence. A judgment in the probate proceedings showing what the Judge understood to be the questions for decision, is not enough to make out the plea. The Court cannot give effect to the plea of *res judicata* unless it can say for itself that the matters now in issue were in issue in the probate proceedings. MIRZA KURRATULAIN v. NAWAB NUZHAT-UD-DOWLA, **7 Bom L.R. 876=9 C. W.N. 938=1 C.L.J. 594, P.C.=2 A.L J. 758=15 M.L.J. 336=33 C. 116=32 I.A. 244=8 Sar. 239.**

(3)—*Civ. Pro. Code, s.* 13—Res judicata—*Appealable cases.*--In appealable cases, a decision to be *res judicata* must have been given in a previous suit which the parties, according to the ordinary procedure, were entitled to take, as to fact and law, ultimately to the same (or corresponding) appellate tribunal to which the subsequent litigation, wherein the decision is relied on as conclusive, could be carried. VITHILINGA PADAYACHI v. VITHILINGA MUDALI, **15 M. 111.** [*Diss.*, 25 C. 571, 28 C. 78=5 C.W.N. 483; *R.*, 17 M. 168, 17 M. 273, 18 M. 189, 2 O.C. 261, 54 P.R 1904, 29 M. 195, F.B.=16 M.L.J. 41=1 M.L.T. 25, 57 P.R. 1907=66 P.W.R. 1907.]

(4)—Res judicata—*Judgment ambiguous.*—In 1830, three persons A, B and C sold a taluqa to D, reserving to themselves a certain portion, subject to this condition that they were to pay no rent for this portion reserved, nor the Government revenue, which was to be paid by the vendee. The conditions of the sale deed were subsequently confirmed by an ikrarnama of 1831. Plaintiff, a purchaser of a part of the reserved portion, deriving title from the original vendors, sought to establish that the agreement between the original vendors and vendee was binding upon the defendant who derived title from the original vendee and that he was bound to indemnify him, the plaintiff, for the payment of Government revenue in respect of such portion of the reserved property as he possessed. The plaintiff did not put in the original deed and ikrarnama; he put in a decree of 1853 in a suit between the same parties in estate relating in a great degree to the same subject-matter, and relied upon it as an estoppel. The decree in favour of the original vendors was "for possession of the land, exempt from the payment of revenue and *wasilat* to the amount claimed by them." *Held* that the plaintiff failed to prove his case, as it did not appear definitely on the face of the decree, (*a*) whether it was adjudged that the claim to be indemnified for the payment of Government revenue related to the then impending settlement or to the next settlement or to any subsequent settlement, and (*b*) whether the effect of the judgment was simply to render the defendant therein, liable to indemnify the plaintiffs in respect of the reserved rent or whether the contract of indemnity was to be taken to run with the land. HERA LAL v. GONESH PERSAD, **11 C.L.R. 109, P.C=9 I.A. 64=4 A. 406=4 Sar. 342.**

(5)—*Several persons claiming easement or other right by one common title—Pasturage right—Civ. Pro. Code, s.* 13, *expl.* 5.—Expl. 5 to s. 13 of the Civ. Pro. Code only applies to cases where several different persons claim an easement or other right by one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well. The explanation has no application to the case of a prescriptive right, claimed by a person individually *in respect of his own house and premises* and depending upon the length of time he had used the right, which such person and other inhabitants of the neighbourhood did not claim under one common title. KALISHUNKUR DOSS v. GOPAL CHUNDER DUTT, **6 C. 49=6 C.L.R. 543.**

(6)—*Right common to plaintiff and others—Civ. Pro. Code, s.* 13, *expl.* 5.—The decision in a suit respecting a right common to the plaintiff along with others, will not be *res judicata*, in a subsequent suit in which the plaintiff along with others, not plaintiffs in the first suit, claims the same right, against the defendants in the first suit along with others, newly added as defendants, except as between the parties to the first suit. THANAKOTI v. MUNIAPPA, **8 M. 496.** [*R.*, 23 M. 28, 33 C. 905=10 C.W.N. 867; *D.*, 6 C.W.N. 178, 16 C.P.L.R. 161.]

(7)—Res judicata—*Decisions in previous rent suit—When* res judicata—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 13.—A decision in a rent suit is *res judicata* as regards the years in suit and the area admitted, but it does not operate as *res judicata* for all future time. But although the decision in a previous rent suit does not as a rule operate as *res judicata*, yet, in establishment of a formal contract, whether written or oral, between the parties finding by a rent Court that the rate of rent is as fixed by such contract, does operate as *res judicata*. SRINARAIN SINGH v. SUNDARABATI KUMARI, **6 Ind. Cas. 860** (1 C L.J. 248; 2 Ind. Cas. 11, 6 Ind. Cas. 860, *F.*)

(8)—Res judicata—*Material irregularity—S.* 11 *of Act* V *of* 1908—*S.* 70 (*a*) *and* (*b*) *of Act* XVIII *of* 1884, *as amended by Act* XXV *of*

***Res Judicata*—continued.**

—11.—Miscellaneous *—continued.*

1889.—*Held*, that, throwing out a case upon a mistaken view of the rule of *res judicata* is even a good ground of revision, under s. 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899. *Held*, also, that an issue is not *res judicata*, if (*a*) it has not been finally heard and decided; (*b*) the parties were not the same—co-defendants do not fall within the category of "same parties," and (*c*) it was immaterial for the decision of the revious case. RAMAN v. CHARAN SINGH **42 P.W.R. 1910.**

(9)—*Civ. Pro. Code*, s. 13—*Suits in City Civil Court and High Court between same parties and relating to same matter—Suit in City Civil Court first instituted and adjourned with consent of parties to await disposal of suit in High Court*—Res judicata.—Plaintiff instituted a suit in the City Civil Court to restrain the defendants from opening certain windows. Subsequently the defendants filed a suit in the High Court to restrain the plaintiff from interfering with their right to light and air through their windows. In both the suits, the acquisition of a prescriptive right to certain lights was the common issue to be determined The suit in the City Civil Court was adjourned from time to time with the consent of both sides to await the disposal of the suit in the High Court. After the High Court had delivered judgment, the suit came on for hearing in the City Civil Court. The plaintiff contended that as his suit was of prior date the decree of the High Court did not operate as *res judicata*. *Held* that the suit was *res judicata*, as the doctrine of *res judicata*, so far as it relates to prohibiting the re-trial of an issue, refers not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue. GURURAJAMMAH v. VENKATAKRISHNAMMA CHETTI, **24 M. 350.** (11 A. 148, *Appr. & F.*) [*R.*, 13 M.L.J. 134; 29 M. 333=16 M.L.J. 63, F.B., 33 C. 1101=10 C.W.N. 934=4 C.L.J. 149, A.W.N. 1908, 211.]

(10)—*High Court—Jurisdiction—Small Cause Court*—Res judicata.—The High Court cannot compel a Court of Small Causes to re-hear a suit dismissed by that Court on the ground of the same cause of action having been already heard and determined by a Court of competent jurisdiction. BROMO ROOP GOSSAIN v. ANUND MOYEE DEBIA, **7 W.R. 316.**

(11)—Ex parte *decree—Application for setting aside rejected—No appeal preferred—Fresh suit for setting aside* ex parte *decree*—Res judicata—*Civ. Pro. Code*, 1859, s. 119.—In August, 1877, when Act VIII of 1859 was in force, an *ex parte* decree was passed against plaintiff. He applied to have it set aside, but his application was refused and he did not carry the matter further. He then brought the present suit, which was virtually to set aside the decree of 1877. *Held*, that the present suit of the plaintiff, which was virtually to set aside the decree of 1877, on the identical grounds which, had he appealed, he would have urged as his defence in the former suit, could not be maintained. AHMAD ALI v. MUMTAZ ALI, **A.W.N. 1882, 4.**

(12)—*Administrator, suit by—Decree—Satisfaction—Sanction of the Court—Indian Succession Act* (X *of* 1865), *s.* 282.—The defendant brought a suit in 1888 against the then administrator of the deceased's estate, and obtained a decree. In satisfaction of the decree, the administrator executed a sale-deed of some property belonging to the deceased with the sanction of the Court obtained under s. 257-A of the Code of Civ. Pro. The management of the estate then passed into the hands of another administratrix, who brought a suit in 1901 to set aside the decree and sale thereunder:—*Held*, (1) that the decree obtained and the execution had against the former administrator in whom the aggregate of rights and obligations of the deceased were vested as the legal representative of the estate were binding upon his successor as long as that decree and sale consequent upon it were not the result of fraud or collusion; (2) in answer to the contention that the only execution of the decree allowed by law was that authorised by s. 282 of the Indian Succession Act, 1865, that whatever might have been the proper way of executing such a decree as a matter of fact, it was executed rightly or wrongly under s. 257-A of the Civ. Pro. Code: according to ss. 244 and 13 of the Code such execution bound the parties to the decree and all persons claiming under them; and the question was therefore *res judicata*. BAI MEHERBAI v. MAGANCHAND, **6 Bom. L.R. 853=29 B. 96.** [*Expl.*, 32 B. 381 =10 Bom. L.R. 519; *R.*, 31 B. 73=8 Bom. L.R. 885, 11 Bom. L.R. 250.]

(13)—*Award—Reference to arbitration out of Court—Application to file the award—Decree in terms of the award—Suit to set aside the decree.* A reference to arbitration without the intervention of the Court resulted in an award, in accordance with which a decree was passed. A suit was then brought to obtain a declaration that the decree was invalid. The grounds on which the plaintiff based his claim were grounds which had previously been substantially raised and determined in the proceedings taken under s. 525 of the Civ. Pro. Code, on the application to the file the award:—*Held*, (1) that the order that the award be filed should be regarded as a decree, (2) that the points which the plaintiff relied on were matters which were directly and substantially in issue in a former suit and so could not be tried in this suit, under s. 13 of the Civ. Pro. Code. MAGANLAL v. LALCHAND, **9 Bom. L.R. 259.** [*R.*, 9 Bom. L.R. 885.]

(14)—*Practice of first examining defendant as a witness disapproved—Civ. Pro. Code, ss.* 13, 179 *and* 180—*Indian Evidence Act* (I *of* 1872, *ss.* 21, 92, 137 *and* 138—*Pro-note—Liability under it of a person not a party to it*—

***Res Judicata*—continued.**

—11.—Miscellaneous—*continued.*

Practice—Examination of witnesses—Interest on amount decreed and costs allowed—Judge prohibited from receiving private communication from a party to suit.—The plaintiff sued D. 1, the husband, and D. 2, the wife, for recovery of the amount due on a pro-note and cheque alleged to have been signed respectively by D. 1 and J, the brother of D. 2 in payment of certain accounts due to him on building agreement. Before the institution of the present suit, plaintiff filed a suit on the whole account in which the amount of both these documents were included. That suit was dismissed on the ground that the plaintiff, having taken from D. 1, a pro-note in settlement of the account had no longer a cause of action on the account itself. Defendant 1 denied execution of the pro-note sued on, alleging that his signature was forged. The plaintiff, on the contrary, alleged the documents to be perfectly genuine, and, as regards the pro-note executed by D. 1, sought to make D. 2 also liable on the allegation that it was signed for D. 2 by her husband D. 1, as her duly authorized agent, D.2 denied the allegation. *Held*, (1) that the dismissal either rightly or wrongly of previous suit on the whole account which included the amount of the cheque now sued on operated as *res judicata* under s. 13, Civ. Pro. Code, and that on this account, part of the claim which is based on the cheque should fail. (2) That the evidence did not disclose that there was any such authority given by D. 2 to D. 1 to sign the pro-note as alleged by plaintiff. *Obiter.*—It is extremely doubtful whether any evidence would be admissible to show that D. 1, signed not only as a principal but also as an agent of a principal not named in the pro-note. Both under English Law, and Indian Law (see s. 92 of the Indian Evidence Act), such evidence would be inadmissible. (3) That the circumstantial evidence proved that the pro-note alleged to have been signed by D. 1 was in fact so signed and genuine. *Practice.*—(4) That it is not only illegal, but improper and unfair for Courts to permit the defendant, at the very outset of the case, to be put in the witness box nominally as plaintiff's witness to be cross-examined in the presence and hearing of the plaintiff, before the plaintiff is even called upon to go into the box and tell his own story. This practice generally prevalent, as it is in the Courts of this province, is much to be deprecated. It is certainly in accord with justice and equity that a party who has to defend a suit should hear what his opponent has to say before he is called upon for an answer, and it is only under exceptional circumstances that the opponent should be called at all as witness of the party who may be then putting his case before the Court. (5) That it is improper for a Judge to receive from any party to a suit, private communication in writing as to the special grounds of requiring production of certain documents, which communication is kept concealed from the opposite side. (6) That the following statement of

***Res Judicata*—continued.**

—11.—Miscellaneous—*continued.*

Defendant 2's counsel does not amount to a confession of judgment. "If the pro-note is established and receipt of consideration is proved Mrs. Max Mink does not wish to protract matters by disclaiming liability." In this case, interest at the rate given in the pro-note sued upon was allowed on the amount decreed and costs from the date of institution of the suit to the date of the decree and further interest at 6 per cent. per annum on this amount till payment. MAX MINK v. SHANKAR DASS, **116 P.W.R. 1908.**

(15)—*Agreement to undertake expense of litigation in consideration of receiving a share of land in dispute—Suit for cancellation of agreement—Cancellation refused by Court—Subsequent suit by plaintiffs for enforcement of the agreement*—Res judicata—*Mixed question of law and fact—Civ. Pro. Code, s.* 13.—An agreement was entered into between the plaintiffs and the defendants by which the plaintiffs were appointed the agents of the defendants to institute an appeal on behalf of the defendants at the expense of the plaintiffs themselves, the defendants promising to convey to the plaintiffs half the lands in dispute. The defendants succeeded in the appeal, and then sued for the cancellation of the agreement on the ground that it was not supported by consideration. The suit was decided against the defendants. The plaintiffs afterwards brought the present suit for the enforcement of the agreement. *Held*, that the judgment in the previous suit, being a decision on a mixed question of law and fact, was a bar to the present suit. Observations as to how far a decision on a question of law can operate as *res judicata*. MUAZAM SHAH v. ALAM KHAN, **44 P.R. 1908.** (22 B. 669, 14 M. 312, 28 C. 323, 5 M. 304, 11 M. 393, 28 M. 517, 32 C. 749, 10 C. 1087, 1 C.W.N. 687, 26 M. 104, 15 A. 327, 55 P.R. 1896, 92 P.R. 1902, F.B., 28 C. 318, *R.*)

(16)—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 13—*Suit instituted before Munsiff—Compromise-decree on appeal before District Judge—Application for review to have compromise-decree set aside—Decision if bars fresh suit before Subordinate Judge—Ground for setting aside compromise—Decree not raised in review—Fresh suit on such ground, if lies—Procedure for setting aside decree—Rule issued by the High Court—Discharge—Effect.*—Plaintiffs had instituted three suits against the defendants in the Court of the Munsiff. Pending appeals preferred before the District Judge against the decrees of the Munsiff, a compromise was filed and decrees made thereon. The plaintiffs then applied for review of the decrees alleging that their pleader had no authority to agree to the compromise. The District Judge rejected the application on the ground that the pleader had the requisite authority. The plaintiffs obtained rules from the High Court against this order but they were discharged. Plaintiffs now instituted a fresh suit in the Court of the Subordinate Judge praying that the compromise and the

Res Judicata—continued.

——11.—Miscellaneous—*continued.*

decree made thereon be set aside on the ground that the pleader had no authority to compromise and that the terms of the compromise went outside the subject-matter of the suit. *Held*, that, in order to have the compromise-decree set aside, it was open to the plaintiffs to proceed either by way of suit or by an application for review, the latter being the more regular mode of procedure. (10 C. 612, *F.*) That the effect of the discharge of the rules issued by the High Court was to leave the order of the District Judge undisturbed; that the question regarding the pleader's authority to compromise was directly and substantially in issue in the proceeding for review and was heard and finally decided by the Court of the District Judge, which was a Court of jurisdiction competent to try the present suit. This suit in consequence is barred by the rules of *res judicata*. (25 C. 571, 28 C. 78, *Rel. on.*) An independent suit would not lie merely because a ground is alleged for setting aside the decree which was not taken in the application for review. The plaintiffs having elected to proceed by way of review, ought to have raised upon their application all the grounds upon which they relied for setting aside the decree. RAM GOPAL MAZUMDAR v. PRASANNA KUMAR SANIAL, **10 C.W.N. 529=2 C.L.J. 508.**

(17)—*Partition suit—Decree in a previous suit operate as* res judicata *in a subsequent suit.*—In a partition suit the present plaintiff and defendants were defendants and had come to an amicable understanding among themselves and had agreed to divide the house in dispute equally between the plaintiff and the defendants. In accordance with that understanding a decree had been passed, on the 17th April 1889, directing that, on payment of Court fees, the plaintiff should recover the share assigned to him. Plaintiff did not pay the Court-fees and take possession of the house. In 1898 he brought the present suit to recover possession of half of the house on the strength of the old decree. *Held*, that the old decree operated as *res judicata* and the suit was barred. It was not open to the plaintiff, after his neglect for so many years and after he had lost his right to execute his decree, to bring a second suit for recovering possession of the house assigned to him. SONI v. MUNSHI, **3 Bom. L.R. 94.** [*D.*, C.W.N. 839.]

(18)—*Limitation, Erroneous decision on.*—An erroneous decision on a question of limitation cannot be treated as invalid, unless it be set aside in a way provided by law. GUNESSAR SINGH v. GONESH DASS, **25 C. 789.** (8 C. 51, P.C., *Rel. on.*) [*Affirmed*, 33 C. 1178=10 C.W.N. 969=4 C.L.J. 177=3 A.L.J. 698=8 Bom. L.R. 719=16 M.L.J. 365.]

(19)—*Right to honours in temple—Damages for invasion of right*—Res judicata—In a suit by U against A to establish his right to receive certain honours in a temple as appertaining to his office of Officiating priest of the temple, and to recover damages for the invasion of his right, where it appeared that in a former suit by U's predecessor against A, the claim to sit at the right side of the idol at festivals had been admitted but the right to receive a cake on the same occasion had been disallowed, *held* that U's claim so far as it sought to establish his right, was *res judicata*. A. SRINIVASA DIKSHATULU v. ANANTHA CHARLU, **4 M.H.C. 349.**

(20)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 2—*Bar of subsequent suit*, res judicata—*Act* XXIII *of* 1861, *s.*11.—Suit by the present plaintiff, as the disciple of a deceased priest, to recover from the defendant possession of the property allotted to the deceased under a compromise decree in a prior suit between him and the present defendant, and the claim was held to be liable to objection on the two following grounds, *viz.*, (1) the plaintiff's right to sue for the estate in the character of the disciple of the deceased priest had been determined by a decree in a suit brought by him against the Nazir of the District Court who had been placed in management of the property under the provision of s. 9 of Reg. VII of 1827, and who then represented the then undetermined owner; (2) the property now sued for had been specifically awarded to the plaintiff's predecessor as against the present defendant by the said compromise decree between them. If the decree were not time-barred, the deceased or his legal representative could obtain possession of the suit property by means of execution proceedings on the decree, and the mere fact of such decree having become time-barred could not confer on the legal heir or representative any right to *sue* again for the estate or any part thereof. The present suit, therefore, was barred alike by s. 2 of Act VIII of 1859 and s. 11 of Act XXIII of 1861. SHIVALINGAYA v. NAGALINGAYA, **4 B. 247.** [*R.*, 25 B. 115.]

(21)—*Possession, suit for.*—In 1895, G brought a suit against T claiming to be confirmed in possession of certain property in virtue of his being a surviving co-parcener and asking for an injunction restraining T from obstructing him in the enjoyment of that property. This suit was dismissed, the Court holding that there was no co-parcenary. The same plaintiff being dispossessed of the property in the *interim*, brought a second suit for restitution of possession on the ground that he was the nearest reversioner. *Held*, that the claim in the second suit was constructively in issue in the first and was therefore *res judicata*. GUDDAPPA v. TIRKAPPA, **2 Bom. L.R. 872=25 B. 189.** [*Disappr.*, 13 M.L.J. 448; *R.*, 31 M. 385, 11 Bom. L.R. 921; *Not F.*, 26 M. 760; *F.*, 6 Bom. L.R. 594.]

(22)—*Profits, suit for—Past profits—Finding in the former suit—Sum not fixed—Second suit for the profits.*—Where a claim for past profits is made in a former suit and inquired into and

Res Judicata—continued.

——11.—**Miscellaneous**—*continued.*

the finding recorded that there was a balance due to the plaintiff but no particular sum is fixed by the decree, no second suit for the past profits can be maintained by reason of the bar created by s. 13, Explanation III, Civ. Pro. Code. KACHU v. LAKSHMANSING, **2 Bom. L.R. 781=26 B 115.** [*D.*, 5 C.L.J. 192; *R.*, 34 C. 223, 9 Bom. L.R. 1164.]

(23)—*Civ. Pro. Code*, s. 13, *Expln.* 2—*Agra Tenancy Act* (II *of* 1901). *ss.* 164 *and* 165—*Suit for profits—Mode of collection.*—A suit for profits by one co-sharer against another was dismissed in 1905 by the Assistant Collector as barred by the rule of *res judicata.* This decision was reversed by the District Judge who remanded the case under s. 562, Civ. Pro. Code. The decision of the District Judge was affirmed on appeal by the High Court. In second appeal, after remand, the plea of *res judicata* was again put forward, based upon certain decisions of the High Court, barring a second appeal in case of remand, under s. 562, Civ. Pro. Code, under the Tenancy Act, and also based upon two other decisions between the same parties, which had not been set up on the previous occasion. *Held*, that the decision of the District Judge became final and its effect was not nullified by the decisions subsequently passed as to the right of appeal. As to the other decisions, they, not having been relied upon before the District Judge as a ground of defence, could not be now set up under expln. 2 of s. 13, Civ. Pro. Code. The appellant not only might but ought to have relied upon those decisions in the previous litigation. In a suit under s. 164 of the Tenancy Act, only the actual collections, made by the defendant, are to be taken into account in determining the amount of profits due. In a suit like the present, a plaintiff is not entitled to have profits calculated on what might have been collected or on the rates paid by tenants in other *khewates*, for lands of the same kind. This constitutes the distinction between a suit of this and one under s. 165, Tenancy Act. ABDUL RASHID v. ABDUL LATIF, **5 A.L J. 117=A.W.N. 1908, 68.**

(24)—Res judicata—*Suit for rent.*—The judgment in a suit for arrears of rent, deciding against the tenant, who, while admitting his liability to pay the amount claimed, contended that it was the rent due for a larger area than that specified in the plaint, would bar a subsequent suit by the tenant to have it declared that the same amount comprised the rent due on all the lands held by him under the landlord. BUSSUN LALL SHOOKUL v. CHUNDER DOSS, **4 C 686=4 C.L.R., F B.** [*D.*, 21 C. 236, *R.*, 1 C.L.J. 248, 57 P.R. 1907=66 P.W.R. 1907.]

(25)—*Rent suit—Judge trying the question and giving judgment on the question "what is yearly rent"*—Res judicata,—Where, in a rent-suit, the Judge tries the question and gives judgment on the question, "what is the yearly rent," and makes that the foundation of his judgment, that becomes *res judicata* between the parties. (19 C. 656, *F.*) *Obiter.*—Even if the judgment of the High Court in the prior suit did not operate as *res judicata*, in the prior suit, still it was some evidence of the rate of rent of the previous year.—*Per Norris, J.* BAKSHI v. NIZAMUDDI, **20 C. 505.** [*F.*, 1 C.W.N. 120, 4 C.W.N. 161, 6 C.W.N. 589.]

(26)—*First suit for rent for one year—Abatement of rent claimed to a smaller extent and decided—Second suit for abatement of rent to a larger extent in the future barred—Patni lease.*—The plaintiff brought this suit for the purpose of obtaining an abatement of her rent for the future for the lands of which the defendant had given her a patni lease and she claimed in this subsequent suit the precise measure of abatement, Rs. 155, which she had claimed in a former suit brought against her by the present defendant. *Held* that, as the principle of the entire question of what ought to be the permanent abatement of rent had been substantially determined in such previous suit, the question of abatement of rent determined in the former suit between the parties was *res judicata* as it decided the point not only for one year but for all future years. NOBA DOORGA DOSSEE v. FOYZBUX CHOWDHRY, **1 C. 202=24 W.R. 403.** (15 B.L.R. 25 and 23 W.R. 282, *F.*) [*Appr.*, 3 C. 383; *R.*, 13 M. 287, 9 B. 75, 1 C.L.J. 248; *D.*, 3 C. 271, 21 C. 236.]

(27)—*Suit for rent—Rate of payable rent—Failure of plaintiff to prove rate claimed—Decree for a lesser sum, on admission by defendant*—Res judicata.—On failure of the plaintiff, in a suit for rent, to prove the rate of rent claimed in the plaint, a decree for rent passed at the rate admitted by the defendants, which was less than that claimed, may or may not operate as *res judicata.* Whether the decree in that suit operated as *res judicata* and determined conclusively the rate of rent payable for the year in question in a subsequent suit for arrears of rent, at the rate claimed in the prior suit, can be determined by seeing whether the effect of the previous decision was that the plaintiff should recover from the defendants, the sum admitted by them to be due or that the sum admitted by them to be due was the proper amount of rent payable for the land in suit for the year or years in question. If it was to the latter effect, the decision in the prior suit will operate as *res judicata*, on the question of the rate of rent payable by the defendants. HURRY BEHARI BHAGAT v. PANGUN AHIR, **19 C. 656.** (7 C. 298, 11 C.L.R. 483, *R.*) [*F.*, 20 C. 505, 4 C.W.N. 43, 4 C.W.N. 161; *Appr.*, 6 C.W.N. 589; *R.*, 1 C.L.J. 248.]

(28)—*Contest for title—Ghatwal and under-tenure—Decision Bindingness on under-tenure holder*—Res judicata—*Civ. Pro. Code*, 1877, s. 13.—Where a decree, awarding to one of the parties money deposited in a Treasury by a third party, as the compensation for land taken by the latter for railway purposes, was based upon the right to the land as between a ghatwal and his under-tenure holders, the decree

Res Judicata—continued.

—11.—Miscellaneous—*continued.*

deciding that the under-tenure holder had been in possession by the mere sufferance of the ghatwal, the question of title having been directly and substantially in issue between the parties, *held*, the contest of title was conclusive between them under s. 13 of the Civ. Pro. Code, so as to bar the under-tenure holder, in a subsequent suit by the ghatwal to resume the under-tenure as determinable at will, from contesting that the under-tenure was permanent. RAMCHUNDER SINGH v. MADHO KUMARI, **12 C. 484=12 I. A. 188, P.C.=4 Sar. 666.** (*On Appeal from* 9 C. 411.) [*R.*, 20 M. 269 ; *D.*, 11 C.W.N. 525=34 C. 466.]

(29)—*Rent suit—Suit for title*—Res judicata, —The mere fact of the former suit, in which the question of title is determined, being a rent suit, does not prevent that determination from operating as *res judicata* in a subsequent suit brought for the establishment of title. RADHA MADHUB HOLDAR v. MONOHUR MUKERJI, **15 C. 756, P C.=15 I.A. 97=5 Sar. 211.** [*F.*, 25 C. 136 ; *D.*, 24 C. 569, 6 C.W.N. 66 ; *R.*, 18 B. 597, 17 A. 174=A.W.N. 1895, 47, 2 N.L.R. 94, 8 O.C. 37, 10 C.W.N. 820, 26 A. 447=A.W.N. 1904, 61, F.B.]

(30)—Res-judicata, *constructive*—Thak *map, admissibility of—Possession, legal termination of, when physical control is doubtful or interrupted.*—A *putnidar* brought a suit for assessment of rent in the Munsiff's Court on the ground that the tenant had encroached upon the adjoining lands of his landlord. The defence was that the lands in dispute were outside the *ganti* and comprised within his taluk. It was held that the disputed lands were within the *ganti*. A suit was then brought on the enhancement decree in the Subordinate Judge's Court for the recovery of rent. That suit was decreed *ex parte* and the decree was enforced in execution. *Held*, a suit brought in the Court of the Subordinate Judge, by the representative of the tenant, for recovery of the land, on the ground of its being included in the taluq, was barred by the principle of constructive *res judicata*. (31 C. 79, *F.*) *Held*, also, that the plaintiff could not be allowed to get rid of the decree passed twenty-four years before, and place himself in a position of advantage which he could not occupy, if he made a direct attempt to assail that decree. (29 C. 518=29 I.A. 104=6 C.W.N. 617, *App.*) An entry in a *thak* map that it was prepared in the presence of the representatives of certain parties is admissible in evidence. (7 C.W.N. 849, *F.*; 18 C. 224=17 I.A. 145, *D.*) As soon as a person is entitled to possession and enters in the assertion of that possession, or which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who so enters. BIDHUMUKHI DASI v. JITENDRA NATH ROY, **10 C L.J. 527=4 Ind. Cas. 442.**

(31)—*Mortgage decree—Execution of decree—* Res judicata—*Civ. Pro. Code*, 1882, *s.* 13—In execution of a decree upon a mortgage by S and A, which was passed against the legal representatives of S and one only of the legal representatives of A, part of the mortgaged property was sold to H, while, as to the remainder, a compromise was effected, whereby it was saved from sale by H paying the decree-holders Rs. 474. H subsequently obtained possession of the whole of the mortgaged property ; and two suits were brought against him by the other legal representatives of A, for possession of their shares and the ejectment of H therefrom. H defended these suits on the ground that he stood in the shoes of S and occupied the position of one joint mortgagor, who had satisfied the other's debt by payment of Rs. 474, and that, unless and until the plaintiffs should pay their proportion of that amount, he was entitled to retain possession of the whole of the property mortgaged. These suits were dismissed in the lower Courts, but the High Court on appeal decreed them, merely observing that they were governed by the decision of the Full Bench in *Jafri Begam* v. *Amir Muhammad Khan*. (7 A. 822). H then sued those plaintiffs for Rs. 275 as the contribution which he alleged to be due by them in respect of the sum of Rs. 474. *Held* that the High Court in its former decision must be taken to have held that the plaintiffs in that case were entitled to an unqualified and unconditional decree for ejectment, and that the present claim was *res judicata* by reason of that decision. MAZHAR ALI KHAN v. HADI KHAN, **A.W.N. 1889, 4.**

(32)—*Suit to enforce mortgage—Parties to suits—S.* 13, *Civ. Pro. Code.*—In 1883, the plaintiff commenced an action against his mortgagors on a bond dated 21st July, 1871, and obtained a decree. In 1888, the defendant brought a suit against the same mortgagors to enforce the mortgage of the 18th August, 1876 ; and obtained a decree for payment against the mortgagors. To this suit, the mortgagors and the plaintiff were made parties. The plaintiff held another mortgage over the same property under a deed, dated 7th February, 1874. In 1893, the plaintiff brought an action, to enforce the bond of 7th February 1874, against the mortgagors and the defendant. The defendant contended that in the suit of 1888 the plaintiff did not set up the bond of 7th February 1874, and that therefore the action was barred by s. 13 of the Civ. Pro. Code. *Held*, that the suit was barred as being *res judicata*. SRI GOPAL v. PIRTHI SINGH. **14 Bom. L R. 827 =24 A. 429, P.C.=6 C.W.N. 889=29 I.A. 118 =8 Sar. 293.**

(33)—*Civ. Pro. Code*, 1877, *s.* 13—Res judicata—*Mortgage.*—One of the heirs to the estate of the deceased Mahomedan mortgaged such estate to B. Subsequently another heir to the same estate sued the mortgagor for her share of the property, claiming by right of inheritance, and obtained a decree. Then her sister, also an heir, sued both the mortgagor and the mortgagee for possession of her share, and obtained a

***Res Judicata*—continued.**

——11.—Miscellaneous—*continued.*

decree against the mortgagor, but, as against the mortgagee, her suit was dismissed. Both the sisters then sold their shares to the plaintiff who brought the present suit against the mortgagee for possession. *Held* that the question of the defendant's right to the possession of such shares as mortgagee was *res judicata*. MATADIN v. SADIK HUSAIN, **A.W.N. 1882, 14.**

(34)—*Suit on a mortgage—Prior mortgagee added as party but remaining* ex parte—*No issue about prior mortgage—Decree not reserving rights of prior mortgagee—Subsequent suit by prior mortgagee on his mortgage barred—Civ. Pro. Code, s.* 13.—Where in a suit on a mortgage, the mortgagor brought to the notice of the Court through his written statement the existence of a prior mortgage, and the prior mortgagee was made a party but he remained *ex parte*, and no issue was raised about the prior mortgage and the Court passed the usual decree for sale without reserving the rights of the prior mortgagee, a subsequent suit by the prior mortgagee on his mortgage was held to be barred by Explanation 2 to s. 13, Civ. Pro. Code, as he could and ought to have raised the question of his prior mortgage in the former suit. KRISHNAMACHARIAR, v. SESHADRI AIYANGAR. **11 M.L.J. 333.**

(35)—*Mortgage suit—Redemption—Decree of redemption—Mesne profits—Separate suit.*—In virtue of a redemption decree, the mortgagor paid the amount of the decree and took possession of the property in 1893. This decree was amended in appeal, by substituting a large amount of redemption money but no provision was made for the mesne profits from the date when the possession was transferred to the date of the payment of the additional amount. To recover these mesne profits, the mortgagee brought a fresh suit. *Held*, that the claim was *res judicata* as the question was one which arose directly out of the mortgage transaction which was the subject-matter of the litgation in the former suit; and was one that could and ought to have been advanced in it. VINAYAK v. DATTATRAYA, **4 Bom. L.R 492=26 B. 661.** [*R.*, 5 Bom. L.R. 97, A.W.N. 1907, 281=4 A.L.J. 763=30 A. 36, 30 A. 225=A.W.N. 1908, 96=5 A.L.J. 192.]

(36)—*Purchase of the equity of redemption by first mortgagee—Sale of mortgaged property in execution of decree obtained by second mortgagee—Purchase by decree holder—Suit by first mortgagee for declaration of invalidity of auction sale, dismissal of—Suit for redemption by second mortgagee decreed—Suit for possession by second mortgagee—Plea by first mortgagee as purchaser of equity of redemption, to redeem second mortgage, validity of—S.* 13, *C.P.C.*—The appellant, first mortgagee, obtained a decree for sale of the property upon his mortgage. The respondent then became the second mortgagee of the same property. In consideration of his decretal amount, the first mortgagee purchased the mortgaged property from the judgment-debtor and obtained possession of the property.

***Res Judicata*—continued.**

——11.—Miscellaneous—*continued.*

In a suit brought upon his mortgage, the respondent obtained a decree for sale of the property, notwithstanding the plea of his prior mortgage set up by the appellant. In execution of the respondent's decree, the property was sold and purchased by the respondent himself. The appellant, though a party to the respondent's suit was not made a party to any proceedings in execution nor to the order absolute for sale. Then the appellant brought a suit for a declaration of the invalidity of the auction-sale, which was dismissed. Recognizing the position of the appellant as prior mortgagee, the respondent brought a suit for redemption of the appellant's mortgage and obtained a decree in his favour. In execution of the above decree, the respondent obtained formal delivery of possession. As his application for mutation of names was opposed by the appellant, the respondent brought the present suit for recovery of possession of the disputed property. The contentions of the appellant were that, as his purchase was subsequent to the respondent's mortgage, he, as purchaser of the equity of redemption, was entitled to redeem that mortgage; that, as he was not made a party to the proceedings, which ended in the order absolute for sale and actual sale of the property, his right of redemption still subsists; that the Court below ought to have afforded him an opportunity to redeem the respondent's mortgage and that the decree for possession should have been made conditional upon his not redeeming that mortgage. *Held*, that the appellant was precluded from raising this contention and was not entitled to redeem. He might and ought to have raised this plea in the previous litigations and, having failed to do so, he was barred by s. 13, Expl. II, Civ. Pro. Code, from setting up a title to redeem. The effect of his omission to set up, in the previous suits, the defence which he now raised, was that it must be taken that the Court had refused in the previous litigations to recognise the right, which he now claimed. CHET RAM v. BARU MAL, **A.W.N. 1905, 107=2 A.L.J. 278.** (24 A. 44, F.B., *Expl.*)

(37)—*Civ. Pro. Code*, ss. 13, 106—*Suit dismissed in defendant's absence on plaintiff's failure to adduce evidence—Fresh suit, if barred.*—S. 13, Civ. Pro. Code, is no bar to fresh suit, when the previous suit is dismissed in the defendant's absence on the failure of plaintiff to adduce evidence. DOMA RAM v. RAGHU NATH PANDIT, **10 C.W.N. 40.** (13 A. 53, *R.*)

(38)—*Failure to include present claim in previous suit—Ground of title same—Defendant different—Properties comprised different*—Res judicata—*Civ. Pro. Code*, 1882, s. 43.—Where, in a previous suit, the plaintiff has failed to include the present claim, he would not be barred from maintaining the present suit by s. 43, Civ. Pro. Code, where, though the ground of title on which the two suits are

***Res Judicata*—continued.**

——11.—Miscellaneous—*continued.*

founded is one, the defendants are different persons and the properties comprised in the two suits are also different. DAMPANABOYINA GANGI v. ADDALA RAMASWAMI, **25 M. 736 = 12 M.L.J. 103.** [*R.*, 26 M.686, F.B., 13 M L.J. 479 = 27 M. 94, 6 O C. 379, 1 P.R. 1905 = 83 P. L.R. 1905, 9 O.C. 339, 31 M. 252 = 18 M.L.J. 238.]

(39)—*Plea of* res judicata, *not taken notice of, the decree or order on which it rested not having been produced* —Where in one of the appeals, a plea of *res judicata* was taken on the ground that a ruling by the Judge in one application for execution ought to be held conclusive against the judgment-debtor in every other application for execution of the same decree, *held*, that the plea required no further notice, because the decree or order upon which it rested had not been produced. BISAMBHAR NATH v. NAWAB IMDAD ALI KHAN, **18 C. 216, P.C. = 17 I.A. 181 = 5 Sar. 619.**

(40)—*Civ. Pro. Code*, 1882, *s.* 13 (=*s.* 11, *new Code*)—*Judgment of British Court—Suit on, in Native territory—Cession of territory to British Government pending suit—Act* XVII *of* 1886, *s.* 8. — While a suit founded on a judgment of a British Court was pending in the Court of Jhansi (Native State), the town was ceded to the British Government; *held*, with reference to s. 8 of Act XVII of 1886, that the suit might be continued in the British Court of Jhansi after the cession, and that s. 13 of the Code was no bar. SALONI v. HAR LAL, **10 A 517 = A.W.N. 1888, 183.**

(41) —*Civ. Pro. Code*, *s.* 13 — *Finding in previous judgment immaterial to decision of case.*—D. B. and S. G. sued for ejectment of M. P. from a certain house claiming title thereto under a deed of gift from one B. K. the mother of D. B., who was alleged to be the widow of a separated Hindu to whom the house had belonged. Prior to this suit M. P. had brought a suit against B. K., D. B. and S. G. alleging that the house in question was the property of a joint Hindu family of which he was a member and praying for a declaration of his right to a one-sixth share therein. That suit was dismissed on the ground that the property was not joint, as asserted, but the Court of first instance recorded a finding that "the gift by a woman in respect of immoveable property even in favour of the next heirs must be held to be invalid, a woman having no such authority." In the subsequent suit this finding was relied upon by the defendant as constituting *res judicata* in his favour *Held* that the finding in question did not operate as *res judicata*. MADHO PRASAD v. DARYAI BIBI, **A.W.N. 1895, 108.**

(42) —*Suit by some reversioners—Subsequent suit by other reversioners.*—Where an action was instituted by two of the reversioners for a declaratory decree and for an injunction forbidding alienation of the moveable and immoveable property of the deceased, which was then

***Res Judicata*—continued.**

——11.—Miscellaneous—*continued.*

in the possession of his widow, such a suit can only bar those two reversioners and cannot exclude the other reversioners from obtaining a declaratory decree in another suit, which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants. CHAND KOER v. PARTAB SINGH, **16 C. 98 = 15 I.A. 156, P.C. = 5 Sar. 243.** [*R.*, 27 M. 588, 1 P.R. 1905 = 83 P.L.R. 1905, 58 P.R. 1905 = 59 P.L R. 1905, 8 O.C. 124]

(43) — *Will — Revocation—S.* 13, *Civ. Pro. Code*, 1882 (=s. 11, *present Code*) Res judicata *not made out* —Case where a decree obtained against the defendant that the will was revoked, was held not to be *res judicata* in a suit against him brought by other plaintiffs, but was *held* to be admissible as evidence against him. BHITTO KUNWAR v. KHESHO PERSHAD MISSER, **1 C.W N. 265, P.C. = 19 A. 277 = 24 I A. 10 = 7 Sar 131.** [*Appr.*, 25 A. 546 ; *Appl*, 24 B. 591 ; *R.*, 25 C. 522, F.B., 4 C.W.N. 63, 5 Bom. L. R. 230, 9 C.W.N. 402, 9 C.L.J. 597 = 12 C.W. N. 739.]

(44)—Res judicata—*Question tried by Probate Court—Subsequent suit—Maintainability of suit —Declaration of revrsionary interest—Specific Relief Act* (I *of* 1877), *s* 42.—Where, in a contested application for probate the Court of Probate has held that a certain person was not the next reversioner of the deceased, and such finding has been affirmed on appeal, no suit by the said person to have it declared that he was such reversioner would lie. The previous judgment would bar the subsequent suit. Where the real object of the suit was not merely to get a declaration but also to protect the present interest of the plaintiff, the suit would not be barred under s. 42 of the Specific Relief Act. RAMNANDAN PERSHAD v. SHEOPARSAN SINGH, **11 C L.J. 623 = 6 Ind Cas 301.** (6 C W.N. 912, *F.*) [*R.*, 12 C.L.J. 185 = 14 C.W N. 924 = 7 Ind Cas. 126.]

(45)—Res judicata *as to point of law—No bar when the subject-matter of second suit is different—Trustee under a will—Co-trustee, validity of the appointment of, by existing trustee.*—One G.N. had been appointed as trustee under the will of A. G.N. died and his son and heir, K, succeeded him as trustee. S, the plaintiff-respondent, was appointed by K as a co-truster with him. In the present suit, S sought to enforce his rights as co-trustee entitling him to act jointly with the defendant-appellant, K, in respect of charities and trusts created by the above will. The question had to be decided whether the appointment of S as co trustee made by K was valid in law. It was urged on behalf of the plaintiff-respondent that the question of the validity of the appointment was *res judicata* by reason of a previous suit brought by the plaintiff against the first defendant and another for the purpose of setting aside certain fraudulent alienations of trust-property, since it had been

***Res Judicata*—continued.**

—11.—Miscellaneous—*continued.*

rai ed and decided in plaintiff's favour in that suit. *Held*, the contention of the respondent as to *res judicata* was not sustainable, as the prior decision was one of a question of law and an adjudication upon a point of law, though binding upon the parties, in any future suit, *quoad* the same object-matter, is not conclusive even between the same parties when the subject-matter of the second suit is different. (5 M. 304, 11 M. 393, 22 B. 669, 26 B. 25, *R. and F.*) As to the above question of the competency of K to appoint S as his co-trustee, *held*, s. 73 of the Trusts Act does not extend to trusts, such as that created under the will of A in the present case, and, in the absence of a power to appoint trustee, under the will creating the trust or by virtue of some statutory provision, the existing trustee has no power to appoint any person as trustee either in his own place or to act jointly with him. The appointment by K was, therefore, not valid in law and could not confer on S any right to act as trustee. GOPU KOLANDAVELU CHETTY v. T. SAMI ROYER, **15 M.L.J. 466 = 28 M. 157** [*R.*, 30 M. 461 = 17 M.L.J. 250, 44 P.R. 1908.]

(46)—*Civ. Pro. Code* (1882), *ss.* 13, 43(=*s.*11, *O.* II, *r.* 2, *Civ. Pro. Code*, 1908)—Res judicata—*Relinquishment—Specific performance of contract—Suit for possession—Defendant's name struck out in first suit.*—Plaintiff had obtained a decree for specific performance of a contract of sale against defendants 3 to 7, and subsequently brought the present suit for possession against them, and the principal defendants in whose favour the former had executed a conveyance, although made parties, in the former suit, were at the request of the plaintiff subsequently removed from the category of defendants, *held* that the claim against both sets of defendants did not arise out of the same cause of action, the cause of action of the first suit being the refusal of defendants 3 to 7 to execute a deed of sale and the cause of action against the principal defendants in the second suit being the resistance to the plaintiff taking possession of the property conveyed to him, and the second suit was not barred by ss. 13 and 43, Civ. Pro. Code. It was not necessary under s. 27 of the Specific Relief Act to bring the previous suit against both the sets of defendants. ABDUL MAJID v. BOIDA NATH DHUR, **6 C.W.N. 314.**

(47)—*Civ. Pro. Code*, 1882, *s.* 13—*Explanation V*—Res judicata—*Decree of a foreign Court—Bond executed in British India—Subsequent acknowledgment in a foreign territory—Decree in the foreign Court—Judgment by consent how far an estoppel—Partnership—Partner's power to change the joint liability of his co-partner into a joint and several liability—Estoppel.*—The plaintiff lent, on the 6th July 1895, a sum of money to a partnership composed of defendants, some of whom resided in the Baroda (a Native State) territories and some in British India The money were borrowed in Ahmedabad (British territory), and the

***Res Judicata*—continued.**

—11.—Miscellaneous—*continued.*

khata was signed there on behalf of the partnership by defendant No. 1 (a British subject). On the 25th April 1896, defendant No. 1, passed to plaintiff in Baroda an agreement reciting the above transaction and acknowledging the debt of Rs. 13,400. The agreement gave the plaintiff the power of taking the money from the firm's deposit of Rs. 33,732 lying in the Baroda treasury; and it also acknowledged the joint as well as the several liability of all the partners. On the 1st September, 1896, plaintiff and defendant No. 1, being in Baroda, referred the matter in dispute to arbitration, and on the day following took out on the award a consent decree from the Baroda Civil Court. In execution of this decree the plaintiff got, on the 6th December 1896, through the Baroda Court, Rs. 7,000 from the deposit in the Baroda treasury. Plaintiff then brought a suit in the Court of the First Class Sub Judge at Ahmedabad to recover the balance Rs. 6,909-4-0 with interest from all the defendants. The First Class Sub-Judge dismissed the suit and held that the suit against defendant No. 1 was *res judicata*, because the *khata* was merged in the agreement of the 25th April 1896 and the said agreement was merged in the decree of the Baroda Court and that the remaining defendants were liable for the debt jointly but not jointly and severally:—*Held*, (1) that the remaining defendants were liable to be sued because defendant No. 1 had no authority without the consent of his partners to change the joint liability of each partner, which was the ordinary incident of the partnership, into a joint and several liability; (2) that the principle of *res judicata* did not operate as a bar to the present suit, because the Baroda Court had no jurisdiction over the present defendants, who were British subjects and resided in the British territory; (3) that the defendants could not rely on s. 13, Explanation V, Civ Pro. Code, 1882, because that referred to *bona fide* claims and not to *bona fide* defences. A judgment by consent raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. LAKSHMISHANKER v. VISHNURAM, **1 Bom. L.R. 534 = 24 B. 77.** [*R.*, 22 A. 307.]

(48)—*Instalment-bond—Bond payable by instalments—Fraud—Defence—Limitation.*—The defendant signed on the 4th June 1893 a Ruzu acknowledging Rs. 11,534-15-0 to be due by him to the plaintiff's firm. On the 19th June 1894, he paid Rs. 400 cash and a Hundi for Rs. 600 and for the balance Rs. 10,634-15-0 passed an instalment bond payable by yearly instalment of Rs. 1,000 each. The Hundi having been dishonoured, the plaintiff's firm brought suit No. 249 of 1895 to recover the amount of the Hundi from the defendant. The latter pleaded want of consideration and impeached the correctness of the accounts. The Court appointed a Commissioner to examine

Res Judicata—continued.

——11.—**Miscellaneous**—*continued.*

the plaintiff's accounts: and the Commissioner reported that the debt due was Rs. 3,016-3-0 and not Rs. 11,534-15-0 as stated in the Ruzu. Upon this the Court without going into other question raised by the defence, decreed the claim. In 1897, the first two instalments under the bond having become due, the firm sued the defendant (Suit No. 105 of 1897) to recover Rs. 2,000. The defendant admitted the claim, and the suit ended in a consent decree. The defendant then instituted Suit No. 412 of 1898 against the firm for cancellation of the instalment bond, alleging that it was obtained by misrepresentation and fraud, and was void in law and passed in respect of wagering transactions and nothing was due under it. The litigation went up to the High Court, which without giving any decision on the merits, dismissed the suit as time-barred. In 1902, the plaintiff sued to recover 3rd, 4th and 5th instalments under the bond. The defendant pleaded that the bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contract unenforceable by law. The Subordinate Judge held that the defendant was barred by the decrees in Suits Nos. 249 of 1895 and 105 of 1897 from raising any of his contentions, and passed a decree in plaintiff's favour. On appeal, the District Judge held that the defendant was barred by *res judicata* from pleading that the bond was voidable for fraud or from pleading that the bond was void by reason of its consideration being a wagering debt. On appeal to the High Court:—*Held*, by *Aston, J.*, that unless it be established that the pleas which the defendant had raised in the present suit and had not been allowed to prove, would, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June 1893 to less than Rs. 600 *plus* the Rs. 400 paid in cash, the decision in the Hundi suit could not operate as *res judicata* in respect of the said pleas, for the matter which might and ought to be made a ground of defence in the Hundi suit must be a ground of defence to "the claim actually made in the said former suit; (2) that the plea that the consideration for the instalment bond partly failed because of the reasons set up in the pleas aforesaid, would have been irrelevant in Suit 195 of 1897, unless by setting up these pleas and proving them the claim in that latter suit for Rs. 2,000 would have been reduced. *Held*, by *Scott, J.*, that before the present suit was brought the issue as to consideration had not been raised except with reference to the Hundi and had been heard and determined in Suit No. 249 of 1895 with reference to that document alone. The defendant was, therefore, not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration; (2) that the lower Court was wrong in holding that the defendant was barred by s. 13 of the Civ. Pro. Code from raising the questions of

Res Judicata—continued.

——11.—**Miscellaneous**—*continued.*

fraud or wager as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895 was a sufficient issue for the disposal of the case on the Hundi and in that suit the defendant's liability under the Hundi was the only matter in issue; in Suit No. 105 of 1897, there was no hearing and disposal of any matter in issue: the provisions of s. 13 did not, therefore, apply; (3) that the fact that the defendant was, owing to the bar of limitation only, denied the specific relief of cancellation claimed in Suit No. 412 of 1898, could not prevent him from raising defences on the merits as a defendant in this suit. MINALAL v. KHARSETJI; KHARSETJI v. MINALAL, **8 Bom. L.R. 296=30 B. 395.**

(49)—*Civ. Pro. Code*, 1882, *ss.* 13 *and* 344—*Res judicata — Insolvency proceedings.*— An application under s. 344 of the Civ. Pro. Code, is not a "suit" within the meaning of s. 13 of the Civ. Pro. Code. (145 P.R. 1884, *F.*) The rejection of such an application is not a bar to a subsequent application on arrest at the instance of the decree-holder who previously caused applicant's arrest or at the instance of another decree-holder. RAM LAL v. LABHU, **122 P.L.R. 1903.**

(50)—*Partnership--Debt--Assignment.*—M and A were partners in a trade, in respect of which a debt was due to H. After A died, the debt was settled between H on the one side and M and A's widow, as guardian of his minor sons, on the other. Both M and A's widow passed bonds to H, each for a moiety of the debt. H obtained a decree against M on his bond, which was satisfied, and he then sued A's heirs. The Court allowed the widow's objection that she was not competent to give a bond binding her sons personally, and of its own accord made M a defendant and passed a decree against M and A's estate. H assigned this decree to R, who applied for execution against M. The present suit was brought by M, against H and R to restrain R from executing the decree, alleging that, during the pendency of the above suit, H agreed with him that he would not get a decree against him, and, in the event of its being passed against him, he would not execute it. The plaintiff also claimed damages from H. The lower Court rejected the plaint, on the ground that the question in issue in the suit as between M and R was *res judicata* by reason of the decree in the previous suit, and that there was no cause of action for damages against H. *Held*, that the suit was not *res judicata*. MUKUND HARSHET v. HARIDAS KHEMJI, **17 B. 23.** (11 B. 708, *D.*)

(51)—*Civ. Pro. Code s.* 13—Res judicata—*Effect of expiry of limitation—Extinguishment of right.*—In 1862, R purchased certain land in execution of a decree against D. In 1875, A applied for foreclosure of a mortgage by conditional sale to him of the land by D, dated the 29th June 1861. The mortgage was accordingly foreclosed. In 1877 R sued A to have the

Res Judicata—continued.

——11.—Miscellaneous—*continued.*

mortgage set aside on the ground that it was a fraudulent and collusive transaction. The suit was dismissed on the ground that it was barred by limitation. In 1880, A brought the present suit against R for possession of the land by virtue of the mortgage and foreclosure proceedings R pleaded that the mortgage was a fraudulent and collusive transaction. *Held* that this contention of R was not *res judicata*. His plea of fraud and collusion was not judicially disposed of in the suit by him in 1877, as required by s. 13 of the Civ. Pro. Code. Though R's claim to have the mortgage-deed cancelled was dismissed as beyond time, yet, he continued in possession. The determination of the period allowed only extinguishes the claimant's (R's) right, but does not create a right to the property for the opposite side (A). Hence, when the opposing side on any grounds contests with the party in possession, then it is necessary that the objections raised against the claimant be disposed of. DILSUKH RAI v. TIKA RAM, **A.W.N. 1883, 100.**

(52)—*Different pre-emption suits regarding sale of same property—Appeal in one suit*—Res judicata.—Where, with regard to the sale of certain property, three suits for pre-emption were instituted all questioning the amount of the price, and they were disposed of by one judgment awarding to the different sets of plaintiffs separate shares in the property on payment of proportionate amounts of the sale consideration which was put at a much lower figure than that claimed by the vendees, and the vendees preferred an appeal against the decree in one of the suits, *held*, that the decrees not appealed against did not operate as *res judicata* on the question of the sale consideration. JHAMAN v. BILAS KUNWAR, **1 A.L. 466.**

(53)—*Civ. Pro. Code, Act* XIV *of* 1882, *s.* 13 —*Right of pre-emption not set up in previous suit for redemption—If bar to suit for pre-emption.*—The failure of a mortgagee to set up his right of pre-emption in a suit by the purchaser from the mortgagor for redemption, is no bar under s. 13 of the Civ. Pro. Code, to the trial of the mortgagee's subsequent claim for pre-emption in respect of the sale by the mortgagor. RAMCHAND v DURGA PRASAD, **26 A. 61, F.B. =A.W N. 1903, 196.** (1 A 75, 1 A. 316, 3 A. 189, 20 A 516, *Overruled;* 11 M I.A. 50, 12 A. 234, *R.*) [*R.*, 27 A. 78=A.W.N. 1904, 165= 1 A.L.J. 426, 55 P R. 1907=96 P.W.R. 1907= 65 P.L.R. 1908, 133 P.R 1907, F.B.=84 P. W.R. 1907=88 P.L R. 1908.]

(54)—*Suit for redemption—Decree declaring right to redeem not executed, effect of.*—A suit by a mortgagor, to redeem the mortgage is not barred by virtue of a previous decree, which declared the mortgagor's right to redeem, on paying a certain amount. The previous decree, should be regarded as a declaratory decree.

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——11.—Miscellaneous—*continued.*

SAMI v. SOMASUNDRAM, **6 M. 119.** [*Overruled*, 25 M. 300; *Diss.*, 19 A. 202; *F.*, 15 M. 366, 24 A. 44=A.W.N. 1901, 194; *Appl.*, 8 M. 478, *R.*, 16 B. 243, 19 M. 40, 21 M. 18, 43 P.R. 1907=101 P.W.R. 1907=169 P.L.R 1908, 93 P.R. 1908, F.B.=164 P.L.R. 1908=133 P.W. R. 1908.]

(55)—*Mortgagor's suit for possession of mortgaged property against trespasser after dismissal of similar suit by mortgagee in default—Waste land, presumption as to possession of.*—The mortgagee of a village let some waste land to A to have it reclaimed and brought under cultivation. The defendants interfered with A and the mortgagee brought a suit for possession in which the mortgagor was impleaded as a defendant. The suit was dismissed on the mortgagee failing to put in an appearance. Subsequently the mortgagor brought a suit for possession of the waste land against the defendants. *Held*, that the decision in the former suit did not render the question *res judicata*. *Held*, further, that the mortgagor being in rent-collecting possession of the village, must be presumed, in the absence of any evidence to the contrary, to be in possession of the waste land therein. SHEIK MUHAMMAD ALAM v. RAGHBIR SINGH, **9 O C. 33.** (8 O.C. 177, *F.*)

(56)—*Civ. Pro. Code*, 1882, *ss.* 13 (*Exp.* II), 48 —*Dismissal of former suit for sale of land as on mortgage—Subsequent suit to recover land as no usufructuary mortgage from defendants in wrongful possession.*—A former suit by the plaintiffs to recover money alleged to be due under a mortgage, by sale of the land, was dismissed on the ground that the alleged mortgage was a purely usufructuary mortgage which contained no covenant to pay. In the present suit the same plaintiffs claimed as mortgagees, and alleged that the defendants (who were also defendants in the former suit) though they were let into possession as tenants, were setting up a title in themselves and refused to surrender the land, and prayed for a decree for possession of the land and mesne profits. *Held*, that the suit was not barred either by s. 43 or by s. 13, Expl. II, of the Civ. Pro. Code, the rights in dispute in the two suits being different. VEERANA PILLAI v. MUTHUKUMARA ASARY, **27 M. 102.** (21 M. 91, *Com.*; 26 M. 760, *Appr.*) [*F.*, 2 N.L.R. 94, 29 M. 153, F B.=16 M.L.J. 48; *Appr.*, 15 M.L.J. 374; *R.*, 55 P.R. 1907=96 P.W.R. 1907=65 P.L.R 1908, 31 M. 385.]

(57)—*Civ. Pro. Code*, 1877, *s.* 13—Res judicata—*New circumstances.*—The mortgagor of certain property who, according to the terms of the mortgage, was bound to pay interest annually, sold the mortgaged property to A. The property was purchased in auction by B in execution of a decree against A; the balance of the proceeds of the execution sale, after satisfaction of the decree, amounting to Rs. 2,364, was appropriated by A. Subsequently, the mortgagees sued his mortgagor, as well as A

Res Judicata—continued.

—11.—Miscellaneous—*continued.*

and B, for the annual interest due to him under his mortgage, wherein it was held that A was primarily liable to satisfy the claim because he had appropriated the surplus proceeds of the execution sale, and the mortgaged property in the hands of B was only liable in case A failed to satisfy the claim. A paid several instalments of interest, and paid in Court subsequently the balance in his hands out of the Rs. 2,364, which was at once drawn by the mortgagee. In 1880, the mortgagee brought the present suit for the principal amount against A and B. *Held* that the property in the hands of B was liable and that the previous judgment did not operate as *res judicata*, as the position of the parties assumed an entirely different character when the first defendant paid in Court the surplus proceeds of the execution sale. RATAN RAI v. HANUMAN DAS, **A.W.N. 1881, 139.**

(58)—*Release of same property from attachment under different decrees—Suits to set aside the orders—Act* VIII *of* 1859 *(old Civ. Pro. Code), ss.* 2 *and* 7—*Mortgage during infructuous attachment—Subsequent attachment and sale—Effect.*—A suit to bring certain property, released from attachment on a claim, to execution sale, will not bar a second suit to bring to sale the same property, released from attachment in execution of an entirely different decree under a different order, there being, in no other respect than that the property to be sold is the same, any identity between the suits. It is not also incumbent upon the plaintiff to include both claims in one suit under s. 7 of the old Civ. Pro. Code of 1859. Principle laid down in 2 C. 152 held not applicable. [*R.*, 14 B. 31.] Where property had been attached prior to a mortgage, under an *ex parte* decree which was set aside, the attachment being withdrawn, and the property was purchased under a subsequent attachment under a subsequent decree, the purchaser cannot set up his purchase as against the earlier mortgage. RADHANATH KUNDU v. LAND MORTGAGE BANK OF INDIA, LTD., **6 C. 559=8 C.L.R. 10.**

(59)—*Regular suit for attached property—Dismissal of suit not upon merits—Second suit, right of.*—Where a regular suit for establishment of right to attached property was dismissed, not upon merits, but for non-payment of costs of service of summons upon the defendant's representative, after the death of the defendant, a subsequent suit for the same relief would be maintainable, as the order of dismissal is one made under s. 97, Civ. Pro. Code, and is no bar to a fresh suit BESSESSUR BHUGUT v. MURLI SAHU, **9 C. 163=11 C.L.R. 409.** [*R.*, 1 C.W.N. 24; *D.*, 10 M. 272.]

(60)—*Claim to property attached by plaintiff—Suit to establish right—Judgment-debtor not represented in suit—Dismissal of suit—Judgment-debtor's suit to recover property, not barred—Civ. Pro. Code,* 1882, *ss.* 13, 278, 283.—A suit by a judgment-creditor for a declaration

Res Judicata—continued.

—11.—Miscellaneous—*continued.*

that the property in question was liable to be attached as the property of his judgment-debtor the present plaintiff, was dismissed, the judgment-creditor not having appeared. In the present suit brought by the said judgment-debtor to recover possession of the property, the defendant contended that the dismissal of the previous suit operated as *res judicata*, barring the present suit under s. 13 of the Civ. Pro. Code. *Held* that the previous decree in the judgment-creditor's suit did not operate as *res judicata*, there being no evidence to show that the judgment-creditor, in the previous suit, represented the present plaintiff so that he might be regarded as a party to that suit. SHIVAPA v. DOD NAGAYA, **11 B. 114.** [*F.*, 15 C. 674; *R.*, 13 M. 366, 16 B. 700, 17 B. 629, 22 B. 875, 25 M. 721=12 M.L.J. 411; *D.*, 22 B. 640.]

(61)—*S.* 13, *Civ. Pro. Code,* 1882—Res judicata—*Estoppel—Evidence Act, s.* 115.—G, having been defeated on a claim petition arising out of an attachment made by the present plaintiff, sued in 1900 the present plaintiff to establish title to the property attached. The suit was dismissed on a finding that the conveyance on which he founded the title, a sale by the owner, was fraudulent and not intended to convey any interest. The plaintiff now sued alleging that, after the dismissal of G's suit, he brought the attached property to sale and purchased it himself and obtained possession, but was dispossessed by the first defendant, who set up a *mulgani* tenure under G. *Held*, on the question whether the first defendant was bound by the decision in the suit of 1900, that the defence was not barred. It is not to be supposed that the Civ. Pro. Code, contemplates the adjudication between the parties to a suit of interests or other rights which are not theirs and are not represented by them. Consequently though the words "under whom they or any of them claim" in s. 13 are wide, there seems no difficulty in the way of restricting them so as to bind the party to the subsequent suit by the decision in the former suit only in respect of interests represented by the party to the former suit at the time of the suit. The test is, whether the interest is represented and if it be possible that the party represents in the suit an interest already vested in some one else, that person will be a privy. In a *mulgani* tenure, where the lessor alienated his interests to possession in perpetuity and reserved to himself only a right to receive a rent, he cannot be said to have represented the interest of the *mulganidar* in a suit between himself and the plaintiff. With reference to the question whether the defendant was estopped in a different way, the facts were these. In the former suit, the first defendant was a witness for G and he did not then or before the execution sale bring his *mulgani* interest into Court. It was *held* that this conduct, to create an estoppel,

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——11. —Miscellaneous *-continued.*

must be found to have misled the plaintiff. SESHAPPAYA v. VENKATARAMAH UPADYA, **5 M.L.T. 37.** (8 A. 324, 22 C. 364, 4 C. 692, *R.*)

(62)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13 —Res judicata — *Order returning plaint for presentation to proper Court—Punjab Tenancy Act* (XVI *of* 1887), *s.* 77, (3), (*d*), (*h*)—*Suit for possession by landlord against transferee from occupancy tenant and trespasser.*—The land in suit was held by one H.S., an occupancy tenant under s. 6 of the Punjab Tenancy Act. On his death, it was inherited by his widow, who got her brother, J.R., entered as occupancy tenant of one-half, while the other half continued to be recorded in her own name, and remained in her possession. On her death, her half was mutated in the proprietors' names, but J. R. held possession of the whole. The proprietors brought a suit for his dispossession in the Court of the District Judge, but as J.R., was recorded occupancy tenant of one-half, the plaint was returned, and the plaintiffs, acting on the suggestion of the District Judge, sued in the Revenue Court for a declaration that J.R. was not such a tenant under s. 77 (3) (*d*) of the Punjab Tenancy Act and obtained a decree. They obtained possession also through the same Court, though there was no decree for it; but, on review, possession was restored to J.R. The plaintiffs then brought in the Civil Court the present suit for possession of the whole, reciting all the above facts. J R. pleaded *inter alia* that the Civil Court had no jurisdiction, and the suit was dismissed on the ground of *res judicata* under the previous order of the District Judge. *Held*, by *Chatterji, Johnston and Rattigan, JJ.*, that the question of jurisdiction was not *res-judicata*, and that the claim in respect of one-half of the land, *viz.*, that held by the widow of H.S. at the time of her death, which was mutated in plaintiff's names was cognizable by the Civil Court. *Per Chatterji and Johnston, JJ.*—The claim regarding the half recorded in J.R.'s name could be tried in the Revenue Court, and the Civil Court had no jurisdiction to entertain it. *Per Rattigan, J.*—The whole claim was cognizable by the Civil Court. MULA v. GANDU, **16 P.L.R. 1903. F.B.=92 P.R 1902.** [*R.*, 57 P.R. 1907, 44 P.R. 1908, 45 P.R. 1907.]

(63) *Tenant's suit against proprietor for possession—Decision in previous suit by proprietor against tenant on ground of invalid mortgage, whether* res judicata *—Unauthorised alienation by occupancy tenant by way of mortgage—Forfeiture.*—The proprietor of certain land had previously sued both his tenant and the tenant's mortgagee for possession of the land on the ground that the mortgage was illegal under the provisions of s. 34 of the Tenancy Act, no offer having been made to him. The tenant disputed having made a mortgage at all, but the Court, holding that a mortgage had been made, passed a decree for possession in favour

Res Judicata**—continued.**

——11.—Miscellaneous—*continued.*

of the proprietor. The present suit was brought by the occupancy tenant against the proprietor for possession of his holding, but this suit was dismissed by the first Court on the ground that the former proceedings were a bar to it. *Held* that, at the time when the former suit was instituted, the tenant had no title to possession though he had obtained it at the time of the institution of the present suit, the tenant's title to recover possession having occurred only after the former suit had been decided and in consequence of the decision. *Held* also that that there is nothing in the law which renders the interest of an occupancy tenant liable to forfeiture merely by reason of an unauthorised alienation by way of mortgage. HIRA v. JIA, **54 P.R. 1884.**

(64)—*Former suit to redeem land—Defence of irredeemable* Adimayavana *tenure—Defence disallowed—Subsequent suit to recover* Adimayavana *allowance*—Adimayavana *explained—Presumption of perpetual grant of allowance charged on land—Remand to the lower Court when to be made—S.* 562, *Civ. Pro. Code.*—Defendant had, in a previous suit, sued plaintiff to redeem certain lands held by plaintiff on Kanom, and the plaintiff, as defendant in that suit, pleaded that he had an irredeemable *Adimayavana* tenure in the lands. His contention was disallowed in second appeal, and a decree for redemption passed in favour of the defendant (the plaintiff in the previous suit). Defendant having redeemed the land, plaintiff brought the present suit to recover *Adimayavana* allowance. On the question whether the present suit is not *res judicata*, the High Court held that the decision in the previous suit, disallowing the plea of perpetual *tenure*, would not be a bar to the present suit to recover the (*Adimayavana*) *allowance*. The word *Adimayavana* implies an allowance given for service. *Adimayavana* as well as *Anubhavam*, when used with reference to tenure of land, will *prima facie* import an irredeemable tenure; but it may be used with reference to a specified money or grain rent charged on land, and, in that case, it will not imply any tenure in favour of the grantee. But if the amount of the grant is not specified, and if the terms indicate that only a fixed rent is reserved for the grantor, and the rest of produce is given as *Anubhavam* or *Yavana* then it may well be that the Court will treat it as creating an irredeemable tenure, so as to secure to the grantee the benefits intended for him by the grant. (29 M. 501, *Expl. & F.*; 27 M. 202, *R.*) The fact that an allowance has been enjoyed for many years and has been received during all that time out of certain lands with the acquiescence of successive owners, will justify the conclusion that there was a valid grant of perpetual allowance charged on such lands. Where an issue is an integral and vital part of the plaintiff's suit, and not a mere preliminary issue within the meaning of s. 562 of the Civ. Pro. Code, an appellate Court ought not to remand the suit

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——**11.—Miscellaneous**—*continued.*

to the lower Court but should call upon the lower Court to return findings on such other issues in the case as are necessary and decide the case itself. MANA VIKRAMA v. KARNAVAN GOPALAN NAIR, **30 M. 203.**

(65)—*Rent-suit—Question of title being raised in prior suit—Subsequent suit for title.*—The decision of a question of title to land incidentally raised in a suit for rent does not operate as *res judicata* in a subsequent suit for declaration of title to, and for possession of the same land. SRIHARI BANERJEE v. KHITISH CHANDRA RAI BAHADOOR, **24 C. 569=1 C.W.N. 509.** (11 C. 301, *F.*; 15 C. 756, *D.*) [*R.*, 10 C.W.N. 820; *D.*, 25 C. 136, 32 C. 891=1 C.L.J. 371=9 C.W.N. 728.]

(66)—*Suits against promisors—Joint and joint and several liability, difference between—Suit for rent—Registered talukdars and purchaser of patni.*—Where the obligation between promisors is *joint and several*, a decree obtained against one of them *without satisfaction* is no bar to a suit against another, though it would be otherwise if the obligation were single and undivided. (10 B.L.R. 200, 3 C. 352, *R.*) [*R.*, 21 A. 301, 22 A. 307, 25 M. 736, 27 M. 243=14 M.L.J. 84.] The relationship between the registered talukdars of a patni and the purchaser of a share therein from them resembles that of *joint and several* contractors, so that a decree for arrears of rent against the former would not bar a subsequent suit against the latter if the prior decree is not satisfied with respect to the rent of that share. DHUNPUT SINGH v. SHAM SOONDER MITTER, **5 C. 291 =4 C.L.R. 501.**

(67)—*Ss. 13 and 562, Civ. Pro. Code, 1882—Suit in Rent Court for ejectment of defendant as tenant—Tenant's setting up ownership and dismissal of suit—Second suit in Civil Court for ejectment of defendant as trespasser—Former decision no* res judicata—*Remand order, legality of—Entire suit not disposed of on preliminary point.*—Plaintiffs applied to a Rent Court to eject defendant alleging that he was their tenant. The Collector decided that the defendant was either the owner or a rent-free-tenant of many years' standing. Plaintiffs, thereupon, made an application to the Assistant Collector to have rent assessed on two plots. This application was refused on the ground that the defendant was in adverse possession of those plots. Plaintiff, now, sued in a Civil Court to eject defendant from the two plots mentioned above as well as from two other plots. The suit was dismissed on the ground of *res judicata*. Plaintiff appealed. The lower appellate Court held that the suit was barred by *res judicata* as regards the first two plots, and, as regards the other two plots, remanded the suit. *Held*, (1) that the order of remand was illegal. S. 562 authorizes a remand, only when the entire suit, and not merely a portion of it, has been disposed of by the Court below

Res Judicata—continued.

——**11.—Miscellaneous**—*continued.*

on a preliminary point. Applying that rule, the remand order was illegal (11 A. 488, *Appl.*) (2) the suit was not barred by *res judicata* so far as the first two plots were concerned; the present suit being one for ejectment of defendant as a trespasser, the Rent Court which decided the first suit was not competent to decide the second suit, which was one in ejectment. MAHESH PRASAD v. RANJOR SINGH, **27 A. 163=A.W.N. 1904, 202=1 A.L.J. 503.** (15 A. 189, *D.*)

(68)—*Rent suit—Suit for the claim of rent for a particular year—Second suit for another year, on the ground of custom.*—The plaintiff brought a suit against the defendant in 1898, *inter alia*, for rent in respect of betel-nuts for the year 1897-98. In his plaint he alleged that the defendants were liable to pay *thal* to him and he gave the value of the fruits and grain due to him as *thal* for the year 1897-98. He did not, however, then specifically allege that according to practice he was entitled to rent for every year. The suit was decided in his favour. In 1899, the plaintiff brought a second suit against the defendants to recover *thal* for 1898-99. The defendants objected to the suit as *res judicata*. *Held*, that the second suit was not barred as *res judicata*, because the first suit merely decided that *thal* was payable in respect of betel nuts for the year 1897-98 as alleged and claimed in the plaint and not according to practice. VISHNU v. RAMLING, **3 Bom. L.R. 450=26 B. 25.** [*F.*, 28 M. 517=15 M.L.J. 466.]

(69)—Res judicata—*Civ. Pro. Code*, 1882, *s* 13 (=*s.* 11, *present Code*)—*Rent suit—Bengal Tenancy Act*, VIII *of* 1885, *s.* 51—*Presumption—Weight of presumption.*— A decision in a previous rent suit as to the amount of rent payable for certain years does not operate as *res judicata* in a suit for the rent of *subsequent* years, although it gives rise to the presumption under s. 51 of the Bengal Tenancy Act that the rent for subsequent years remains the same. (19 C. 656, 21 C. 236, 4 C.W.N. 43, *R.*) [*F.*, 5 C.L.J. 92; *R.*, 1 C.L.J. 248, 2 Ind. Cas. 11.] The weight to be attached to the presumption thus raised must depend on the conditions under which that decision was arrived at, that is to say, whether it was after an adjudication of the question of the amount of rent or rate of rent or not. MAHARANI BENI PERSHAD KOERI v. RAJ KUMAR CHOWBEY, **6 C.W.N. 589.**

(70)—Res judicata — *Landlord and tenant—Distress—Property distrained lost by fire—Suit by tenant—Subsequent suit by landlord.*—The landlord distrained his tenants' crops for arrears of rent due to him for a certain *fasli*, whereupon the tenant instituted the suit to contest the claim of the landlord. When the suit was instituted, the crops which had been distrained had ceased to exist. The Assistant Collector, instead of dismissing the suit on the ground that the subject-matter of the distraint

Res Judicata -continued.

— 11.—**Miscellaneous**—*continued.*

had ceased to exist, held in addition that the arrears of rent were not due. *Held* that the present suit by the landlord for the same *fasli* as in the previous suit was not barred as *res judicata*. RADHA PRASAD SINGH v. ANNU PANDEY, **A.W.N. 1882, 50**.

(71) —*Right to bring suit for enhancement or abatement, how far affected by decision in previous similar suit.*—There is no provision in the Rent Law to the effect that suits for enhancement or abatement shall not be brought within a certain period after the determination of a similar suit on the same grounds; nor is there any provision in the Act throwing upon a plaintiff, in such a suit, the burden of proof as to a change of circumstances since the passing of the decision in the previous similar suit. CHEDA v. NUNHOO BEG, **2 N.W.P. 348.**

(72)—*Mutation proceedings — Persons not parties*—Res judicata.—Ordering *dakhil kharij* does not constitute the matter *res judicata*, much less as against persons not parties to the mutation proceedings. HEERA SINGH v. JAGEER BEG, **3 P.R. 1868.**

(73)—Res judicata — *Civil Procedure Code*, 1882, *s.* 13, *Explanation* I.—This was a claim by certain proprietors in a village, for a share of land recovered by suit by the defendants, other proprietors of the village on the death of an occupancy tenant, from persons who alleged themselves to be the tenant's representatives. It was urged in defence that the plaintiffs did not join the defendants in making the original claim when the defendants impleaded them as *pro forma* defendants they did not defend the suit but asserted their right to share in any land which might be recovered from the original defendants; some of the plaintiffs even gave evidence for the defendants in the previous case. The Divisional Judge dismissed the suit on the ground that the decree in the previous suit was a bar to the present claim. *Held*, that the judgment of the Divisional Court was wrong. There was no conflict of interests between the parties to the present suit, *inter se*, and explanation II of s. 13, Civ. Pro. Code, was not applicable. SHAIB SINGH v. SHER SINGH, **P.L.R. 1900, p. 409=70 P.R. 1900.**

(74)—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 11 —Res Judicata—*Decree by Court not having jurisdiction to pass it—Evidence Act* (I *of* 1872), *ss.* 40, 44—*Jurisdiction — Burden of proof—Agra Tenancy Act* (II *of* 1908), *s.* 32 —*Division of holding made with the consent of landlord—Not illegal—Suit to enforce an agreement to divide a holding—Not maintainable.—Per Tudball, J.*—If a decree is made in a suit of such a nature that no Civil or Revenue Court could entertain it, it would be null and void, and no decision therein can operate as *res judicata* between the parties. If a party to a suit raises a plea that a certain decision does not operate as *res judicata* on account of its having been delivered by a Court incompetent to deliver it, the burden is on him to prove that the decree was passed without jurisdiction. Partition of a holding made by the co-sharers thereof with the sanction of the landlord is not an illegal act, and, if once made, could be maintained in a suit brought in a Civil Court for possession in case of dispossession by either party, and it cannot be said that a decree for possession in such a suit would be one made without jurisdiction. *Per Piggott, J.*—A suit to enforce an agreement, under which a certain occupancy holding had been divided, is not maintainable in any Court, by reason of the provisions of s. 32 of the Tenancy Act, 1901. (A.W.N. 1906, 274, 3 A.L.J. 735, 31 A. 348, 6 A.L.J. 343, 1 Ind. Cas. 594, *R.*) If an objection is raised to a suit that it is barred by s. 32 of the Agra Tenancy Act, 1901, and an issue is raised on the point and decided against the defendant, it is not open to the defendant to subsequently treat the decision as a nullity, and plead, under s. 44 of the Indian Evidence Act, in a subsequent proceeding, that it was passed without jurisdiction. BALADEEN KALWAR v. RAGHUNATH KALWAR, **6 Ind. Cas. 98.** (12 M. 228, 21 B. 205, 26 A. 522, *R.*)

(75)—Res judicata — *Decision by Revenue Court in a suit for resumption—Second suit for declaration of title—Wrong admission in plaint that certain persons were parties to a previous litigation not binding upon plaintiffs. Held*, that, in a matter which fell within Chapter X of the Tenancy Act, the decision of a Revenue Court was no bar to a suit subsequently brought in a Civil Court on title, the provisions of ss. 199 and 201 of the Tenancy Act having no application to a suit against a *muafidar*.—*Held*, also, that, where there was nothing on the record of a previous suit to show that certain persons were parties to that suit either directly or by legal implication, a misstatement in the plaint, in a suit subsequently brought by those persons, that they were parties to the previous suit, was not binding on them. BACHCHI LAL v. MUHAMMAD MUJIDULLAH KHAN, **6 A.L.J. 527=2 Ind. Cas. 587.**

(76)—*Act* XIX *of* 1873 (*N.W.P. Land Revenue*), *ss.* 112, 113 *and* 134—*Partition—Imperfect partition*—Res judicata.—The failure of one of the parties to an "imperfect partition" to raise a possible objection to the title of one of the other parties to the partition cannot have the effect of *res judicata* in a subsequent civil suit between the parties, as would be the case where there had been a "perfect partition" and a decision of the Court of Revenue under s. 113 of Act XIX of 1873. AISHA BEGAM v. ABDULLAH KHAN, **A.W.N. 1899, 190.** (18 A. 59, *R.*)

(77)—*Previous suit for partition rejected on the ground of limitation—Second suit for partition by defendants.*—In 1875, defendants 6 and 9 sued plaintiffs along with others, for their share in a

Res Judicata—continued.

——11.—Miscellaneous—*continued.*

part of family estate. The Subordinate Judge dismissed the claim on the ground that the property was impartible. On appeal, the District Judge held that the property was not partible in the sense that it could not be divided by metes and bounds, but that under an arrangement that had been arrived at by the parties previously defendants 6—9 were entitled to enjoy the property by rotation during certain years. The High Court on second appeal, held that the suit was barred by limitation. In 1901, plaintiffs brought a suit against the members of the family including defendants 6—9 for their share in the lands belonging to the family. The Subordinate Judge awarded the plaintiffs' claim ; but the District Judge dismissed it on the ground that it was barred by *res judicata. Held*, reversing the decree and remanding the case for decision on merits, that though the High Court's finding on the question of limitation in the first litigation proceeded on the ground of an agreement between the parties to enjoy the property by turns, yet whether that made the property impartible in the sense that the defendants in that suit could not ask for a partition by metes and bounds was a question which was not and could not be decided by the High Court so as to bind the defendants therein, since the finding that the plaintiffs in that litigation had lost their right to the property was enough to dispose of the case. MAHADEO v. VASUDEO, **5 Bom. L.R. 737.**

(78)—*Suit for partition*—Razinama *decree —Civ. Pro. Code*, s. 13—Res judicata.—A suit for partition of certain land having been withdrawn against the defendant entitled to a share, a *razinamah* decree was passed which, in effect, was only a declaratory decree. After the death of the decree-holder, his heir brought a suit for partition against all the persons entitled to shares in the land including the defendant against whom the former suit was withdrawn. The decree in the former suit, being only a declaratory decree, does not operate as *res judicata* to bar the suit by the heir. BEEMABAI v. YAMUNABAI, **13 M. 313.**

(79)—Res judicata—*Watercourse—First suit as to use of water—Second suit as to right to throw up embankment— Verdict — Effect.*—A decision in a former case in which a mere question as to the use of the water in a watercourse arose, does not operate as *res judicata* in a subsequent suit in which the subject-matter is whether the defendants have a right to throw up an embankment and obstruct the water-way. The effect of verdicts, whether upon the parties or privies, must altogether depend on the question whether the same point was actually in issue in the two suits. MUNMOHUN SINGH v. AMRITNATH CHOWDREE, **W.R. 1864, 167.**

(80)—Res judicata—*Cause of action — Right of way.*—In a suit for removal of an obstruction

Res Judicata—concluded.

——11.—Miscellaneous—*concluded.*

to a right of way, the plea of *res judicata* which was raised in defence was held not sustainable, as the previous suit was dismissed on the ground that the road was a public one, and therefore no individual had a right to bring a suit with regard to it, and as the question of obstruction which was alleged to be the cause of action for that suit was not heard and decided. NUREEM MUNDLE v. BORAMDY SIRDAR, **25 W.R. 208.**

(81)—*Injunction restraining use of door as way—Subsequent suit for closing door—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 13—Res-judicata.—The plaintiffs in a previous suit against the defendants obtained a decree to the following effect :—" A decree be and hereby is given that the plaintiffs are entitled to an injunction restraining defendants using the new doors as a way to the plaintiff's lane and also restraining the defendants from using the four *parnalas* A.B.C.D, shown in plan in the judgment, for any purposes except rain water. It is further ordered that, if after this, they continue using any *parnala*, for escape of water from the privy, the plaintiffs can claim to have such *parnala* closed." The plaintiffs subsequently brought a fresh suit against the defendant for closing the door and one of the *parnalas*, and a decree was passed in their favour. It was contended for the defendant that the suit was not maintainable. *Held* that the suit was not barred by any rule of law, and that the questions in dispute must be regarded as *res judicata*. MUSSAMMAT JANNO v. RAFIK KHAN, **49 P.L.R. 1903=12 P.R. 1903.**

Resolution.

Privileges attaching to a Government—*See* ACT OF STATE, 6 Bom. L.R. 131.

Respondent.

See PARTIES TO SUIT.

(1)—*Who should be made respondent?*—The party against whom some relief is claimed should alone be made respondent and it is needless to join other parties as respondents if against them no further relief is sought. A. CASPERSZ v. KISHORI LAL ROY CHOWDHRY, **23 C. 922, P.C.=1 C.W.N. 12=7 Sar. 31.**

Suit for dissolution of marriage—Respondent, if competent witness—*See* ACT IV OF 1869, s. 52, 3 B.L.R. App. 6.

See CIV. PRO CODE, 1908, O. XXII, r. 4, 11 C. 694.

Getting a decree against a co-respondent—*See* CIV. PRO. CODE, 1908, O. XLI, r. 20, 4 A.L.J. 772=A.W.N. 1908, 4=3 M.L.T. 176=30 A. 48.

Appeal — Withdrawal — Cross-objections — Application by, for extension of time to appeal —*See* LIMITATION ACT, 1908, ss. 4, 5, **16 B. 249.**

Respondent —*concluded.*

See PRIVY COUNCIL, PRACTICE OF—COSTS, 9 B.L.R. 460=14 M.I.A. 203.

In appeals to Privy Council, whether entitled to notice of transmission of records from High Court—*See* PRIVY COUNCIL, PRACTICE OF—RE-HEARING, 19 A. 209=24 I.A. 49, P.C.

What is a proper service of notice on—*See* SUMMONS, 8 Bom. L.R. 757=30 B. 623.

Respondent, Death of.

See ABATEMENT OF APPEAL.

(1)—*Civ. Pro Code*, 1877, *ss.* 362, 368, 582, 587—*Appeal by decree-holder — Death of one of several respondents during appeal—Legal representatives not brought on record—Abatement of appeal.*—Where one of two respondents (judgment-debtors) died in the course of an appeal and the decree-holder (appellant) made no application under the provisions of the Code to bring the legal representatives of the deceased respondent on record, *held* that, by the combined operations of ss. 587 and 582 of the Civ. Pro. Code, the provisions of Ch. XXI of the Code extended to the present appeal and that the proper section applicable under the circumstances was s. 368 and not s. 362, and that accordingly the appeal abated under the last clause of s. 368 as amended by Act XII of 1879. SHEO GOPAL v. BISHEN SINGH, **30 P.R. 1880.** [*R.*, 113 P.R. 1882, 165 P.R. 1882, 133 P. R. 1884.]

Restitution.

See CIV. PRO. CODE, 1908, S. 144.

See RESTITUTION OF RIGHTS BY MOTION.

(1)—*Restitution as between parties to proceeding, principle of.*—The Court, in making restitution as between parties to a proceeding, is bound to restore the parties, so far as they can be restored, to the position they were in at the time when the Court, by its erroneous action, had displaced them from it. PARASURAMA AYYAR v. SESHIER, **27 M. 504.** (10 A. 166, 27 M. 98, *R.*)

(2)—*Restitution—Assignment of decree before appeal filed—Assignee executing decree—Decree reversed—Assignee no party—Restitution against assignee.*—The judgment-debtor's right of appeal is in no way affected by any intermediate assignment of the first Court's decree. Even though the assignee is not brought on record, it is not open to him to question the decree that may be passed by the appellate tribunal. The doctrine of *lis pendens* applies to such intermediate assignment, even though it was made before the appeal was filed, and the judgment-debtor had knowledge of the assignment before he lodged his appeal. The judgment-debtor, from whom the assignee of a money-decree has realised the decretal amount in execution, is entitled to recover it back from him when the decree is afterwards reversed in the appeal, even though he was not brought on the record in appeal. Where a petitioner pursues a certain course to which the other side

Restitution —*continued.*

successfully objected and then takes to some other course, the other side cannot then be heard to say that the procedure to which he himself successfully objected was the proper procedure. Money obtained under an invalid procedure of Court must be treated as money had and received to the use of the person from whom it was received. The doctrine of restitution is based upon this principle. BAREDDI GOVINDAPPA v. BANDI HANUMANTHAPPA, **23 M.L.J. 513=M.W.N. 1912, 1152=17 Ind. Cas. 420.**

(3)—*Restitution—Decree in favour of trustee reversed—Trustee's personal liability.*—Plaintiff sued as manager of a temple and got a decree. On payment being made to him in pursuance of the decree, he handed over the proceeds to the temple committee. On appeal, the decree was reversed and an order for restitution was made. An application was made for execution of the order by his arrest. *Held* that the manager could not be arrested by way of execution of the restitution order. VENKATASAMI PILLAI v. KUPPAYEE AMMAL, **14 M.L.J. 377.**

Revenue sale set aside—*See* MAD. ACT II OF 1864, s. 40, 14 M.L.J. 433.

Ex parte decree set aside on appeal and suit remanded—Right of successful appellant to—*See* CIV. PRO. CODE, 1908, s. 2, O. XLI, r. 23, ss. 144 (1), 104, O. XLIII, r. 1, 3 C.L.J. 181.

Execution of decree—Effect of reversal on appeal—Separate suit, maintainability of—*See* CIV. PRO. CODE, 1908, ss. 47, 144 (1), 35 C. 265.

Right to—Under s. 583, Civ. Pro. Code, when applicant, being originally deprived of his property in an appeal before the High Court, is given the property on review—*See* CIV. PRO. CODE, 1908, ss. 4 47, 144 (1), A.W.N. 1906, 171 3 A.L.J. 556= 28 A. 655.

Of mesne profits on restoration of possession to judgment-debtor lost in consequence of a Court-sale which was subsequently set aside — Maintainability of application for, under s. 583, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908. s. 47, O. XXI, r. 92, ss. 144 (1), 104, O. XLIII, r. 1, 8 O.C. 254.

Application for—Of money realized in excess in execution—Subsequent amendment of decree —Limitation applicable to application for restitution—*See* CIV. PRO. CODE, 1908, O. XX, r. 6, ss.152, 47, A.W.N. 1905, 63=2 A.L.J. 169 =27 A. 485.

Of possession of property by Court under order of Appellate Court setting aside dismissal of objection to sale—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, ss. 144 (1), 141, 9 O.C. 101.

First lessee, giving up possession of land to subsequent lessee on receipt of compensation, —Such lessee becoming afterwards entitled to restitution of land by a decree of Court—Right

Restitution—*concluded.*

of such lessee to postpone applying for restitution until mesne profits became sufficient to wipe off compensation money—*See* CIV. PRO. CODE, 1908, O. XLI, r. 4, 18 M.L.J. 39.

Execution in excess of decree—Power of Court to order—In execution-proceedings—Regular suit, necessity for—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 9 C.W.N. 381=2 C L.J. 537.

Appealability of order in execution determining rate of interest on—*See* EXECUTION OF DECREE—MISCELLANEOUS, 15 M.L.J. 247 =28 M. 355.

Reversal of decree—Right of restitution can be enforced in execution and not by separate suit—*See* LIMITATION ACT, 1908, arts. 179, 182, 10 M.L.T. 568.

Possession under decree since reversed—Restitution of property with mesne profits, order for—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 14 C 484.

Reversal or modification of decree—Of payment made under decree—Execution—Fresh suit—*See* REVERSAL OF DECREE, 7 A. 432= A.W.N. 1885, 67.

Restitution of Conjugal rights.

See ACT IV OF 1869, SS. 32, 33.

See CUSTODY OF WIFE.

See HINDU LAW—HUSBAND AND WIFE.

See HINDU LAW—RESTITUTION OF CONJUGAL RIGHTS.

See MAHOMEDAN LAW—DIVORCE.

See MAHOMEDAN LAW—DOWER.

See MAHOMEDAN LAW—HUSBAND AND WIFE.

See MAHOMEDAN LAW—MARRIAGE.

See SEPARATION DEED.

(1)—*Restitution of conjugal rights, Suit for—Child-wife—Custom*—Where it is the custom that a child-wife should remain away from her husband until a certain event occurs, a Court of Justice must not order her to go and live with her husband until the happening of the contingency, although the marriage is valid. SUNTOSH RAM DOSS v. GERA PATTUCK, **23 W.R. 22**, [*R.*, 25 W.R. 386, 28 C. 37.]

(2)—*Suit for restitution of conjugal rights—Incapability for sexual intercourse, how far a legal defence—Proof of legal plea essential for Court's refusing decree.*—In a suit brought by the husband for restitution of conjugal rights, a plea by the wife that sexual intercourse with her is impossible owing to her incurable disease or physical mal-formation, is not in itself a good defence. It would be wrong to allow one of the parties to withdraw from the performance of the duties and obligations binding on that party on a ground which gives such party no

Restitution of conjugal rights—*continued.*

just cause of complaint and of which the other party does not complain. In such a suit by the husband, the Judge cannot in his discretion refuse a decree for other causes than those which in law justify a wife from refusing to return to live with her husband, and he cannot abstain from passing a decree in favour of a plaintiff's spouse, merely because he considers that it would not be for the benefit of either side that the decree should be granted. In this case, the lower Appellate Court had found that there was no cruelty, but that the suit was brought by the husband as a counter-move to defeat the claim of the wife for separate maintenance and a considerable time after the wife had ceased to live in his house and because, when the wife left the husband's house last, she left it crying; and wrongly thinking that it had discretion to refuse a decree for the above reasons, dismissed the plaintiff's claim. The High Court, however, was of opinion that the above circumstances were not in themselves sufficient in law to justify the Court in refusing to pass a decree for the plaintiff. PURSHOTAM DAS v. BAI MANI, **21 B. 610.**

(3)—*Hindu Law—Suit for restitution of conjugal rights—Leprosy.*—To a suit instituted by a Hindu husband to compel his wife to go and live with him in his house as his wife, the fact that he is, at the time of such suit, suffering from a loathsome disease, such as leprosy and syphills, is a good defence. BAI PREMKUVAR v. BHIKA KALLIANJI, **5 B.H.C.A.C., 209.** [*R.*, 16 B. 269, 25 B. 644, F.B.=3 Bom. L.R. 371.]

(4)—*Restitution of conjugal rights—Custom—Chins—Husband suffering from leprosy.*—According to the custom among the Chins, a husband is not entitled to a decree for restitution of conjugal rights, if he is suffering from leprosy and has not been cured. PA PAR v. NGA PO, **11 Ind. Cas. 783.**

(5)—*Restitution of conjugal rights, Suit for—Circumstances under which decree for restitution should not be granted.*—In a suit for restitution of conjugal rights brought by the husband, the plaintiff's claim ought not to be decreed when it appears that there is imminent danger of the wife being subjected to bodily violence, if compelled to return to her husband. BEGUM v. KHUDA BAKHSH, **A W.N. 1892, 77.**

(6)—*Strained relations between husband and wife—Apprehension of breach of peace—Decree not to be passed.*—It is very incorrect for a Court in India to pass a decree for the custody of a woman's person, when the relations between the parties are of such a condition that it is obvious that a breach of the peace is likely to occur. MUSSAMMAT KARM JAN v. ABDUL JABBAR, **166 P.L.R. 1913=19 Ind. Cas. 475= 121 P.W.R. 1913.**

(7)—*Marriage not consummated—Breach of contract of marriage by wife—Husband entitled only to damages, not custody of wife.*—Plaintiff married a girl of seven years of age. The

Restitution of conjugal rights—*continued.*

marriage was never consummated. But the girl refused to live with the plaintiff and was at the time of suit cohabiting with another man. Under such circumstances, it was *held* that the plaintiff was entitled only to damages under the Punjab Civil Code, Chap. VI, para. 12, but not to custody of his wife. JEWUN v. SUNDHEE, **3 P.R. 1870.** [*D.*, 85 P.R. 1877, 79 P.R. 1880]

(8)—*Hindu Law—Restitution of conjugal rights, Suit for—Cruelty—Condonation—Separation.*—Though a suit for restitution of conjugal rights is maintainable in law by a Hindu, the same state of circumstances which would justify such a suit, or which would be an answer to such a suit in the case of a European, may not be equally so in the case of a Hindu [*R.*, 13 A. 126, 34 C. 971=9 C. W. N. 510=1 C.L.J. 283.] After a condonation, by the wife, of cruelty on the part of her husband, a much smaller measure of offence would be sufficient to neutralise the condonation, than would have justified the wife, in the first instance, in separating from her husband, though the act or acts constituting the offence must be of such a nature as to give the wife just reason to apprehend a renewal by the husband of his former course of conduct and a consequent danger to her personal safety. In this case, it was held that, where the wife had condoned her husband's cruelty and was living with him in reconciliation in her mother's house, a slap on the cheek by the husband was not sufficient to entitle her to resist a suit for restitution of conjugal rights and to sue for maintenance. Case in which the High Court, under the peculiar circumstances of the case, imposed a condition on the husband, seeking restitution, to the effect that he should secure a home to the defendant-wife, untainted by the presence of any persons of bad character. JOGENDRO NUNDINEE DOSSEE v. HURRY DOSS GHOSE, **5 C. 500=5 C.L.R. 65.** [*Appl.*, 28 C. 37; *R.*, 10 B. 301, 28 C. 751= 5 C. W.N. 673; *D.*, 31 P.R. 1908=76 P.W.R. 1908=152 P.L.R. 1908] *See also* MOONSHEE BUZLOOR RUHEEM v. SHUMSOONNISSA BEGUM v. JODANATH BOSE v. SHUMSOONNISSA BEGUM, **11 M.I.A. 551** *and* PAIGI v. SHEONARAIN, **8 A. 78.**

(9)—*Husband and wife — Hindu—Mutual separation—Restitution of conjugal right.*—A Hindu husband and wife had been married, while the latter was a girl of about 13 years of age; she had cohabited with him for a few months, but was ill-treated and expelled by him in consequence of his having formed an illicit connection with his brother's widow, whom he had made an inmate of his house and had three children by her and was still keeping her as his mistress. The wife, ever since her expulsion by her husband, had been living with her father, and the husband had not contributed to her support. It further appeared that the dispute had been considered by a *Punchait* which adjudged a separation of the married couple. Thirteen years later, the husband sued to enforce restitution of conjugal rights. The learned Judges declined to make a decree in favour of the husband, having regard to the circumstances existing at the date of the suit. MOOLA v. NUNDY, **4 N.W.P. 109.** [*R.*, 4 B. 545, 9 C.W.N. 510=1 C.L.J. 283; *D.*, 13 A. 126, 17 M. 235, F.B.]

(10)—*Agreement at marriage not to take away wife from her parent's house—Whether opposed to public policy.*—Suit by a husband for the custody of his wife L. The wife pleaded an agreement executed by plaintiff on his marriage, binding himself never to take his wife away from her parent's house or town under penalty of freeing his wife from the marriage tie. *Held* that such contracts were opposed to public policy, and that, as the girl was the lawful wife of the plaintiff, she was bound to live with him. MUSSUMMAT LAHORAN, SHEIKH NABBI BAKSH *and* MUSSUMMAT YAKINAN v. MADAR BAKSH, **20 P.R. 1878.** [*Doubted*, 5 P.R. 1891; *R.*, 15 P.R. 1900=P.L.R. 1900, p. 193.]

(11)—*Separation deed—Restitution of husband and wife—Agreement to live separate—Agreement operates as a bar—Hindus.*—An agreement between husband and wife to live separate, bars a subsequent suit for restitution of conjugal rights. PURSHOTAM v. BAI JADI, **2 Bom. L.R. 72.**

(12)—*Suit for restitution of conjugal rights—Right to declaration of nullity of marriage.*—It is competent to the Court, in a suit for restitution of conjugal rights, to make a declaration of nullity of marriage, if the respondent shows himself entitled thereto. (*Per Garth, C.J. and Wilson, J.*). LOPEZ v. LOPEZ, **12 C. 706, F.B.** [*R.*, 17 M. 235, **F.B.**]

(13)—*Restitution of conjugal rights—Neglect to perform usual ceremonies—Husband's rights.*—Where a husband neglected to perform the customary ceremonies, before cohabitation as man and wife, till the wife attained the age of 19, but married a second time, whereupon the first wife, according to the custom obtaining in her community, married another man: *Held*, that the husband was not entitled to a decree in a suit for restitution of conjugal rights against his first wife. BOOLCHAND KOILTA v. JANOKEE, **25 W.R. 386.** [*R.*, 17 B. 400.]

(14)—*Hindu wife married during infancy—Marriage not consummated—Suit for restitution of conjugal rights not maintainable by husband—Hindu Law—Later practice in Indian Courts.*—The practice of allowing suits for the restitution of conjugal rights has no foundation in Hindu Law, under which such a suit would not be cognizable by a Civil Court. According, however, to the later practice of the Courts in India, introduced from the practice in England, when a married couple, after cohabitation, separate and live apart, either of them can bring a suit against the other for the restitution of conjugal rights. The parties to the present suit went through the religious ceremony of marriage when the defendant, the wife of the plaintiff, was a child of eleven years

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of age. Eleven years after such marriage, when the defendant had become a woman of twenty-two, plaintiff instituted this suit against her praying for an order of the Court compelling her to go to his house, that he may complete his contract with her by consummating the marriage. The Court was of opinion that it was a misnomer to call the suit one for restitution of conjugal rights, and that neither the law nor the practice of the Courts either justified the Court's making the order sought for by the plaintiff, or even justified the plaintiff in maintaining the present suit. DADAJI BHIKAJI v. RUKHMABAI, **9 B 529** [*Reversed*, 10 B. 301; *Not F.*, 13 A. 126, A.W.N. 1891, 18.]

(15)—*Restitution of conjugal rights—Hindu girl married during minority—Her denial or a refusal to consummate marriage.*—Restitution of conjugal rights should not be decreed, and freedom of choice should ordinarily be allowed where a Hindu girl married during her minority denies the *factum* of, and refuses to consummate the marriage. MUSSAMMAT KALAWATI v. BUKHAN, **187 P.W.R. 1912=215 P.L.R. 1912.**

(16)—*Hindu Law—Restitution of conjugal rights—Minor wife—Decree, if minor an outcaste, only on restoration to caste and position as wife—Suit for restitution of conjugal rights—Validity and legality of marriage—Presumption—Actual celebration of marriage—Absence of consent of particular person—Effect.*—A suit for restitution of conjugal rights is maintainable. (11 M.I.A. 551, 6 W.R. 105, 8 W.R. 467, 9 W.R. 552, 20 W.R. 50, 92, 23 W.R. 179, 5 C. 500, 1 B. 164, 10 B. 301, 16 B. 714, 23 B. 307, 8 A. 78, 13 A. 126, *R.*) Such a suit lies, even though the wife is a minor, provided she is of sufficient age to perform her conjugal duties. (11 M.I.A. 551, 23 W.R. 22, 178, 23 B. 307, 13 A. 126, *R.*) When a decree in a suit of this nature is passed directing the wife to return to her husband, what the law contemplates is that she should return to her position as a wife in the household. If the minor wife living with her relatives, has by her adulterous conduct lost caste, a decree for restitution of conjugal rights would be passed, only when the husband arranges for the restoration of the wife to caste and to her position as his wife. (11 M.I.A. 551, 5 C. 500, 8 A. 78, *R.*) [*F.*, 28 C. 751=5 C.W.N. 673; *R.*, 82 P.R. 1908=147 P.W.R. 1908.] Where, in a suit for restitution of conjugal rights, the validity and legality of the marriage is one of the most essential points in issue, the Court is not entitled to presume, from the mere finding that the marriage was celebrated, that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed. (12 W.R. 41, P.C.; 9 M. 466, *R.*; 12 C. 140, *D.*) A marriage having actually and properly been celebrated, the absence of the consent of the person whose consent ought to have been obtained, would not make it illegal or void. SURJYAMONI DASI v. KALI KANTA DAS, **28 C. 37=5 C.W.N. 195.**

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(17)—*Suit for return of minor wife—Order to send back wife—Form of decree.*—In a suit for the return of plaintiff's minor wife and certain jewellery from the illegal possession or keeping of defendant, the utmost that the Court can rightly do, if there is an occasion for an order of the kind, is to enjoin the defendant to abstain from putting any obstruction in the way of the wife returning to her husband. The Court has no authority to order the defendant to send back the plaintiff's minor wife and her jewels. LALL NATH MISSER v. SHEOBURN PANDY, **20 W.R. 92.** [*R.*, 28 C. 37.]

(18)—*Suit for restitution of conjugal rights—Form of decree.*—In a suit for restitution of conjugal rights, there is nothing illegal in a decree directing the wife to return to her husband. KUROONA MOYEE DEBEE v. GUNGA DHUR SURMAH, **20 W.R. 50.** [*R.*, 28 C. 37.]

(19)—*Suit for restitution of conjugal rights—Form of decree.*—The proper form of decree to be passed, in a suit for restitution of conjugal rights against a wife, and several others alleged to be detaining her from her husband, was one enjoining the wife to return to her husband, and the other persons to abstain from preventing her return. JAFFREE KHANUM v. IMDAD HOSSEIN, **2 N.W.P. 314.**

(20)—*Custody of wife, decree for—Form of decree—Wife's disobedience to such decree.*—A decree, in favour of the husband in a suit for the custody of his wife, cannot order that the girl should be handed over to her husband, bodily; and disobedience of the wife to the decree makes her liable to imprisonment. ALLAH BUKSH v. ALLAH BAKSH, **15 P.R. 1876.** [*R.*, 35 P.R. 1894.]

(21)—*Suit for restitution of conjugal rights—Form of decree—Act* VIII *of* 1859, *s.* 200—*Construction.*—In a suit for restitution of conjugal rights, a decree that "the case be decreed awarding the plaintiff to take the defendant as his married wife" is in a form which has been declared to be erroneous. (6 W.R. 105, 8 W.R. 467, 11 M.I.A. 551, *R.*) Where, in such a suit, the decree contains an order to the wife to return to her husband's protection, such an order is not an order "for the performance of a particular act" within the meaning of s. 200 of Act VIII of 1859, and the decree is not enforceable by the mode pointed out in the said section. GATHA RAM MISTREE v. MOOHITA KOCHIN ATTEAH DOMOONEE, **14 B L.R. 298 =23 W.R. 179.** [*Diss.*, 1 B. 164; *Appl.*, 28 C. 37=5 C.W.N. 195; *D.*, 10 B. 301, 8 A. 149= A.W.N. 1886, 53.]

(22)—*Suit for restitution of conjugal rights—Decree, form of.*—The following is the form of a decree in a suit for restitution of conjugal rights:—"That the defendant, the wife, do within a certain time (fixed) from the receipt of this order, return to cohabitation with her husband and live with him as claimed. That the other defendants be ordered to abstain from harbouring the wife or otherwise interfering

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with the rights of the plaintiff as her husband. PAKHANDU v. BISHESHAR, **A W.N. 1882, 243.**

(23)—*Suit by husband to recover wife—Refusal to return to husband—Form of decree—How enforced in execution.*—Where a husband seeks to recover the custody of his wife, the proper form of decree, when the marriage is proved, is that "the wife must return to her husband and live with him." Where, however, the wife was unwilling to return even when the Court was satisfied that he would treat her well, the proper order is to enforce obedience by imprisoning her in the Civil Jail, and not to direct the police to transfer the custody of the wife to the husband. MUSSUMAUT GOOLABEE v. GOORMOOKH SINGH, **7 P.R. 1868.**

(24)—*Restitution of conjugal rights—Description of decree to be passed.*—Appellant urged that the lower appellate Court was wrong in having given a decree to the respondent for the recovery of the person of his wife, and the High Court, modified the decree as follows:—"That the plaintiff is entitled to his conjugal rights, and that his lawful wife be ordered to return to his protection." KOOBUR KHANSAMA v. JAN KHANSAMA, **8 W.R. 467.** (6 W.R. 105, *F.*) [*Cons.*, 23 W.R. 179; *R.*, 9 B.H.C. 290, 28 C. 37.]

(25)—*Decree in restitution suit—Separate house and maintenance to wife—Court's power to order.*—In decreeing a suit for restitution of conjugal rights in favour of husband, the Court cannot impose on him the duty of providing his wife with a separate house and separate maintenance. CHIMIANLAL v. BAI NARMADA, **4 Bom. L.R. 820.**

(26 & 27)—*Conditions for grant of restitution—Conditional decree.*—It is not competent to a Court, in passing a decree for restitution of conjugal rights, to impose certain conditions under which the restitution can be had. MOTILAL v. BAI CHANCHAL, **4 Bom. L.R. 107.**

(28)—*Suit for restitution of conjugal rights—Form of decree—Enforcement of decree—Civ. Pro. Code*, 1859, *s.* 200.—A decree for restitution of conjugal rights should be passed in the terms, that the husband is entitled to conjugal rights, that his wife do return to live with him and that her parents do not interfere in any manner to prevent her so doing. A decree for the restitution of conjugal rights may be enforced under s. 200 of Act VIII of 1859. RAM TAHUL v. MADHO, **2 Agra 111.**

(29)—*Restitution of conjugal rights—Form of decree—Enforcement of decree—Civ. Pro. Code, Act* VIII *of* 1859, *s.* 200.—In a suit for restitution of conjugal rights, the proper form of decree is a direction to the wife to return to cohabitation, which direction on disobedience by her may be enforced as provided in s. 200, Act VIII of 1859. MUSSUMAT IMAMUN v. MAHOMED MAJEED-OOL-LAH, **3 Agra 88.**

(30)—*Suit for restitution of conjugal rights—Form of decree—Execution.*—A wife cannot be delivered in execution as a chattel; but in a suit for restitution of conjugal rights, it may be ordered that the wife do return to her husband, with which decretal order if she fail to comply, she may be dealt with under the provisions of the Civ. Pro. Code, relating to attachment for non-performance of acts decreed. MUSSUMAT TOOFEAH v. JUSSOUDA, **2 Agra 337.**

(31)—*Suit for restitution of conjugal rights—Form of decree.*—In a suit for restitution of conjugal rights, the decree should simply declare that the plaintiff is entitled to the restitution and that the defendant (wife) be directed to go to her husband's house. To declare that the husband should get possession of the person of his wife is erroneous in form. FURZUND HOSSEIN v. JANE BIBEE, **4 C. 588.** (6 W.R. 105, *F.*) [*R.*, 23 B. 307.]

(32)—*Decree for performance of a particular act—Execution of decree—Civ. Pro. Code* (1859), *s.* 200.—When a decree directs the performance of, or abstinence from, a certain act, there must be clear evidence of disobedience by the person so directed, before the decree can be executed against him. When, in a decree for restitution of conjugal rights, the plaintiff's mother-in-law, who had been impleaded as a defendant, was directed to refrain from preventing the plaintiff's wife from returning to him, *held*, in an execution petition for attaching the property of the mother-in-law, that her action in permitting her daughter, who was of age, to reside in her home after decree did not constitute such interference, on her part, with the return of her daughter, as would justify execution against her. AJNASI KUAR v. SURAJ PRASAD, **1 A. 501.**

(33)—*Suit for restitution of conjugal rights—Enforcement of decree—Policy of law—Plea of husband's cruelty—Criterion of cruelty justifying wife.*—A suit for the restitution of conjugal rights is within the jurisdiction of Civil Courts, and a decree ordering such restitution is capable of being enforced under s. 200 of Civ. Pro. Code, 1859. (11 M.I.A. 551, 9 B.H.C. 290, *F.*) The policy of entertaining and enforcing such claims may be open to question, but so long as their jurisdiction is not barred by legislation, the Courts have no discretion in the matter. [*F.*, 13 A. 126, 26 B. 269; *R.*, 10 B. 301, U.B.R. 1897—1901, Vol. II, 488.] Where a Hindu husband sues for restitution of conjugal rights, the criterion of cruelty justifying the wife's refusal to return to her husband is, whether there is actual or reasonable apprehension of violence of such a character as to endanger her personal health or safety. Mere pain to mental feelings, *e.g.*, an unfounded imputation upon a wife's chastity, however wantonly caused or keenly felt, is not, by itself, sufficient to constitute legal cruelty under the Hindu Law any more than under English Law. YAMUNABAI v. NARAYAN MORESHVAR PENDSE, **1 B. 164.** [*R.*, U.B.R. 1897—1901, Vol. II, 104, 4 Bom. L.R. 107, 9 C.W.N. 510=1 C.L.J. 283=34 C. 971.]

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(34)—*Suit for—Decree declaring wife's rights to future maintenance and residence—Effect of—Whether relief can be claimed in execution proceedings.*—In a suit for the restitution of conjugal rights a decree was passed in terms of an award between the parties. It declared the right of the husband to the restitution, and ordered the wife to return to him and live with him. It further declared that the husband should return certain ornaments, to her, and it also made provision as to her future maintenance and residence. *Held*, that the provisions as to maintenance and residence were merely declaratory; and no relief could be granted to her in execution proceedings. MUSAMAT LACHMIBAI v. KANIAMAL ASUDAMAL AND KANIAMAL ASUDAMAL v. MUSAMAT LACHMIBAI, **1 S.L.R. 184.**

(35)—*Restitution of conjugal rights—Decree—Execution—Civ. Pro. Code, s 200.*—The question in this case was whether a Civil Court has power to commit a wife to prison on her refusal to obey the decree of such Court that she must live with her husband. *Held* that s. 200 of Act VIII of 1859 laid down the law by which such order could be enforced. If the Court was not assured of the good treatment of the wife it would not restore her to the husband, but being assured of that fact, it could give an order to the effect. Imprisonment in execution of a decree under Act VIII of 1859 for restitution of conjugal rights had been authorised by many previous decisions of Chief Court, and was in harmony with the opinion indicated in judgments of the Privy Council and of the High Court, N.W.P. MUSST. BEGUM KHATUN v. ABDUL KI, **2 P.R. 1871.** (8 W.R.P C. 3, *R.*)

(36)—*Decree for restitution of conjugal rights in Civil Courts—Effect of on previous order for maintenance obtained against husband n Criminal Court.*—An order of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. *In re* BULAKIDAS, **23 B. 484.** [*F.*, 27 A. 483=A.W.N 1905, 54=2 A. L.J. 160; *Appl.*, U.B.R. 1910, 34.]

(37)—*Restitution of conjugal rights—Plaintiff's want of* bona fides—*Evasion of Magisterial order for maintenance—Whether sufficient to refuse restitution—Ill-treatment—Recent ill-feeling, ground in bar of right.*—Where, in a suit by a husband for restitution of conjugal rights, it appears that he is entitled to restitution, the Court ought not to refuse to grant him a decree, merely because he instituted the suit to evade a magisterial order for maintenance against him. Where, in such a suit, the wife pleads cruelty or ill-treatment by the husband, plaintiff will be barred of his right only on proof of recent ill-treatment. The Court will not be justified in refusing restitution to the husband on the ground of his ill-treatment years ago, which had latterly been compounded. PEDAPATI DURGAYYA v. PEDAPATI MANIKYAM, **16 Ind. Cas. 808.**

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(38)—*Not allowed where parties are of different castes.*—A marriage between a Rajput and a Brahman girl is not allowed by Hindu Law; hence, one of the parties to such a marriage cannot sue the other for restitution of conjugal right. BAI LAKSHMI v. KALIANSING, **2 Bom. L.R. 128.**

(39)—*Restitution of conjugal rights—Hindu convert to Christianity—Convert's right to custody of children.*—A husband who becomes a Christian will not be permitted to claim the person of a wife who remains a Hindu. If, in a suit for restitution of conjugal rights brought by a husband, the wife pleads that the husband, by change of religion, has placed himself in such a position that she cannot live with him without doing extreme violence to her religious opinions and the social feelings in which she has been brought up, and in the enjoyment of which she has been married, the plea would be a good plea. [*R.*, 8 M. 169] The inherent right of a father to the custody of his children is a right recognized by the English as well as the Hindu law. Of this right, the father is not deprived by becoming a convert to Christianity, though he may have become "potit," degraded, according to the dictates of the Hindu law. MUCHOO v. ARZOON SAHOO, **5 W.R. 235.** [*R.*, 25 B. 551=3 Bom. L R. 89]

(40)—*Excommunication from caste.*—In a suit by the husband, who is excommunicated from his caste, for the restitution of conjugal rights against his wife, it is open to the latter to require that he should get himself readmitted into the caste, to which the parties belonged at the time of marriage, before she is compelled by the Court to go and live with him as his wife. BAI JINA v. JINA KALIA, **9 Bom. L.R. 451=31 B. 366.**

(41)—*Suit for restitution of conjugal rights—Defence of exclusion from caste and cruelty.*—Exclusion of a person from caste, by only a portion of the members of the caste, cannot be held in equity to operate as an exclusion from caste by the entire brotherhood, and would not give the wife of the person so excluded a good ground for resisting his claim for restitution of conjugal rights. *Quære.*—Whether exclusion by the entire brotherhood would be a valid defence to such a claim? A husband does not lose his right to the custody of his wife on the ground of cruelty, where it is merely shown that he and his wife had occasional quarrels, and that he had now and then struck her, and there is no proof of any actual violence of such a character as to endanger the personal health or safety of his wife, nor any reasonable apprehensions of it. MUSSUMMAT KAKO v. LACHMI NARAIN, **18 P.R. 1877.**

(42)—*Restitution of conjugal rights—Parsi Marriage and Divorce Act* (XV *of* 1865), *ss.* 36, 40—*Civ. Pro. Code, s.* 200.—A decree for restitution of conjugal rights, under the Parsi Marriage and Divorce Act, is enforceable only

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in the manner provided in s. 36 of that Act. Such provision is in substitution of, and not in addition to, the ordinary remedies provided by s. 200 of Act VIII of 1589. ARDESAR JAHANGIR FRAMJI v. AVABAI, **9 B.H.C. 290.** [*F.*, 1 B. 164.]

(43)—*Suit for restitution of conjugal rights by Parsi husband—Separate living of wife, agreement in respect of—Parsi Marriage and Divorce Act* (XV *of* 1865), *s.* 36.—In a suit by a Parsi husband for restitution of conjugal rights against his wife, it is competent to the defendant under s. 36 of the Parsi Marriage and Divorce Act (XV of 1865), to plead in bar of the suit a previous contract by which the plaintiff had agreed to allow the defendant to live separate. KAWASJI v. SIRINBAI, **23 B. 279.** [*R.*, 2 Bom. L.R 845.]

(44)—*Among Parsis—Delegates.*—The question—what constitutes a lawful ground among the community of the Parsis for the refusal of the husband to live with his wife or *vice versa*—is one the determination of which lies within the cognizance of the delegates. To justify a refusal for the restitution of conjugal rights, the causes must be grave and weighty and such as to show a moral impossibility that the duties of married life can be discharged. HIRABAI v. DHANJIBHAI, **2 Bom. L.R. 845.**

(45)—*Mahomedan law—Dower, non-payment of.*—After consummation of marriage, the non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights. BAI HANSA v. ABDALLA, **7 Bom. L.R. 684=30 B. 122.**

(46)—*Mahomedan law — Suit by wife to recover her property in husband's hands—Admission by husband of receipt of property—Plea of purchase set up by husband*—Onus *on husband to prove* bona fides — *Mahomedan woman,* bona fide *purchase of immoveable property from, by stranger—Suit to set aside conveyance*— Onus *on plaintiff—Holding of lands* benami, *Court not to make every presumption against apparent owner—Act* VIII *of* 1859, *s.* 7 —'*Relinquish or omit to sue,*' *meaning of—Construction of statute—Test of distinct causes of action in suits—Mahomedan husband, competency of, to sue wife, for conjugal rights—Suit to be determined according to Mahomedan law—Reg.* IV *of* 1793, *s.* 15—*Defence of legal cruelty—Court's order in suit for restitution, enforceable only by imprisonment or attachment —Act* VIII *of* 1859, *s.* 200.—This was a suit by a Mahomedan woman against her husband, after having left his protection, for recovering the value of certain company's papers and other personal estate, alleging that the above securities came to her hands whilst she was an inmate of his zenana, that they got into the possession of the husband and were detained by him. Her case was that the securities were entrusted to him for a particular purpose, *viz.*, that of receiving the interest on them for her, and that, though they may have been indorsed, she never meant to transfer the property in them. The husband's case was that he purchased them from her on several occasions, and that, on their indorsement and delivery, he paid her the full value for them. With respect to the burden of proof, the judgment of the Courts below proceeded on the principle that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bona fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships of the Judicial Committee expressed that the above principle was a sound one and was in accordance with the long established practice of the Courts in India. Their Lordships, therefore, decided that the wife was entitled to the protection which, according to the authorities, the law gives to a *purdahnasheen*, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him, and that the husband having failed to discharge this burden, there was no ground for disturbing the concurrent judgments of the Courts below. [*R.*, 4 A. 462, 8 A. 267, 12 M. 380 ; *D.*, 15 W.R. 329] In this case, it appeared that some immoveable properties of the wife had been conveyed by her to a person who purchased them *bona fide*. It was the wife that came into Court seeking to be relieved from the effect of her own conveyances, the execution of which she did not dispute, against one who, if not an absolute stranger, stood in no fiduciary relation to her, and it was, therefore, held to be upon her to establish her right to that relief. The habit of holding lands *benami* is inveterate in India ; but that does not justify the Courts in making every presumption against apparent ownership. [*R.*, 18 W R. 132, 9 C.W.N 89. 6 C L.J. 472.] The words in s. 7 of Act VIII of 1859, namely, 'if a plaintiff relinquish or omit to sue for any portion of his claims,' include accidental or involuntary omissions as well as acts of deliberate relinquishment, and where the words of law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. [*Appl.*, 15 W.R 408 ; *F.*, 2 C.L J. 490 ; *R.*, 9 W.R. 1 F.B.=B.L.R. Sup 774, F.B., 12 W.R. 79, 3 N.W.P, 27, 8 B.H.C. 205, 20 W.R. 450, 1, A. 543, 2 M 352, 6 C. 142, 8 C. 483, F.B., 8 C. 819, 8 M. 520, 14 B. 31, 19 C. 372, 17 B. 573, 20 B. 469, 21 M. 153=8 M.L J 92, 23 B. 597, 25 M. 736=12 M.L.J. 103, 29 C. 543, 26 M. 760.] On authority as well as principle, it is

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competent to a Mussalman husband to institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation, and such a suit must be determined according to the principles of the Mahomedan law. Their Lordships expressed that, if cruelty in a decree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. The Mahomedan law, on the question of what is legal cruelty between husband and wife, is not materially different from the English law and, according to both, there must be actual violence of such a character as to endanger personal health or safety or there must be a reasonable apprehension of it. [*R.*, 7 B.H.C. 122, 9 B.H.C. 290, 23 W.R. 178, 23 W.R. 179, 1 B 164, 14 C. 276, 10 B. 301, 8 A. 149 F.B., 17 C. 670, 17 A. 126, 28 C. 37, 28 C. 751=5 C.W.N. 673, 25 B. 644 F.B., 4 Bom L.R. 820, 34 C. 971=9 C.W.N. 510=1 C.L.J. 283, 7 Bom. L.R. 602, 29 A. 222=4 A. L J. 60=A.W.N. (1907) 27, 31 B. 366=9 Bom. L R. 451.] In this case, their Lordships expressed their doubt whether, in such a case, under the new Act of procedure, regulating the Civil Courts of India, in the event of disobedience on the part of the wife to obey the order of the Court, he might be given over bodily into her husband's hands. They stated that the disobedience of such an order directing the wife to return to cohabitation would fall within s. 200 of the Code, so as to be enforcible only by imprisionment or attachment of property or both. MOONSHEE BUZLOOR RUHEEM v. SHUMSOONNISSA BEEGUM, **8 W.R P C. 3=11 M I.A. 551=2 Suther. 59=2 Sar. 259.**

(47)—*Mahomedan Law—Conjugal rights, suit for restitution of—Prompt dower, necessity for payment or tender of.*—*Held* that where some of the dower must, in the absence of specification, be taken to be prompt, a suit by the husband for restitution of conjugal rights will not lie until so much of the dower as is prompt has been paid or tendered. ABDUL KARIM KHAN v. MUSAMMAT CHHOTI, **A.W. N. 1906, 136=3 A.L.J. 432.** (2 A. 831, *F.*)

(48)—*Mahomedan law—Separation deed—Mahomedans.*—According to the Mahomedan Law, it is not competent to parties contracting marriage to enter into a separation deed by which the husband consented that his wife might live with her parents: and in a suit for restitution of conjugal rights by the husband against his wife, who also pleaded non-payment of her prompt dower in bar of the suit, he would be entitled to a decree for restitution conditional on payment of the dower. ABDUL v. HUSENBI, **6 Bom. L.R. 728.**

(49)—*Mahomedan law — Suit to recover custody of wife—Prompt dower, Payment of—Condition precedent.*—According to the Mahomedan law, a husband cannot compel his wife to return to him before he pays her the prompt dower that has been fixed, or which she is entitled to have in accordance with the average rate of dower granted to the females of her father's family, when there has been no stipulation that the payment of the whole dower shall be postponed and there is no reason for believing there was such a stipulation. MOULADAD KHAN v. WAZIR SHAH, **45 P.R. 1876.** [*Overruled*, 164 P.R. 1889, F.B.; *Diss.*, 5 P.R. 1891, 14 P.R. 1891; *Doubted*, 141 P.R. 1884.]

(50)—*Mahomedan law—Suit for restitution of conjugal rights—Adultery of husband, whether valid defence.*—A suit by a Mahomedan for restitution of conjugal rights was resisted on the ground that he was debarred from claiming conjugal rights by reason of his admitted adultery with common prostitutes. *Held* that the fact of sexual intercourse by the plaintiff with prostitutes during the absence of his wife, she having persistently for years refused to live with him, was not so gross a violation of the marriage contract as to disentitle him from claiming rights which otherwise he could enforce. MUSSUMMAT FAHIMULNISSA v. MAHOMED HUSSAIN, **41 P.R. 1878.** (11 M.I.A. 551, *R.*)

(51)—*Restitution of conjugal rights—Marriage of Muhammadan minor-girl by doubtful guardian—Husband taking second wife when the girl was about to attain her puberty—Effect of her repudiating marriage—Court not to help such a husband to take custody of his wife.*—*Held*, that it is hard enough for a minor girl to be married without her own inclination being consulted. Moreover for her to find, just about the time of her attaining puberty, that her husband takes second wife, seems to be adding insult to injury and it is not a matter of surprise if she elopes and takes her abode with another man. In such a case the discretionary power of the Court should be exercised not to help the husband in taking custody of his wife, especially when it is doubtful that the girl has been given in marriage by a person competent, according to her personal law, to do so. *Held*, on review that, under such circumstances, it is a step of very doubtful policy to allow costs against her husband, and the parties should be left to bear their own costs throughout. MUSSUMMAT SAHIB JAN v. GHULAM HAIDAR, **111 P.W.R. 1912=15 Ind. Cas. 560.**

(52)—*Muhammadan Law*—Shia—*Husband and wife—Restitution of conjugal rights, suit for—Cruelty as defence—Jurisdiction of Civil Court—Legal cruelty, criterion of*—*Husband charging wife with murder and prostitution.*—The Civil Courts of India have succeeded to the duties which under the Muhammadan Law were discharged by the *Kazi* or at his instance by the umpires, and hence the Courts have the same jurisdiction. Cruelty on the part of a husband is a good and valid defence to a suit by him for restitution of conjugal rights, even where the parties are Muhammadan *Shias.* (11 M.I.A. 551, 8 W.R. P.C. 3, *R.*) The plea of

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cruelty would be allowed only in a case where the evidence establishes legal cruelty such as is demanded by the English Law in a suit for judicial separation. There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it. (11 M I.A. 551, 8 W.R. 3. P.C., 2 A.L.J. 608, 10 B. 301, *Rel. on.*) A husband transferred some of his wife's property during her minority to his brothers. On attaining majority, the wife obtained a decree for possession of the property against her husband and his brothers. In execution of her decree for costs, she got a warrant of arrest issued against her husband. The brothers of her husband raided her house and beat her. The husband was living with his brothers : and he and his brothers were heirs to his wife. The husband in a letter charged his wife with the murder of her child and for prostitution. In a suit by the husband for restitution of conjugal rights with his wife ; *Held*, that there was ground for apprehension of danger to the health and safety of the wife; (2) that the object of the husband was not to resume happy connubial relations but to get his wife in his power with no friendly motive to her ; (3) that the facts established legal cruelty on the part of the husband, and, consequently, his suit for restitution of conjugal rights must be dismissed. JAFRA HUSAIN v. HUSAN ARA BEGAM, **13 Ind. Cas. 609 = 15 O.C. 159.** (3 W.R. 93, 29 A. 222, 4 A.L.J. 60, A.W.N. 1907, 27 A.W.N. 1892, 77, *Rel. on*; 13 A. 126, 21 B. 610, 10 B. 301, *D.*)

(53)—*Suit for restitution of conjugal rights—Dower—Mahomedan law.* — By Mahomedan law a husband cannot compel his wife to return to him until he pays her the prompt dower fixed at the time of marriage. MUSSUMAT ZEBO v. JIWAN KHAN, **35 P.R. 1873.** [*Overruled*. 164 P.R. 1889 ; *Diss.*, 5 P.R. 1891, 14 P. R. 1891 ; *R.*, 45 P.R. 1876, 118 P.R. 1880, 141 P.R. 1884, 119 P.R. 1885.]

(54)—*Right to possession of wife—Muhammadan Law.*—Upon principle as well as authority, there can be no doubt that a Mussalman husband may maintain a suit in a Civil Court for a declaration of his right to the possession of his wife, and for a decree that the should return to cohabitation. Such a suit must be determined according to the principles of the Muhammadan Law. ABDUL KADIR v. SALIMA, **8 A. 149, F.B. = A.W.N. 1886, 53.**

(55)—*Mahomedan Law—Marriage—Suit for restitution of conjugal rights—Stipulation as to residence—Wife's plea that exigible portion of dower was not paid.*—In a suit for restitution of conjugal rights brought by a Mahomedan husband, the question, whether a stipulation, entered into by him at the time of the marriage with his wife to reside with her in her father's house, could in any case afford an answer to a suit for restitution of conjugal rights, was considered, but not decided, the wife's plea being rejected on the ground of want of definiteness in the stipulation itself. [*R.*, L.B.R. 1893-1900, 655, 5 C.W.N. 673 = 28 C. 751, 1 L.B.R. 351.] Where, in a suit for restitution of conjugal rights by a Mahomedan husband, his wife pleaded that he had not paid the exigible portion of the dower due, *held*, upon the authorities, that the non-payment of prompt dower was not a sufficient plea in bar of such a suit, the marriage having been consummated. HAMIDUNNESSA BIBI v. ZOHIRUDDIN SHEIK, **17 C. 670.** (8 A. 149, *Appr.*) [*F.*, 30 B. 122 = 7 Bom. L.R. 684; *Diss.*, 7 Bom. L R. 602.]

(56)—*Mahomedan Law—Suit for restitution of conjugal rights—Cause of action—Payment of dower.*—Under Mahomedan law, even after consummation with consent, a wife may refuse herself to her husband until her dower (prompt) has been paid, and so no cause of action could accrue to the husband for the restitution of conjugal rights until the dower was paid. SHEIKH ABDOOL SHUKKOAR v. MUSSUMAT RAHEEM-OON-NISSA, **6 N.W.P. 94.** [*Overruled* 8 A. 149, F.B. = A.W.N. 1886, 53; *F.*, 1 A. 483, 2 A. 831 : *R.*, 141 P.R. 1884.]

(57)—*Husband and wife—Mahommedan Law.*—A Mahommedan wife cannot resist a suit for restitution of conjugal rights on the ground that her dower has not been paid. ABDOOLA v. AH WA, **1 L.B R. 145.** (8 A. 149, 11 M. 327, *F.*)

(58)—*Suit for restitution — Limitation Act (1877), art. 35—Madras Act III of 1873, s. 16—Agreement for present and future separation—Legality — English and Indian law — Public policy.*—In this case a suit was brought, after a demand and refusal, for restitution of conjugal rights, in 1903, and that was compromised in 1904. By the compromise the parties agreed to live together "according to the custom of the world." The agreement further provided "If on any day subsequent to this and for any reason whatever you (the wife) should not like to live with me, but want to go away from me, I agree to give you Rs. 350." The parties never lived together after the agreement. The husband brought the present suit for restitution in 1907. *Held*, that, though art. 35, Limitation Act, 1877, would bar a suit for restitution if there has been a demand and refusal more than 2 years before suit (28 M. 436, 25 B. 644, 34 C. 79, *R.*) it is impossible to contend, after the above agreement, that the previous demand and refusal furnish the starting point for the running of time, and that, unless there is a fresh demand and refusal, time cannot run against the present claim for restitution. Courts should be strict in applying art. 35, according to the letter. Moreover it does not find a place in the new Limitation Act. The parties in this case being Hindus and Brahmins, the law to be applied in determining their marital obligations is the Hindu law. See s. 16 of Madras Act III of 1873. It may be doubted whether, under that law, any agreement between husband and wife to live apart from each other is valid. It may well be

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deemed to be forbidden by the Hindu law. (28 C. 751, *R.*) Even apart from the Hindu law, the agreement must be regarded as opposed to public policy and therefore not enforceable. (7 Bom. L.R. 602, *R.*) Even under the English law, an agreement providing for future separation is invalid, though an agreement for a present separation is enforceable. KRISHNA IYER v. BALAMMAL, **8 M.L.T. 314=8 Ind. Cas. 412.**

(59)—*Limitation Act* (1908), *ss.* 28, 29—*Limitation Act* (XV *of* 1877), *ss.* 2, 28. *sch.* II, *art.* 35—*Suit for restitution of conjugal rights brought after expiry of limitation provided by the Act of* 1877.—A right to restitution of conjugal rights is not one which is extinguished under s. 28 of the Limitation Acts of 1877 or 1908. The result of expiry of the period of limitation in respect of such right under the Limitation Act, 1877, is that the remedy only is barred and, as the portion of s. 2 of the same Act which enacts "that nothing herein contained shall revive any right to sue barred under that Act" not having been re-produced in the Limitation Act of 1908, a suit for restitution of conjugal rights when Act of 1908 was in force was maintainable, although it was filed after the expiry of limitation period provided by art. 35, sch. II, Limitation Act (1877). AYESHA v. FAIAZ HUSAIN, **9 A.L.J. 784=34 A. 412=16 Ind. Cas. 124.**

(60)—*Limitation—Suits for restitution of conjugal rights.*—A suit by a wife for the restitution of her conjugal rights is barred by lapse of time when restitution has been demanded by her and refused by the husband, being of full mind, more than two years prior to the commencement of the suit. DHANJIBHOY v. HIRABAI, **3 Bom. L.R. 371=25 B. 644.**

(61)—*Husband deserting and abandoning his wife—Lapse of time—Husband not entitled to claim custody of wife.*—Where it is clearly established that a Hindu husband for years past grossly failed to fulfil the obligations of giving his wife a home and of supporting her and her child, *held*, in the face of such desertion and abandonment, that the husband is not entitled to come forward and assert his rights as her husband and that a Court is not bound to decree a claim by such husband for custody of his wife. DHANI v. NARAIN SINGH, **82 P. R. 1908=147 P.W.R. 1908=8 P.L.R. 1909=4 Ind. Cas. 650** (78 P.R. 1893, 95 P.R. 1898, 28 C. 37, 751, 29 A. 222, 11 M.I.A. 551, *relied on*; 25 B. 644, 28 M. 436, 34 C. 79, *R.*; 60 P. R. 1879, F.B., *D.*)

(62)—*Husband and wife—Suit for restitution of conjugal rights—Suit filed with great delay—Neglect to maintain wife for a number of years.*—When the wife leaves her husband's protection and lives with her parents for a long period (15 years), without the husband caring to bring her back or contributing to her maintenance or demanding her company, the husband is not entitled to a decree for restitution

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of conjugal rights. MUSSAMMAT JIWANI v. MANGAL SINGH, **125 P.L.R. 1909=126 P.W. R. 1909=4 Ind. Cas. 974.** (6 P.R. 1885, 95 P. R. 1898, *R.*)

(63)—*Marriage, decree for consummation of, jurisdiction of Chief Court to pass.*—Where a married woman has attained majority and her marriage has been solemnized but not consummated, the Chief Court has jurisdiction to decree consummation. CHOUGUTTA v. RAJUN, **13 P.R. 1869.**

(64)—*Right of suit—Jurisdiction of Civil Courts—Suit for restitution of conjugal rights—Suit not maintainable by husband for recovering possession of wife—Decree declaratory of conjugal rights, mode of enforcement of.*—A suit will lie in the Civil Courts by a husband against his wife for restitution of conjugal rights. This suit was brought by a husband against his wife and certain others, the parties being Hindus, to obtain his conjugal rights. On special appeal the two Judges differed on the point of law as to what precisely should be the relief to be granted to the husband: one of them being of opinion that bodily possession of the wife may and ought to be delivered to the husband, and the other holding that the decree could be a merely declaratory one, to be enforced in case of disobedience by attachment. The third Judge to whom the case was referred for opinion concurred with the latter, holding that no suit could be maintained by the husband for recovering possession of the person of his wife; but a husband can maintain a suit in the nature of a suit for the restitution of conjugal rights, for a declaration that he is entitled to his marital rights, and for an order that the wife do return to him and live with him. Such an order is an order "for the performance of a particular act" within the meaning of s. 200 of Act VIII of 1859, and if the wife refuses to obey it, the decree may be enforced, as that section provides, by the imprisonment of the wife or by attachment of her property, or by both imprisonment and attachment. CHOTUN BEBEE v. AMEER CHUND, **6 W.R. 105=1 Ind. Jur. N.S. 317.** [*F.*, 2 Agra 111, 8 W.R. 467, 9 W.R. 552, 17 W.R. 13, 23 W.R. 179, 4 C. 588; *R.*, 8 W.R. 23, 9 B.H.C 290, 1 B. 164, 28 C. 37.]

(65)—*Decree for recovery of person of wife—Restitution of conjugal rights—Jurisdiction.*—Civil Courts cannot pass a decree for the recovery of the person of the wife, the proper order in all such cases being an order for the restitution of conjugal rights. MELARAM NUDIAL v. THANOORAM BAMUN, **9 W.R. 552.** [*R.*, 5 C.W.N. 195=28 C. 37.]

(66)—*Hindus—Suit for restitution of conjugal rights, if maintainable—No distinction between 'restitution and institution' of conjugal rights—Such suits, not discredited by Legislature—Discretion of Court, exercise of—Question of delicacy, how far to be considered by Courts.*—The Civil Courts in India have, since a long

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time, been entertaining suits for the institution or restitution of conjugal rights, in the case of natives, whether Hindus or Mahomedans; and this jurisdiction is a well-established one. It may however be remarked that although no text may be found in the Hindu Law books which provides for the King ordering a husband or wife to return, there is also no text to be found forbidding or deprecating compulsion. The duties appertaining to the relationship of husband and wife have always been the subject of caste discipline, and therefore, with the establishment of a systematic administration of justice, the Civil Courts would probably and almost necessarily assume to themselves the jurisdiction over conjugal rights as determined by Hindu Law, and enforce them according to their own modes of procedure. [*R.*, 13 A. 126, 23 B. 307, 28 C. 37=5 C.W.N 195, 28 C. 751=5 C.W.N. 673.] The gist of an action for restitution of conjugal rights is that married persons are bound to live together, and that one or other has withdrawn himself or herself without lawful cause. Consummation being unnecessary by Hindu Law as it is in the case of English Law, to complete the marriage, it necessarily follows that, whether the withdrawal or 'substraction' as Blackstone terms it, be before or after consummation, there has been a violation of conjugal duty which entitles the injured party to the relief prayed for. It may be that, owing to the practice of infant marriage in this country, there may be a custom for the infant wife after the celebration of the marriage, to return to her own house until she arrives at puberty, and in view of the above custom the Court would not order the wife to join her husband until she was of mature age. But this has nothing to do with the general legal right, and in any case, where the girl has long past the age of puberty. [*R.*, 18 B. 327.] It cannot be said that suits for restitution of conjugal rights stand discredited in this country. On the contrary, notwithstanding the express wish of *Markby, J.*, as expressed in 1875 in 14 B.L.R. 298 to regard the decree for restitution of conjugal rights as a mere declaration of rights, the Civ. Pro. Code, 1882, so far from treating the suit as a discredited one, or giving effect to *Justice Markby's* views, provides in express terms by s. 260 for the enforcement of such a decree by imprisonment or attachment of property or by both. The Courts in India would be exercising a wrong discretion if, in such suits it takes into consideration that the infant wife has had no voice in the choice of her husband or has never adopted her guardian's choice, and refuses to grant relief to the husband on this ground. If it does so, it would be virtually disregarding the precepts of Hindu Law, which treats the marriage of daughters as a religious duty imposed on parents and guardians, and looking at the matter from the purely English point of view, which sees in marriage nothing but a contract to which the husband and wife must be consenting parties. [*R.*, 21 B. 23, 21 B.

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610.] As to the objection that for the Court to compel a Hindu wife against her will to join her husband *for the purpose of consummation*, would be more than ordinarily revolting to delicate feelings, it was *held* that the Civil Courts having assumed jurisdiction, cannot draw fine distinctions between a woman who has never lived with her husband and is averse to joining him and one who has lived with him and perhaps acquired a physical or moral loathing for him and objects to returning. It may be admissible that the law should not adopt stringent measures to compel the performance of conjugal duties; but as long as the law remains as it is, Civil Courts cannot with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances) recognise any plea of justification other than a martial offence by the complaining party. DADAJI BHIKAJI v RUKMABAI, **10 B. 301.** (U.B.R. 1904, 4th Quarter, Buddhist Law—Marriage, 5, 31 P.R. 1908=76 P.W.R. 1908=152 P.L.R. 1908, *R.*)

(67)—*Suit for restitution of conjugal rights—Wife not within jurisdiction—Cause of action.*—The plaintiff and defendant were husband and wife. The former sued the latter for restitution of conjugal rights in Court T, within whose jurisdiction the plaintiff resided but not the defendant. The defendant contended that the Court T had no jurisdiction to entertain the suit. *Held*, that the Court had jurisdiction to entertain the claim. The cause of action in a suit by a husband for restitution of conjugal rights arises from the duty of the wife to reside with her husband, unless he has been guilty of some matrimonial offence which justifies her, in the eye of the law, in living apart from him. As the cause of action consists in the wife absenting herself from her husband's house without his consent, it must be deemed to arise at his house only. LALITAGAR KESHARGAR v. BAI SURAJ, **18 B. 316.**

(68)—*Suit for restitution of conjugal rights—Jurisdiction, no money value can be attached for—Privy Council, appeal to—Action of parties concerning valuation of suit*—A suit for restitution of conjugal rights and possession of a wife is not one to which any special money value can be attached for the purposes of jurisdiction. (13 C. 232, *F.*) [*R.*, 31 C. 849=8 C.W.N. 705; *D.*, 28 A. 545=3 A.L.J. 266=A.W.N. 1906, 99, 34 C. 352=5 C.L.J. 400=11 C.W.N. 458.] The action of the parties cannot affect the question of jurisdiction. In a suit for restitution of conjugal rights, no appeal lies to the Privy Council, as of right, although the suit was valued above Rs. 10,000 and the valuation was relied on by the defendant. MOWLA NEWAZ v. SAJIDUNNISSA BIBI, **18 C. 378.**

(69)—*Suit for restitution of conjugal rights—Appeal from decree of Recorder of Rangoon—Burma Courts Act* (XVII *of* 1875), *s.* 49.—The proviso in s. 49 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from

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the Recorder's Court that the suit shall be one, which has an amount or value capable of being estimated in money, and that *that* amount or value shall fall within certain specified limits; so that an appeal from a suit for the restitution of conjugal rights, which is incapable of being valued, will not lie from a decision of the Recorder. [*F*, 18 C. 378; *D.*, 5 C.L.J. 400=11 C.W.N. 458=34 C. 352; *R.*, 31 C. 849=8 C.W.N. 705, 3 A.L.J. 266, F.B. =28 A. 545=A.W.N. 1906, 99.] Where the suit is one not capable of being valued, the affidavit put in by a party, in which he professes to place a pecuniary value on the society of his wife, against whom he claims restitution, cannot alter the real nature and character of the suit. GOLAM RAHMAN v. FATIMA BIBI, **13 C. 232.**

European British subjects resident in Native State, suit for divorce arising between, within jurisdiction of High Court, Bombay—Petition in India against wife—Indian Divorce Act, IV of 1869—Suit for restitution of conjugal rights instituted in England by wife—*See* ACT IV OF 1869, s. 2, 10 B. 422.

Suit for—Valuation of suit—Appeal—Jurisdiction—*See* ACT XII OF 1887, ss. 20, 21, 11 C.W.N. 458=5 C.L.J. 400=34 C. 352.

See BUDDHIST LAW—DIVORCE, U.B.R. 1897-1901, Vol. II, 37.

See BUDDHIST LAW—HUSBAND AND WIFE, U.B.R. 1872—1892, 391.

Ill-treatment and desertion — *See* BUDDHIST LAW-MARRIAGE, U.B.R. 1904, 4th Qr., Buddhist Law, p. 5.

Suit for, whether lies.—*See* BUDDHIST LAW, MARRIAGE, U.B.R. 1909, 1st Quarter, Buddhist Law.

Decree for—Detention of wife in prison—Discretion of Court—*See* CIV. PRO. CODE, 1908, O. XXI, r. 33 (1) and (2), 10 Ind. Cas. 177.

Suit for—Court-fee — Appeal—*See* COURT FEES ACT, 1870, art. 17 (vi), 8 A.L.J. 889.

See HINDU LAW—MARRIAGE, 17 W.R. 522.

Suit by a Parsee wife against her husband for—*See* JURISDICTION — ECCLESIASTICAL JURISDICTION, 4 W.R.P.C. 91=6 M.I.A. 348.

See LIMITATION ACT, 1877, s. 23, arts. 31, 35, 120, 13 A. 126=A.W.N. 1891, 18.

Cause of action—Limitation—*See* LIMITATION ACT, 1877, s. 23, sch. II, arts. 34, 35, 16 B. 714.

See LIMITATION ACT, 1877, art. 35, 28 C. 37=5 C.W.N. 195.

See LIMITATION ACT, 1908, s. 23, 16 B. 715, Note=P.J. 1883, 124.

Apostacy—Effect upon marriage—Maintainability of suit for—*See* MAHOMEDAN LAW—MARRIAGE, 7 A.L.J. 956=7 Ind. Cas. 342.

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Suit for—Valuation of suit—Jurisdiction—*See* SUITS VALUATION ACT, 1887, ss. 8, 9, 12, 3 A.L.J. 266, F.B.=A.W.N. 1906, 99=28 A. 545, F.B.

Suit for— Valuation — Jurisdiction — *See* SUITS VALUATION ACT, 1887, ss. 11, 21, 11 Bom. L.R. 1352=4 Ind. Cas. 836.

Suit for— Jurisdiction— *See* VALUATION OF SUITS, 6 Ind. Cas. 636=14 C.W.N. 929

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See CIV. PRO. CODE, 1908, s. 144.
See RESTITUTION.

(1)—*Execution of decree—Assignment of decree for costs—Costs realised by assignee—Decree reversed in appeal—Costs cannot be recovered by way of execution—Civ. Pro. Code*, 1882, s. 583.—Certain appellants in the High Court obtained from that Court a decree dismissing the plaintiffs-respondents' suit with costs. That decree for costs was assigned by the decree-holders, and the assignee took out of Court in execution thereof the money which had been paid in satisfaction of it by the judgment-debtors. Subsequently, that decree was reversed by the Privy Council, and the plaintiffs obtained a decree in their favour with costs in all the Courts. The aforesaid assignee was not included as a party to the appeal to the Privy Council although the appellants therein had notice of the assignment. *Held* that the plaintiffs could not, merely by virtue of and in execution of the order of the Privy Council, obtain restitution from the assignee of the amount of costs paid as above stated. (19 A. 136, *R.*) [*R.*, 24 A. 288; *D*, 28 A. 337=3 A.L.J. 110=A.W.N. 1906, 43] S. 583, Civ. Pro. Code, does not apply to a case such as the one mentioned in para (1). The section only applies to parties to the proceedings in the suit and in the appeal and does not apply to assignees of interests of the parties to the suit when those assignees have not been made parties to the suit or the appeal. SADIG HUSAIN v. LALTA PRASAD, **20 A. 139=A.W.N. 1897, 222,** [*F.*, 5 C.W.N. 426.]

(2)—*Civ. Pro Code*, 1882, s. 583 (*Cf.* s. 144 (1), *new Code*)—*Reversal of decree of lower Court—Refund of money—Interest.*—Where a decree is reversed on appeal and the successful applicant is entitled under s. 583, Civ. Pro. Code, to recover any sum, which, before the decree of the Appellate Court he had been obliged to pay in execution of the decree of the lower Court, he is also entitled to receive interest on the sum so recoverable. PHUL CHAND v. SHANKAR SARUP, **20 A. 430=A.W.N. 1898, 100** (7 A. 432, 8 A. 262, 18 A. 262, 9 M. 506, A.W.N. 1888, 287, *R.*; A.W.N. 1897, 76, *Diss.*) [*Appr.*, 21 A. 1.]

(3)—*Decree reversed on appeal—Restoration of benefit obtained under original decree Civ. Pro. Code*, s. 583—*Right to mesne profits and interest.*—The respondent had obtained a decree cancelling the lease granted to the appellant's assignor and directing him to give up possession

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of the leased land to the respondent and pay her certain sums for mesne profits, etc. She executed the decree and obtained possession and realised the moneys awarded thereby. On such decree having been set aside subsequently on appeal, the present appellant sought for restitution under s. 583 of the Civ. Pro. Code, and he was held entitled to be put in that position which he would have occupied if the decree had never been passed and executed. He was, therefore, allowed the mesne profits which he would have received between the date, when he was ejected in execution of the decree and the date of the expiration of the lease. HARDAT v. IZZAT-UN-NISSA, **21 A. 1=A W.N 1898, 153.** [20 A. 430, *Appr.*]

Restoration of appeal.

Appeal dismissed for default—Application to restore the appeal also dismissed for default—Second application for the same purpose—Appeal—Review—*See* CIV. PRO. CODE, 1908, ss. 115, 141, 104, O. XLIII, r. 1, 7 P.L.R. 1900.

See CIV. PRO. CODE, 1908, O. XLI, rr. 17, 19, s. 105, 24 A. 464=A.W.N. 1902, 136.

Application for, dismissed for default—*See* CIV. PRO. CODE, 1908, O. XLI, r. 19, A.W.N. 1898, 155.

Application to restore appeal dismissed for default—Evidence of sufficient cause for restoration—*See* PRACTICE AND PROCEDURE, 20 A. 266=A.W.N. 1898, 34.

See PRACTICE AND PROCEDURE, 2 M.I.A. 181, 2 M.I.A. 441.

See PRIVY COUNCIL, PRACTICE OF—DISMISSAL OF APPEAL FOR WANT OF PROSECUTION, 7 M.I.A. 16=11 Moo. P.C. 305=1 Sar. 590.

Restoration of suit.

See CIV. PRO. CODE, 1908, O. XVII, rr. 1, 2, 2 C.W.N. 490.

See CIV. PRO. CODE, 1908, O. IX, r. 9, O. XVII, r. 3, s. 104, O XLIII, r. 1, A.W.N. 1893, 44.

See NOTICE, 18 B. 59.

See SUIT, 14 C.W.N. 558=6 Ind. Cas. 13.

See WITHDRAWAL OF SUIT, 2 Agra 158.

Restraint of legal proceedings.

See CONTRACT—ILLEGAL CONTRACTS.

(1)—*Agreements for.*— An agreement the object of which is to stifle a prosecution, *e.g.*, to compound an offence which cannot by law be compounded, is against public policy and cannot be recognised in any way by a Court of law. DALSUKHRAM v. DE BRETTON, **6 Bom. L.R. 73=28 B. 326.**

Restraint of trade.

See CONTRACT—ILLEGAL CONTRACTS.

See CONTRACT ACT, 1872, s. 23.

Restraint of trade—*concluded.*

(1)—*Contract Act, s. 27—Contract in restraint of trade—Cancellation of—Cause of action.*—C' wife when unmarried entered into a contract with the defendant to superintend the millinery and dress-making part of his business, remaining in his service for three years. When two years of this period had elapsed, a marriage having been arranged between the two plaintiffs, the defendant allowed her to cancel this agreement on her entering into a new one by which she bound herself to refrain from entering into any business as a milliner or dress-maker on her own account or with any person or persons for a period of three years, in the Punjab, and she also agreed to pay a sum of Rs. 10,000 as penalty in the event of breaking this portion of her agreement. Plaintiffs sued to have the contract cancelled. The defendant, admitting that the above contract, so far as it purported to be a general undertaking, on the part of the plaintiff not to trade in the Punjab, in her line of business, was void under the Contract Act, contended that with regard to the defendant having freed her from liability in respect of her agreement to serve him for three years, it was a contract to pay him Rs. 10,000 on the occurrence of a lawful act on the part of C's wife, *viz.*, the setting up of a trade by her as a milliner. He further contended that the present suit would not lie, no cause of action having arisen. *Held* that under s. 27 of the Contract Act, the contract was void because it was in restraint of trade, as it allowed the plaintiff to set up in trade only on condition of paying Rs. 10,000. *Held* also that though it was true that the defendant absolved the plaintiff from one year's service according to her covenant, and that he had not been shown to have held out any threats of attempting to enforce this agreement, yet the position of the plaintiff was such that to discover whether, without incurring dangerous liabilities, she could establish a millinery business or attempt to do so, was of the first necessity to her. And where, in such a case as this, an instrument ought not to be used or enforced, it was against conscience for the party holding it to retain it, since he could only retain it for some sinister purpose. *Held* therefore that a suit would lie for the cancellation of the agreement. COOKE AND WIFE v. RUSSELL, **29 P.R. 1874.**

Restraint on alienation.

(1)—*Restraint on alienation—Policy of the law.*—The policy of law as to restraints on alienation considered with reference to the provisions of the Transfer of Property Act. VYANKATRAYA v. SHIVRAMBHAT, **7 B. 256.**

(2)—*Validity of condition as to—Void and inoperative condition—Sale in execution of decree of such interest.*—*Held* that, where a decree of a Settlement Court was based on a compromise which contained restrictions as to alienation, such conditions were void and inoperative. *Held* further that, where such a decree stood in favour of the judgment-debtor, his right was transferable and could be attached and sold in

Restraint on alienation—*concluded.*

execution of decree against him. GAYA DIN SINGH v. SYED MUMTAZ HUSAIN, **10 O.C. 136.** (4 O.C. 163, *F.*)

See HINDU LAW—ALIENATION, 4 B.L.R. O.C. 265, Note.

See HINDU LAW—WILL, 24 C. 406.

Will—Gift of rent and profits—Disposition of corpus—and partition—Construction—*See* HINDU LAW—WILL, 7 M.L.J. 184.

See MAHOMEDAN LAW—GIFT, 6 M.H.C. 356.

Restraint on anticipation.

Decree passed against separate property of married woman—Attachment—Income of property subject to restraint—*See* ACT III OF 1874, s. 8, 17 M.L.J. 363=2 M.L.T. 322=30 M. 378.

Resulting trust.

See TRUST.

(1)—*Resulting trust.*—Resulting trust is not a mere expectancy or contingency under s. 266 (*k*) of the Civ. Pro. Code, 1882. Resulting trust in favour of a person passes on his insolvency to the Official Assignee and becomes vested in him. ANTAO v. ARDESHIR, **1 Bom. L.R. 303.**

See CIV. PRO. CODE, 1908, O. XXI, r. 16, 2 C.P.L.R. 45.

See LIMITATION ACT, 1908, s. 10, 8 C. 788 =11 C.L.R. 370.

Statute of frauds, applicability of, in the case of Parsis, under Will, necessity of taking probate—*See* PARSIS, 6 B. 363.

Resumption.

See RESUMPTION, RIGHT OF.

Resumption, Bengal Land Revenue.

See BEN. ACT VII OF 1862.

Resumption, Right of.

1.—GENERAL.
2.—EFFECT OF RESUMPTION.
3.—PRACTICE AND PROCEDURE.
4.—MISCELLANEOUS.

See BEN. REG. XIX OF 1793.

——1.—General.

(1)—*Resumption of land by zemindar—Evidence of title—Local inquiry.*—In a suit by a zemindar to resume and assess lakheraj land, the plaintiff must give some evidence of his title to the property in dispute before the Court can order any local enquiry. BABOO RAJKISSEN MOOKERJEE v. BABOO JOYKISSEN MOOKERJEE, **W.R. 1864, Act X, Rul. 119.**

(2)—*Resumption by Zemindar—Purchase at subsequent sale in execution by Zemindar--Judgment in previous resumption suit, inadmissible in evidence against auction purchaser.*--Plaintiff sued for lands as originally belonging to a lakheraj holding of his ancestor, which had been resumed by the zemindar who, as holder of a decree, caused a sale of the lands as the lakheraj of his debtor, at which sale defendant

Resumption, Right of—continued.

——1.—General—*continued.*

became the purchaser. The first Court dismissed the suit on the ground that plaintiff's possession was not proved, but the lower appellate Court gave the plaintiff a decree, finding, upon the strength of a copy of the judgments in the previous resumption suit, that plaintiff's title was proved, and, upon other evidence, that plaintiff's possession was shown. The defendant appealed specially, contending that, as she was an auction-purchaser, and no party to the Zemindar's resumption suit, the judgment in that suit could be no evidence against her, and that the plaintiff had obtained a decree from the lower appellate Court without any evidence of his title at all. *Held* that the lower appellate Court should have found plaintiff's title proved on legal evidence before a decree was pronounced in his favour. The resumption judgment might be binding as against the decree-holder, who was the same person as the zemindar ; but it could be no evidence of plaintiff's title as against an auction-purchaser, who was no party to the resumption suit. MOHA MOYA DOSSEE v. JOODISHTIR DEB, **10 W.R. 112.**

(3)—*Suit for—Plea of service in lieu of land—Burden of proof.*—Where, in a suit for resumption of certain lands, the defendants pleaded that the grant was burdened with service, *held*, the burden of proving such service, or the grant burdened with such service, lay on the defendants, and that the enjoyment of the land for 40 years will not shift the burden of proof. VISUESWARA NISSENKA BAHADUR v. GORLA BUDARADU, **8 M.L.T. 82=7 Ind. Cas. 401.** (7 M. 268, 14 M. 365, 26 M. 403, *R*.)

(4)—*Land settled by Government—Resumption—Purchase of such land—Title—Opinion of Revenue Officer.*—Where a person purchases an estate settled by Government after resumption, his title thereto must depend upon the resumption-decree, any opinion of the Deputy Collector to the contrary notwithstanding. SHIB RAM DOSS v. SUDANUND SURMAH, **17 W. R. 557.**

(5)—Wajib-ul-arz -*Recognition of right to resume—Previous grant—Re-grant to* muafeedars.—Where it is admitted that the right of the rent-free holder had existed for many years before the date of the *wajib ul-arz*, the mere recognition of the defendant's right to resume, contained in that document, does not amount to a re-grant to the *muafeedars* so as to give to the plaintiff a new starting point from which his right to resume should date. DAYUM KHAN v. TUNSOOKH RAI, **2 Agra 189.**

(6)—Lakhiraj *land not resumable by defendant Talukdar, Competency of zemindar to resume.*—In this suit for resumption the defendant pleaded that the lands claimed were within his *Shikmee* taluq and consequently, the plaintiff had no right to resume them. The High Court found that the defendant derived his tenures from the zemindar represented by the plaintiff and that he paid the rent to the

***Resumption, Right of*—continued.**

——1.—General—*continued.*

plaintiff. As *Shikmeedar*, therefore, defendant held rent-paying lands from the plaintiff and paid rent to him. As a dependant taluqdar, however, he was not entitled to resume any *lakheraj* land within the limits of his dependant tenure; but the fact of his holding such tenure could not deprive the zemindar of his right to resume the land if the defendant who held both as *shikmeedar* and *lakhirajdar* failed to make out his title as *lakhirajdar*. JUGUNNATH GOSSAIN v. MR. J.G.N. POGOSE, **4 W.R. 42.**

(7)—*Right to resume* lakheraj *lands—Limitation.*—In respect of a suit to resume land and dispossess the *lakherajdar*, if the time for instituting the suit is run out in the lifetime of the father, the right to sue is lost to the heir. NOBI BUKSH v. MUSSAMUT AMATULLA, **W.R. 1864, Act X, Rul. 132.**

(8)—*Act* XI *of* 1859, *ss.* 11, 13, 54—*Reg.* II *of* 1885, *s.* 3—*Limitation*—Lakhiraj—*Adverse possession.*—Where a grant of a *lakhiraj* was made subsequently to the 1st December, 1790, the cause of action founded on the proprietor's right to dispossess the grantee under s. 10, Reg. XIX of 1793 arose immediately after the passing of that law, and no suit could be maintained upon it after the 1st May, 1853, (*i.e.*) 60 years after the date when it first arose. KASHINATH KOOWAR v. BANKUBEHARI CHOWDHRY, **3 B L.R.A.C. 446=12 W.R. 440.**

(9)—*Reg.* XIX *of* 1793, *s.* 10—*Suit for resumption of* lakheraj—*Exemption from limitation*—Onus *on plaintiff to prove creation of* lakhiraj *subsequent to* 1790.—This suit was commenced in December 1861, plaintiff alleging that he was a dur-putnidar, that there was a certain quantity of land, part of his *mal* lands, held by the defendant under the false pretence that it was *lakheraj*. The defendant pleaded that the suit was barred by limitation, and the question had to be decided whether or not it was so barred, assuming that the grant was subsequent to the 1st December 1790, and it was held that if the suit was one falling within s. 10, Reg XIX of 1793, such suit for resuming an invalid *lakheraj* subsequent to 1st December 1790, would be exempt from limitation. In such a case, it is the plaintiff that must prove that the case is one falling within s. 10 of Reg. XIX of 1793 so as to show that it is excluded from the law of limitation by the words "and no length of possessions shall be hereafter considered to give validity to any such grant," etc. Plaintiff must prove his allegation that the land which is held by the defendant and which he claims to be *lakheraj*, is part of the *mal* land of the plaintiff. If he prove that fact and show that it was assessed to the public revenue at the time of the decennial settlement, it may be presumed that the right under which the defendant claims to hold as *lakheraj* commenced subsequently to the 1st December 1790, unless the defendant gives satisfactory evidence to the contrary. The lower Courts were wrong in having held that the *onus* was upon the defendant and the case was therefore remanded to be tried by the first Court with reference to the above opinion of the High Court. SONATON GHOSE v. MOULLVIE ABDUL TURRUC, **2 W.R. 205** [*F.*, 2 W.R. 303; *R.*, 2 W.R. 302, 3 W.R. Act X, Rul. 148, 9 W.R. 181, 24 W.R. 447, 25 W.R. 209; *D.*, 4 W.R. 53.]

(10)—*Reg.* XIX *of* 1793, *s* 10—*Reg.* XLIV *of* 1793, *s.* 8—*Land granted by zemindar "rent free" for public purpose - Rent—Revenue.*—A zemindar by a sunnud in 1850 (after reciting that there was no water in talook A, and that, the river being at a distance, great inconvenience was felt for want of water, in consequence of which desertions took place in the village) granted to B, 22 bigas of land rent-free, stipulating that B should dig a tank on the land, and continue to distribute water. In a suit to annul the grant, on the ground that it was valid under s. 10, Reg. XIX of 1793, *held* by the majority of the Court (*dissentiente Levinge, J.*), that grants of land made by zemindars free of rent are void under the provisions of that enactment. But further held by the majority of the Court (*dissentientious Trevor, J. and Loch, J.*) that the grant in question was valid, the reservation of a right to the use of the water by the tenants of the zemindaree being a benefit of service in the nature of rent reserved to the zemindar; and that the grant was therefore either not one of those intended to be dealt with by s. 10, Reg. XIX of 1793, or was one which the zemindar was empowered to make by Regulation XLIV of 1793. PIZIRUDDIN v. MADHUSUDAN PAL CHOWDHRY, **B.L.R Sup. Vol., 75=2 W.R. F.B., 15.** [*Appl.*, 25 W.R. 245; *Expl.*, B L.R. Sup. Vol. 774=9 W.R. 1; *D.*, 3 W.R. 177.]

(11)—*Religious endowment — Manager — Right of resumption—Invalid* lakhiraj *land.*—The manager of a religious endowment appointed simply to look after the service of an idol and to expend certain allowances derived from the rents of certain villages upon it has no power or authority to sue for resumption of invalid *lakhiraj* land. NOBIN CHUNDER ROY CHOWDHRY v. PEAREE KHANUM, **3 W.R. 143.**

(12)—*Resumption of* lakheraj *land—Taluqdars.*—Taluqdars have no legal right to sue for resumption of areas containing more than 100 bighas of land. GOPAL CHUNDER ROY v. OODHUB CHUNDER MULLICK, **W.R. 1864, 156.**

(13)—Lakheraj *lands, extent of right of Government to resume, as agent for zemindar—Burden of proving land being* mal *when so claimed.*—Plaintiff, a *lakherajdar*, sued for the reversal of an order of resumption passed by the Board of Revenue. It appeared that the Revenue Authorities had renounced any right of Government to resume as the paramount power, and were only acting as private agents of the zemindar, and could thus do no more than the

***Resumption, Right of*—continued.**

——1.—General—*continued.*

zemindar, *i.e.*, claim to resume lands *under*, but not *above*, 100 beeghas, in extent, whereas the area in suit was admittedly more than 100 beeghas. The defendant, the zemindar, contended on appeal that the lower Court had thrown the burden of proof on him wrongly. But the High Court was of opinion that the burden was rightly put by the lower Court on the defendant. Plaintiff sued for declaration of right to certain land as rent-free. He filed a sunnad of a date before the Company's accession, which was admitted by defendant. He was found to have possession of the area, 5,032 beeghas, for declaration of title to which he sued, and this was not disproved. The defendant's plea was that the sunnad, though good for 310 beeghas, was good for no more, and that the rest of the land belonged to his zemindaree; and this it was clearly for the defendant to prove. RAM LOCHUN SIRKAR v. DEENONATH PAUL, **2 W. R. 279.**

(14)—*Resumption of lakheraj-lands, suit for —Onus of proof.*—In a suit for resumption of *lakheraj* lands, although the documents on which the defendant bases his title may be found to be forgeries, it is for the plaintiff (if he is not estopped by the terms of his patta from resuming the *lakheraj*) to show that the lands held by the defendant are rent-paying lands, and that, if the defendant holds them as *lakheraj*, he does so on a grant of date subsequent to his patta. KEDARNATH MOOKERJEE v. UNODA DEBIA, **1 W.R. 25.**

(15)—*Resumption of* lakheraj *lands.*—When land in extent beyond 100 beeghas is admittedly held by a *lakherajdar*, the presumption is that it is held under one grant, and that it is resumable by Government, and not by the Zemindar. In order, therefore, to rebut the presumption, it is necessary for a zemindar suing to resume under these circumstances to show that the land, though beyond 100 beeghas in extent, is held under different sunnads. RAJAH JOGENDRONARAIN ROY v. HURRY DOSS ROY, **W.R. 1864, 145.**

(16) —Lakheraj *land — Rights of zemindar— Resumption and assessment.*—A zemindar is not entitled to the resumption and assessment of invalid *lakheraj* lands of more than 100 beeghas and covered by one sunnad, when the power to resume is one vested in the zemindar by law. BEER CHUNDER JOOBRAJ v. UMAKANT SEIN BAHADOOR, **W.R. 1864, 232.**

(17)— *Resumption of lakheraj lands by zemindar—S.* 30, *Reg.* II, 1819.—A zemindar's right to resume lands in excess of 100 beeghas (as invalid lakheraj under s. 30, Reg. II, 1819) can be declared to be barred only when it is shown that the lands are held under a sunnad in excess of 100 beeghas, or under different sunnads, each in excess of 100 beeghas. MAHOMED MUNSOOR v. UMBICA CHURN ROY, **W.R. 1864, 132.**

(18)—*Resumption of lakheraj land—Under Reg.* XIX *of* 1793.—Under Reg. XIX of 1793, a zemindar can sue for resuming invalid lakheraj lands exceeding 100 beeghas held under several sunnads, if any one of them singly is not for more than 100 beeghas. MRS BARBARA AMEENA JOHN ELIAS v. MOONSHEE MAHOMED PEEZEER, **W.R. 1864, 2.7.**

(19)—*Suit for resumption—Question of validity or invalidity of lakheraj—Quantity of land not subject of decision.*—Plaintiff, a zemindar, having obtained a decree for resumption of certain lands against the defendant, a *lakherajdar*, now sued for a kabuleut for the rent of those lands. The defendant's answer was that the extent of the lands had been wrongly stated by the plaintiff; that she held less land than that for which the plaintiff demanded rent. The lower Court refused to enquire into the plea of the defendant, because, in the resumption suit, she had raised no objection relating to the quantity of land in her possession. *Held* on second appeal, that the lower Courts were clearly in error. They should have tried the issue as to what quantity of lands defendant held, and given a decree for the plaintiff to that extent of lands only. MURRIAM BEBEE v. BEER CHUNDER JOOBORAJ GOSSAMEE, **2 W.R. Act X, Rul. 35.**

(20)—*Suit for resumption Evidence of possession during period only few years short of* 1790—*Presumption in favour of* lakheraj *holding prior to such period.*—Where the defendant, in a suit for resumption, gives evidence of possession for a period only few years short of 1790, it is competent to the Court to infer from collateral facts and other evidence a possession prior to that period. Since such presumption when well-founded constitute good evidence, the lower Court was right in having taken it that the defendant had proved that he had held the lands as *lakheraj* from a period prior to 1790, so that the plaintiff's suit was clearly barred, as he was not an auction purchaser within twelve years from the date of suit. HEERA MONEE DEBEA v. LOKENATH MUNDUL, **2 W.R. 135.** [*Appr.*, 5 W.R. 191.]

(21)—*Reg.* II *of* 1819, *s* 30—*Act* X *of* 1859, *s.* 28—*Lakheraj—Resumption — Revenue and Civil Courts—Jurisdiction* —The plaintiff, the purchaser of a putnee lease, sought to obtain a declaration of his *mal* right by setting aside an alleged rent-free tenure in certain lands held rent-free from the time of a former talookdar, alleging that he had called for the defendant's documents; and, as the defendants refused to produce them, the plaintiff instituted in this suit before the Collector under Reg. II of 1819. The defendant pleaded a lakheraj title from before 1790. The suit was referred to the Civil Court under Bengal Act VII of 1862, and the plaintiff obtained a decree. On appeal by the defendant.—*Held* that, prior to the passing of Reg. II of 1819, under their ordinary jurisdiction, the Civil Courts were competent to entertain regular suits by zemindars for declaration of their right to resume revenue

***Resumption, Right of*—continued.**

——1.—General—*continued.*

illegally alienated subsequently to 1790, and for possession of the land rent-free under grants of titles which had their origin subsequently to 1790. *Held by Trevor. J., Seton-Karr, J., and Glover, J.*, that such suits were unaffected by the passing of Reg. II of 1819, s. 30, which related only to resumption of lakheraj existing prior to 1790 *Norman, C. J., Phear, J., and Jackson, J., dissenting, held* that, since the passing of Reg. II of 1819, regular suits for the resumption of all tenures held rent-free, in which the defendant alleged a valid rent-free grant, have been instituted and down to the passing of Bengal Act VII of 1862, might have been maintained or referred to the Collector under s. 30 of that Regulation. *Held* by a majority of the Court, (*dissentientibus Trevor, J., Seton-Karr, J., and Glover, J.*) that the jur isdiction of the Civil Court to try this cause was not affected by s. 28 of Act X of 1859. SONATON GHOSE v MOULVI ABDUL FARAR, **B.L R. Sup. Vol. 109=2 W.R. 91.** [*F.*, 2 W. R. 258, 7 W.R 470; *Appr.*, 8 B.L.R. 566, P.C.=14 M.I.A. 152=20 W.R 459: *Appl.*, 16 W.R 173; *R.*, B L.R. Sup. Vol. 162, 4 W. R. 53, B.L R. Sup.Vol. 774=9 W R. 1, F.B., 8 B.L.R App. 85, Note=15 W.R. 474, 8 B L. R. App. 87, Note=15 W.R. 440, 21 W.R. 447, 8 C. 230, 16 C. 449; *D.*, 34 C. 223=5 C.L J. 192.]

(22)—*Release of small extent of land by Government to benefit cultivator, no bar to resumption by proprietor as invalid* lakheraj —The mere fact of Government releasing land under 50 beeghas in extent, as a boon to the cultivator, is not *per se* a bar against the zemindar seeking to resume it as invalid *lakheraj*. MRS. B. O. ELIAS v. BROHMO MOYEE BURMONEE, **2 W.R. 42.**

(23)—*Suit among lakherajdars—Right of resumption.*—One lakherajdar cannot maintain a suit for resumption against another and force the defendant to prove his title. KAEM KHAN v. MUSSAMUT BIBEE SAHEBAJAN, **7 W.R. 362.**

(24)—*Act* X *of* 1862, *sch. B*, s. 11, *cl.* (*d*)—Lakheraj-*lands—Suit for resumption—Stamp—"Revenue" meaning of—Rent to Zamindar.*—A suit for the resumption of lands claimed to be held as *lakheraj* falls under cl. (*d*) of s. 11 of sch. B of Act X of 1862, under which clause the suit should be valued at eighteen times the aggregate annual rents payable by the ryots. The word "revenue" in cl. (*d*), s. 11, sch. B, Act X of 1862, must be read as meaning revenue or rent to Government, or to a zemindar, or to any other person. GOPEE MOHUN MOJOOMDAR v. J. B. MACKINTOSH, **9 W.R. 395.**

(25)—*Reg.* I *of* 1793 *s.* 8, *cl.* 4—*Ghatwalle lands whether liable to resumption.*—The question for decision in this case was touching the validity of a claim made by the East India

***Resumption, Right of*—continued.**

——1.—General—*continued.*

Company to resume, for the purposes of Revenue assessment, certain beeghas of land forming part of the zemindary of the Rajah of Khurruckpore. The lands sought to be resumed were of ghatwalee tenure, and the main question therefore was, whether lands of that description were liable to be resumed as under Reg. I of 1793, s. 8, cl. 4, relating to thannah or police establishments. Special commissioners appointed for the purpose passed a final judgment in favour of Government, resting their decision on the grounds that the lands were in reality lands granted for the police establishments and were to be considered and treated as provided for in cl. 4, s. 8, Reg. I of 1793. From the above decision the present appeal was brought to the Privy Council, and their Lordships advised that the decision complained of ought to be reversed. The lands in question were not lands properly coming under cl. 4, s. 8 of Regulation I of 1793; they were a part of the zemindary of Khurruckpore and were included in the settlement for that zemindary and covered by the *jumma* assessed upon it. With respect to the costs of the proceedings, their Lordships directed that the respondents should be ordered to re-pay to the appellant all the costs that they had received from him under orders of Judges below, and should also be ordered to pay to him all his own costs of the proceedings including those of the appeal to the Privy Council. The claim of the Government had been wrongly persisted in by them after the several decisions against them by their own officers acting as Judges; further, the decree in their favour had been finally obtained upon grounds different from those on which it was originally sought, and the appellant had been exposed to a long and most expensive litigation. RAJA LELANUND SINGH v. THE GOVERNMENT OF BENGAL, **4 W.R. P.C 77=6 M.I A. 101.** [*F.*, 9 C 187=9 I.A. 104; *R.*, 6 W.R. 199, 13 B L.R. 124, 20 W.R. 154, 3 C. 251, 8 C. 620=11 C.L.R. 285, 10 C. 677, 9 B. 198, 5 Bom. L.R. 983, 12 C. W.N. 178, 34 C. 753=5 C.L J. 583=12 C.W. N. 193.]

(26)—*Resumption by Government of a* jaidad *tenure—Suit by representatives of grantee—Jurisdiction of Municipal Courts—Arms and ammunition, claim to.*—Maharajah Scindia granted a Jaghire to a Begum S on a Jaidad tenure, *i.e.*, a grant of a certain district and the revenues thereof, on condition of the grantee keeping up a military force to be employed in the service of Scindia, whenever called upon. The whole administration of the Jaghire including the exercise of Civil and Criminal jurisdiction therein vested in the grantee, who exercised a sort of delegated Sovereign authority. On Scindia's authority being ceded to the East India Company, the grantee of the Jaidad tenure entered into a treaty with the Company, under which she was to hold the tenure under the Company during her life-time. As long as she was alive, British law and jurisdiction were

***Resumption, Right of*—continued.**

——1.—General—*continued.*

excluded from her dominions. After her death, the Regulation Law was introduced therein by order of the Governor-General, under Act XVII of 1836. Since the death of the Begum, the Government, acting in the Political Department resumed the Jaghire and seized the arms and ammunition of the Begum. The representatives in interest of the Begum claimed in this suit the Jaghire and to hold the same free from the payment of any revenue to Government. They also claimed, in another suit, the arms and ammunition seized by the Government. The defence was that the suits were not maintainable in the Civil Courts on the ground that the resumption and seizure were acts of state. *Held*, the resumption was not an act of state, because it was not the seizure by arbitrary power, of territories, which up to that time, had belonged to another Sovereign State. On the contrary it was the resumption of lands previously held under the Government under a particular tenure, upon the alleged determination of that tenure; the possession being taken under colour of a legal title, which was a title in the Sovereign Power, to resume and retain, or to assess to the public revenue all lands previously held rent free. If by continuance of the tenure or other causes a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *prima facie* be cognizable by the Municipal Courts of India. (1 M.I.A. 476, *D*) *Held*, upon the evidence, that the plaintiffs failed to establish their title to claim the lands in this suit. It appearing in evidence that the Begum had purchased the arms and ammunition and there appearing nothing to disprove her title thereto, a decree was given in favour of the plaintiffs for the value thereof with interest. FORESTER v. THE SECRETARY OF STATE, **12 B.L.R. 120, P.C. =18 W.R. 349=I.A. Sup. Vol. 10=3 Sar. 1 =1 P.R. 1872.** [*R.*, 6 Bom. L.R. 131; *D.*, 12 B.L.R. 167, P.C.=18 W.R. 389.]

(27)—*Mokurruree tenure—Death of grantee—Resumption.*—There is nothing in the nature of a mokurruri tenure granted in perpetuity which renders it capable of resumption, if there be no known heir of the last holder. MIRZA HIMMUT BAHADOOR v. BANEE SOONEET KOOER, **15 W.R. 549.**

(28)—*Resumption of* Numuk Sayer Mehals. —Resumption, by Government, of *Numuk Sayer Mehals* (Saltpetre duty estates) upheld; the *sunnuds of the Subadar of Bahar*, the ruling power previous to the Company's accession to the *Dewanny*, purporting to grant this Government revenue as *mocurrary istimrary* at a permanent fixed rent, being declared forgeries. *Quære.*—Whether the *Numuk Sayer mehals*, being a *Sayer* right, was not wholly abolished by Ben. Reg. XXVII of 1793, and the Bengal Government, in their Sovereign character, had not an absolute right to resume? GOVERNMENT OF BENGAL v. NAWAB JAFUR HOSSEIN, **5 M.I.A. 467=1 Sar. 472.**

***Resumption, Right of*—continued.**

——1.—General—*continued.*

(29)—*Jaghir — Resumption — Alienation by grantee.*—A Zamindar cannot seek to resume a jaghir on the ground of its alienation by the grantee so long as there are heirs male of the grantee in existence. The transfer by the Jagirdar did not interfere with the exercise of the Zemindar's right of resumption when there would be no heirs male of the grantee in existence. He would be entitled to recover possession notwithstanding this alienation if at some future time it should so happen that there were no heirs male of the original grantee. RAJA RAMESWAR NATH SINGH v. HARALAL SINGH, **1 B.L.R.A.C. 170.** [*R.*, 1 C.L.J. 557.]

(30)—*Khamar lands—Claim to possession of lands as* khamar lands, *dismissal of—Action for resumption—Necessity of proof of alleged grant with its time and terms.*—The prayer in this plaint was to declare that the village in question was a portion of the *mal* lands of the plaintiff's zemindaree; and that the *lakhiraj* title set up by the defendant may be set aside and possession awarded to the plaintiff. The lower Court dismissed the case of the plaintiff on the ground that he had failed to establish that he or his ancestors ever held possession of the village for the last 60 years from the year 1803, when the claim of his ancestors to obtain certain rents of the village brought against the husband of the defendant was dismissed for want of proof. The plaintiff was bound to prove that the village had been given for maintenance of the husband of the defendant as alleged by him and was such as he had a right to resume after his death. Plaintiff was not authorised to ask for the resumption of any maintenance grant whatsoever, without showing its nature and conditions and the relationship of the party to whom it may be said to have been originally granted. MAHARAJAH NEELMONEY SINGH DEO BAHADOOR v. RAJCOOMAREE THAKORANEE, **2 W.R. 171.**

(31)—*Purchase of Nuzzool land from Government—No condition as to resumption—Resumption by Government whether legal.*—Appellant purchased from Government a piece of Nuzzool land to erect shops on it, but did so only on a part, leaving the other part vacant, with a trench on it. This portion was resumed by Government and sold on the ground that the trench was likely to become a nuisance. Appellant thereupon sued for the recovery of the sale proceeds from Government. *Held*, that he was entitled to recover, there being no stipulation entitling Government to resume in certain events, and no proof of abandonment by appellant to entitle them to do so. PIAR SINGH v. THE GOVERNMENT, **6 P.R. 1868.**

(32)—*Resumption by istemrardar in Ajmere of sub-taluk — Custom not established.*—An alleged custom, entitling a Patwi Rajput Chief an istemrardar of an ancient and impartible taluk in Ajmere, to resume a sub-taluk, which was granted generations back, on

***Resumption, Right of*—continued.**

——1.—General—*continued.*

the ground of the last holder having died issueless and without adopting, was *held* not established. RAO BAHADUR SINGH v. JOWAHER KUAR, **10 C. 887, P.C. = 11 I.A. 75 = 4 Sar. 540.**

(33) - *Grants for tanks—Validity—Resumption—Grant of road—Public purpose—Assessment.*- Grants for tanks are invalid and are resumable by the zemindar. Rent cannot be assessed on land granted for a road which is used annually for the *Ruth Jattra* (which is a public purpose). HURREENARAIN GOSSAIN v. SHUMBOONATH MUNDUL, **1 W.R. 6.**

(34)—*Claim of Government to julkur of a navigable river not forming portion of settled estate—Reg.* II *of* 1819—*Resumption.*—Reg. II of 1819 is not the Regulation under which Government must proceed when claiming julkurs of navigable rivers not forming portions of settled estates. All such cases are cognizable only in the ordinary Court and the Government must go into the Court as an ordinary litigant; first, because of the total absence of the words "julkurs" in any of the Resumption Regulations, either before or after Regulation II of 1819; and secondly, by reason of the difference in the nature of the claims between one to take possession of julkurs and one to resume lands. THE COLLECTOR OF MALDAH v. SYUD SUDUROODEEN, **1 W.R. 116.** [*R.*, 2 B. 19.]

(35)—*Suit for resumption—Plaint—Amendment—Refusal—Subsequent application to amend—Remand.*—A suit was brought under s. 30 of Reg. II of 1819 to resume certain lands held rent-free, on the allegation that they were part and parcel of the plaintiff's permanently settled estate illegally alienated and held by the defendant as *lakhiraj* since the Permanent Settlement. The plaintiff was offered by the Court time and opportunity to amend his plaint and supplement his evidence. He refused to do the latter supposing that he had sufficient evidence to sustain his case, and elected to go to trial on the record as it stood. The Court found that the plaintiff failed to give any proof that the lands in dispute were at any time part of his permanently settled estate. Now, he wanted to have the case remanded in order to produce further evidence. *Held*, that this is mere trifling with the Court and cannot be permitted and that the appeal should not be remanded. NOBBO LALL KHAN v. MAHARANEE ODHEERANEE NARAINEE KOOMAREE, **3 W.R. 5.**

See ACT XXIII OF 1871, 2 B. 346.

Grant of permanent gunti-tenure—By Government and temporary settlement with heirs of former proprietor—Effect on right of lessee under grant—Parties — *See* BEN. ACT VIII OF 1879, s. 10, 30 C. 811, P.C. = 7 C.W.N. 601.

Settlement officer not entitled to resume and assess lands held as lakhiraj—*See* BEN. ACT VIII OF 1885, 20 C. 577.

***Resumption, Right of*—continued.**

——1.—General—*continued.*

See PUN. ACT XXVII OF 1868, s. 5 (4), 7 P.R. 1887.

Grove land—*See* U. P. ACT XVII OF 1876, 2 O.C. 73.

Grant by way of endowment to religious institution liable to—*See* U. P. ACT XVII OF 1876, ss. 52, 53, 2 O.C. 295.

Grant, resumption of—Grant held rent-free under judicial decision—*See* U. P. ACT XVII OF 1876, ss. 52, 53 and 55, cl. (*a*), 4 O.C. 252.

See U. P. ACT XII OF 1881, ss. 30, 95 (*c*), 7 A. 191 = A.W.N. 1884, 331.

Grant by Government to compensate for—Of rent-free land—Pension—Liability to attachment—*See* ATTACHMENT — SUBJECTS OF ATTACHMENT, 8 C.W.N. 665.

Of lakhiraj land—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 8 C. 230 = 10 C. L.R. 41.

See BURDEN OF PROOF—LANDLORD AND TENANT, W.R. 1864, 8, 9 W.R. 454.

Resumption of land, in cantonment—*See* CANTONMENT, 7 Bom. L.R. 735 = 30 B. 137.

Effect of—Chowkidari Chakran lands—*See* CHOWKIDARI CHAKRAN LANDS, 9 C.W.N 571 = 1 C.L.J. 303.

Lands held under *amaram* tenure—Stoppage of performance of military service—Reasonable notice necessary before resumption of lands—*See* EJECTMENT, SUIT FOR, 23 M. 262.

Title—Resumption chittas, evidentiary value of—*See* EVIDENCE—MISCELLANEOUS, 14 C. 120.

See GHATWALI TENURE, 5 W.R. 292.

See GRANT—GRANTS FOR MAINTENANCE, 22 W.R. 225.

See IMPARTIBLE ZEMINDARI, 5 C. 113 = 4 C.L.R. 181, *on appeal* 8 C. 199 = 8 I.A. 248, P.C.

Resumption of inam—*See* INAM, 6 Bom. L. R. 364 = 28 B. 305.

See INAMDAR, 1 B.H.C. 22.

See JAGHIR, 2 P.R. 1892, Rev.

See JURISDICTION OF REVENUE COURTS, 6 O.C. 383.

Service tenure, Suit for—of—Landlord and tenant—*Res judicata*—Dispensing with service—Enhancement of rent—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 14 M. 365.

Landlord and tenant—Village in zamindari entered as Jaghir in accounts of permanent settlement—Zamindar, if entitled to resume—*See* LANDLORD AND TENANT—MISCELLANEOUS, 1 M.H.C. 355.

***Resumption, Right of*—continued.**

——1.—General—*concluded.*

Grant of lands for service of private nature—Resumption of lands after discontinuance of service—Notice to quit in respect of certain lands—Sufficiency in respect of other lands—*See* LANDLORD AND TENANT—MISCELLANEOUS, 13 M.L.J. 209.

Maintenance—Grant of lease—Limitation—Resumption of grant—*See* MAINTENANCE, 3 C. 793.

See MAINTENANCE, 5 C. 113=4 C.L.R. 181, *on appeal*, 8 C. 199=8 I.A. 248, P.C.

Of maintenance grant—*See* MAINTENANCE GRANT, 3 C.L.J. 521.

By Government of portion of lands mortgaged, and subsequent sale to mortgagor—Equity—Waiver—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 5 C.L.R. 227.

Circumstances telling against right of permanent occupancy—*See* PERMANENT TENURE, 8 M.L.T. 258=7 Ind. Cas. 202.

See POSSESSION—SUITS FOR POSSESSION, 11 W.R. 227, P.C.

Suit for possession by adjudication of right to settle—Of land by Government—Jurisdiction—Right of suit—*See* POSSESSION—SUITS FOR POSSESSION, 13 B.L.R. 118, F.B.=21 W.R. 327.

Suit for unlawful—Suit for damages for unlawful resumption by Government—*See* RIGHT OF SUIT—MISCELLANEOUS, 1 Ind. Jur. O.S. 48.

Mokhassa tenure—Right of mokhassadars to hold land irrespective of performance of services—Right of zamindar to dispense with services and resume land—Burden of proof in suit for ejectment—*See* SERVICE INAM, 26 M. 403.

See SERVICE TENURE, 70 P.R. 1868.

See SERVICE TENURE, 5 B.L.R. 529, P.C. =14 W.R.P.C. 28=13 M.I.A. 438.

Of estate by Government—Political tenure—Mixed estate of saranjam and inam—*See* SERVICE TENURE, 17 B. 431, P.C.=20 I.A. 50.

Resumption of land—Notice—*See* SERVICE TENURE, 8 M. 72.

See WITHDRAWAL OF SUIT, 3 W.R. Act X, Rul. 18.

——2.—Effect of Resumption.

(1)—*Landlord and tenant — Resumption—Right to settlement — Transfer— Consent of Zamindar.*—M and his four brothers held a tenure (alleged to be lakhiraj of ten bighas of land. The zamindar brought a suit for resumption of this land as part of his *mal* estate, and succeeded in getting three bighas declared liable to pay rent. After this decree was obtained, M and his brother sold the whole tenure of 10 bighas as lakhiraj to the plaintiff and then took a lease of the land as ryots from the purchaser.

***Resumption, Right of*—continued.**

——2.—Effect of Resumption—*concluded.*

Subsequently, the zamindar took execution of the decree he had obtained for costs in the resumption case, and in execution attached and sold M and his brothers' rights and interests in the three bighas of land which had been declared to be *mal*. These rights were bought by R and P. After this, the plaintiff sued M and his heirs for rents. The defendants objected that part of the land, *viz.*, the 3 bighas, had been taken out of their possession by R and P, and they prayed the Court to make these parties defendants. This was done, as the plaintiff admitted their possession. R and P denied plaintiff's right to any rent from them, that there was no relation of landlord and tenant between them, nor had they ever agreed to pay him rent, and that they paid rent to the zamindar, *held* that the utmost right that M. and his brothers had in these 3 bighas after the resumption suit was the right to settlement, and that this was a personal right which could not have been transferred to a third party except with the consent of the zamindar, and that, as no relation of landlord and tenant existed between the parties, the execution purchasers ought not to have been made defendants, and that they could not in this suit be made liable to pay rent to the plaintiff. MOHESH CHUNDER BHUTTACHARJEE v. ROMANATH DUTT, **20 W.R. 7.**

(2)—*Resumption decree, conclusive nature of—Administrative order of Settlement Officer, open to jurisdiction of Civil Court.*—According to the rulings of the Sudder Court, a decree for resumption is final and conclusive in respect to a resumed mehal, so that a Civil Court shall not declare *that* to be *free* from assessment which a *Resumption* Court declares *liable* to assessment. The above law, however, is confined entirely to what is *decreed* in the actual decree by the *Resumption* Courts, and does not extend to what is subsequently administratively done by a Settlement Officer. The proper distinction is that the decree of the *Resumption* Court as to the *liability* of the *resumed mehal* to be assessed with a Government demand is final. But the subsequent dealing by the Settlement Officer, with alleged proprietary right and claims to land, not being land mentioned in the resumption decree, is not final, but open to the jurisdiction of the Civil Court. MAHOMED GAZEE CHOWDHRY v. LAUL BEBEE, **10 W.R. 103.** [*F.*, 22 W.R. 48.]

See ALLUVION—LAND INUNDATED AND REFORMED, W.R. 1864, 273.

Resumption of inam—Relation between inamdar and tenants not affected—Right of inamdar to eject tenants—*See* INAMDAR, 9 B. 419.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS—PURCHASERS, RIGHTS AND LIABILITIES OF, 5 W.R. 191.

Resumption, Right of—continued.

——3.—Practice and Procedure.

(1)—*Reg.* XIX *of* 1793, *s.* 9—*Resumption-decree—Suit for rent—Right of suit—Reg.* II *of* 1819.—A person who has obtained a decree in a resumption suit has no *locus standi*, as holding lands, to bring suits for rent until he takes steps under the provisions of s. 9, Reg. XIX of 1793, to have the revenue fixed by the Collector, and the defendant consents to pay the revenue required of him. The rule which should be followed in determining in what manner and under what regulation the assessment of resumed lakhiraj estates should be conducted is first to ascertain whether the existence of the lakhiraj prior to 1790 has been decided by the decree for resumption between the parties or not. It cannot be presumed that every case instituted under s. 30, Reg. II of 1819 dealt with an estate which was held lakhiraj prior to 1790. The assessment must be conducted under s. 9, Reg. XIX of 1793. If the question has not been decided by the resumption decree, it is still an open question, and must be decided before the assessment is commenced. POGOSE v. SYUD EKRAM HOSSEIN, **15 W.R. 483.** [*Appr.*, 24 W.R. 447.]

(2)—*Decision in resumption proceedings—Effect.*—The fact of a revenue officer, in resumption proceedings, having released lands on the ground that they formed portions of a parent estate which had been assessed under the decennial settlement is no proof that such lands were at any time regarded as rent free. SHEIKH TOUJOH HOSSEIN v. JUDOO SINGH, **25 W.R. 505.**

(3)—*Resumption suit* — Ex parte *decree—Service of summons — Decree, effect of, on defendant not served.*—Where, in a resumption suit, summons was issued after the death of one of the defendants and his representatives were not made parties, and an *ex-parte* decree was passed, *held* that the decree was infructuous as against such defendant, even through the summons was affixed to the gate of his house. *Held* also that the decree was not binding on any defendant who was not served with summons. MOHESH CHUNDER SEIN GUPTA v. DHUN MONEE DOSSEE, **17 W.R. 357.**

(4)—*Reg.* II *of* 1819, *s.* 15—*Notice—Failure of party to appear before resumption officer.*—Where the resumption-officer, as directed by s.15, Reg. II of 1819, supplied the plaintiff with a copy of his reasons for considering the lands in question liable to resumption, and subsequently, in the absence of the plaintiff, who failed to appear either in person, or by agent, declared the lands liable to assessment, *held* that, as the plaintiff was not present, it was not possible for the officer to give him the warning mentioned in s. 16, and the omission to give the warning, under such circumstances would not render the proceedings illegal. BURODA KANT ROY v. THE COMMISSIONERS OF THE SOONDERBUNS, **13 W.R. 180.**

(5)—*Presumption of invalid lakhiraj, suit by Government for, under Reg.* II *of* 1819—*Intervention of zemindar.*—In this suit for presumption of invalid *lakheraj* brought by the Government, under Reg. II of 1819, the zemindar, apprehending that his interest might be affected by the decision of the Collector declaring the *lakhiraj* lands to be more extensive than they really were, intervened by petition. It was held that, in any view of the case, he had an interest which justified him in so doing; for, even assuming it to be true that the Collector's report as to the extent of the land subject to revenue, was not binding on the zemindar, and that he had a remedy against such a proceeding in another Court, still he had clearly an interest in averting an erroneous decree being made to his prejudice, the creation of *prima facie* evidence prejudicial to himself, and the necessity of resorting to the Civil Courts to remedy an evil already inflicted. MOHARAJAH MOHESHUR SINGH v. THE GOVERNMENT OF INDIA, **3 W R.P.C. 45=7 M.I.A. 283=1 Suther. 325=1 Sar. 645.**

(6)—*Lakhiraj held before* 1790—*Resumption—Limitation.*—When a *lakhiraj* tenure is alleged to have been held before 1790, the validity of the grant is not open to consideration, but only the existence of the tenure before 1790. SAGORE MONEE DOSSEE v. BIPRO DOSS DEY, **1 W.R. 249.**

(7)—*Possession under genuine deeds—Assessment—Resumption.*—Possession by the tenant under apparently genuine deeds would entitle him to resist assessment by the zemindar, unless the zemindar is in a position to show that the tenant has paid him rent. Otherwise, the zemindar must bring a regular suit to resume the lands. MATUNGINEE DEBEA v. MAHOMED *alias* BOOREE MEAH, **W.R. 1864, Act X, Rul. 29.**

(8)—*Jurisdiction*—Mal *estate—Suit for declaration—Decree of Resumption Court.*—A suit will not lie to have certain lands declared as part of the plaintiff's *mal of a formerly settled mal estate*, which land has been declared by a resumption Court to be liable *to assessment as a resumed rent-free tenure* held on invalid title, and brought after such resumption on the rent-roll as an estate totally separate from plaintiff's. BISHONATH DUTT v. FOOL CHAND BIRJOBASHEE, **5 W.R. 22.** [*Appl.*, 22 W.R. 48; *D.*, 10 W.R. 103.]

(9)—*Resumption—Finality of decree of Resumption Court—Necessity for notice to parties not in possession—Decision of Resumption Court—Jurisdiction.*—A decree of a Resumption Court as to the liability of a resumed mehal to be assessed with the Government demand is final. A person not in possession need not be given notice of resumption proceedings or be made a party thereto. A Civil Court has no jurisdiction to interfere with a decision of a Resumption Court as to the proprietary rights and claims to land mentioned in proceedings before it. RAMCHUNDER SHAHA v. THE COLLECTOR OF MYMENSINGH AND PUBNA, **22 W.R. 48.**

***Resumption, Right of*—continued.**

——3.—Practice and Procedure—*continued.*

(10)—*Resumption of parent estate—Rights of howaldar within estate.* — The Resumption of a parent estate does not nullify a howaladar's existing rights, or deprive him of the benefit of the presumption under s. 16, Act X, 1859. MOOTHOORANATH GUNGOPADHYA v. SHEETA MONEE, **9 W.R. 354.**

(11)—*Etmamee tenure — Subsequent settlement, effect of.*—No subsequent settlement of a mehal in which an under-tenure (etmamee) was created before and was in existence at the time of the Decennial Settlement, could invalidate that tenure under the Revenue Law. Any resumption of *lakhiraj* lands has simply the effect of declaring that such lands are liable to be assessed to the revenue of the State, but it does not go the length of destroying any sub-tenure existing in it before resumption. ABDOOL ALI v. RAM GUTTY, **12 W.R. 128.**

(12)—*Maafee land—Resumption—Assessment* —Ex-maafeedars *in possession— Right to profits.*—Where a *maafee* land after resumption has been assessed and left in the possession of the *ex-maafeedars*, they and not the *lumberdars* of the village would be the persons entitled to make the collections of profits, in the absence of any stipulation to the contrary. DAL CHUND v. MUSST. SEETA KOONWER, **2 Agra 152.**

(13)—*Lessees of Turruf and Nowabad lands, rights of, not affected by presumption and settlement by Government.*—In this suit for a *kabuleut* brought by the plaintiff, a purchaser of a Nowabad talook sold for arrears of rent, it was *held* that, if the defendants had continued to pay rent to the parties from whom they got their lease so long as they continued to hold both the turruff and the Nowabad lands, the mere fact that Government resumed and separately settled the Nowabad lands with the Turrufdars, will not injure the rights of the defendants, the ryots, nor affect the presumption arising from the payment of a uniform rate of rent for 20 years. All that the plaintiff, the purchaser could claim would only be that the defendants should give them *kabuleuts* for their proportion of the rent assigned on the Nowabad lands which they had hitherto paid to the Turrufdars. HURO DOSS RAHA v. TRAHEERAM PAUL, **6 W.R. Act X. Rul. 15.**

(14)—*Act* XI *of* 1859, *s.* 37 — *Sale for arrears of revenue—Rights of purchaser—Incumbrances — Resumption decree—Lakhirajdars—Dispossession—Permanent settlement—Cause of action—Revenue sale—Ownership.*—A purchaser at a sale for arrears of revenue claiming under paramount title under s. 37 of Act XI of 1859, acquires the estate free from any incumbrance which had accrued upon the estate from the laches of the former proprietors exactly in the same way as he would have acquired the estate free from any incumbrance created by a sale, lease, or mortgage by the former owner. [*Appr.*, 22 C. 244; *Rel. on*, 3 C.W.N. 13; *R.*, 14 A.L.J. 136.] The effect of a decree in a resumption suit is not to destroy the proprietary right of the lakhirajdars. That proprietary right would continue unless and until they should be dispossessed in due course of law. The former proprietors obtaining a permanent settlement stand in a very different position from a person acquiring a new right by the settlement. A cause of action—a right of suit to recover possession—accrued to the former proprietors by their ouster before the date of the settlement. No new wrong is done to them, and no new right accrued to them in consequence of their obtaining a permanent settlement. In the absence of any proof to the contrary, the purchaser at a revenue sale must be assumed to be the owner. THAKOOR DASS ROY CHOWDHRY v. NUBEEN KISHEN GHOSE, **15 W.R. 552.**

(15)—*Resumption of lands and fresh settlement by Government, whether can conclusively prove absence of charitable trust.*—It was contended for the defendant in this case that, inasmuch as Government resumed the property in 1838 and 1841, and made a fresh settlement with the plaintiff, no allusion being made in the settlement to the existence of any endowment, this showed that no endowment did, in fact, exist at the time, and that, by reason of the settlement with him, he had got the title to the land absolutely free from all trust. The High Court was, however, of opinion that the fact of the estate being declared not to be *lakhiraj*, *i.e.*, the resumption proceedings did not relate to any question of trust as regards the plaintiff and the endowment of which he was the *shebait*. The lands were held on a trust prior to the resumption proceedings and there was nothing to show that they were not liable to that trust. The only question decided by the Government officer in resuming the land was that those who claimed the land as *lakhiraj* had not been able to prove that the land was held under any such religious or charitable trust as would debar Government from resuming it. RAJAH LEELANUND SINGH BAHADOOR v. ISHURE NUNDUN DUTT JHA, **8 W.R. 316.**

(16)—*Purchase of land from rent-free holder —Liability to pay rent or revenue—Ryot—Resumption by Government.*—The plaintiff's ancestor had purchased certain land from parties who were at the time rent-free holders of the mouzah in which the land was situated. Those partieson the resumption of the *maafee* tenure were admitted by the Government to a proprietary settlement of the *mouzah*. The sale made by them to the plaintiff's ancestor being therefore neither invalid nor illegal, *held* that the resumption of the *maafee* tenure of the *mouzah* by the Government, did not and could not affect the proprietary right which the plaintiff's ancestor had previously acquired by purchase in the land which had not been assessed with revenue by the Government. This being so, the plaintiff was not liable to be called upon

***Resumption, Right of*—continued.**

—3.—Practice and Procedure—*continued.*

to pay either rent or revenue, and could not be regarded as a mere ryot, and the zemindar of the *mouzah* could have no right to treat him as such. SHEIKH AHMED v. GUNAISH PERSHAD, **2 Agra 9.**

(17)—*Resumption of land and new settlement —Payment of rent by tenant—Rate.*—In respect of lands resumed and newly assessed, the tenant must pay rent at the rate at which it had been assessed by the Settlement Officer. And in such a case, the tenant has no right to a notice under Act X of 1859. WOOMANATH ROY CHOWDHRY v. DEBNATH ROY CHOWDHRY, **14 W.R. 471.** [*Commented on*, 16 W.R. 153.]

(18)—*Mortgage*—Lakhiraj *land usufructuarily mortgaged—Resumption.*—On the resumption by Government of property granted in Zurepeshghee lease, if the mortgagee does not either call in his money or make a fresh payment, the presumption arises that he assented to receive the profits minus the Government revenue as security. JOY PROKASH NARAIN v. RADHA KISHEN, **W.R. 1864, 227.**

(19)—Lakhiraj—*Resumption by Government —Under-tenant — His right not destroyed.*—When a *lakhirajdar* has entered into a contract with a tenant, whether for a term or in perpetuity, both parties are, in strict law, bound to the conditions of the contract. Therefore, the mere resumption of the *lakhirajdar's* tenure by Government, that is, the mere fact that that tenure has been rendered liable for the payment of revenue, cannot of itself, as a matter of law, dissolve the contract entered into by the two parties. The under-tenant may determine the tenancy if he thinks fit or he has a right to be maintained in his holding if he accepts to pay the Government revenue. FURSAL BANOO v. AZEEZUNNISSA BEEBEE, **3 W.R. 72.** [*Cons.*, 16 W.R. 35=8 B.L.R. 197.]

(20)—*Resumption and re-grant of Inam lands —No title to lands acquired by grantee—Attachment placed on village by Government, limited to exemption from assessment.*—In this case the plaintiff sought to recover possession of land described by him as *mirasi* land belonging to the Waikar family, on the ground that, on the death of the original grantee of that family from the East India Company, the property was attached by the Government, but ultimately granted to the plaintiff. The plaintiff's claim was dismissed on the ground that the effect of resumption under the above Act was to leave the right to the land in the possession of the Inamdar untouched and the attachment placed by the Government on the village inam and saranjam property should, therefore, be regarded as limited only to the assessment. *Held* further that the District Judge was wrong in having held that the proceedings of Government in 1873 and 1876, by which the plaintiff was recognized as the representative of the Waikar family, and the whole estate, saranjam and inam was directed to be continued to

***Resumption, Right of*—continued.**

—3.—Practice and Procedure—*concluded.*

the plaintiff as such representative, were acts of State. The Waikars were merely subordinate though powerful saranjamdars and had not the status of an independent Sovereign. HARI SADASHIV v. SHAIK AJMUDIN, **11 B. 235.** [*R.*, 6 Bom. L.R. 131, 29 B. 480=7 Bom. L.R. 497.]

(21)—*Resumption of* saranjam *lands by Government, effect of—No distinction between Regulation and Non-regulation Provinces.*—As in the case of *inam* lands, so also, in the case of *saranjam* lands, resumption by Government means only the discontinuance of exemption from payment of public revenue, leaving the *inamdar* or *saranjamdar*, who is in occupation of the land, to retain possession so long as he pays the assessment imposed thereon, *i.e.*, his occupancy rights are not affected. The rule applies primarily to Regulation Provinces, but it is the same also, unless the contrary is proved, in the case of Non-regulation Provinces. GANPATRAV TRIMBAK PATWARDHAN v. GANESH BAJI BHAT, **10 B. 112.** [*R.*, 11 B. 235, 29 B. 415=7 Bom. L.R. 439, 29 B. 480=7 Bom. L.R. 497, 32 B. 432=10 Bom. L.R. 531, 34 B. 232=11 Bom. L.R. 1333.]

(22)—*Reg.* X *of* 1793, *s.* 19—*Zemindar suing for resumption when not limited to time.*—A zemindar seeking to resume invalid *lakhiraj* land under s. 19 of Regulation X of 1793 is not to be limited to time, provided that he could prove that, at some time subsequent to the Decennial Settlement, the land sought to be resumed was part of his *mal* estate and had paid him rent. GOPAL CHUNDER SHAHA v. BHABO TARINEE DOSSEE, **7 W.R. 240.**

(23)—*Suit for resumption—Costs.*—One of the fundamental rules in respect of costs is that a party getting his costs and asserting his rights to a portion of the property claimed by the plaintiff in a suit to which there are numerous defendants only gets his costs on the value of the right asserted by and released to him. So, in a suit for resumption against several defendants, the plaintiff is liable to each defendant in costs only to the extent of the value of the interest enjoyed by him in the lands released to him, andnot upon the aggregate claim of the plaintiff. HUREEHUR MOOKERJEE v. ABDOOL HUQ KAZEE, **1 W.R. 97.** [*R.*, 2 W. R. Mis. 45.]

—4.—Miscellaneous.

(1)—*Illegal resumption by Government—Liability to account.*—The Government having seized certain chur lands and dispossessed the proprietor in possession, and having entirely failed to establish any claim for assessment or resumption during the period of attachment following the dispossession of the proprietor, *Held* that the Government must be regarded as a wrong-doer for the whole period, and must account to the proprietor for all the collections

***Resumption, Right of*—concluded.**

——4.—Miscellaneous—*concluded.*

made by its officers up to the time of the restitution. SURNOMOYEE v. COLLECTOR OF RUNGPOR, **W.R.F.B. 4=Marsh 13, 1 Hay 37.**

(2)—*Act* X *of* 1859, *s.* 28—Maafee *land—Resumption proceedings—Mortgagee not a party.*—Where a *maafee* land was resumed with the mortgagor's consent and in the resumption proceedings under s. 28 of Act X of 1859, the mortgagee was not made a party, the *bona fide* character of the resumption proceedings may be questioned by the mortgagee or transferee from him. SHEIKH TOOLUN v. OOMAN SHUNKER, **2 Agra 117.** [*R.*, 6 O.C. 110.]

(3)—*Limitation* — Lakhiraj. — Limitation bars a suit for resumption even of a questionable *lakhiraj*, of which the *lakhirajdar's* ancestors are proved to have been in possession before 1790. MUNEAH LALL BABOO v. MULKESSUR BANERJEE, **1 W.R. 297.**

(4)—*Resumption*—Lakhiraj—*Limitation.*—A party who is sued for recovery of possession of certain lands by others claiming to hold the same as resumed *lakhiraj* settled with them, if he succeeds in establishing his possession of the disputed lands for more than 12 years previous to the suit, notwithstanding the decree of the Resumption Courts, is entitled to the benefit of limitation. RUNGLOLL SAHOO v. MUSST. BONESHUN, **1 W.R. 109.**

(5)—*Resumption of* lakhiraj *tenure—Act* X *of* 1859, *s.* 28—*Invalid tenure—Burden of proof.*—A suit for resumption of a *lakhiraj* tenure under s. 28, Act X of 1859, will not lie upon the ground that the tenure is invalid, but merely upon the ground that the *lakhiraj* was granted after 1st December, 1790; and the *onus probandi* in such case is on the plaintiff. MAHARANEE INDERJEET KOONWAR v. CHOKEN SAHOO, **W.R. F.B. 81.**

(6)—*Suit by zemindar for resumption—Allegation of* jungleboore *tenure*—Onus *on zemindar.*—Plaintiff sued as zemindar to cancel and resume an alleged hereditary *jungleboore* tenure. Although the defendant and his ancestors had for many years been in possession of the lands without paying rents, the plaintiff asserted that they had held the lands only in lieu of wages and not under any hereditary rights. Plaintiff, however, failed to produce any evidence whatever beyond the admission that the lands were within his zemindary, and the High Court held *that*, according to the decisions, that was not sufficient to start his case, and the Courts below therefore were right in having rejected his claim. RADA KISHEN SINGH v. BISHAMBHUR SINGH PUTTUR, **6 W.R. 130.**

Retrial.

See REMAND.

(1)—*Appeal—Loss of record—Appeal determined without record.*—Where, in a pre-emption suit, the record of the case was lost, and

Retrial—*concluded.*

the appeal by the pre-emptor, on the ground that the actual price of the property was less than the price entered in the sale-deed, was decided by the lower appellate Court in the absence of the record, holding that the price entered in the deed of sale must be taken to be the actual price of the property, but the record was found before the appeal was heard by the High Court, *held* that the objection to the lower appellate Court's decision that it was not based on evidence should be allowed, and that the appeal should be heard now that the records had been found. MANGAL PRASAD v. KALWANTA, **A.W.N. 1881, 26.**

(2)—*Decision following ruling of High Court—Privy Council subsequently holding different view—Rehearing.*—Where the decision of the lower Court was given implicitly following the judgment of the High Court in a similar case which had come before that Court in appeal, and subsequently the Privy Council overruled the said decision of the High Court, the party is entitled to have his case reconsidered upon the Ruling arrived at by the Judicial Committee. BANEE PERSHAD v. RADHA PERSHAD SINGH, **15 W.R. 143.**

(3)—*Evidence taken at* ex parte *hearing.*—Evidence taken in the absence of a defendant at an *ex parte* hearing cannot be used against him on a retrial. RAM BAKSH LAL v. KISHORE MOHAN SHAHA, **3 B.L.R. A.C. 273=12 W.R. 130.**

(4)—*Disposal of on preliminary point—Reversal of decree on appeal, and irregular remand of case under s.* 562, *Civ. Pro. Code*, 1877—*Power of succeeding Judge to retry preliminary point.*—Where, on appeal in a suit dismissed on a preliminary point, the District judge reverses the lower Court's decision on such point, and remands the case under s. 562 (though irregularly) for the trial of a certain issue, it is not competent for his successor, when the case comes up again in appeal, to retry and decide such preliminary point. SURAJ DIN v. CHATTAR, **3 A. 755=A.W.N. 1881, 55.** [*R.*, 32 M. 318; *Appr.*, 14 A. 348.]

Ex parte decree against defendant—Power of appellate Court on appeal from to remand—Suit for—Retrial—*See* CIV. PRO. CODE, 1882, ss. 562, 564, 23 M. 445=10 M.L.J 61.

See DAMAGES — MEASURE AND ASSESSMENT, 5 C. 283=4 C.L.R. 473.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 37, 38, 69, 20 M. 358=7 M.L.J. 140.

See SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—PRACTICE AND PROCEDURE, 15 M. 179.

Retrospectivity of Acts.

See STATUTES, CONSTRUCTION OF.

(1)—*Retrospectivity of Acts, rule as to.*—A statutory prohibition could have no reference to transactions which had been completed before the Act came into force. LALA HURRO PROSHAD v. BASARUTH ALI, **25 C. 909.**

Retrospectivity of Acts—*concluded.*

(2)—*Rule as to.*—Statutes are, *prima facie*, deemed to be prospective only; "Nova constitutio futuris forman imponere debet, non praeteritis." DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS, **5 M.I.A. 109=7 Moo. P.C. 239 = Perry O.C. 232=1 Sar. 403.**

(3)—*Construction of Statutes—Retrospective effect.*—It is not in accordance with sound principle of interpreting Statutes to give Statutes a retrospective effect. MAHOMED ABDUS SAMAD v. QURBAN HUSAIN, **26 A. 119, P.C.= 31 I.A. 30 = 8 C.W.N. 201=8 Sar. 593=6 Bom. L.R. 238.** [*R.*, 31 A. 557=10 C. L. J. 297=14 C.W.N. 59, 7 Bom. L.R. 618.]

(4)—*Law relating to procedure.*—Changes of law relating to procedure have retrospective effect. BALAKISHNA PANDHARINATH v. BAPU YESAJI, **19 B. 204.**

(5)—*Procedure—Change of law—New Act to apply.*—Where a new Act has come into force after the institution of a suit, that Act will apply to matters of procedure. SEVAI ROWTAN v. THE TAHSILDAR OF PERIAKULAM, **6 M. L.J. 122.** (3 M. 98, *Rel. on.*)

(6)—*Legislation—Substantive rights—Procedure—Pending suit.*—It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, but do not extend to rights of action. VEDAVALLI NARASIAH v. MANGAMMA, **27 M. 538.**

Act conferring new right—*See* BEN. ACT VIII OF 1885, s. 174, 14 C. 636, F.B.

See BOM. ACT V OF 1886, s. 2, 21 B. 118.

See BOM. ACT VI OF 1888, s. 31, cl. 2, 17 B. 289.

See MAD. ACT III OF 1895, s. 21, 14 M.L.J. 340.

See PUN. ACT I OF 1900, 53 P.L.R. 1901 =39 P.R. 1901, 153 P.L.R. 1901=4 P.R. 1902, 88 P.L.R. 1904=90 P.R. 1904, F.B.

See U.P. ACT I OF 1869, ss. 13, 14, 22, 26 A. 393, P.C.=8 C.W.N. 699=31 I.A. 132=1 A.L.J. 384=7 O.C. 248.

Act V of 1894, retrospective effect of—*See* EXECUTION OF DECEEE--EFFECT OF CHANGE OF LAW PENDING EXECUTION, 21 C. 940, F.B.

See LIMITATION ACT, 1908, art. 171, 6 B. 26.

See PROBATE AND ADMINISTRATION ACT, 1881, s. 19, 3 C.W.N. 483.

See REGISTRATION ACT, 1908, s. 17, 18 B. 92.

See REGISTRATION ACT, 1908, s. 50, 6 B. 495.

See TRANSFER OF PROPERTY ACT, 1882, ss. 111, 116, 20 B. 759.

"Return," Doctrine of.

Mahomedan Law—Widow's right to "return" of deceased husband's estate — *See* MAHOMEDAN LAW—INHERITANCE, 11 C. 14.

Mahomedan Law—Widow's rights—The doctrine of Return—Rights of Crown—*See* MAHOMEDAN LAW—INHERITANCE, 3 C. 702 =2 C.L.R. 46.

Re-union.

See HINDU LAW—INHERITANCE.

See HINDU LAW—PARTITION.

Reuter.

Mistake of, in transmitting message—Effect —*See* SALE—GENERAL, 8 M.L.T. 353=8 Ind. Cas. 291.

Revenue.

See JURISDICTION OF REVENUE COURTS.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS.

(1)—*Government revenue and public cesses.*—Revenue and the public cesses constitute a standing encumbrance and first charge upon the land subject to them. CHATRAPUT SINGH v. GRINDRA CHUNDER ROY, **6 C. 389 =7 C.L.R. 456.** [*Disc.*, 30 C. 778=8 C.W.N. 357.]

(2)—Muafidar—*Assignee of Government revenue—Assigned revenue not first charge—Rent—Act* XII *of* 1881 (*N. W. P. Rent Act*), *ss.* 93 (i), 171, 177—*Act* XIX *of* 1873 (*N.W.P. Land Revenue Act*), *s.* 16.—Revenue, which has been assigned by Government, is not a first charge on the land. It must be considered as rent only. A *Muafidar* or assignee of revenue, has neither the rights nor the powers of Government in respect of the mode of recovery of such revenue. He must adopt the procedure laid down in the rent Act for the recovery of rent. BITHAL DAS v. HARPHUL, **6 A. 503=A.W.N. 1884, 176.** [*R.*, 23 A. 5=A.W. N. 1900, 173.]

(3)—*Assignment of revenue for maintenance of mosque—Increase in revenue—Effect.*—The revenue payable by certain zemindars to the Government was released in favour of the *muafidars*; the descendants of the person who founded a mosque agreed that they would pay anually to those entusted with the management of the mosque, for its support, half the amount of revenue payable by the zamindars. At the recent settlement of the villages, the amount fixed as revenue was increased. *Held* that the increase was merely for the purpose of fixing a standard by which certain cesses were to be paid by the zemindar, and the *muafidars* were not entitled to any increased revenue. The persons entrusted with the management of the mosque were therefore only entitled to the sum originally fixed. MUHAMMAD SADIK v. ZAHUR HUSAIN, **A.W.N. 1881, 63.**

(4)—*Arrears of Revenue—Revenue, suit against co-sharer for arrears of — Rent Act (Oudh), s.* 108, *cl.* (16)—*Assessment of Revenue*

Revenue—*continued.*

upon under-proprietary tenure— Settlement officer, entries in khewat *made by—Under-proprietor, liability of, to pay revenue—Estoppel—Land Revenue Act (Oudh).*—The appellant, who was the lambardar of an eight annas share in a certain village, purchased a two annas share from the respondent's father by a deed dated July 20th 1875. The material portions of the deed were to the effect that vendor had sold all his two annas share to the appellant with the exception of four plots of *sir* 'lagani fi bigha ek rupia,' four plots of bagh-land 'bila lagan,' and three plots of grazing ground 'bila lagan' that the purchaser was to enjoy proprietary possession over the whole two annas share generation after generation, and the vendor was to pay the rent of the excepted lands year by year; that if the vendor wanted to sell or mortgage the excepted lands kept in his possession, he has to sell or mortgage to the purchaser and not to any other person, but he retained power to make a gift or *shankalap* of them; and that if he gave them to any person that person would be bound to pay the rent. For about twenty years the vendor and after him the respondent paid Rs. 5-10-0 rent to the appellant for the excepted plots at the rate of Re. 1 per bigha. The village then came under settlement and the Settlement Officer formed the excepted plots into a sub-patti and assessed them at Rs. 18. The respondent objected to the assessment but unsuccessfully. He was shown in the *khewat*, prepared at the new settlement, as the proprietor of the plots in question, and he attested the correctness thereof. The appellant brought a suit against the respondent under cl. (16) of s. 108 of the Rent Act for recovery of arrears of revenue at the rate assessed by the Settlement Officer. The respondent contended that he was not a co-sharer of the appellant but an under-proprietor, who, by reason of the terms of the deed of 1875 was not liable to pay rent at a higher rate than Rs. 5-10 per annum. *Held*, that the respondent by his action in the Settlement Court was not estopped from denying that he was a co-sharer in the Mahal or that he was liable to pay the revenue assessed upon the plots. *Held*, that a Settlement Officer, acting under the Oudh Land Revenue Act, cannot, by making entries in the *Khewat* or otherwise, convert a proprietary into an under proprietary right or *vice versa*. *Held* that, having regard to the provisions of the deed of sale, the parties intended that the vendor should retain a heritable and (except as provided in the deed) a transferable right of property in the plots for which he should pay rent; in other words he was to be an under-proprietor. *Held*, therefore, that the respondent was not a co-sharer of the appellant, and the suit as brought against him failed. JADUNANDAN PERSHAD v. BRIJ BHUKHAN, **5 O. C 70.**

(5)—*Revised settlement on land with one person for himself and as trustee for another—Subsequent purchase of zemindari rights from Government, rights of old proprietors not affected*

Revenue—*continued.*

by—Purchase not covering corpus of property.—Plaintiff, a purchaser of the rights and interests of K, sued, in right of his purchase, for a share in a certain resumed property. After the first permanent Settlement made by the Revenue authorities with K and another, the defendant Z representing himself to be the heir of K and a purchaser from the other got the Collector to make a revised settlement with him. *Held*, agreeing with the Court of first instance, that the revised settlement did not destroy the rights of K in the property. The revised settlement though made with the defendant alone must be regarded as a settlement made for himself and as trustee for K. So K or any one representing him had a right to claim from the defendant whatever share or interest K was entitled to. The subsequent purchase of the rights of Government cannot confer on the defendant a right to ignore the previously existing rights of the owners. He purchased not the *corpus* of the property but the right to receive the Government revenue assessed upon the property from the proprietors. MAHOMED NAZIR v. ZAHOOR-UL-HUQ, **2 W.R. 6.**

(6)—*Act* XIV *of* 1859, *s.* 1, *cls.* 15, 16—*Mehal*—Butwara—*Payment on account of Government revenue—Cause of action—Limitation.*—Plaintiff in 1842 purchased B's share of an *ijmale mehal* while a *butwara* was going on in the *mehal*, and the several sharers paid in what they thought due from themselves on account of Government revenue. In 1864, plaintiff asked for the suplus payment as per an account stated dated March, 1857, by which it had been ascertained that there stood a balance in his favour. The Collector refused the application, saying that the money was not in the treasury, having been drawn out by certain judgment-creditors of B. Plaintiffs then, in 1867, sued to recover. *Held*, that cl. 16, s. 1, Act XIV of 1859, applied to the case, the plaintiff's cause of action accruing from the date of the adjustment of the accounts. *Held* also that the payments not being deposits, but simply moneys paid over in a certain number of years to meet uncertain demands on account of Government revenue, the Collector could not be regarded as a "depository" in the sense of cl. 15, s. 1, Act XIV of 1859, but was in the position of a person receiving money on account subject to adjustment. GOBIND CHANDRA v. THE COLLECTOR OF DACCA, **3 B.L.R. App. 57=14 W.R. 491.**

(7)—*Act* IX *of* 1847—*Scope—Alluvion.*—Act IX of 1847 applies only to a subject which was gained from the sea or from rivers by alluvion or dereliction, not to land seemingly gained from another proprietor by the mere changing of a river's course. When the land so possessed is found by a comparison of the new map with the old map to be in excess of what he had previously been possessed of as constituting his zemindari, the Government is empowered to make an addition to the Jama which is payable by him in respect on the zemindari. All orders that may be made

Revenue—*continued.*

by Government in this matter are, by the words of s. 6, rendered final, that is, as regards the person whom they may directly affect, namely, the zemindar. But they do not take away the right of the proprietor from whom the land was gained to seek by suit in a Civil Court to recover his property from the hands of those who are keeping it from him. THE COLLECTOR OF MOORSHEDABAD v. ROY DHUNPUT SINGH BAHADOOR, **15 B.L.R. 49=23 W.R. 38.** [*R.*, 2 B. 19.]

This circular lays down New Annual Return (Table VI.) regarding demand and collection of land revenue. Rev. Cir. No. 4, **12 W.R. Rev. Cir. p. 1.**

This circular directs Judges to inform Collectors whenever any Civil Court attaches and appoints a manager for landed property paying revenue to Government. Civ. Cir No. 9, dated 12th May 1870, **13 W.R. Civ. Cir. 15.**

This circular gives a direction for filling up Return No. 9 as to abatement of revenue. Rev. Cir. No. 5, **20 W.R. Rev. Cir. p. 1.**

This circular directs that all excess payments of revenue or rent are to be excluded from Return No. 31. Rev. Cir. No. 2, **20 W.R. Rev. Cir. p. 3.**

This circular deals with the amount of revenue written off as matter of right to be shown in Table IV, Return No. 10, separately from amount remitted as a matter of grace. Rev. Cir. No. 5, **20 W.R. Rev. Cir, p. 8.**

This circular makes an addition to cl. 1, s. 12, Ch. VIII. of Board Rules, regarding payment of revenue of lands. Rev. Cir. No. 3, **20 W.R. Rev. Cir. p. 9.**

This circular amends cls. 2 and 3, para. 2, s. 12 of Board Rules, regarding payment of land revenue. Rev. Cir. No. 5, **20 W.R. Rev. Cir. . 10.**

This circular expunges Return No. 28 regarding land revenue, and amalgamates it with an amended form of Return No. 41. Rev. Cir, No. 6, **20 W.R. Rev. Cir, p. 10.**

This circular cancels s. 7, Ch. XVIII of Board Rules—Substituting new rules for them—Regarding annual Land Revenue Report. Rev. Cir. No. 7, **20 W.R. Rev. Cir. p. 11.**

This letter circulates Financial Department and Bengal Office Resolutions regarding curtailment of expenditure in consequence of the then apprehended scarcity in Bengal, and the serious loss of revenue consequent thereupon. Civ. Cir. Memo. No. 20, **20 W.R. Rules & Ors. of the H.C., p. 25.**

This circular directs that the value of revenue abated as compensation for land taken for public purposes, has to be credited and entered in Table V. of Return No. 10 Rev. Cir. No. 2, **21 W.R. Rev. Cir. p. 1.**

This circular prescribes the latest date for payment of revenue of small estates. Rev. Cir. No. 8, **24 W.R. Rev. Cir. p. 4.**

Revenue—*continued.*

This circular prescribes the proper way to account for revenue received in one District for an estate transferred to another District. Rev. Cir. No. 5, **24 W.R. Rev. Cir. p. 7.**

Sale of tree in respect of arrears of revenue—Tree immoveable property—Procedure in sale of moveable and immoveable property—*See* ACT I OF 1868, 59 O.C. 228.

Exemption from—*See* BOM. ACT II OF 1863, s. 6, cl. 2, 1 Bom. L.R. 528.

Remission by Government—Effect on superior and inferior proprietors—*See* C.P. ACT XVI OF 1889, s. 49, 11 C.P.L.R. 106.

Assignment of Government revenue—Rights of assignee—*See* MAD. ACT II OF 1864, 7 M. 258.

Liability for revenue of all fields included in patta—Claim for release of one field on tender of proportionate kist, validity of—*See* MAD. ACT VIII OF 1865, ss. 2, 25, 37, 8 M. 130.

Liability of mortgagee without possession of share in mahal for payment of—Person interested in payment of money which another is bound by law to pay - Contract Act, s. 69—*See* U.P. ACT XVII OF 1876, s. 108, 4 O.C. 369.

Superior proprietor—Contract for, with inferior proprietor—Effect—Enhancement of—*See* U.P. ACT III OF 1901, ss. 76, 77, 6 A.L.J. 733=3 Ind. Cas. 538.

See CONTRACT ACT, 1872, ss. 69, 70, 6 A. 67.

Payment of Government revenue by person in wrongful possession of land—*See* CONTRACT ACT, 1872, ss. 69, 70, 7 A. 660=A.W.N. 1885, 176.

One co-sharer making payment of Government revenue for another— Charge—*See* CO-SHARERS—GENERAL, A.W.N. 1886, 269.

Payment of arrears of—By one of the co-sharers—Effect — Charge on share of other co-sharers — Equiry — *See* CO-SHARERS — GENERAL, 14 C. 809, F.B.

Revenue matters—Mandamus—Jurisdiction of High Court—*See* HIGH COURT, JURISDICTION OF—CALCUTTA, 11 B.L.R. 250.

Hindu law—Hindu widow — Mortgage by Hindu widow—Legal necessity— Payment of Government revenue--Nature of proof of necessity required—*See* HINDU LAW—WIDOW, A. W.N. 1893, 163.

Grant of right to collect—Ownership of tank, if also granted thereby—*See* INAM, 6 M.L.T. 242=19 M.L.J. 470=32 M. 456=3 Ind. Cas. 456.

See JURISDICTION OF CIVIL COURTS, A. W.N. 1881, 59.

Suit for redemption—Mortgaged land sold for arrears of — By Native Chief—Rights of purchaser against mortgagor and mortgagee—Revenue Jusisdiction Act X of 1876—Bombay Land Revenue Code Act V of 1879—*See* JURISDICTION OF CIVIL COURTS, 17 B. 681.

Revenue—*concluded.*

Suits affecting — Liability to pay public revenue—Acts of executive officers—*See* JURISDICTION OF CIVIL COURTS, 2 M.H.C. 167.

See LAMBARDAR, A.W.N. 1888, 248.

Hindu widow—Payable for estate of—Lambardar's right to recover money paid for—Decree against assets of widow in the hands of her representative—*See* MONEY PAID FOR BENEFIT OF ANOTHER, 18 A. 471=A.W.N. 1896, 154.

Mortgagee compelled to pay Government revenue payable by mortgagor—Mortgagee's remedies—*See* MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 20 A. 401=A.W.N. 1898, 90.

Sale of property by executor for paying debts—Mortgage of same for paying Government revenue—Priority of title—*See* MORTGAGE—MISCELLANEOUS, 8 C. 79=9 C.L.R. 173=10 C.L.R. 113.

Mortgagee making payments to save mortgaged property from being sold for arrears of—Lien—*See* MORTGAGE—MISCELLANEOUS, 31 C. 975.

See BEN. REG. XIX OF 1793, s. 10, B.L.R. Sup. Vol. 75=2 W.R. F.B. 15.

Liability to pay Government revenue—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 2 C. 141, F.B.

Lambardar or co-sharer—Claim to set off for revenue paid—*See* SET-OFF, 1 A. 135, F.B.

Suit for contribution by co-sharer who had paid whole Government Revenue—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, B.L.R. Sup. Vol. 675=2 Ind. Jur. N.S. 155=7 W.R. 377.

See SPECIFIC RELIEF ACT, 1877, s. 42, 19 M. 292.

Acts for protecting revenue — Construction of clauses imposing penalty — Tests — *See* STATUTES, CONSTRUCTION OF, 16 C. 436.

Transfer of proprietary right when vendor undertakes to pay land revenue—Recovery of sum due on account of land-revenue, suit for, by lambardars against co-sharer—Covenants affirmative and restrictive—Covenants annexed to the ownership of the property sold by the vendor—*See* VENDOR AND PURCHASER—MISCELLANEOUS, 6 O.C. 184.

Revenue Administration.

This circular deals with the errata in Memo on Revenue Administration of Bengal, **20 W.R. Rev. Cir. p. 6.**

This circular deals with the errata in Memo. on Revenue Administration for Bengal, **20 W. R. Rev. Cir. p. 8.**

Revenue Agents.

This circular warns officers to guard against Revenue Agents practising as Mookhtears without renewing their certificates in that capacity. Crim. Cir. Memo. No. 8, **22 W.R. Rules & Ords. of the H.C. p. 18.**

This circular prescribes a form for statement of Renewal of Revenue Agent's Certificate Rev., Cir. No. 5, **24 W.R. Rev. Cir. p. 3.**

This circular deals with ch. XII, Addendum, "Revenue Agents" Rev. Cir. No. 5. **25 W.R. Rev. Cir. 9.**

Admission of — Effect upon client—*See* LAMBARDAR AND CO-SHARER, 1 Ind. Cas. 975=7 A.L.J. 90.

Revenue Agents, Mukhtars and Pleaders.

See ACT XX OF 1865.

Revenue Arrears, Sales of land for.

See ACT I OF 1845.

Revenue Authorities.

This circular cancels C. O. No. 5 of 1870 and No. 2 of 1875, and substitutes amended rule as to suits connected with estates in charge of the Revenue Authorities. Rev. Cir. No. 6, **24 W. R. Rev. Cir. p. 3.**

Suit to recover house-site in Burma—Necessity for reference to—Jurisdiction of Civil Court to recover house-site without such reference—*See* BUR. ACT IV OF 1898, ss. 11, 15 and 41, 3 L.B.R. 50.

Revenue Board.

Power of Revenue Board—Commissioner—*See* SETTLEMENT—MISCELLANEOUS, 3 B.L.R. App. 82.

Certificate by Head-quarters Deputy Collector that documents are exempt from duty—Reference by Revenue Board to High Court—*See* STAMP ACT, 1899, s. 57, 25 M. 752.

Revenue Circulars.

This circular prescribes certain alterations in the Test Table of Table III, Return No. 31, Rev. Cir. No. 2, **21 W.R. Rev. Cir. p. 3.**

This circular prescribes a new heading "Nominal Remission" to be opened in Return No. 10, Rev. Cir. No. 3, **21 W.R. Rev. Cir. p. 6.**

This circular prescribes that the rate per acre of each denomination of soil is to be entered, in addition to the rate per beegha, in Abstract Statement No. 20, Rev. Cir. No. 1, **21 W. R. Rev. Cir. p. 7.**

This circular expunges part of Circular Order No. 3 of May 1872, regarding settlements, Rev. Cir. No. 3. **21 W.R. Rev. Cir. p. 7.**

This circular states how "Sale Proceeds of Waste Papers" and certain other particulars are to be shown in Table V, of Return No. 10. Rev. Cir. No. 8, **21 W.R. Rev. Cir. p. 9.**

Revenue Circulars—*continued.*

This circular directs that Register No. XXVI should show how, and when, lands the property of Government have been acquired. Rev. Cir. No. 5, **21 W.R. Rev. Cir. p. 13.**

This circular deals with alterations made in Return No. XXXV. Rev. Cir. No. 2, **22 W. R. Rev. Cir. 2.**

This circular requests District Officers to intimate to proprietors, &c., whenever their estate has been transferred from the towjih of one district to that of another. Rev. Cir. No. 3, **22 W.R. Rev. Cir. 10.**

This circular draws attention to Financial Department Resolutions of 5th December 1873 and 19th June 1874, which require Commissioners to inspect periodically all revenue treasuries, and points out how those Circulars are to be carried out. Rev. Cir. No. 5, **22 W.R. Rev. Cir. 10.**

This circular makes an addition to Circular Order No. 11 of November 1872. Rev. Cir. No. 7, **22 W.R. Rev. Cir. 13.**

This circular enjoins the preparation by Collectors of briefs of cases which are appealed to the High Court. Rev. Cir. No. 8, **23 W.R. Rev. Cir. p. 17.**

This circular publishes revised rules for the supply of copies of, and information respecting, Papers and Documents in Collectors' Offices—Register No. 62 cancelled. Rev. Cir. No. 2, **23 W.R. Rev. Cir. p. 18.**

This letter circulates slips of directions contained in Circular Order No. 3 of November 1874. Rev. Cir. No. 1, **23 W.R. Rev. Cir. p. 29.**

This circular requests local officers to make themselves acquainted with the facts, in respect to the intervention of parties having rights between the zemindars and the cultivators, before recommending in future any remission of revenue to Zemindars upon condition that the ryots should participate in it. Rev. Cir. No. 8, **23 W.R. Rev. Cir. p. 34.**

This circular states that revised forms of Return No. XII, and Register No. 65 have been prescribed. Rev. Cir. No. 5, **23 W.R. Rev. Cir. p. 37.**

This circular prescribes certain alterations and additions to Return No. XXXI. Rev. Cir. No. 6, **23 W.R. Rev. Cir. p. 37.**

This circular deals with various alterations in s. III, Ch. XIX, page 266. Board's Rules, and cancellation of Circular No. 20 of 1871. Rev. Cir. No. 4, **23 W.R. Rev. Cir. p. 40.**

This circular alters heading of Return No. VI-B. Rev. Cir. No. 7, **24 W.R. Rev. Cir. p. 5.**

This circular draws attention to a Notification as to the duty chargeable on the counterpart of an instrument. Rev. Cir. No. 6, **24 W.R. Rev. Cir. p. 7.**

Revenue Circulars—*concluded.*

This circular deals with the modification of Test Table. Rev. Cir. No. 2, **24 W.R. Rev. Cir. p. 18.**

This circular deals with Indents for Forms. Rev. Cir. No. 4, **24 W.R. Rev. Cir. p. 18.**

This circular deals with a Corrigendum. Rev. Cir. No. 8, **24 W.R. Rev. Cir. p. 25.**

This circular deals with District Superintendent of Police—Excise duties. Rev. Cir. No. 6, **25 W.R. Rev. Cir. 7.**

This circular deals with return of surrendered rowannahs. Rev. Cir. No. 3, **25 W.R. Rev. Cir. 8.**

This circular states that Interportal steamers are exempted from Rule 6, s. V, Chapter V. Rev. Cir No. 2, **25 W.R. Rev. Cir. 11.**

This circular states that Return No. VIB is to be submitted in future to Legal Remembrancer. Rev. Cir. No. 4, **25 W.R. Rev. Cir. 11.**

This circular states that Atraffee rowannahs, challans, and boat-notes are not to be sent to Board's office. Rev. Cir. No. 1, **25 W.R. Rev. Cir. 12.**

This circular prescribes certain revised rules relating to the "Fund for the Improvement of Government and certain temporarily-settled estates." Rev. Cir. No. 1, **25 W.R. Rev. Cir. 15.**

This circular deals with the New Hydrometer Tables. Rev. Cir. No. 9, **25 W.R. Rev. Cir. 23.**

According to this circular the limit of Tari possessed or sold is raised from 4 to 12 seers. Exception as regards Pachwai. Rev. Cir. No. 2, **25 W.R. Rev. Cir. 24.**

This circular deals with Corrections in Return No. X. Rev. Cir. No. 1, **25 W.R. Rev. Cir. 29.**

Revenue Commissioner.

Revenue Commissioner can hear appeal from an order passed by Collector in execution proceedings transferred to him under s. 320, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, ss. 68, 70, 71, 7 Bom. L.R. 682.

Revenue Court.

See JURISDICTION OF REVENUE COURTS.

See RES JUDICATA — COMPETENCY OF COURT.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS.

(1)—*Judgment of—Suit for declaration that judgment was not binding on plaintiff.*—No suit can lie to declare that the judgment of the Revenue Court was not binding on the plaintiff, who was a party to it. THIRUVENGADAM PILLAI v. T. RAMANUJULU NAIDU, **8 M.L.T. 380=7 Ind. Cas. 874.**

Revenue Court—*concluded.*

(2)—*Jurisdiction*—Kabuliat.—A suit by a ryot to set aside the judgment of a Revenue Court passed in a suit by the zemindar against the ryot to obtain a *kabuliat*, cannot be maintained in a Civil Court. SONATAN ROY v. ANANDA KUMAR MOOKERJEE, **2 B.L.R. App. 31=11 W.R. 96.**

(3)—*Revenue Courts—Open days—Plaint.*—Revenue Courts have no authority to specify certain days on which plaints shall not be received. GOBIND KUMAR CHOWDHRY v. HARGOPAL NAG, **3 B.L.R. App 72=11 W.R. 537.**

(4)—*Landlord and tenant—Act* IV *of* 1840—*Cl.* 6, *s.* 23, *Act* X *of* 1859—*Ejectment—Jurisdiction.*—The Civil Court has no jurisdiction, in cases of ejectment between landlord and tenant, although the ejectment might have taken place in pursuance of an order of a Magistrate under Act IV of 1840. Courts of Revenue only have jurisdiction to hear such cases, which must be brought under the provisions of cl. 6, s. 23 of Act X of 1859. MUTHOORANAUTH KOOND v. SAMIRUDEE MOLLAH, **1 W.R. 42.**

Regulation XVII of 1827—Within contemplation of — Mamlatdars' Court regarded as Revenue Court—*See* BOM. ACT XVI OF 1838, s. 1, cl. 2, 14 B. 372.

Payment by tenant of *nazarna* under threat of ejectment—Suit for compensation by tenant —Jurisdiction of—to entertan suit—*See* U. P. ACT XXII OF 1886, ss. 17, 108, (cl) 9, 8 O. C. 200.

Jurisdiction of—Illegal ejectment by landlord—Recovery of land by under-proprietor—*See* U. P. ACT XXII OF 1886, s. 108, cl. (10), 8 O.C. 174.

Decision of a, on question of title, has the same effect as the decision of a Civil Court as regards appeal—*See* U.P. ACT III OF 1901, ss. 199 and 200, 4 A.L.J. 53=A.W.N. 1907, 6=29 A. 160.

Suit for ejectment in—Question of title decided by—Decision becoming final—Effect—*See* CIV. PRO. CODE, 1908, s. 11, Expl. VI, 8 A.L. J. 341, F.B.

Right of Hindu widow to claim partition in a—*See* HINDU LAW—WIDOW, 9 O.C. 53.

Vacation — *See* LIMITATION ACT, 1908, ss. 4, 5, 9 P.W.R. 1908, Rev.

Order of—Containing adjudication upon question of title—*See* PARTITION—MISCELLANEOUS, 6 O.C. 372.

See RENT, SUIT FOR, 3 O.C. 65.

See RES JUDICATA—ESTOPPEL BY JUDGMENT, 7 B.L.R. 673=15 W.R. P.C. 30.

High Court's powers of revision against orders of—*See* REVISION—GENERAL, 14 O.C. 38=9 Ind. Cas. 747.

Revenue Courts, Oudh.

See **U.P. ACT XVI OF 1865.**

Revenue free grant.

(1)—*Revenue-free grant—Sharers mentioned in recommendation, but not in order of Government —Civil Court—Jurisdiction.*—The question in whose favour Government intended to make a revenue-free grant, where sharers are mentioned in the recommendation, but not in the order of Government, is one which cannot properly be determined by a Civil Court but by Government alone. MUHAMMAD SHAH v. FATTEH-ULLA-SHAH, **122 P.R. 1880.**

Revenue Jurisdiction, Bombay.

See BOM. ACT X OF 1876.

See BOM. ACT XV OF 1880.

Revenue Officer.

See SETTLEMENT OFFICER.

Preparation of record of rights under Beng. Act VIII of 1885—Power of—*See* BEN. ACT VIII OF 1885, s. 102, 21 C. 38, F.B.

Power of—to make survey and prepare record-of-rights without order of Government—*See* BEN. ACT VIII OF 1885, ss. 104 to 108, 117, 118, 119, 145, 158, 189, 30 C. 339=7 C.W.N. 33.

Forest officer not a Revenue officer—*See* BOM. ACT V OF 1879, s. 3, 20 B. 803.

Restriction of summary jurisdiction in case of ejectment—*See* C.P. ACT XVII OF 1889, s. 92, 16 C.P.L.R. 70.

Nature of proceedings by a—*See* U.P. ACT III OF 1901, ss. 4 (9), 46, 13 O.C. 198.

Premature closing of Government channel by Revenue officer—Negligence and no malice—Loss to Government raiyat—Liability of Revenue officer—*See* DAMAGES— DAMAGES, SUITS FOR, 24 M. 36=10 M.L.J. 249.

Forest officer not—*See* JURISDICTION OF CIVIL COURTS, 20 B. 764.

See SANCTION TO PROSECUTE, 22 B. 936.

Revenue-paying Estate.

Suit for partition of—In a Civil Court—Power to appoint Commissioner—Partition how effected—*See* PARTITION—SUITS FOR PARTITION—JURISDICTION OF CIVIL COURT IN, 23 C. 679.

Revenue-paying Estates, Partition of.

See ACT XIX OF 1863.

Revenue, paymentin kinds.

(1)—*Payment of Revenue in kind—Order insisting payment of Revenue in cash—Absence of order in the settlement.*—In the absence of an order at the time of settlement, the proprietors cannot insist upon paying revenue in cash where they have always before settlement paid in kind. PUNDIT MOTEE LAL v. UTTRA, **7 P.R. 1867, Rev.**

(2)—*Payment of Revenue in grain unenforceable without proprietor's consent—Order as to*

Revenue payment in kinds—*concluded.*

payment of Revenue an administrative act open to revision.—A Jagirdar cannot enforce payment of his revenue in grain without the proprietor's consent. Orders as to payment of revenue held to be administrative and open to revision. MULLIK FUTTEH SHER KHAN v. MULLIK SHER BAHADOOR KHAN, **6 P.R. 1868, Rev.**

Revenue Records.

Official records — Evidentiary value—*See* EVIDENCE—GENERAL, 22 M.L.J. 393.

Wrong entry in—Suit for possession by partition of shamilat lands — *See* LIMITATION ACT, 1908, Art. 120, 151 P.L.R. 1906.

Revenue Recovery.

See ACT I OF 1890.

Revenue Recovery, Madras.

See MAD. ACT II OF 1864.

Revenue Recovery, Madras (Amendment).

See MAD. ACT III OF 1884.

Revenue Register.

See BUDDHIST LAW—GIFT, L.B.R. 1872—1892, 44.

Extracts from—Proof of custom—Evidentiary value—*See* CUSTOM, 4 S.L.R. 88.

Revenue Resumption, Bengal Land.

See BEN. ACT VII OF 1862.

Revenue Sale.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS.

Revenue Sales, Bengal Land.

See BEN. ACT XI OF 1859.

See BEN. ACT VII OF 1868.

Reversal of Decree.

(1)— *Reversal or modification of decree—Restitution of payment made under decree—Execution—Fresh suit— Civ. Pro. Code, ss.* 244, 583.—The effect of an appellate Court's decree reversing or modifying an original decree is to direct restitution of any sum paid under the latter decree which is disallowed by the appellate decree, and the recovery of such sum is a question of execution, and cannot form the subject of a separate suit. And interest can be awarded in execution on the amount to be recovered. JASWANT SINGH v. DIP SINGH, **7 A. 432=A.W.N. 1885, 67.** (L.R. 3 P.C. 465, *R.*; 7 A. 170, *D.*) [*F.*, 15 M. 203; *R.*, 9 M. 506, 111 P. R. 1892, 18 A. 262, 20 A. 430.]

(2)—*Civ. Pro. Code*, 1859, *s.* 350—*Appellate Court—Error in valuation or claim—Appeal.*—An error in the valuation of a claim is not an error, defect, or irregularity, which affects the merits of the case, and an appellate Court

Reversal of Decree—*concluded.*

is restrained under s. 350 from ordering the reversal of a decree on account of any such error which does not also affect the jurisdiction of the Court which originally tried the suit. RAMESSUR DYAL SINGH v. RAJ KISHORE SINGH, **13 W.R. 325.**

Execution of decree—Reversal on appeal—Power of Court to award restitution—Jurisdiction of executing Court—*See* CIV. PRO. CODE, 1908, s. 144 (1), 13 B. 485.

On appeal by one defendant—*See* CIV. PRO. CODE, 1908, O. XLI, r. 4, Marsh 281=2 Hay 288.

Right to recover the land sold and not simply the sale proceeds—*See* EXECUTION OF DECREE—MISCELLANEOUS, 5 M. 106.

Reversionary Interest.

(1)—*Interest of reversioner — Property.*—A reversionary interest, although a contingent interest, is property, and can be sold in execution of a decree. GAUR HARI DUTT v. RADHA GOBIND SHAHA, **7 B.L.R. 343, Note=12 W.R. 54.** [*Overruled*, 7 B.L.R. 341.]

Reversionary interest of grantor liable to attachment and sale—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 10 A. 462=A. W.N. 1888, 200.

Injury, to — Smoke nuisance, whether amounts to —*See* NUISANCE, 3 S.L.R. 30=1 Ind. Cas. 958.

Reversioner.

See DECLARATORY DECREE, SUIT FOR—REVERSIONERS.

See HINDU LAW—ALIENATION.

See HINDU LAW—REVERSIONERS.

See HINDU LAW—WIDOW.

See LIMITATION ACT, 1908, ARTS. 140—144.

(1)—*Alienation by life-tenant, not valid against reversioner.*—An alienation of property by a life-tenant is invalid as against one who is entitled as reversioner. TIRUMALATHAMMAL v. VENKATARAMANAIYAN, **2 M.H.C. 378.**

(2)—*Decision about reversionary rights — Effect* —A decision in a suit by one claiming as reversioner against the widow and a person in whose favour a will was made by her, as to the reversionary right of the plaintiff, is binding only on the parties to the suit and will not affect the inheritance after the death of the widow. JAIPAL KUNWAR v. INDAR BAHADUR SINGH, **26 A. 238, P.C.=31 I.A. 67=8 C.W.N. 465=6 Bom. L.R. 495=14 M.L.J. 149=8 Sar. 625.**

(3)—*Decree against representative for time being of inheritance—Reversioner's right to set aside decree—Fraud.*—A mere reversioner or other person prospectively entitled is not ordinarily permitted to set aside decree against a

Reversioner—*continued.*

the representative for the time being of the inheritance, except on the ground of fraud. YETCHANEN NAMBUDRI v. SIVA RAMA PATTER, **1 M.L.J. 390**. (9 M. 473, *F.*; 8 M. 484, *D.*)

(4)—*Reversioner's interest—Contingent*—Spes successionis — *Transfer— Value of interest—Relinquishment—Registration--Registration Act* (III *of* 1877), *s.* 17 (*b*).—The interest of a reversioner in an estate in the hands of a widow is not a mere *spes successionis* ; it is at the least a "contingent" interest ; for on the death of the widow it would fall to the reversioner by operation of law. It is a tangible interest derived from the common ancestor and not to be defeated except in the special case of a sale by the widow for necessity. Therefore, the reversioner's interest can validly form the subject of a relinquishment. (30 B. 304=7 Bom. L.R. 742, *D.*) The present value of a reversioner's interest can be ascertained. (25 C. 778, *R.*) A relinquishment of a reversioner's interest of the value of Rs. 100 or upwards requires compulsory registration. KHAIRTI v. MATAB, **214 P.L.R. 1911=11 Ind.Cas. 211=135 P.W.R. 1911.**

(5)—*Hindu Law—Adoption by widow—Custom—Reversionary heirs, consent of—Reversioner present at adoption—Estoppel.*—It is not an indisputable proposition of law that wherever the Mitakshara school of Hindu law prevails, a widow may validly adopt if she obtains the consent of her husband's kinsmen as a substitute for her husband's authority ; and an adoption by a widow, if otherwise invalid, is not validated if made with the consent of the reversionary heirs. Among the Hindus of the Aziwal caste (resident in Delhi) there is no valid and binding custom by which a widow can validly adopt by her sole act in the absence of authority from the husband ; and the mere presence of a reversionary heir at the adoption of a boy by a widow, will not estop him from afterwards claiming the property after the death of the widow. KIDAR NATH v. BANARSI DAS, **62 P.R. 1880.** [*Appr.*, 198 P.R, 1882.]

See ABANDONMENT OF TENURE, 43 P.R. 1901.

Appeal by alienee of Hindu widow—Suit by reversioner—*See* CIV. PRO. CODE, 1908, O. XLI, r. 4, Marsh 113=1 Hay 339.

Nature and extent of reversioner's interest in ancestral property—Whether his interest affected by full owner's crime or absconding—*See* CRIM. PRO. CODE, 1898, ss. 87 and 88, 19 P.W.R. 1908, F.B.=18 P.R. 1908=156 P.L.R. 1908.

Right of, to claim standing crops on death of tenant for life—*See* CROPS, 14 C.P.L.R. 89.

Declaratory suit by, when a female intervenes —*See* CUSTOMS — PUNJAB—ALIENATION, 3 Ind. Cas. 284.

Compromise by next reversioner—Remote reversioner bound by compromise—*See* CUSTOMS —PUNJAB—ALIENATION, P.L.R. 1900, p. 536.

Reversioner—*continued.*

See CUSTOMS—PUNJAB—ALIENATION, 61 P.L.R. 1901.

Right of a, to sue for share of another — *See* CUSTOMS — PUNJAB—INHERITANCE, 143 P.W.R. 1910.

Doctrine of equity in England—Applicability to India—*See* EQUITY, 11 A. 57=A.W.N. 1888, 296.

See ESTOPPEL—STATEMENTS AND PLEADINGS, 1 N.W.P. 65.

Right of setting aside alienation by a widow —*See* HINDU LAW—ALIENATION, 1 Bom. L. R. 201.

Assent of, necessary to validate the alienation made by a widow—*See* HINDU LAW—ALIENATION, 2 Bom L.R. 820=25 B. 129.

Liability of, for trade debts incurred by Hindu widow—*See* HINDU LAW—DEBTS, 3 Bom. L.R. 738=26 B. 206.

Claiming on the death of a widow, limitation applicable to—*See* HINDU LAW—WILL, 1 Bom.L.R. 607=23 B. 725.

Enfranchisement of land as personal inam in favour of Hindu widow—Title of reversioners—*See* INAM, 25 M. 424=12 M.L.J. 89.

See JURISDICTION — GENERAL, 98 P.R. 1886.

See LANDLORD AND TENANT — MISCELLANEOUS, 15 C.P.L.R. 89.

Suit to recover property—*See* LIMITATION ACT, 1908, art. 118, 1 Bom. L.R. 799=24 B. 260.

Right to set aside an adoption—*See* LIMITATION ACT, 1908, art. 118, 2 Bom. L.R. 495.

Entitled to possession on the death of Hindu female, limitation applicable to—*See* LIMITATION ACT, 1908, art. 141, 2 Bom. L.R. 106.

Will—Bequests to *dharam* void as indefinite —Claim by—To undisposed of property—*See* LIMITATION ACT, 1908, art. 141, 21 B. 646.

Suit by—For possession—*See* LIMITATION ACT, 1908, art. 141, 9 C. 934, F.B.=13 C.L.R. 372.

See LIMITATION ACT, 1908, art. 141, 12 C. L.R. 548.

Possession adverse to the female adverse to the—*See* LIMITATION ACT, 1908, arts. 141, 142, 144, 41 P.R. 1903.

Declaratory suit to set aside alienation—Dismissal of suit—Appeal by some only of the plaintiffs—Declaration should be granted only on appellants' right—Reversioners not joining appeal to be excluded—*See* MAHOMEDAN LAW —LEGITIMACY, 190 P.L.R. 1908.

Rights of—To open and work mines—Rights of grantor or his lessee to work and appropriate the minerals during the continuance of the life estate—*See* MINES, 2 C.L.J. 20.

Reversioner—*concluded.*

Suit by—To declare invalidity of several alienations by widow — *See* MISJOINDER OF CAUSES OF ACTION, 7 B. 289.

See MORTGAGE—MISCELLANEOUS, 13 P. L.R. 1902.

One of several reversioners taking possession of whole property—Suit by other reversioners for their shares after 12 years—Limitation—*See* POSSESSION—ADVERSE POSSESSION, 6 Ind. Cas. 695.

See RES JUDICATA—GENERAL, 20 C. 79, P.C.=19 I.A. 234.

Decree against remote—Subsequent suit by him as next reversioner on the presumptive heir predeceasing female holder—*See* RES JUDICATA—PARTIES, 9 C. 462.

See RES JUDICATA—PARTIES, 1 A. 282, 82 P.R. 1874.

Suit by some—Subsequent suit by other reversioners—*See* RES JUDICATA—MISCELLANEOUS, 16 C. 93.

Suit for possession under Will—Will found invalid—Suit for declaration of reversionary heirship—*See* SPECIFIC RELIEF ACT, 1877, s. 42, Illustration (*e*), A.W.N. 1881, 93.

Hindu reversioner's contingent right—Assignment of such right—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6, 25 C. 778.

Transfer of reversionary right—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6, 9 Ind. Cas. 243.

Reverter, Doctrine of.

Doctrine of—*See* HINDU LAW — REVERSIONERS, 5 Bom. L.R. 833.

Review.

1.—GENERAL.
2.—GROUNDS FOR REVIEW.
3.—JURISDICTION TO REVIEW.
4.—PRACTICE AND PROCEDURE.
5.—REVIEW AFTER TIME.
6.—REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE.
7.—REVIEW WHEN LIES.
8.—WHAT QUESTIONS CAN BE RAISED ON REVIEW.
9.—MISCELLANEOUS.

See CIV. PRO. CODE, 1908, S. 114.

See CIV. PRO. CODE, 1908, O. XLVII, rr. 1—9.

See PRACTICE AND PROCEDURE.

——1.—General.

(1)—*Review of judgment—General principles.*—The provisions of the law as to applications for review are one distinct matter. To rehear after the success of such applications is another matter. When a party applies for a review of

Review—continued.

——1.—General—*continued.*

judgment, it must be shown that there is good and sufficient cause for granting the review, before he can be heard to argue that the decision is erroneous. In so showing cause, no point can be reviewed which has been already discussed and decided on the original hearing of the appeal; no new point, not received at the hearing of the appeal, can be argued on the application for review. BHAWABAL SINGH v. MAHARAJA RAJENDRA PRATAP SAHOY BAHADUR, **5 B.L.R. 321=13 W.R. 157.**

(2) — *Civ. Pro. Code*, 1882, *ss.* 623, 630 — *Review of judgment.* — It is lawful for a Judge or a Bench in admitting an application for review to define and limit the points on which the case shall be re-heard. Admission of a review does not *ipso facto* re-open the whole case. DHANRUP MUL v. SIRDAR HIRA SINGH, **158 P.R. 1889.** (10 B.H.C. 360, *Diss.*; 5 C. 89, 9 C. 209, 11 M.I.A, 487, *R.*)

(3)—*Review—Sufficient reason—Order under erroneously assumed circumstances—Receiver, Appointment of—Subsequent rent decree obtained by owner—Application by Receiver—Court not restricted to grounds mentioned in application for review—Application may be granted in part—Decree when set aside should be wholly set side—Civ. Pro. Code* (*Act* V *of* 1908), *O.* XLVII, *r.* 1 —It is the plain duty of every Court to recall an order when it is apprised that the order has been made under an erroneously assumed state of circumstances essentially different from the true state of things. (14 M.I.A. 40, 7 B.L.R. 186, 6 C.W.N. 710, 6 C.L.J. 662, 3 M.L.T. 41, *Rel. on.*) When a receiver is appointed to an estate, the estate vests in the Receiver and thereafter the Receiver is the only person competent to prosecute suits and to obtain decrees. Therefore, where, after the appointment of a Receiver, the owner obtained a decree for rent: *Held*, that the decree ought to be set aside on an application for review by the Receiver. (34 C. 305, 5 C.L.J. 270, 6 Ind. Cas. 270, 14 C.W.N. 653, *R.*) A Court, in dealing with an application for review of judgment, is not restricted to the ground mentioned in the application: the Court has wider powers and is competent to enlarge those grounds on oral application, if it is satisfied that there was a proper case on the merits for so doing and granting the review. (11 M.I.A. 487, 9 W.R 23, *Rel. on.*) An application for review of a judgment may be granted in part. (12 C.L.R. 64, 9 C. 209, 13 C.L.R. 285, *Rel. on.*) When a decree is set aside on the ground that it was made in favour of a person who at the time had no subsisting title, the entire decree should be set aside. BHUBANESHWARI KOER v. AJODHYA SINGH, **11 Ind. Cas. 102=15 C.L.J. 339.**

(4)—*Civ. Pro. Code*, 1882, *s.* 628—*Review of judgment—Discretion of Court—Applications for review not to be dealt with too technically.*—Applications for review of judgment are matters

Review—continued.

——1.—**General**—*continued.*

to a great extent within the discretion of the Court to which the application is made, but such discretion, in case of the application being granted, is subject to appeal. In dealing with applications for review, Courts should not be too technical, but should look to the substance of the application rather than the form in which the application is made. CHIRANJI v. MOTI RAM; **A.W.N 1898, 33.** (3 I.A 221 and 16 A. 390, *R.*) [*Overruled*, 20 A. 523, F.B.]

(5)—*Review—Admission of application for review, Objection taken to, in appeal—Terms of the order admitting the review, discretion of Court as to—Irregular procedure in hearing case in review—Power of appellate Court in dealing with—Code of Civil Procedure, ss. 623 and 626—Court-fee, how calculated when appellant seeks to escape payment of a sum decreed against him and to recover a sum from respondent.*—When the admission of an application for review of judgment is not challenged on any of the grounds stated in s. 626 of the Code of Civil Procedure, it cannot be challenged in appeal at all. A Judge, who hears the case in review, is not bound by the terms of the order admitting the review, whether the order was passed by himself or by another Judge, and, if the procedure adopted by him in hearing the case in review is irregular, it is the duty of the appellate Court on appeal to decide the case upon its merits. (11 M.I.A. 487, 12 C.L.R 64, 10 B.H.C. 360, 9 C 209, *F.*) When an appellant in his memorandum of appeal seeks to escape payment of a sum decreed against him and also to recover from the respondent a sum named therein, the Court-fee should be calculated on the sum decreed against him *plus* the sum sought to be recovered. MUSAMMAT BASANTI v. BADRI, **7 O.C. 345.**

(6)—*Application for review—Duty of Court.*—An application for review ought to be rejected, if no matter is brought to notice which might not have been brought before the Court, when the appeal was heard. (*Per Phear, J.*) The Court is bound to administer the law as it is, and to take notice of a Full Bench decision applicable to the case whether it is referred to or not by the pleaders. (*Per Mitter J.*) THE COLLECTOR OF TIPPERAH v MUSSAMAT MAFEZUNNISSA BIBI, **5 B.L R. 341, Note.** [*Appr.*, 5 B L.R. 321.]

(7)—*Act* VIII *of* 1871, *s.* 76—*Review—Act* XXIII *of* 1861, *s.* 38.—Every Court has so far the power to revise its own decision as may be necessary for the purpose of making that decision in terms which accord with the intention entertained at the time it was passed, *e g.*, to correct verbal errors, or otherwise to make the decree an accurate expression of the judgment intended. But an inferior Court of limited jurisdiction does not possess the general power of revising its own decision. A District Judge has no power to review an order passed under s. 73, Act VIII of 1871. *In the matter of the petition of* HADJEE ABDULLA, **10 B L.R. 394 =19 W R. 303.** [*F.*, 20 W.R. 284.]

Review—continued.

——1.—**General**—*continued.*

(8)—*Decree and judgment not at variance—Power to amend—Civ. Pro. Code*, 1877, *s.* 206.—Where the judgment and the decree were in agreement with each other, no order under s. 206, Civ. Pro. Code, 1877, could be passed amending the decree. The proper course in such a case would be to apply for a review of judgment first, and then to have the decree brought into conformity with the judgment. TEJ SINGH v. DIP CHAND, **A.W.N. 1882, 72.**

(9)—*Amendment of decree—Alteration of decree—Order for interest added to decree—Civ. Pro. Code*, 1859, *s.* 377.—Where, after the decree of a Subordinate Judge was confirmed on appeal, and an appeal to the Privy Council had been presented by the party, the decree was amended by adding interest to the decree-amount, *held* that the Subordinate Judge was right in treating the omission as a mistake which it was within his power to correct. [*F.*, 20 W.R. 11, 11 B.L R. 363; *R.*, 8 A. 519.] Merely adding to the decree an order that it was to bear interest from its date is not an act done by way of review of judgment. ZUHOOR HOSSEIN v. MUSSUMAT SYEDUM, **11 W.R. 141=11 B.L.R. 367, note.**

(10)—*Act* VIII *of* 1859, *ss.* 376, 377, 378, 380—*Final order—Construing Act.*—An order rejecting or admitting a review is not final, but the Court may, in the exercise of its discretion, admit a second review even after a prior order rejecting it. Applications for review dismissed for mere default may be re-admitted like appeals dismissed for default. *Seton-Karr, J., contra.* NASIRUDDIN KHAN v. INDRONARAYAN CHOWDHRY, **B L R. Sup. Vol. 367=5 W R. 93.** [*F.*, W R. 1864, 91, 7 W.R. 464, 15 C. 432, 30 C. 619; *R.*, 6 W.R. Mis. 118, 1 C. 197=23 W. R. 438, 34 C 677=11 C.W.N. 803=6 C L.J. 84; *Expl.*, 2 C 131, P.C.=3 I.A. 221=26 W. R. 50, 26 B. 485.]

(11)—*Provisions of Civ. Pro. Code relating to reviews of judgment—Proceedings under Beng. Act* VII *of* 1868 *and* VII *of* 1880—*Power to review.*—Those portions of the Code of Civil Procedure which confer the power to review a judgment and regulate the exercise of such powers, have not been extended to proceedings under Bengal Acts 1868 and 1880. A Court has no inherent jurisdiction to review an order which, at the time it was made, was rightly made. LALA PRAYAG LAL v. JAI NARAYAN SINGH, **22 C. 419.** (2 C.L.J. 308, *R.*) [*F.*, 34 C. 677 =11 C.W.N. 803=6 C.L.J. 84; *R.*, 30 C. 619, 2 C.L.J. 306]

(12)—*Of judgment—Duty of counsel.*—The abandonment by a counsel of a ground of appeal cannot subsequently be admitted as reason for granting a review of judgment. If reviews were allowed on such grounds, the whole administration of justice throughout the country would be open to uncertainty, and one review might on these grounds be had after another. HEEKAJEE BURJORJI v. NANABHOY, **L. B. R. (1872—1892), 183.**

Review—continued.

——1.—**General**—*continued.*

(13)—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 624—*Application for review, when deemed to be made—Application made to successor of Judge who delivered judgment.*—Under s. 624 of the Civ. Pro. Code, the mere presentation of the petition praying for a review is not "making an application for review" within the meaning of it on a reasonable interpretation of the section. The application is made when the petitioner moves the Court to bring its mind to bear upon the merits of the petition for review. And it is only when that is done for the first time in respect to the successor of the Judge who delivered the judgment, the application is made to the successor within the meaning of the section. AZIZUDDIN v. BADARUDDIN, **134 P.R. 1884.** [*R.*, 97 P. R. 1885, 6 P.R. 1887, 7 P. R. 1894; *F.*, 85 P. R. 1906.]

(14)—*Civ. Pro. Code*, 1882, *ss.* 624, 626, 627—*Application for review of judgment—"Made" in s.* 624, *meaning of.*—The successor of the Judge who originally had the application for review of judgment before him has jurisdiction to dispose of it. Where a petition for review of judgment is presented to the Judge who passed the judgment complained of, and that Judge, instead of rejecting it at once as he might do under s. 626, Civ. Pro. Code, orders it to be entertained, and the opposite party to be called on to show cause why it should not be allowed, the subject has been necessarily reconsidered by the Judge and he has brought his mind to bear upon the merits of the application; and the application for review may fairly and reasonably be held to have been "*made*" to the Judge who passed the original decision within the meaning of s. 624, Civ. Pro. Code, so that his successor in office has, under the circumstances, jurisdiction to dispose of the application for review, the omission of the ministerial officers of the Court to carry out the Judge's order and issue notice to the opposite party in no way affecting that jurisdiction. DIWAN SINGH v. JOWAHIR MAL, **97 P.R. 1885.** (10 C. 80, *F*; 4 A. 278, *Diss.*; 7 M I.A. 283. 134 P.R. 1884, *R.*) [*R.*, 6 P.R. 1887.]

(15)—*Application for review of judgment—Meaning of "made" in s.* 624.—An application has been *made* in the sense in which the word is used in s. 624, Civ. Pro. Code, to the Judge who delivered the original judgment, if such Judge has so applied his mind *judicially* to it as to have ordered notice to issue to the opposite side to show cause against the application being granted TULSI RAM v. RAM LAL, **97 P.R. 1885, Note.** (10 C. 80, 97 P.R. 1885, *F.*)

(16)—*Review—Point once argued.*—A point previously argued cannot be argued in review. GANGAPERSAD v. THE AGRA AND MASTERMAN'S BANK **5 B.L.R. 340, Note.** [*Appr.*, 5 B.L.R. 321.]

(17)—*Decree—Proceedings to set aside decree obtained by fraud—Review—Suit for declaration of right to set aside decree—Right of suit.*—The proper course for a party desiring to set aside a decree passed against him by a competent Court, which he alleges to have been obtained by fraud, is to apply to the Court which passed the decree to review and alter it, and not to bring a suit for declaration of his right by setting aside such decree. MEWA LAL THAKUR v. BHUJHUNJHA, **13 B.L.R. App 11 = 22 W.R. 213.** [*Diss.*, 3 C.L.J. 119; *F.*, 10 C. 612; *Cons.*, 10 C.L.J. 420 = 13 C.W.N. 1197 = 2 Ind. Cas. 129; *R.*, 10 B. 338, 5 C.W.N. 559, 34 C. 83; *D.*, 4 A.L.J. 392 = A.W.N. 1907, 112 = 29 A. 418.]

(18)—*Civ. Pro. Code (Act* X *of* 1877), *s.* 629, *ground of objection under—Admission of review, insufficient cause for—Appellate Court, Power of, to consider objection as ground of appeal—Judgment on razinamah—Fraud, allegation of—Application for review—Power of Court.*—An objection that there was no sufficient cause for the admission of a review which has been granted, is a ground of appeal which may be considered by an appellate Court when the final decree in the suit is under appeal, notwithstanding this ground of objection is not specifically mentioned in s. 629 of the Civ. Pro. Code. A Court is competent to consider an application for review of judgment passed on a razinama alleged to have been obtained by fraud, and it is not bound to refer the applicant to a regular suit to set aside the decree JOWAHIR SINGH v. KHAN SINGH, **47 P.R. 1880.**

(19)—*Decree, if may be set aside as fraudulent, on proof that it was based on perjured evidence*—Res judicata, *bar of—Review of judgment upon newly discovered evidence showing previous evidence perjured.*—A decree obtained in a suit cannot be set aside in a subsequent action brought for that purpose, on mere proof that the previous decree was obtained by perjured evidence. If evidence not originally available comes to the knowledge of a litigant and he can show thereby that evidence on which a decree against him was obtained was perjured, his remedy lies in seeking a review of judgment. But the rule of *res judicata* prevents him from reagitating the matter on the same materials, or on materials which might have been laid before the Court in the first instance. MUNSHI MOSUFUL HUQ v. SURENDRA NATH RAY, **16 C.W.N. 1002 = 15 Ind. Cas. 893** (14 C.W.N. 695, *F.*; 38 C 936, 15 C.W.N. 1010, 29 M. 179, *Diss.*; L.R. 10 Ch. D, 327 (1879) 3 Ch. App. 203, 1867, 67 L.J.R.Q.B D 301 (1898), *relied on*; L.R. 10 Q.B.D. 295, (1882), L.R. 25 Q B. D 310, (1890), 9 D. 210, (1884) L.R. (1898), 2 Q B. 36, *R.*)

(20)—*Review of judgment, condition for granting.*—A Judge admitting a review on the ground of discovery of new evidence must first satisfy himself on legal evidence that the applicant has brought himself within the section, in other words, must insist on the fact of the applicant's ignorance or inability being strictly proved. NUDARCHUND BHOOYA v. REEDOY MUNDUL **11 B L.R. 424. Note = 17 W.R. 458.** [*F.*, 18 W.R. 413, 18 W.R. 316.]

Review—continued.

——**1.—General**—*continued.*

(21)—*Review—Discovery of new matter—Strict proof of allegation—Appeal—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 626, 629—*Grant or rejection of application for review—Appeal.*—Applications for review on the ground of discovery of new evidence must be strictly proved. The order of the Judge rejecting such an application is final; but where such an application is granted, the order may be appealed from, and the appellate Court must decide whether the allegation that the new evidence was not within the knowledge of the applicant, when the decree was passed, has been strictly proved, for otherwise the right of appeal in such a case would have no meaning. AHED KHUND KAR v. MOHENDRA LAL DEY, **6 Ind. Cas. 320.** (6 C.L.J. 5, 31 B. 331, 11 C.W.N. 721, 4 A.L.J. 461, 2 M.L.T. 435, 9 B.L.R. 671, 17 M.L.J. 347, *Rel.*; 12 B. 171, 22 C. 3, 22 C. 984, 24 C. 878, *D.*)

(22)—*Review of judgment—Documentary evidence, Discovery of new and important—Evidence of doubtful character - Discovery of new evidence, when may be good ground for review of judgment—Civ. Pro. Code*, 1882, *s.* 623.—An application for a review of judgment cannot be granted merely on the ground of the discovery of new and important evidence, which could not be produced at the time when the decree was passed. The applicant has to show that, after the exercise of due diligence, such evidence could not be produced at that time. The new and important documentary evidence contemplated by s. 623, Civ. Pro. Code, 1882, is evidence which itself might have had effect upon the judgment, had it been produced in the suit, and not evidence, which it is very doubtful, would have had such effect, and which requires to be supplemented by oral evidence before such doubt can possibly be removed. BAKAR ALI KHAN v. ANJUMAN ARA BEGAM, **5 O.C. 59.**

(23)—*Review, application for—Grounds.*—It is not sufficient for an applicant for a review of judgment to prove that he was not aware of the existence of a document filed by the other party, but he must also show that he diligently made enquiries to ascertain its existence and found that it was not available. SEETANATH GHOSE v. SHAMA SOONDUREE DOSSIA, **14 W.R. 26.** [*F.*, 16 W.R. 7.]

(24)—*Question of general importance—Grant of review—Practice.*—Where a point sought to be raised in review had not been argued by either party, the Court may itself take up the point and give its opinion, where the question is not merely one between the parties, but is one of great general importance to the public. SULLEMAN HUSSAIN v. THE NEW ORIENTAL BANK CORPORATION, LIMITED, **15 B. 267.** [*Cons.*, 15 B. 376.]

(25)—*Point sprung upon litigant in lower Court — Application for review.*— Where a litigant asserts that a point has been sprung upon him in the lower appellate Court, his proper course is to apply to that Court for a review, because, the whole matter might be set right by an application to that Court, and the ground alleged, if established, would be a good ground for review. GANGA PERSHAD SAHU v. MAHARANI BIBI, **11 C. 379, P.C. = 12 I.A. 47 = 4 Sar. 621.** [*R.*, 3 C.L.J. 545, 33 C. 1323 = 10 C.W.N. 986.]

(26)—*Conflicting decisions—Review—Authority discovered since decision.*—An application for a review of judgment will not be allowed on the ground that the decision of a Division Bench of a High Court is at variance with the decision of another Division Bench of the same High Court. It is no ground for re-opening a case which has been fully argued, that the diligence of a pleader has discovered since the decision, an authority in his favour. NOBEEN KISHEN MOOKERJEE v. SHIB PERSHAD PATTUCK, **9 W.R. 161.**

(27)—*Effect of review after filing of appeal.*—In this case, a High Court passed a judgment on the 20th April, 1870; an appeal was filed thereon in May following. In August of the same year, the original judgment was reviewed by the High Court, and the judgment on review was transmitted to the Judicial Committee along with the records of the appeal. No appeal had been preferred against the judgment on review. Under the circumstances, the Privy Council recommended the confirmation of the original judgment without prejudice to the judgment on review. TOONDUN SINGH v. POKHNARAIN SINGH, **1 I.A. 342 = 3 Sar. 390 = 22 W.R. 199.**

(28)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 376—*Review of judgment by lower Court after filing of special appeal.*—Where a special appeal has been admitted against a judgment of the lower Court, the latter's admission of a review of that judgment would be without jurisdiction. LALLMUN v. MANICK CHUND, **1 Agra 133.**

(29)—*Review of order (rejecting application to admit special appeal).*—The Court declined, in the absence of some satisfactory explanation, to entertain an application for a review of an order rejecting an application to admit a special appeal. *In the matter of the petition of* BARMUTOLLAH, **10 B.L.R. 156, Note.**

(30)—*Special appeals—New rules—Right to review.*—The new rules which regulate the admission of special appeals do not and cannot take away an unsuccessful applicant's right to apply for a review. Such application may be made for the review of an order as well as of a decree. The application for review may be made without notice to the other side. JOY KOOMAR DUTTA JHA v. ESHAREE NUND DUTTA JHA. **10 B.L.R. 155 = 18 W.R. 475.** (17 W.R. 484, *F.*)

(31)—*Act* VIII *of* 1859, *ss.* 375, 376—*Review—Appeal.*—If a review of judgment be applied for in proper time, and before an appeal has

Review—continued.

—1.—**General**—*continued.*

been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of appeal, and he has full power, and is bound to proceed with the application for review. *Quaere*:—Whether a review can be admitted by a lower Court after an appeal has been preferred ?. BHARAT CHANDRA MAZUMDAR v. RAMGUNGA SEN, **B.L.R. Sup. Vol 362=5 W.R. 69.** [*Rel. on*, 12 C.W.N. 885=8 C.L.J. 2, Note; *Expl.*, 16 W.R. 112.]

(32)—*Appeal—Pendency of application for review.*—If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the number of days limited for appealing, but will be added thereto, and a memorandum of appeal presented within such extended period will be received as put in within time. *In the matter of the petition of* BROJENDER COOMAR ROY, **B.L.R. Sup. Vol. 728, F B.=7 W.R. 529.** [*F.*, 15 W R. 61, 22 W R. 79; *R.*, 8 B. 260, 30 C. 155=6 C W.N. 737, 3 C.L J. 545=33 C. 1323=10 C.W.N. 986; *D.*, 15 W R. 152.]

(33)—*Review—Order on review—Appeal.*—When a review is granted, the order on review is a fresh judgment and an appeal lies against such order. MASSUMAT PREM KOUR v. PUNJAB SINGH, **3 P.R. 1873.** [*R.*, 31 P.R. 1875.]

(34)—*High Court—Revision—Order refusing to grant review—Whether such order can be revised.*—The High Court has power to entertain a revision petition against an order refusing to grant a review. PERIA MADI v. THOMMAI VESUVADIA FERNANDEZ, **2 M.W.N. 1911=252=10 M.L.T. 283=12 Ind. Cas. 172.** (26 A. 572, *R.*)

(35)—*Civ. Pro. Code (Act X of 1877), s. 629—Second application for review, admissibility of, when fresh grounds are adduced*—The object of the last clause of s. 629, Civ. Pro. Code, which provides that "no application to review an order passed on review or an application for review shall be entertained" is merely to prevent the repetition of the same grounds for review in subsequent applications which had already been once fully considered and disposed of; the prohibition in the clause does not prevent the admission of a second review of the original order when some fresh ground is advanced in support of such an application, which the applicant was not in a position to adduce in a former application. JAI GOPAL v. JOWAHIR, **107 P R 1883.** (6 P.R. 1878, *R.*) [*F.*, 57 P.R. 1892; *R.*, 57 P.R. 1892.]

(36)—*Review of judgment—Error in granting review—Fresh evidence—Reversal of decree on technical ground—Error affecting merits.*—The Munsiff dismissed a suit. Afterwards he issued a rule calling upon the defendant to show cause why a review of judgment should not be granted. The defendant showed cause, but his objections were overruled; the review was granted, both plaintiff and defendant adduced new evidence, and a decree was given for the plaintiff. On appeal, the Subordinate Judge reversed the decision on the ground relied upon by the defendant, *viz*, that the plaintiff had not established that, with due diligence, he could not have brought forward in the original trial the evidence upon which the application for review was passed. *Held*, on special appeal, that the fact of the defendant having adduced fresh evidence in the Court below did not debar him from objecting before the Subordinate Judge that the review was wrongly granted because the order admitting it was final. The lower Appellate Court was not justified in reversing a decision of the Court of first instance for a technical error, unless that error has affected the decision of the case on the merits. PRAN NATH BHADOORY v. SREE KANT LAHOREE, **2 C.L.R. 257.**

(37)—*Jurisdiction—Review of judgment by Subordinate Court, pending appeal—Civ. Pro. Code, s. 623—Application of—Merger, of lower Court's decree in appellate decree.*—*Held*, that a Subordinate Court is competent to review its judgment, on an application put in before any appeal has been preferred, at any time after the appeal has been preferred, but before it is decided (*a*). "S. 623, Civ. Pro. Code, only applies to cases in which an appeal is pending when the application for review is made." (*b*) When once the appellate Court has decided the appeal, the only decree in existence is that of the Appellate Court, and the Subordinate Court is not competent to review its own decree, which, having merged, no longer exists. JAGAN NATH v. DEVI DAS, **25 P.R. 1904** (5 W.R. 59, F.B., 12 C.L.R. 64, *F.*; 7 W.R. 166, *Cit.*; 32 P.R. 1896, 59 P.R. 1900, *D.*; 59 P.R. 1900, *R.*)

(38)—*Appeal against decree passed on review—Jurisdiction of Court, admitting review—Review, application for—Civ. Pro. Code, O. 47, rr. 1 (2) and 7.*—*Held*, that a decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no jurisdiction to do so. UJAGAR v. RAM SAHAI, **14 O.C. 108.** (7 O.C. 299, *F.*; 27 M. 602, *R.*)

(39)—*Review of judgment—Application for review filed before filing of appeal, Jurisdiction of Court regarding—Procedure as regards application for review—Code of Civil Procedure, s. 623.*—S. 623 of the Code of Civil Procedure means that a person considering himself aggrieved by a decree or order cannot apply for a review of judgment, if either he himself has appealed or any other person has appealed on a ground common to the appellant himself or any other person has filed an appeal to which he has been made a respondent and in which he can, under s. 561 of the Code or otherwise, present to the appellate Court the case on which he

Review—continued.

——1.—General—*continued.*

wishes to apply for review. The respondent sued for possession of property detailed in a list attached to their plaint which consisted of two parts. The Subordinate Judge overlooked the second part of the list and passed a decree for possession of the property in the first part only. The title to all the property in the list was the same. On June 15th, 1900, the respondent applied for a review of judgment. On July 3rd, the appellant filed an appeal in the Court of the Judicial Commissioner. On April 25th, 1902, the appellant's appeal was dismissed, and on April 30th, 1903, his application for leave to appeal to His Majesty's Council was dismissed. The Subordinate Judge then took up the application for review and modified the decree so as to make it include the property in the second part of the respondent's list. *Held*, that the order of the Subordinate Judge was made with jurisdiction and was right. As a matter of practice, however, if, after an application for review has been filed, an appeal is filed on a ground common to the appellant and the applicant or an appeal is filed in which the applicant can file objections under s. 561, Civ. Pro. Code, the Court, to which the application is made, should decline to proceed with the application, until the appeal has been heard, and, when the applicant has been made a respondent and can obtain the relief which he requires by means of objections under s. 561, it should require him to file such objection. SARJU PERSHAD v. SHEO CHARAN LAL, **7 O.C. 299.**

(40)—*Appeal after review—Grounds of appeal not confined to grounds urged on review—Mortgagee's right to plead title of mortgagor when latter does not appear to defend it.*—One Tek Singh died leaving a widow. She gave his son-in-law, Charat Singh, possession of lands left by her husband. After the death of Charat Singh, Sujjan Singh had the lands entered in his name on the strength of his adoption by Charat Singh. A part of the land was mortgaged by Sujjan Singh for Rs. 1500. Samand Singh, a collateral of Tek Singh, brought a suit against Sujjan Singh and the mortgagees for the possession of land mortgaged claiming it as next heir after Charat Singh. Samand Singh having died during the pendency of the suit, his sons who were brought upon the record as plaintiffs, obtained a decree in their favour, which was passed *ex parte* as against Sujjan Singh. The appeal of the mortgagees was at first dismissed, but on review the Divisional Court made the decree for possession conditional on the payment to the mortgagees of Rs 700 by the plaintiff. On appeal to the Chief Court filed by the mortgagees, it was contended, on behalf of the plaintiffs-respondents, that (1) Sujjan Singh not having appealed, it was not open to the appellants, mortgagees, to urge that the respondents are not entitled to possession on payment of the full amount of the mortgage-money, and (2) that appeal would

Review—continued.

——1.—General—*continued.*

only lie on the grounds urged for review. *Held* that (1) the mortgagees are entitled to set up any defence which furthers their own case, and to plead that, at the time the mortgage was made, Sujjan Singh's title was good, and they can defend their title on that ground, whether Sujjan Singh for his own reasons fails to fight the case or not and that (2) grounds of appeal cannot be confined to the grounds urged on review. MANGAL SINGH v. GURDITTA, **10 P. L.R. 1900.**

(41)—*Review—Revision—Order rejecting an application for review of judgment—Final—Application of new or old Code of Civil Procedure—S. 629 of old Code and r. 7 of O.* XLVII *of new Code—S.* 70 (1) (*a*) *of Punjab Act*, XVIII *of* 1884.—*Held*, that under s. 629 of Act XLV of 1882, an order rejecting an application for review is final, which means that such an order is neither subject to appeal nor revision. (26 A. 572, 31 B. 381, *R.*) *Held*, also, that the use of the words "not appealable" in r. 7 of O. XLVII of the new Code (which no doubt differ from the word, "final" as used in s. 629 of the old Code) cannot help the petitioner, inasmuch as the application, presented before the new Code came into force, is governed by the old Code. SEWA DAT PERSHAD v. KARM CHAND, **35 P.W.R. 1911=10 Ind. Cas. 725.**

(42)—*Review—Order granting—No appeal against—O.* XLIII, *r.* 1 (*w*), *O* XLVII, *rr.* 4, 7 (*i*), *Civ. Pro. Code*, 1908—The District Munsif, following the Full Bench decision reported in 32 M. 1, decreed compensation for improvements according to the rates provided in the Marupat. But, on an application by the defendants after the date of the decision in 34 M. 61, he granted a review of his judgment on the strength of that decision. The plaintiffs appealed against the order granting review to the District Court which set aside the order. *Held* by the High Court, in revision, that no appeal lay against the Munsiff's order granting review and that the District Judge had no jurisdiction to entertain the appeal. (11 C.L. J. 161, *Rel.*) An order granting review can be appealed against only on one of several grounds mentioned in O. XLVII, r. 7 (i), Civ. Pro. Code, 1908. THOLAN v. KUNHIKUTTY, **24 M.L.J. 93.**

(43)—*S.* 629, *Civ. Pro. Code*, 1882 (=*O.* XLVII, *rr.* 7, 9, *present Code*)—*Judgment, Review of—Appeal from order granting review.*—An appeal does not lie from an order granting a review of judgment, except in the cases set forth in s. 629, Civ. Pro. Code, 1882. MAHABIR PRASAD v. NATHIN THAKUR, **1 C.W.N. 338.** (12 B. 171, *R.*)

(44)—*S.* 629, *Civ. Pro. Code*, 1882—*Order for review can be challenged, when?—Appeal.*—In general final appeal, an order for review cannot be challenged save upon the grounds stated

Review—continued.

——1.—General—*continued.*

in s. 629, Civ. Pro. Code. BARODA CHURN GHOSE v. GOBIND PROSAD TEWARY, **22 C. 984.** (22 C. 3 and 12 B. 171, *F.*) [*F.*, 24 C. 878 ; *R.*, 33 P R. 1902=24 P.L.R. 1902, 27 M. 602=14 M.L.J. 321.]

(45)—*Civ. Pro. Code*, 1882, *ss.* 588, 629—*Order granting review—No second appeal.*—S. 588 does not allow a second appeal against an order under s. 629, since such an order is not itself a decree. PAPAYYA v. CHELAMAYYA, **12 M. 125.** (11 C. 296, *F.*)

(46)—*Civ. Pro. Code*, 1882, s. 629—*Application for review of judgment, order passed on--Appeal.*--Where a lower appellate Court passes an order under s. 629 of the Civ. Pro. Code (1882), in an appeal preferred, not against the order allowing a review, but against the original decretal order itself, which the Court of first instance amended on the application for review, such order is appealable.—*Semble.*—S. 629 of Civ. Pro. Code (1882) *prima facie* applies to the Court which has passed the original decree, but it would be properly deemed to apply, according to its spirit, to an order by the appellate Court. BALANATHA v. BHIVA NATHA, **13 B. 496.**

(47)—*Review of judgment—Effect of order on review—Appeal from original decree.*— Where an application for review of judgment is granted, and an order passed thereupon, the original decree is superseded. *Held*, therefore, that, where the original decree was modified upon review by the Court which passed it and an appeal was filed from the original decree, and not from the order upon review, the appeal could not be heard, inasmuch as the decree under appeal had ceased to exist. BRIJBASI LAL v. SALIG RAM, **9 A. L. J. 183=34 A. 282=14 Ind Cas. 472.** (A.W.N. 1890, 144 and 28 A. 240, *F.*; 30 A. 479, *D.*)

(48)—*Order on review affirming previous judgment, not an order rejecting petition for review—Appeal.*—Plaintiff having obtained a decree in the Court of a Tahsildar, the defendant applied for revision. The Court, after hearing the applicant, issued notice to the opposite party fixing a day for the re-hearing of the suit and after hearing the parties affirmed its prior judgment. It was held (Melvill, J., *dissenting*) that the fact that the Court, on the ground that the applicant had not produced new evidence, affirmed its first judgment, and rejected the application, cannot constitute the order one merely rejecting the application as contemplated by s. 378 of Act VIII of 1859 After the admission of the review there must always be a re-hearing and a new judgment, whether the judgment be in accordance with or different from the original judgment, and from such judgment there would be an appeal. Ss. 378 and 380 must be read together and construed to mean that, if the Court find upon the application of a party that there is reasonable ground for holding its prior judgment to be erroneous, or for other good cause, that a review is necessary, it shall grant the application ; but that the opposite party by service of notice must have the opportunity of being heard in support of the prior decree. When notice has been served and the case comes on for re-hearing, the judgment of the Court, whether affirming, cancelling or modifying the former judgment, and whatever may be the form of words employed, is a new judgment, from which an appeal may be preferred. SOWAYA v. PIR BAKSH, **31 P. R. 1875.**

(49)—*Arbitration—Award—Review of judgment passed on award—Civ. Pro. Code, ss.* 522, 623—*Appeal, not review, excluded by s.* 522.—The wording of s. 522 of the new Civ. Pro. Code, 1877, is very different from that of the corresponding s. 325 of Act VIII of 1859, for, whereas the latter section expressly declared that a judgment given according to an award was to be final, the new law merely excludes an appeal, a provision which by no means excludes the admissibility of a review. Had the Legislature intended to prescribe any such exclusion, it may be naturally assumed that, in framing s. 623 and in making its terms applicable to decrees or orders from which no appeal was allowed by the Act, a provision to that effect would have been inserted. Construing the section according to the language employed in it, its provisions are as applicable to decrees passed in accordance with awards as to any other decrees from which no appeal is allowed by the Code. BUTA v. GUNI DAS, **111 P.R. 1881.**

(50)—*Act* XI *of* 1865, *s.* 21—*Review—Small Cause Court—Deposit—Instalment.*—A defendant in a Small Cause Court who applies for a review of judgment with the only object of obtaining an order for payment of the debt by instalments, need not deposit in Court the amount of the decree. MULCHAND JETHASHA v. KILKA VARDHVAN, **5 B.H.C.A.C. 70.** [*R.*, 2 N.L.R. 23.]

(51)—*Review of judgment—Small Causes Court --Provincial Small Causes Courts Act, s* 21--*Act* VIII *of* 1859, *s.* 376.—S. 21 of the Small Causes Courts Act precludes a Small Causes Court from entertaining a review of its own judgment under s. 376 of Act VIII of 1859. REFERRED CASE NO. 11 OF 1873, **7 M.H.C 225.**

(52)—*Act* XI *of* 1865, *s.* 21—*Deposit of decree amount—New trial - Review of judgment.*—The provisions of s. 21 of Act XI of 1865, regarding deposit upon application by a defendant for a new trial, do not extend to an application for review of the judgment of a Small Cause Court under s. 623 of the Civ. Pro. Code. PRESIDENT, MUNICIPAL COMMITTEE, DELHI v. SULLUR, **60 P.R. 1881.** (29 P.R. 1879, F.B., *R.*)

(53)—*Review granted after ninety days—No sufficient cause for delay shown.*—The Privy Council quashed an order granting a

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——1.—General—*continued.*

review and all subsequent proceedings taken thereunder, on the grounds that the review was applied for more than ninety days after the judgment, that the Judge granting the same had not shown that it was proved to his satisfaction that there was sufficient excuse for the delay in the presentation of the application, and that the granting of the review and all subsequent proceedings taken thereunder were erroneous and illegal. LUCHMAN SINGH v. SHUMSHERE SINGH, **2 I.A. 58=14 B.L.R. 373=3 Sar. 437.**

(54)—*Review of judgment—Delay.*—Where the presentation of a review petition is delayed, an order admitting the petition without stating that the Judge was satisfied that there was good reason for the delay in presenting the petition, could not stand. NOLITA MOHAN ROY CHOWDHRY v. DENONATH MOOKERJEE, **11 B L.R. 427, Note.**

(55)—*Appeal to Privy Council—Rule of* 1838 —*Review of judgment.*—An order rejecting an application to review a judgment passed on appeal is not an order made on appeal, from which an appeal lies to the Privy Council, under s. 39 of the Charter of the High Court. When an application to review is rejected by the High Court, the six months allowed for appeal to the Privy Council run from the date of the judgment and not from that of the order rejecting the review. SOUDAMINEE DOSSEE v. MAHARAJA DHEERAJ MOHOTAB CHAND BAHADUR, **B.L.R. Sup. Vol. 585=6 W.R. Mis. 102.** [*F.*, 30 C. 679; *Appr.*, 1 B.L.R. F.B. 1=10 W.R. F.B. 1; *R.*, 6 C. 22=6 C.L R. 575.]

(56)—*Act* VIII *of* 1859, *ss.* 363, 377, 378—*Review—Just and reasonable cause—Appeal—Full Bench Rulings.*—An appeal lies from the order of a lower Court deciding what is just and reasonable cause for admitting an application for review after the prescribed period of 90 days has elapsed; and an appellate Court has power to look at the reasonableness or sufficiency of the cause assigned for admitting such review. Ss. 377 and 378 of Act VIII of 1859 must be read separately; the words "whether for rejecting the application or granting the review shall be final," applying solely to the application under s. 378 and not to the application under s. 377; and the latter section relates only to the question of the time at which the Court is first asked to review its judgment. A new exposition of the law by the High Court is not a just and reasonable cause for not having applied for a review within the period of 90 days; but, when a review has been properly granted, the case should be governed by any new exposition of the law which may have been laid down since the date of the original decision. SHAMACHURN CHUCKERBUTTY v. BINDABUN CHUNDER ROY, **B.L.R. Sup. Vol. 892=9 W. R. 181.** [*Appr.*, 10 W.R. 26, 2 B.L.R.A.C. 184, Note=10 W.R. 178, 13 W.R. 120, 8 C. 700; *R.*, 11 W.R. 22, 56, 197, 430, 12 W.R. 94, 12 W.R. 154, 8 B.H.C.A.C. 44, 17 W.R. 163, 18 W.R. 286.]

(57)—*Appeal—Calculation of period allowed—Reasonable ground for enlarging time—Review.*—A petition of appeal is presented in time, if presented within the time limited for appealing, exclusive of the time during which the application for a review of judgment was pending. The petition of appeal should be presented immediately after the application for a review is rejected. NABBO KISSEN SINGH v KAMINEE DASEE, **B.L R Sup. Vol 349=2 W.R Mis. 35 =Bourke A.O.C. 38.** [*F.*, 15 W.R. 71; *R.*, 33 C. 1323=3 C.L.J. 545=10 C.W.N 986]

(58)—*Explanation for delay in presentation of, insufficient when based on new allegations first made in special appeal.*—As a reason for the Court's excusing the delay in the presentation of the application for review, in this case, the applicant alleged that soon after the decision to be reviewed, he was engaged in collecting instances of a special custom of adopting a daughter's son among the Brahmins of the country. Such a custom, however, was set up only as a new case on special appeal and had not been raised in the Courts below. The High Court held, under the circumstances, that no sufficient reason had been assigned on behalf of the petitioner for excusing his delay, that there was no reason to suppose that the best case that could be made for the plaintiffs had not been made in the Courts below, and that, unless upon very strong grounds and under very special circumstances, the Court would not generally permit a party to set up, during special appeal, any new case not set up for him in the Court of First Instance or of Primary Appeal. GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY, **6 B. 107.** [*R.*, L.B.R. 1893—1900, 518.]

(59)—*Application to sue as pauper—Review—Limitation.*—Where an application to sue as a pauper was rejected as barred by the Statute of Limitation, and an application for review of the order was granted, and the pauper plaintiff's suit was decreed, *held*, that the application for review not having been made within 90 days of the order to which it referred, and no just and reasonable cause having been shown for the delay, the application could not be entertained, and the Court's decision in the suit was without jurisdiction.—*Quære*:—When a Court refuses to allow a plaintiff to sue as a pauper, can an application for review of that order be entertained? MAHOMED GAZI CHOWDHRY v. SRIMATI DULLAB BIBI, **5 B. L R. 318, Note=11 W R. 22.** [*Diss.*, 5 B.L. R 316=13 W.R. 439; *R.*, 18 W.R. 286; *D.*, 5 B.L.R. 316.]

(60)—*Appeal—Dismissal for default—Review.*—Where an appeal was dismissed for default for non-appearance of the appellant, and no application to set aside the order was made

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——1.—General—*continued.*

within 30 days, the order became final, and was not open to review. FOUJOO SINGH v. MEHTAB SINGH, **100 P.R. 1867.** [*F.*, 92 P.R. 1868.]

(61)—*Jurisdiction—Appeals filed beyond time—Excuse for delay—Lower Court's discretion.*—The High Court is competent to look into the grounds given by a Judge for admitting an appeal after the period limited by the Civ. Pro. Code. *Held, re* a decision of the full Bench in 9 W.R. 181, to the effect that a new statement of the law by the High Court was not a sufficient excuse for the delay in applying for a review of a judgment, that it is still less an excuse for delay in appealing against a judgment. MOWRI BEWA v. SURENDRA NATH ROY, **2 B.L.R.A.C. 184, Note=10 W.R. 178** [*F.*, 10 B.H.C. 397, 8 C. 251; *Appr.*, 51 P.R. 1871; *R.*, 13 W.R. 120, 6 B. 304, 23 B. 513; *D.*, 2 B.L.R.A.C. 181.]

(62)—*Civ. Pro Code (Act* XIV *of* 1882), *s.* 623—*Review—Rules of the High Court, Appellate side—Decision on review application by a single Judge, when the judgment sought to be reviewed was pronounced by a Bench—Prayer in review not asked for by respondent by way of cross-appeal.*—Where the respondent to an appeal applied for a review of the Appellate Court, in respect of matters about which he did not appeal or file a memorandum of objections against the decree of the Court of first instance; *Held*, that, as the review asked for was a review of the judgment of the Court of Appeal, confirming the decree of the Court of first instance, nothing that was done or left undone while the matter was in the Court of Appeal can prevent a party from applying for a review of the judgment of the appellate Court, provided his application is made on any of the grounds mentioned in the Code. An application for review of a judgment passed by a Bench of two Judges of the High Court can be heard and finally decided only by a Bench of Judges, and not by a single member thereof, though it is competent for the latter to direct the application for review, *i.e.*, to direct that the judgment be reviewed ARAYALPURATH RANDU PURAYIL KUNHI MAYAN v. KAUTILAT CHEEKILADEN AHMAD KUTH HAJI, **2 Ind. Cas. 204.**

(63)—*Court fee Review, application for—Application presented on ninetieth day—Eighty-ninth day, holiday—Court Fees Act, s.* 14, *sch.* I, *arts.* 4 *and* 5—*Limitation Act* (1877), *s.* 5—*General Clauses Act* (X *of* 1897), *s.* 10—*General principle.*—An application for review of judgment presented on the ninetieth day, as the previous day was Sunday, should be stampted with a fee leviable on the plaint or memorandum of appeal. (9 C.L.R. 479, 9 M. 134, *R*; 6 W.R. 19, 12 W.R. 24, F.B., 4 B.L.R. 32, F.B., *Expl.*) To such cases under the Court Fees Act, s. 5 of the Limitation Act of 1877 has no application. S. 10 of the General Clauses Act being applicable only to Acts of the Governor General in Council and Regulations made on or after the 14th January, 1887, is inapplicable to such cases. The general principle that a party may be taken to have done an act within the prescribed time, if he has done it on the first day the Court is open after the expiry of the holidays within which the prescribed time terminated, is inapplicable in view of s. 14 of the Court Fees Act. SAYERA BIBI v. BHUTNATH HALDAR, **115 C.L.J. 505=15 Ind. Cas. 465.**

(64)—*Review of judgment—Court-fee.*—The stamp fee on an application for review of judgment must be calculated on the amount which would be obtained, if the review were granted, and not necessarily on the whole value of the suit. PROCEEDINGS, 16TH JANUARY, 1872, **7 M.H.C. App. 1.** [*Not F.*, 6 A.L.J. 215=31 A. 294=1 Ind. Cas. 209.]

Petition for review—Stamp-presentation—*See* 14 W.R.H.C. Rules, p. 11.

Unsuccessful wife not entitled to alimony pending appeal nor for period in which she is seeking review of judgment—*See* ACT XV OF 1865, s. 33, 17 B. 146.

See BEN. ACT I OF 1895, ss. 19, 32, 33, 30 C. 619=7 C.W.N. 433.

Special Judge—Power of—*See* BOM. ACT, XVII OF 1879, s. 53, 15 B. 650.

Of first Court's order—Contrary conclusion—Finding that party to suit is agriculturist—District Judge — Assistant Judge—*See* BOM. ACT XVII OF 1879, ss. 73, 74, 19 B. 113.

See BOM. ACT XVII OF 1879, s. 74, 19 B. 116, F.B.

Agency Rules, No. XXXI—Order of agent in execution—Decree—Appeal to High Court—*See* MAD. ACT XXIV OF 1839, 26 M. 266.

Sale for arrears of revenue — Dismissal of application to set aside sale—Review by Collector of his own order—Madras Revenue Recovery Act—*See* MAD. ACT II OF 1864, 6 M.L.T. 177=3 Ind. Cas. 463=33 M. 65=19 M.L.J. 725.

See PUN. ACT XVIII OF 1884, s. 70 (1) (*a*) (*b*), 170 P.L.R. 1903.

Second application for—Disagreement of the Civil and the Revenue Courts—Sufficient cause for delay within Limitation Act, s. 5—*See* PUN. ACT XVI OF 1887, ss. 77 (3) (*k*), 82, 9 P.R. 1905 (Rev.)=65 P.L.R. 1906.

Order granting review, when appeal is pending—*See* APPEAL—GENERAL, 27 M. 602.

Court acting as arbitrator by consent of parties—Decree—Review—Remand—Appeal—*See* APPEAL—GENERAL, 9 Ind. Cas. 296.

Order on application for—when appeal lies from—*See* APPEAL—ORDERS, 12 B. 171.

Order granting review of judgment, appeal from—*See* APPEAL—ORDERS, 22 C. 3, 24 C. 878.

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Appeal against an order admitting review—Maintainability of review—*See* APPEAL—ORDERS, 12 O C. 151=2 Ind. Cas. 834.

See APPEAL—ORDERS, 18 A. 44=A.W.N. 1895, 151.

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 2 B.L.R. A.C. 264=11 W R. 145.

Agreement to be bound by Court's decision on local inspection—Award — Review — *See* ARBITRATION—GENERAL, 38 C. 421.

See CIV.PRO. CODE, 1859, ss. 119, 148, 158, 6 M.H.C. 262.

Of judgment—Limitation—*See* CIV. PRO. CODE, 1859, s. 377, 2 A. 287.

Insolvency proceeding—Setting aside of ex parte order—*See* CIV. PRO. CODE, 1882, ss. 103, 350, 623, 7 C.L.J. 268.

See CIV. PRO. CODE, 1908, s. 47, 101 P.L.R. 1901=63 P.R. 1901.

Order passed on review of previous order in execution proceedings—Appeal—*See* CIV. PRO. CODE, 1908, s. 47, O. XLVII, rr. 7, 9, 5 Ind. Cas. 483.

Power of lower Court to review its wrong order—Civ. Pro. Code, s. 622—Interference by the High Court—*See* CIV. PRO. CODE, 1908, s. 115, 31 M. 414=5 M.L.T. 221.

See CIV. PRO. CODE, 1908, s. 115, 17 B. 514.

Order rejecting application for—Revision—*See* CIV. PRO. CODE, 1908, s. 115, O XLI, rr. 7, 9, 26 A. 572.

Order rejecting application for—Revision—*See* CIV. PRO CODE, 1908, s. 115, O. XLVII, rr. 7, 9, 1 A.L.J. 298=A.W.N. 1904, 130=26 A. 572.

The ground for amending a decree on review must be something which existed at the date of the decree—*See* CIV. PRO CODE, 1908, ss. 115, 114, O. XLVII, r. 1, 4 M.L.T. 86.

See CIV. PRO CODE, 1908, ss. 115, 114, O. XLVII, rr. 1, 7, 9, 21 A. 152=A.W N, 1899, 1.

Appeal dismissed for default—Application to restore the appeal also dismissed for default—Second application for the same purpose—Appeal—*See* CIV. PRO. CODE, 1908, ss. 115, 141, 104, O. XLIII, r. 1, 7 P.L.R. 1900.

Court overlooking an important plea—Review—*See* CIV. PRO. CODE, 1908, s. 151, 26 P.L.R. 1911=9 Ind. Cas. 545.

See CIV. PRO. CODE, 1908, s. 152, O. XX, r. 6, 22 M. 364.

See CIV. PRO. CODE, 1908, O. IX, rr. 2, 3, O. XV, r. 4, A.W.N. 1883, 171.

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Of judgment — Whether available, when other remedies open—*See* CIV. PRO. CODE, 1908, O. IX, rr. 3, 4, s. 114, O. XLVII, rr. 1, 2, 33 P.R. 1909=44 P.L.R. 1909=31 P.W.R. 1909=1 Ind. Cas. 900.

Application for—Of judgment without prior application to set aside dismissal order—*See* CIV. PRO. CODE, 1908, O. IX, r. 8, s. 114, O. XLVII, r. 1, 26 C. 598.

Application for—Of an *ex parte* order by the legal representatives of a deceased party, maintainability of—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, s. 114, O. XLVII, rr. 1, 7 and 9, 9 O.C. 35.

See CIV. PRO. CODE, 1908, O. IX, r. 13, O. XVII, r. 2, 35 C. 1023.

Setting aside *ex parte* decree—Review of judgment—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, O. XLVII, r. 1, 12 Bom. L.R. 886=8 Ind. Cas. 616.

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Application to restore appeal made after expiry of thirty days—Application treated as—*See* CIV. PRO. CODE, 1908. O. XVII, r. 3, O XLI, r. 19, s. 114, O. XLVII, r. 1, 7 P.L.R. 1910=6 Ind. Cas. 482=124 P.W.R. 1910.

Omission to decree partition—Correction of judgment—Review—*See* CIV. PRO. CODE, 1908, O. XX, r. 3, A.W.N. 1881, 57.

Not necessary when wrong words inadvertently used in judgment in describing property in suit—Corrections may be made on application under s. 202 of Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. XX, r. 3, O. XLVII, r. 1, s. 114, 40 P.L.R. 1908=49 P.W.R. 1908.

Review of judgment—Application to bring decree into conformity with judgment—*See* CIV. PRO CODE, 1908, O. XX, r. 6, ss. 152, 114, O. XLVII, r. 1, A.W.N. 1893, 123.

Application for—on the ground of fraud of a decree against a minor on compromise by guardian, maintainability of—*See* CIV. PRO. CODE, 1908, O. XXXII, r. 7, s. 114, O. XLVII, rr. 1, 2, 3 C.L.J. 119.

See CIV. PRO. CODE, 1908, O. XLI, r. 4, s. 114, O. XLVII, r. 1, 86 P.L.R. 1904=47 P. R. 1904.

A Court has no jurisdiction for reviewing its own decree, after dismissal of appeal therefrom—*See* CIV. PRO. CODE, 1908, O. XLI, r. 11, s. 114, O. XLVII, r. 1, 4 C.L.J. 566.

Refusal of power of appellate Court—*See* CIV PRO. CODE, 1908, O. XLI, r. 27, 9 Bom L. R. 671=11 C.W.N. 721=6 C.L J. 5=4 A.L.J. 461=31 B. 381.

Order of appellate Court directing additional evidence to be taken before itself—Subsequent

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order sending back case to Munsiff for taking evidence—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 27, 28, s. 99, O. XLIII, r. 2, s. 108, O. XLVII, rr. 7 and 9, A.W.N. 1887, 145.

Order granting review—Appeal when lies—Power to interfere with such order on revision—*See* CIV. PRO. CODE, 1908, O. XLIII, r. 1 (*n*), O. XLVII, r. 7 (*a*) and (*b*), s. 115 (*c*), 49 P.W. R. 1911.

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Dismissal of suit—Neither party responsible for—Appeal and review, costs of—*See* COSTS —SPECIAL CASES, A.W.N. 1881, 9.

By a Chamber Judge, of Taxing Master's decision—*See* COSTS—TAXATION OF COSTS, 9 Bom. L.R 983=32 B. 262.

Application for—Court-fees payable on—*See* COURT FEES ACT, 1870, s. 7, sch. I, arts. 4, 5, 4 B. 26.

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Application for review affecting only portion of decree—Court fee—*See* COURT FEES ACT, 1870, sch. I, s. 5, arts. 4, 5, 6 A.L.J. 215= 31 A. 294=1 Ind. Cas. 209.

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Review of judgment—Suit in *forma pauperis* —Non-liability to Court-fee—*See* COURT FEES ACT, sch. I, arts. 4 and 5, 20 A. 410.

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Decree admitted to be fully satisfied — Mistake—Review—*See* EXECUTION OF DECREE—MISCELLANEOUS, 5 Ind. Cas. 148.

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Difference of opinion between Judges in—Ground for appeal—*See* LETTERS PATENT, HIGH COURT, 1865—CALCUTTA, s. 15, 10 C. 108=13 C.L.R. 285.

Refusal by a single Judge of High Court to review appeal judgment of Divisional Bench, whether appealable—*See* LETTERS PATENT, HIGH COURT, 1865—CALCUTTA, s. 15, 9 C. W.N. 502.

See LETTERS PATENT, HIGH COURT, 1865 —MADRAS, s. 15, 9 M. 253.

See LETTERS PATENT, HIGH COURT, 1865 —N.W.P., s. 27, 11 A. 176=A.W.N. 1889, 27.

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Whether presentation of an application for—Is a 'sufficient cause' for delay in presenting an appeal—*See* LIMITATION ACT, 1908, ss 4 & 5, 3 C.L.J. 545=10 C.W.N. 986=33 C. 1323.

When application for, is *bona fide*—Whether sufficient cause for not appealing within time —*See* LIMITATION ACT, 1908, ss. 4, 5, 10 C.L. J. 39=2 Ind Cas. 961.

Appeal—Exclusion of time taken up with—*See* LIMITATION ACT, 1908, ss. 4, 5, 15 C. 242.

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Rejection of review application—Subsequent delay in filing petition for revision—Effect—*See* LIMITATION ACT, 1908, s. 5, 140 P.L.R. 1911=10 Ind. Cas. 129.

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Time occupied by—Exclusion of—*See* LIMITATION ACT, 1908, s. 14, 30 C. 532=7 C.W.N. 550.

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Judgment not providing for costs of preparation of decree in partition suit—Application to the Court for such costs, nature of—Application for amendment of decree, nature of—*See* LIMITATION ACT, 1908, ART. 182—GENERAL, 10 C.L.J. 467= 3 Ind. Cas. 391.

Jurisdiction of Court to—Its own order when an appeal can be laid—*See* LIMITATION ACT, 1908, ART. 182—APPLICATION IN ACCORDANCE WITH LAW, 1 M.L.T. 113=28 M. 396.

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See PROVINCIAL SMALL CAUSE COURTS ACT, 1865, s. 21, 6 B.L.R. 390-N.

Review—continued.

——**1.—General**—*concluded.*

Application for—S. 25, Act IX of 1887—Powers of High Court—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, 5 M.L.T. 73=19 M.L.J. 56=2 Ind. Cas. 488.

See RECEIVER, 21 B. 328.

Review of order on review—Second review — Whether allowed—*See* RES JUDICATA—GENERAL, 25 P.W.R. 1911.

Review of consent decree refused—Fresh suit, if lies—*Res judicata*—*See* RES JUDICATA—ADJUDICATIONS, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129.

Decree passed on compromise entered into by pleader—Application for review of compromise-decree on the ground that pleader had no authority to compromise—Rejection of application—Fresh suit to set aside compromise-decree, whether maintainable—*See* RES JUDICATA—MISCELLANEOUS, 10 C.W.N. 529=2 C.L.J, 508.

See RES JUDICATA—RELIEF NOT GRANTED, 4 B.H.C.A.C. 81.

Point not raised in the lower Court even in an application for a review, whether can be raised in revision—*See* REVISION—GENERAL, 8 M.L.T. 85.

See REVISION—GENERAL, 45 P.L.R. 1901 =54 P.R. 1901.

District Judge can, under s, 73, Village Courts Act, 1892, review Village Munsiff's decree—*See* SANCTION TO PROSECUTE, 6 A.L. J. 796=6 M.L.T. 98=10 Cr. L.J. 437=3 Ind. Cas. 966.

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION OF—PRACTICE AND PROCEDURE OF, 13 M. 178, F.B., 8 C. 287=10 C.L. R. 275.

Order setting aside order granting review Second appeal from—*See* SPECIAL OR SECOND APPEAL—APPEAL AGAINST ORDERS WHEN LIE AND WHEN NOT, 24 C. 319.

Review petition allowed to be presented to the lower appellate Court when it is discovered on second appeal that there is fresh evidence—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE, 5 Bom. L.R. 615=28 B. 4.

See SPECIFIC RELIEF ACT, 1877, s. 9, 4 M. 217.

Review when lies—*See* SUCCESSION CERTIFICATE ACT, 1860, ss. 5, 6, 1 A. 287.

See SUPERINTENDENCE OF HIGH COURT, 2 B.L.R.A.C. 181=11 W.R. 56, 5 B.L.R. 316=13 W.R. 439.

For costs—Court-fees on value of whole suit, necessity for—*See* VALUATION OF SUITS, C.W.N. 292.

Review—continued.

——2 —**Grounds for Review.**

(1)—*General principles—Decree, setting aside of, can be only by application for review or by suit*—There are only two courses provided by the Civ. Pro. Code, for the setting aside of a decree; and they are (1) a review under s. 623, Civ. Pro. Code, 1882; or (2) a separate suit under s. 11. MIRALI RAHIMBHOY v. REHMOOBHOY HABIBHOY, **15 B. 594.** [*R.*, 19 B. 571, 3 C.L.J. 119, 37 P.R. 1903, 13 C.W.N. 1197=10 C.L.J. 420=2 Ind. Cas. 129.]

(2)—*Review when can be granted—Old points and new points.*—As to granting a review, all that the Court has to consider is, whether it is necessary to correct any evident error, or is otherwise requisite for the ends of justice; and a review may be granted on points already discussed and decided at the original hearing of the case, as well as on new points. KALU *bin* BHIWAJI v. VISHRAM MAHWAJI, **1 B. 543.** (6 B.L.R. 126, *F.*)

(3)—*Review—Nature of the remedy.*—It is only where a party is affected and bound by the order reviewed against, and when he has a right to be heard in the matter, that he can apply for review, but not otherwise. SIRDAR ROY v. RAMESWAR SINGH, **15 C. 166.**

(4)—*Civ. Pro. Code*, 1882, *s.* 623—*Review of judgment—"Any other sufficient reason."*—This section gives a much more extended power of review than that existing in England. The words "or for any other sufficient reason" mean that the reason must be one sufficient to the Court or to the Judge before whom application for review is made, and are not limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases "any other sufficient reason" may depend on a question of law, or upon a question of fact, or upon a mixed question of law and fact. AMIR HASSAN v. AHMAD ALI, **9 A. 36** (3 I.A. 221, *R.*) [*R.*, U.B.R. 1892—1896, Vol. II, 153, 11 C.P.L.R. 41.]

(5)—*Civ. Pro. Code*, 1882, *s.* 623—*"Any other sufficient reason"—Omission to give notice—Application for review—Notice to show cause—Right to begin.*—Where a notice of reference to a Full Bench was not given to the respondent, and, in consequence, the respondent was absent at the hearing, a review of the Full Bench was granted, on the ground that the absence of the respondent at the hearing came within the words "any other sufficient reason," in the section. The party opposing an application for review of judgment has the right to begin, where a notice to show cause why the application should not be granted has been issued to him. GHANSHAM SINGH v. LAL SINGH, **9 A. 61, F B.**

(6)—*Review of judgment, on application made within 90 days—Appeal.*—A Court has the power, for any reasons that it may consider good and sufficient to grant a review; and if the application is made within 90 days, the Court's estimate of those reasons cannot be interfered with by an appellate Court. The procedure does not change merely because there is a change (during the 90 days) of office incumbents. MUSSAMUT MONTOORA v. ABLAK ROY, **11 W.R. 197.** (9 W.R. 181, F.B., 10 W.R. 42, *D.*) [*R.*, 8 B.H.C. 44.]

Review—continued.

——2.—**Grounds for Review**—*continued.*

(7)—*Review of judgment—Time—Further investigation—Grounds—Time for obtaining copies.*—An application for a review of judgment, if presented out of time, can be admitted only when there is special and sufficient cause for the delay. Nor can it be admitted merely for the purpose of having a further investigation in the absence of anything to show that the further evidence sought to be adduced, might not have been produced at the original trial. The time for obtaining copies of judgment should not be allowed in applications for review. JHUBHOO SAHOO v. MUSSAMUT JUSODA KOOER, **17 W.R. 230.**

(8)—*Application for review of judgment—Want of jurisdiction not pleaded in lower Courts, whether could be admitted by Chief Court as a good ground for review.*—This was a suit on the part of a reversioner to set aside a mortgage by a widow. In the lower Courts, no plea of want of jurisdiction was advanced by either party, but after the plaintiff's appeal to the Chief Court had been dismissed by a Judge in Chambers, the plaintiff, for the first time, in an application for review of judgment, urged the ground that the first Court had no jurisdiction to try the suit. *Held*, without deciding whether the plea advanced was correct or otherwise, that it was not one to be admitted at the stage of second appeal, especially having come as it did from the plaintiff himself. MARATIB KHAN v. MUSST. MOUJO, **94 P.R. 1882.**

(9)—*Reviews when grantable—Fresh evidence—Act* VII *of* 1859, *s.* 355.—Where the lower appellate Court admitted a review with the object of taking into consideration a material issue which it had omitted to consider at the trial: *Held* that, having admitted the review on grounds independent of fresh evidence, it was competent for the Court, under s. 355, Act VIII of 1859, to admit fresh evidence, if required, to enable it to pronounce a satisfactory judgment, or for any substantial cause. BIHARI LAL NANDI v. SRIMATI TRAILAKHOMAYI BARMANI, **3 B.L.R. A.C. 346=12 W.R. 223.** (3 B.L.R. A.C. 210, *App.*; 11 M.I.A. 345, 1 W.R. 228, 378, *R.*) [*R.*, 12 W.R. 461, 11 C. 139.]

(10)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 376—*Dismissal of suit and special appeal—Discovery of new evidence thereafter—Application for review of judgment—Court to which application to be made.*—Where, after the dismissal of a suit for want of evidence and the confirmation thereof in special appeal, the wanting evidence was discovered, the plaintiff could not apply to the High Court for a declaration that the Court of first instance was at liberty to take into

Review—continued.

——2.—**Grounds for Review**—*continued.*

consideration the fresh evidence. If, under s. 376 of Act VIII of 1859, the plaintiff was entitled to obtain a review of judgment, the proper Court to apply to was the Court in which the suit was brought. *Ex parte* BASHIYAGARULU NAYADU, **1 M.H C. 254.** [*F.*, 6 B. H.C.A.C. 68; *Appr.*, 18 M. 480; *R.*, 9 W.R. 301.]

(11)—*Act* VIII *of* 1859, *ss.* 376 & 378.—If an important document, filed with the plaint and affecting the merits of the case, is not taken issue upon and is ignored by the Judge, a review under Civ. Pro. Code, 1859, ss. 376 and 378 may be granted. MAHADEVA RAYAR v. SAPPANI, **1 M. 396.**

(12)—*Application for review—New evidence —Admissibility.*—Documents which were available to a certain person and which he might with diligence, have obtained and filed at the time of trial, cannot be admitted in evidence on his application for review of judgment. BROJENDRO COOMAR ROY CHOWDHRY v. MR. J.P. WISE, **19 W.R. 130.**

(13)—*Review—Grounds.*—In applying for a review, it is not sufficient for the applicant to make an affidavit that he was not aware of the existence of a document filed by the other party; the law requires that he also showed due diligence and made inquiries to ascertain its existence, and found that it was not available. SITA NATH GHOSE v. SHAMA SUNDARI DASI, **8 B.L.R. App. 37 Note=14 W.R. 26.** [*F.*, 8 B.L.R. App. 34=16 W.R. 7.]

(14)—*Review—New evidence—Applicant to have no previous knowledge of existence.*—Where a review is applied for on the ground of the discovery of new evidence, the applicant must satisfy the Court that the evidence tendered was not within the knowledge of the applicant, or could not be adduced by him at the time when the decree was passed and that it is *prima facie* evidence in the case. RAMDHAN CHUCKERBUTTY v. JAINARAYAN PANJA, **8 B. L R. App. 36, Note=12 W.R. 536.** [*F.*, 8 B. L.R. App. 34=16 W.R. 7.]

(15) — *Proof that evidence was not before available.*—Before a review can be granted upon the ground of the discovery of new matter, it must be stated in the petition and proved that the new matter was not within the applicant's knowledge, or could not be adduced at the time when the decree was passed. DWARAKANATH CHOWDHRY v. KISHENLALL CHOWDHRY, **Marsh 553=2 Hay 650.**

(16)—*Nature of evidence—Civ. Pro. Code,* 1859, *s.* 376.—The new evidence referred to in s. 376, Act VIII of 1859, is evidence that would probably alter the decision of the Court. The affidavit on which an application for review is grounded must state what the new evidence to be relied on is: in such an affidavit, no reliance can be placed on a statement of belief of good defence on the merits, but the facts to be relied

Review—continued.

——2.—**Grounds for Review**—*continued.*

on as such must be set out. DHUNSOK DASS v. HURRY BABOO, **Bourke O. C. 115.**

(17)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 376 —*Review—Evidence not available—Legality of admission of review — Special appeal — Rent suit for sum below hundred rupees—No adjudication—Ben. Act* VIII *of* 1869, *s.* 102.—*Suit for rent.*—During the pendency of the suit, the plaintiff applied to the Court for a postponement of the case, on the ground that the copy of certain Jumabundee papers for which he had applied to the Collector had not been obtained. The Court, having refused the application, gave a modified decree. Plaintiff obtained a review of judgment after he got the copy and a decree was passed in full. The District Judge, on appeal, holding that the review had been wrongly admitted, inasmuch as the application for adjournment did not mention that the plaintiff was previously unacquainted with the fact of the existence of such document, reversed the review decree and confirmed the original decree. *Held* that, under s. 376 of Act VIII of 1859 a party, who discovered new matter or evidence which was not within his knowledge or could not be adduced by him at the time when such decree was passed, could apply for a review of judgment. In the present case, the plaintiff did not apply on the ground of having discovered new matter or evidence which was not within his knowledge, but on the ground that he knew of the existence of the new matter or evidence, that he applied for a copy of it, that the Collector did not furnish him with a copy in time to file it. Therefore, under s. 376 of the Code, the review was properly admitted. In the above case, a special appeal lay to the High Court, though the sum claimed was less than Rs. 100, as the District Judge had not come to any determination at all on the erroneous supposition that the review was improperly admitted. GOOR DYAL ROY v. DEKA NOONYA, **22 W R. 446.**

(18)—*Ground other than error of law or discovery of new evidence.—Order under Registration Act,* 1871 — Under the Civ. Pro. Code of 1859, it was competent for a Judge to entertain an application for review on grounds other than error of law or of discovery of new evidence. *N B.*—In this case the Officer admitting the review was different from the one who passed the order sought to be reviewed. An order rejecting an application for registration, under s. 76 of Act VIII of 1871, was one in the nature of a "decree" so as to admit of a review. *In the matter of the petition of* HADJEE ABDOOLLAH, **2 C. 131, P. C.=3 I.A. 221=26 W R 50=3 Sar. 221.** [*Disc.*, 6 C. 236=6 C.L.R. 549, 2 M. 10; *Appr.*, 10 M.L.J. 134; *D*, 15 C. 166; *R.*, 9 A. 36.]

(19)—*Review of judgment—New document—Discretion.* — A review of judgment on the strength of a new document not produced at the first hearing, can be allowed even though the applicant fails to satisfy the Court upon legal

Review—continued.

——2.—**Grounds for Review**—*continued.*

evidence that the existence of that document was not known to him then, especially when there were several other grounds for admitting such review. HURO GOBIND PAL v. HURO SOONDAREE CHOWDHRAIN, **18 W.R. 316.**

(20)—*Permission to withdraw second appeal—Review on new evidence discovered-Civ Pro. Code (Act X of 1877), s. 623*—The last paragraph of s. 623 of the Civ. Pro. Code, indicates that it is the pendency of an appeal preferred by the party and nothing else, which stands in the way of his application for review. It is however just and reasonable and in accordance with practice that a party who has discovered fresh evidence, soon after he has presented his second appeal, should be allowed by the High Court to withdraw such appeal, so that he may apply for a review to the lower Court which alone could consider his new evidence. PANDU v. DEVJI, **7 B 287.** [*R.* 30 B. 625=8 Bom L.R. 842; *D.*, 18 M. 480.]

(21)—*Judgment of Chief Court on second appeal—Subsequent discovery of new evidence by respondent—Application for review—Civ. Pro. Code, Act X of 1877, s. 623.*—Under s 623 of Act X of 1877, a review can be granted of a judgment passed upon a second appeal, on the ground that the respondent has discovered new and important evidence since the decision of the appeal, his inability to produce such evidence before not arising from any want of due diligence on his part. Neither the terms of s. 623 nor any provision in Ch. XLII of the Code precluded the Court from granting an application by a respondent for review of the decree passed on second appeal based on the ground of discovery of new evidence. In the case of respondent in second appeal, the question does not arise on his application for review of the judgment passed by the Court of second appeal, which would arise if a similar application were made by the appellant, *viz.*, whether the grounds stated in the application would be admissible as grounds of appeal under s. 584 of the Code. The appellant who is dissatisfied with the decree of the lower appellate Court would only ask for the interference of the Court of second appeal on those grounds; he can only urge them on the Court which passed the decree by applying to it for review of judgment. A respondent who has got a decree in his favour, in the lower appellate Court, could not apply to that Court for review of judgment as he could not say that he considers himself aggrieved by the decree. If the existence of the new and important evidence which would have supported the decree of the lower appellate Court was unknown to the respondent at the hearing of the second appeal notwithstanding exercise of due diligence by him, and has become known to him only after the decree of the lower appellate Court has been reversed, the decree by which he is aggrieved is that passed by the second appellate Court, and his only means of getting such evidence heard is to apply to that Court for review under s. 623.

Review—continued.

——2.—**Grounds for Review**—*continued.*

LALA MAL v. GULAM MUHAMMAD, **145 P.R. 1882, F B.**

(22)—*Civ. Pro. Code*, 1882, s. 623—*Review—Discovery of fresh evidence—Power of High Court to review its judgment in second appeal.*—*Per Subramania Aiyar, J.*—It is open to the High Court to entertain an application for review in a second appeal on the ground of discovery of fresh documentary evidence, even if it were otherwise, where the order granting the review is granted after notice to the other party, the order cannot be said to be *ultra vires* and is binding on the party against whom it is passed.—*Per Davies, J.*—The High Court cannot entertain an application for review of its judgment in second appeal on the ground of discovery of new and important evidence GULAM MAHADE v. RAMAKRISHNA MUDALIAR, **10 M L J 134.**

(23)—*Special Appeal—Discovery of new matter—Review—Practice—Withdrawal of special appeal—Review by lower Court.*—The High Court, when sitting in special appeal, has not ordinarily any power to determine questions of fact. Where the Court is asked, on review of its decree made in special appeal, to set aside that decree on the discovery of new evidence, it could not make use of that new evidence, for the purpose of altering any of the findings on questions of fact by the District Court. Nor would the discovery of new evidence subsequently to the making of the decree of the District Court be any ground of special appeal, although it might be a good ground for an application to the District Court for a review of its decree, provided no special appeal shall have been admitted by the High Court. Where the new evidence, on which the review is sought is evidence of facts which might affect the jurisdiction of the Court in special appeal, such a case would be peculiar and possibly might constitute an exception to the general rule which we have now laid down. *Quære*:—Whether the Court ought, in such a case, to review the decision made in a special appeal? Pleaders should be careful to advise their clients not to prefer special appeals where the proper remedy is an application to the District Court for a review of its judgment. When new evidence is discovered, the proper course for the appellant to adopt is to ask leave to withdraw his special appeal, and to apply to the lower Court for a review of its judgment. NANABHAI VALLABHDASS v. NATHABHAI HARIBHAI, **9 B H C. 89.** [*F.*, 9 B.H.C. 238, 7 B. 287; *R.*, 28 B. 4=5 Bom. L.R. 615, 30 B. 625=8 Bom. L.R. 842.]

(24)—*Special appeal—Discovery of fresh evidence after admission—Proper procedure—Review.*—Where fresh evidence is discovered since the admission of a special appeal, the proper course is to dismiss the special appeal, in order to enable the special appellant to apply for a review of the lower appellate Court's judgment. PANDURANG SADASHIV v. MORO VASUDEV, **6 B.H.C.A.C. 68.** [*Diss.*, 9 B.H.C. 89.]

Review—continued.

——2.—**Grounds for Review**—*continued.*

(25)—*Civ. Pro. Code (Act* VIII *of* 1859), *s.* 335—*Additional evidence, admission of, in appeal —Discretion of Court—Review.*—Under s. 335, Act VIII of 1859, an appellant is not entitled to produce additional evidence, but the appellate Court may, if it thinks fit, admit it. The proper course for the appellant, where his application for the admission of additional evidence is rejected, is not to prefer a special appeal to the Judge, but to apply to him for a review of his order. RAM LALL v. RUNG LALL, **17 W.R. 47.**

(26)—*Admission of review—Grounds—Error —Additional evidence.*—An error by a Judge as to the subject of a certain dagh in a Government Halabadee chitta, is sufficient to justify him in entertaining a review. *Held* further that, at the time of review, the applicant may produce additional evidence which was not originally necessary to prove his claim. GUNESH RAM SURMAH v. ROHINEE DOSSEE, **14 W.R. 236.**

(27)—*Review of judgment—Error on point of law, whether sufficient ground.*—An error on a point of law is a sufficient ground for review of judgment. KOH POH v. MOUNG TAY, **10 W. R. 143.**

(28)—*Second appeal—Review of judgment in second appeal—Error of law—Erroneous finding of fact—Jurisdiction— Buddhist Law—Husband and wife—Husband or wife dealing singly with joint property - Presumption* —A review in second appeal might be granted if there is an error of law on the face of the judgment, or, where the decision of the Court has proceeded upon a mistaken view of the law. (14 C 627, *F.*) A review should not be granted for the purpose of allowing the parties to re-argue the case upon the evidence upon the chance of throwing doubt over the decision already passed. (24 W.R. 186, 25 W.R. 324, *F.*) A Court of second appeal has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross and inexcusable the error may seem to be, where there is no error or defect in the procedure. The finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. (18 C. 23, *F.*) Where the parties, a Buddhist husband and wife, begin by acting jointly with respect to the property owned jointly by both, it is a question of fact as to whether the wife or husband was a consenting party when dealing singly with the same property hereafter. In cases where they are still living together, the presumption would be that one was acting as agent for the other. The presumption is, therefore, that the wife consents to the acts of her husband as long as the marriage continues, but this presumption may be rebutted. R M M.S. SOOBRAHMONIAN CHETTY v MA HNIN YE, **L B.R. 1893—1900, 568** [*R.*, 1 L B.R. 11, 3 L.B.R. 66, L.B.R. 1893—1900, 575; *D.*, 2 L.B.R. 324.]

Review—continued.

——2.—**Grounds for Review**—*continued.*

(29)—*Act* X *of* 1877, *s.* 623—*Error in law in judgment whether sufficient reason for review—Erroneous grant of review—Appellate Court if competent to reverse decree passed on review—Error not affecting merits of case or jurisdiction of Court.*—It cannot be laid down, as a matter of law, that an application for review made upon the ground of error in law in the judgment to be reversed, is not based upon a sufficient reason for review within the meaning of s 623 of the Civ. Pro. Code, so as to justify a reversal of the final order passed upon review. Even if it be conceded that the proper procedure in order to correct a positive error in law is by way of appeal rather than review, and that an order admitting a review for this purpose, is for the above reason erroneous, still as it is an error not affecting the merits of the case or the jurisdiction of the Court, it is contrary, to the express prohibition in s. 578 of the Code, for an appellate Court to reverse the decree subsequently passed merely on the ground that the application for review ought not to have been granted. HIRA v. MUSSAMMAT MALO, **128 P.R. 1881.**

(30)—*Civ. Pro. Code*, 1882, *s.* 623—*Review on ground of error in law—Maintainability.*—The Court has jurisdiction to entertain an application for review of judgment on the ground that the judgment was wrong in law. MUTHUSAMI PILLAI v. SRINIVASIER, **12 M. L.J. 194.**

(31)—*Review—Evident error or omission—Special appeal—Grant of review—New evidence —Mode of hearing.*—If the Court to which an application for a review of judgment is made be of opinion that the review desired is necessary to correct an evident error or omission, or requisite for the ends of justice, and if there be matter before it upon which it may come to that opinion, an order admitting the application cannot be the subject of special appeal In the trial of a case after it has been re-opened by the admission of an application for review, the Court can admit evidence which has come to the knowledge or within the reach of the applicant since the first hearing. It is not necessary that the new evidence so admitted must be sufficient *per se* to show that the previous decision is wrong or such as to cause overpowering balance of evidence. The Court should consider the case with the new evidence in the same way as the case would have had to be considered before, *i.e.*, the case is to be heard as if it were being originally heard with the material then before the Court. SAHABJAN BIBEE v. SYUD SUFDAR ALI, **22 W.R. 258.**

(32)—*Judgment based on overruled decision —Sufficient ground for review*—Where a decision was based on a case reported in the I.L.R. series but which had been overruled by a Full Bench before the date of the decision, though it was reported subsequently, there was sufficient reason for a review of the judgment, particularly when the effect of the judgment was,

Review—continued.

— 2.—**Grounds for Review**—*continued.*

on a technical point, to go against what the lower Courts had found to be on the merits of the case. KOOAR LALL v. RUKMA BAI, **11 C P. L R. 41.** (9 A. 36, 14 C. 627, 7 M. 307, 10 M. 357, *F.*)

(33)—*Practice - Omission to try point urged—Mistake—Review—No special appeal.*—Where a Judge refuses to try a point which he ought to try and which was urged before him, that will be a very good ground for special appeal. But where there is an omission to try any point from mistake, the non-decision on that point forms no good ground for special appeal. The proper course is to apply for review to the Judge, and if he refuses to admit a review, an application to the High Court may be made. J. P. WISE v. HURO LALL GIREE GOSSAIN, **16 W.R. 150.**

(34)—*Practice—Omission by Court to try point urged—Duty of pleader—Review.*—When a point is urged before the Judge and the Judge has omitted to try it, it is the duty of the vakeel who urged that point before the Judge to go before him after the decision and to point out to him that he has omitted to decide the point. If necessary, an application for review may be filed. The Judge can then determine that point and pass orders upon it. HUSSUM ALI CHOWDHRY v. NASSIROODDEEN, **16 W.R. 134.**

(35)—*Decision quite wrong in principle—Review of such decision.*—A review can be asked of a decision which is absolutely wrong in principle. DULA SINGH v. JOWAHIR SINGH, **1 P.R. 1872, Rev.**

(36)—*Review—Act* VIII *of* 1859, *s.* 378—*Oral application for enlarging grounds for review.*—Upon an application for review of judgment before the Sudder Court, the written grounds for review impugned the correctness of the decision of the Court below, on grounds that related solely to the immoveable estate, and not to the moveable estate also in question in the suit. *Held* that, notwithstanding the terms of s. 378 of Act VIII of 1859, it was competent to the Judges, by whom the order allowing the application for review was made, to enlarge those grounds, on an oral application, by including moveables, if satisfied that there was a proper case on the merits for so doing. Even if the Court below had been wrong in its procedure, its miscarriage will not prevent the Judicial Committee from deciding the question touching the disposition of the moveable estate on its merits. The Judges of the Sudder Court admitting an application for review were competent to make a qualified order, leaving in the Court which was to review the decision, a discretion as to the extent to which the review should be carried. BHUGWANDEEN DOOBEY v. MYNA BAEE, **9 W.R P.C. 23 = 11 M.I.A. 487 = 2 Suther. 124 = 2 Sar. 327.** [*F.*, 9 C. 209, 12 C.L.R. 64; *Rel. on*, 11 Ind. Cas. 102.]

(37)—Ex parte *decree—Review—Non-service of summons proved by defendant.*—Where the defendant against whom an *ex-parte* decree was

Review—continued.

——2.—**Grounds for Review**—*continued.*

passed appeared before the Court earlier than 15 days after service of process for enforcing judgment, and swore that no summons had been served on him in the case which led to the *ex parte* decree and that although he had entered into a contract with the plaintiff to pay rents for the mehal, yet that the contract had been broken by the plaintiff himself, *held*, that good and sufficient reason had been shown for the defendant's previous non-appearance, and that there had been a failure of justice. *Held*, further, that as this evidence was given in the presence of the *Mookhtears* of both sides, and as the Court ordered that the case be entered in the register of reviews, there was a proper admission of a review in the case. ANUND MOYEE DOSSEE CHOWDHRAIN v. ANUND SOONDUR MOZOOMDAR, **13 W.R. 237.**

(38)—*Rent—Decree for rent on basis of decree for kabooleut—Subsequent reversal of latter decree—Remedy by review.*—On the basis of a decree for a kabooleut, certain rent suits were decreed in favour of the plaintiff. Subsequently, the decree for kabooleut was reversed on appeal. *Held*, that the remedy open to the defendants was by way of review to the Court of first instance. MORAREE MOBAJUN v. MAHOMED AKMOL. **22 W R. 161.**

(39)—*Review, when not grantable—Arguments and facts already placed before Court—Review—Grounds for.*—A review is not to be sought upon the arguments and facts already placed before the Court, and upon which judgement has been given, nor should it be allowed on a new point not taken at all at the first hearing, though full opportunity existed for doing so. JANAB ALI v. CHANDI CHARAN DEY, **5 B.L.R. 334, Note = 11 W.R. 202.**

(40)—*Special appeal - Judgment— Review—Grounds—New point—Patni, Sale of—Separate lots—Legality—Reg.* VIII *of* 1819.—It is not sufficient ground for a review of judgment passed on special appeal that the point on which the Court's judgment was based was not raised in the lower Courts, and, especially where the question was raised pointedly in special appeal and the respondent had plenty of time to meet the statement therein. Under Reg. VIII of 1819, a putnee cannot be sold in separate lots, even though the sale is made on the same day. HERBERT COWELL v. MOHADEB MUNDUL, **17 W R. 182.** [*Appl.*, 20 W.R. 275.]

(41)—*Act* VIII *of* 1859, *s.* 376—*Application for review—Ground.*—A Court cannot entertain an application for review on the ground that, if the facts had been better or more fully placed before the Court, the conclusion would have been different. Nor is a subsequent decision of a question of law by the Privy Council in another suit a ground on which a review can be granted. JADUB RAM DEB v. RAM LOCHUN MUDDUCK, **19 W.R. 189.**

(42)—*Review—Discovery of new evidence—Inquiry as to discovery.*—A Judge has no power

Review—continued.

—2.—**Ground for Review**—*continued.*

to review his judgment on the ground of discovery of new evidence of the existence of which the plaintiff was not previously aware, where it does not appear to have been any inquiry as to whether or not the plaintiff could and ought to have produced that evidence before. NUBOKISHOR BISWAS v. JADUB CHUNDER SIRCAR, **20 W.R. 426.**

(43)—*Civ. Pro. Code, s.* 623—*Review of judgment—Second appeal—Discovery of new and important evidence.*—The High Court on second appeal had decided that a mortgage was void, on the ground that the mortgaged property was, on the date of its execution, subject to an attachment in execution of a decree. The plaintiff-appellant sought for a review of the judgment on the ground of the discovery of new and important documentary evidence showing that on the date of the mortgage the property was not subject to any attachment. *Held*, that the application could not be entertained, inasmuch as the ground relied upon could not be successfully relied on in the second appeal itself. RARU KUTTI v. MAMAD, **18 M. 480.** [*F.*, 10 M.L.J. 134, 31 M. 415.]

(44)—*Judgment passed on special appeal—Discovery of material evidence since judgment passed—Review—Unsustainability.*—An application for review of a judgment passed on special appeal, upon the ground of the discovery of material evidence since the judgment was passed on special appeal, cannot be entertained, as the ground taken in the application for review could not be successfully relied upon in the special appeal itself. JACKAMMAL v. PALNEAPPA CHETTY, **5 M.H.C. 464.** [*F.*, 10 M.L.J. 134 ; *Appr.*, 9 B.H.C. 89 ; *R.*, 18 M. 480.]

(45)—*Review of judgment—Grounds.*—Where the object of an application for review was to tender as evidence fresh matter, but the petition was unverified and supported by no proof of the kind referred to in 3 B.L.R. App. 35 N. *held*, that the review could not be granted. KHELUT CHUNDER GHOSE v. PRANKISTO DAY, **11 B.L.R. 428, Note=12 W.R. 411.**

(46)—*Act* VIII *of* 1859, *s.* 376—*Review—Discovery of new evidence—Proof.*—A Munsiff's order granting a review without proof that the new evidence tendered was not available before, was held to be illegal, as well as the decision of the lower appellate Court confirming that order. UMRAO THAKUR v. GAKUL MANDAL, **8 B.L.R. App. 34=16 W.R. 7.** [*F.*, 17 W.R. 230, 17 W.R. 458 ; *R.*, 18 W.R. 15.]

(47)—*Civ. Pro. Code, s.* 378—*Review—Fresh evidence.*—A Judge ought not to admit a review for the purpose of receiving fresh evidence in the suit, except upon being satisfied by legal evidence that such fresh evidence was not known to the applicant, or could not have been obtained by him, at the time of the original trial. NAFFAR CHAND PAL CHOWDHRY v. D. SANDAS, **8 B.L.R. App. 35=10 W.R. 432.** [*F.*, 12 W.R. 461, 16 W.R. 7=8 B.L.R. App. 34 ; *R.*, 17 W.R. 458.]

(48)—*Act* VIII *of* 1859, *s.* 876—*Special appeal—Discovery of fresh evidence—Review.*—After the disposal of a special appeal by the High Court confirming the decision of the lower appellate Court, the appellant applied to the High Court for a review of the judgment passed in special appeal, on the ground of discovery of new evidence. *Held*, that that was not a sufficient ground for asking for a review of a special appeal, although that might be a good ground for asking the lower Court, which deals with the facts of the case, to admit a review of its judgment. PANCHANAN MOOKERJEE v. RADHA NATH MOOKERJEE, **4 B.L.R. A.C. 213.** [*F.*, 5 M.H.C. 464, 18 M. 480, 4 Ind. Cas. 809=6 A.L.J. 979=32 A. 71 ; *Appl.*, 9 B.H.C. 89.]

(49)—*Application for review—Discovery of new evidence—Proof of such discovery since the first hearing—Review granted without such proof, appealable as contrary to law—Competency of Judge to reverse decision of predecessor, only on palpable error committed by latter.*—The law allows a Judge to review his own judgment or the judgment of his predecessor on any sufficient ground. Where the ground of the application for review is the discovery of new evidence, it is a condition precedent to the acceptance of that evidence that the applicant for review should satisfy the Court that the new evidence sought to be adduced was not within his knowledge, or could not be adduced by him at the time of first trial. Unless, therefore, at the time of granting the review, the Court is satisfied that the new evidence could not have been adduced at the first trial, such application could not be legally granted. Consequently, it is not competent to a Court, when the application is based on the discovery of new evidence, to dispense with proof that the new evidence was not within the knowledge or the reach of the applicant at the time of the first hearing ; and if a Court does re hear a case when an application has been granted without such proof, it is a valid ground of appeal, both regular and special, that the judgment arrived at upon the review has been arrived at contrary to law. Except on such clear and palpable error committed by his predecessor, no Judge is competent to reverse the decision of his predecessor on a matter of fact on the selfsame evidence. So, when any evidence is adduced as affording a ground for preferring an application for review and the Judge finds that the new evidence is not sufficient *per se* to show that the decision of his predecessor is wrong, on the matter of fact, or that the new evidence if thrown into the scale, would not create an over-powering balance of evidence on the side of the party on whose behalf the application is made, the Judge's proper course

Review—continued.

——2.—**Ground for Review**—*continued.*

is to refuse the application. SHUMSHER ALI KHAN v. RAMCHUNDER GOOPTO, **2 W.R. 174**. [*F.*, 16 W.R. 7; *R.*, 17 W.R. 458; *D.*, 18 W.R. 15.]

(50)—*Civ. Pro. Code*, s. 378—*Review—Fresh evidence.*—A Judge ought not to admit the review for the purpose of receiving fresh evidence in the suit except upon being satisfied by legal evidence that such fresh evidence proposed to be adduced was not known to the applicant or could not be obtained by him at the time of the original trial. NUFFUR CHAND PAUL CHOWDHRY v. A.D SANDES, **10 W.R. 432**. [*F.*, 12 W.R. 461; *R.*, 16 W.R. 7, 17 W.R 458.]

(51)—*Review — Discovery of new proof—Chowkeedaree and census returns—Descriptions of boundaries — Evidentiary value of.*—The mere discovery of new proof is not in itself a ground for admitting a review. *Chowkeedaree and Census Returns* and descriptions of boundaries in the deeds of strangers even if the property adjoins are very unsatisfactory, if not wholly worthless, as evidence. MUSST. RADHEY KOONWER v. AJOODHYA PANDEY, **3 Agra 69**.

(52)—*Evidence—Judgment* inter partes, *admissible but not conclusive—Review—Special appeal—New evidence—Review of judgment passed in special appeal.*—A judgment *inter partes* may be received in favour of a stranger as against a party thereto, not as concluding such party but as evidence for what it is worth. The High Court cannot admit a review of a judgment passed in special appeal, merely on the ground that new evidence to prove a fact has been discovered. BHYRUB NATH TOEE v. KALLY CHUNDER CHOWDHRY, **16 W.R. 112**. [*F.*, 9 B.H C 89, 18 M. 480.]

(53)—*Review of judgment, Ground for—Error in law—Mistaken view of law.*—If there is an error in law on the face of a judgment, or if it is shown that the decision of the Court had proceeded upon a mistaken view of the law, that is a ground for review of judgment, if it is necessary for the ends of justice that the judgment should be reviewed. In this case, however, a review was refused on the score of absence of danger of miscarriage of justice, without seeing whether there was any error in law or not. SHARUP CHAND MALA v. PAT DASSEE, **14 C 627**. [*F.*, L.B.R. 1893-1900, 568, 124 P.R. 1906=97 P.L.R. 1907; *R.*, U.B.R. 1892—1896, Vol. II, 153, 11 C.P.L.R. 41.]

(54)—*Review of judgment—Reason for applying for review—Error in fact or law—Grounds of appeal—Civ. Pro. Code*, 1877, s. 623—A review of judgment cannot be granted on grounds which are virtually gounds for appealing from the judgment. SHEO RATAN v. LAPPU KUAR, **5 A. 14**.

(55)—*Institution of two suits in same Court—Judge taking different views in deciding them—Review—Civ. Pro. Code*, 1882, s. 623—*Appeal.*

Review—continued.

——2.—**Ground for Review**—*continued.*

—The fact that a Judge, in whose Court two suits were instituted, in deciding one of them, took a view of the facts contrary to that which he had previously taken in the other, is no ground of review, but the matter should be left for appeal. MAHAMAD SHAH KHAN v. MAHAMAD YAR KHAN, **A.W.N. 1885, 123**.

(56)—*Review—Conflicting decisions—Authority discovered since decision.*—An application for a review of judgment will not be allowed on the ground that the decision of a Division Bench of a High Court is at variance with the decision of another Division Bench of the same High Court. It is no ground for re-opening a case which has been fully argued, that the diligence of a pleader has discovered, since the decision, an authority in his favour. NOBEEN KISHEN MOOKERJEE v. SHIB PERSHAD PATTUCK, **9 W.R. 161**.

(57)—*Conflicting decisions—Reference to Full Bench on review.*—An application for review will not be admitted in order that the case may be set to be argued before a Full Bench, on account of the conflict of decisions of the High Court on questions of fact. FERGUSSON v. THE GOVERNMENT, **9 W.R. 158**.

(58)—*Precedents not cited at hearing—Such precedents no ground.*—Production of authority, not brought to Court's notice at hearing, is no ground for grant of review. ELLEM v. BASHEER, **1 C. 184=24 W.R. 382**. [*R.*, 6 C. 236=6 C.L.R. 549]. *See also*, ROY MEGHRAJ v. BEEJOY GOBIND BURRAL, **1 C. 197=23 W.R. 438**.

(59)—*Erroneous decision on immaterial point.*—When an issue which decides the case on the merits has been found in favour of either party, a review of judgment will not be granted, merely because there has been an erroneous decision on a point affecting an issue which, in consequence of the finding, has become immaterial. RAKUB DOSS v. SOORAJ MULL, **Bourke O.C. 131**.

(60)—*Review—Re-arguing case upon evidence—Documents, admissibility of—Order of review questionable in special appeal*—A review can be given only for certain particular reasons, and it cannot be given merely for the purpose of allowing the parties to re-argue the case upon the evidence, upon the chance of eventually throwing doubt on the soundness of the decision already passed. Whether certain documents already admitted as evidence were admissible as evidence or not, is not a point which can be urged in review. An order granting a review in a case where there is no ground upon which a review can legally be granted, cannot be considered as final, and such an order may be questioned in special appeal. KOLEEMOODDEEN MUNDUL v. HEERUN MUNDUL, **24 W.R. 186**.

(61)—*Review of judgment—Pleader's neglect in conduct of appeal.*—Reviews are not granted merely to supply defects on the part of pleaders

Review —continued.

——2.—**Ground for Review** —*continued.*

in their conduct of appeals. If a remand was necessary in an appeal and the pleader neglected his duty to ask for it, this neglect would be no reason why the judgment should be reviewed. PROSUNNONATH DUTT v. JUDOONATH PAUL, **9 W.R 589.**

(62) —*Review of judgment —Improper neglect to examine witness —Objection not raised in regular appeal* —An objection that the evidence of a witness was not taken in the lower Court when the defendants applied to have him examined, is no ground for a review of judgment, if this objection was not raised when the case was argued before the Court in regular appeal. MUNSHAD BIBEE v. BABOO LUCHMEEPUT SINGH, **9 W.R. 129.**

(63) —*Registration, Plea of—Not urged at original hearing or in lower Courts—Review.* — Where the plea that registration protected a tenure was not urged at the original hearing or in both the lower Courts, and it was found that the title so registered had been procured fraudulently, *held*, that such plea could not be admitted as a proper ground for review. RAM CHUNDER CHOWDHRY v. HURISH CHUNDER CHOWDHRY, **19 W.R. 196.**

(64)—*Review of first appellate Court's judgment—New defence set up—Defence if admissible.*—Where in the first Court the defendants set up the plea of exchange which was found against them and decree for possession was given to the plaintiffs and on appeal the Judicial Assistant dismissed the appeal the defendants still insisting upon their title by exchange, and, on a subsequent application for review by the defendants wherein they set up an entirely new defence, the Judicial Assistant allowed the defendants' new plea and dismissed the plaintiffs' suit and this order was upheld by the Commissioner, the Chief Court reversed the orders of the Judicial Assistant and the Commissioner and restored the decree of the first Court, holding that there was no sufficient ground for admitting the application for review. GUNDA SINGH v. TABA, **28 P.R. 1880.**

(65)—*Act* VIII *of* 1859, *ss.* 376 *and* 378.—A review, on the sole ground of injustice having been done, ought not to be allowed under ss. 376 and 378 of Act VIII of 1859, though the wordings used in the sections, *viz.*, "other good and sufficient reason" (s. 376) and "otherwise requisite for the ends of justice" (s. 378) are general and confers a wide jurisdiction. If the review is asked for in reference to the conclusion of fact drawn from the evidence, it should not be granted simply upon the same evidence. RAMAN v. KARUNATHA THARAKAN, **2 M. 10.** (2 C. 131, *Disc.*)

(66)—*Act* X *of* 1877, *ss.* 281, 283—*Claim to property attached in execution, order rejecting claim—Review of order excluded by s.* 283.—The effect of the last sentence of s. 283 of the Civ. Pro. Code, 1877, was to exclude review of an order passed under ss. 280, 281, or 283 of Act

Review—continued.

——2.—**Ground for Review**—*continued.*

X of 1877, the only remedy being by way of suit. *In re* BANWARI LALL, **143 P.R. 1879, F.B.**.

(67)—*Review—Grant of review without legal reasons—Legality of judgment on review.*—Where a review was admitted without sufficient legal reasons, the judgment passed on review was passed without jurisdiction and could be set aside on appeal. SYUD FUZZUL HOSSEIN v. ENAYET ALI KHAN, **22 W.R. 268.**

(68) —*Review—Act* XXVII *of* 1860—*Refusal of certificate—Grounds for review of order.*—Where an apolication for grant of a certificate under Act XXVII of 1860 was refused on the ground that the applicant had not proved his relationship to the deceased, a review of the order could not be granted, unless the applicant proved that he was ignorant of the evidence which he wanted to let in subsequently or showed that the evidence could not be produced when the application was first heard. NISSA BIBEE v. ABDOOR RUHMAN, **18 W. R. 413.**

(69) —*Application to appeal in* forma pauperis —*Limitation—Review—Finality of order.*—An application to be permitted to file an appeal in *forma pauperis* having been rejected, the petitioner appealed for a review of that order. *Held* that the order rejecting the application to be permitted to file an appeal in *forma pauperis* was final, but that the appellant might file an appeal on a full stamp. BHAG SINGH v. GHUSEETA MULL, **73 P.R. 1868.**

(70)—*Act* XI *of* 1865, *s.* 21—*Re-trial—Review of judgment—Small Cause Courts.*—By s. 21, Act XI of 1865, all decisions and orders of a Small Cause Court are final except in the two instances stated therein; and by s. 47 of the same Act, the provisions of the Civ. Pro. Code are only applicable to suits and proceedings of Small Cause Courts where no special provisions exist in the Act, as is evident from the use of the words "except as hereinafter provided" in that section. And, as a special provision for a new trial has been made in s. 21 of the Act, the provisions of the Civ. Pro. Code, for review of judgment do not apply to Small Cause Courts. GOOLAB SHAH v. LUCHMAN DASS, **70 P.R. 1867.** [*Overruled*, 29 P.R. 1879.]

(71)—*Small Cause Court—New trial — Review.*—The decrees of Small Cause Courts are both final as regards appeal, and final as regards the Court passing them, save so far as applications for new trials may be granted. An application to vary a decree is not an application for a new trial, and a Small Cause Court cannot review in any other way an order previously made by it. RUTTAN SINGH v. DARMODY, **4 P.R. 1876.**

Grounds for—Erroneous decision as to jurrisdiction—Discovery of important document—Revision against order rejecting petition for

Review—continued.

—2.—**Ground for Review**—*concluded.*

review when lies. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, sch. II, art. 29, 195 P.L.R. 1911.

See RULE TO SHOW CAUSE, 3 B.H.C. A. C. 49.

Admission of unstamped document by first Court on payment of duty and penalty—Power of appellate Court to review—*See* STAMP ACT, 1879, ss. 3, 50, 12 C, 64.

—3.—**Jurisdiction to Review.**

(1)—*Mofussil Courts—Review of judgment—Jurisdiction.*—The inferior Courts in the Mofussil have no jurisdiction to review their own judgments except under the circumstances and with the limitations set forth in the Civ. Pro. Code. BURRA FAKEER DOSS BEERA v. FAKEER DOSS BEERA, **20 W.R. 180.**

(2)—*Civ. Pro. Code*, 1882, *s.* 626—*Powers of Court on review.*—The defendant was ordered to pay Rs. 40 as costs. On his application for review of the order as to costs he was directed to pay over Rs. 100 additional to the plaintiff. *Held*, that, in the absence of an application for review by the plaintiff, the order of the Court was *ultra vires.* MUHAMMED ALI v. MUSAMMAT SARDAR BEGUM, **73 P.L.R. 1901.**

(3)—*Review of judgment in favour of some parties only.*—Review can be granted only as regards parties applying or appearing. DOORGA PERSAUD GHOSE v. GREESH CHUNDER BOSE, **1 W.R. 222.** [*R.*, 6 C.L.J. 226; *Cons.*, 24 A. 383; *D.*, 25 C. 155=1 C.W.N. 652.]

(4)—*Civ. Pro. Code, Ch.* XI—*Second review of judgment on application of same party.*—A Court has no jurisdiction to grant a second review of judgment on the application of the same party under the Civ. Pro. Code. VENCAMA SHETTY v. PAMOO SHETTY, **5 M.H.C. 323.** [*R.*, 15 C. 432.]

(5)—*Review of judgment, Second application for admissibility.*—A second application for review of judgment can be admitted, although a first application has been rejected as being founded on insufficient grounds. FUKHEEROODDEEN v. KALACHAND SIRDAR, **1 W.R. 287.**

(6)—*Application for review of judgment, dismissal of, for default—Second application for review, maintainability of.*—The second appeal in this case was preferred on the grounds that the Principal Sudder Ameen was wrong in reviving the application for review which had been struck off for default, the Code of Procedure nowhere providing for the exercise of such power by the Appellate Court, and that, if the Court below had no power to restore the application, the judgment pronounced by it was illegal, and must be reversed, and the decision of the former Principal Sudder Ameen restored. The High Court held that the order

Review—continued.

—4.—**Jurisdiction to Review**—*continued.*

subsequently admitting the petition of review was a just and proper one, inasmuch as the former Principal Sudder Ameen had committed a grave error in his judgment in stating that the petitioner had not filed certain material documents bearing on the merits of the case, whereas they were actually on the record. The order reviving the application for review was not contrary to law. There is no provision in the Code of Procedure for or against such a proceeding and the authorities support the position that "under the law a second application for review can be admitted." NEEDOO MONEE DOSSEE v. SARODA MONEE DOSSEE, **2 W.R. 61.**

(7)—*Second review of judgment, not allowed by law—First review neither appealed against nor shown to be wrong.*—A second review of the judgment sought for in this case was refused on the ground that such an application was not contemplated by the law itself or by the decisions. The previous order in this case in favour of the judgment-debtor had not been appealed against or shown to be in any way improper, incorrect, or illegal; and, while it existed it could effectually bar the decree-holder. TARANATH ROY v. RAJBULLUB BHUNJE, **7 W.R. 464.**

(8)—*Review, admission of, after time—Just and reasonable cause to be proved.*—A party applying for a review beyond time must show, in order that the application may be heard, just and reasonable cause to the satisfaction of the Court for not having preferred such application within the limited period of 90 days; and where a Court entertains an application for review beyond time, though the applicant has not shown just and reasonable cause for the delay, the Court acts without jurisdiction and its order is null and void. MUSSUMMAT FATTO v. LASHKAR KHAN, **101 P.R. 1876, F.B.** (2 I.A. 58, *F.*)

(9)—*Suit dismissed for default—No application for restoration—S.* 623, *Civ. Pro. Code.*—Where a suit has been dismissed for default, and the party has allowed his right under s. 99, Civ. Pro. Code, to have his case restored, to be barred, the Court has no jurisdiction under s. 623 of the Code to reinstate the case. KOILOSH MONDOL v. NABADWIP CHANDRA KAR, **2 C.W.N. 318.** [*R.*, 33 P.R. 1909, 4 N.L.R. 166; *D.*, 26 C. 598.]

(10)—*Reference on review—Act* XXIII *of* 1861, *s.* 28—*Deposit of moveables—Suit for recovery of moveables, or their value—Limitation Act,* XIV *of* 1859, *s.* 1, *cl.* 15.—The Chief Court may consider a reference made on review covered by s. 28 of Act XXIII of 1861. In a suit against a depositary of moveables for the recovery of the moveables or their value, *Held* that, if the limitation for the suit be three years, the period must be reckoned from the date of demand and refusal. But it would seem that the Receiver might be regarded as a depositary,

Review—continued.

——3.—**Jurisdiction to Review**—*continued.*

and thirty years would be the limit to an action against a depositary. GYAN CHAND v. MOHUMDA, **23 P R. 1872.**

(11)—*Appeal from original decree—Dismissal for default in depositing costs for paper-book—Application under Rules of Calcutta High Court—Cl.* 15, *Letters Patent—Limitation.—Per Petheram, C.J., Prinsep and Ghose, JJ.*—An application for re-admission of an appeal dismissed for default in putting in costs of preparation of paper-book is not an application for review of judgment. Under s. 627, Civ. Pro. Code, a single Judge of the High Court cannot dispose it of. When such an application is disposed of by a single Judge, it seems an appeal, under s. 15, Letters Patent, will lie therefrom. *Per Prinsep and Ghose, JJ.*—Such an application is not one, under s. 588, Civ. Pro. Code, but one under the Rules of the Calcutta High Court, and as such, is not governed by art. 168, Act XV of 1877. RAM HARI SAHU v. MADAN MOHAN MITTER, **23 C. 339.** [*Overruled*, 24 C. 350=1 C.W.N. 21; *R.*, 9 Bom. L. R. 508=32 B. 1.]

(12)—*Decree of Subordinate Judge for costs—Confirmation by High Court—Finality—Successor of Subordinate Judge—New construction of decree by.*—A decree of a Subordinate Judge in respect of costs, which is confirmed on appeal to the High Court, is final. Consequently, an Officiating Subordinate Judge is not competent to put an entirely new construction upon the decree after the decision of the case by his predecessor. BABOO JUGGUR NATH SINGH v. AFZUL KHAN, **17 W.R. 130.**

(13)—*Act* VIII *of* 1859, *s.* 206—*Applicability—Decree under Act* X *of* 1859—*Review—Appeal—Jurisdiction.*—S. 206 of Act VIII of 1859 which prohibits settlements out of Court is not applicable to decrees passed under Act X of 1859. A Deputy Collector is not competent to review his order passed in execution of a decree. A Collector acts without jurisdiction in receiving an appeal from an order passed in execution. RAJAH PROTAB CHUNDER SINGH v. KANAYE LAL DOSS, **3 W.R. Act X, Rul. 7.**

(14)—*Decision of Deputy Collector—Review of judgment—Decree against one of two defendants—Appeal to make other defendant liable—Review of judgment—Reversal of decree.*—A Deputy Collector is not competent to entertain an application for review of the judgment of his predecessor. Where, in a suit against two defendants, the plaintiff, who has obtained a decree against one of them, appeals to the Judge to make the other defendant also jointly liable, the defendant against whom the decree was given may, in the meantime, apply for a review of judgment, and the decree also may be reversed. LALJEE MUL v. BABOO DHUNPUT SINGH, **5 W.R. Act X, Rul. 94.**

(15)—*High Court Rules—Dismissal of appeal for default to deposit costs for preparation of Paper-book—Remedy—Ss.* 558, 623, 626, *Civ. Pro. Code*, 1882.—Under Civ. Pro. Code, there are only two ways known to the law by which a judgment and decree of a Divisional Bench of the High Court can be set aside in India. These two methods are described in ss. 58 and 623 of the Code. The only mode of setting aside a decree of a Division Bench of the High Court dismissing an appeal for default in depositing costs of preparation of the Paper book under the rules of the High Court, is by an order under s. 626, Civ. Pro. Code, 1882. FATIMUNNISSA v. DEOKI PERSHAD, **24 C 350, F.B.=1 C.W.N. 21.** (23 C. 339, *Overruled.*) [*R.*, 3 C. W.N. 24, 32 B. 1=9 Bom. L.R. 508.]

(16)—*Review after determination of special appeal—Clerical error—Jurisdiction—Review to modify substance of judgment—Review to alter award of costs.*—A lower appellate Court has jurisdiction to review its own judgment for the purpose of correcting a mere clerical error, even after a special appeal from its decision has been heard and decided. [*F.*, 14 W.R. 438, 8 A. 519 =A.W.N. 1886, 182; *R.*, 11 W.R. 511, 20 W.R. 111.] Where the ground of review goes to the substance of the judgment (*e.g.*, to alter an award of costs) and does not merely seek a rectification of the decree so as to make it to accord with the judgment, a lower appellate Court has no jurisdiction to grant a review of its own judgment after a special appeal from its decision has been heard and decided. OOMANUND ROY v. MAHARAJAH SUTTISH CHUNDER ROY, **9 W.R. 471.**

(17)—*Review, sufficiency of grounds for—Discretion of Court—Finality of order admitting review—Application for re-hearing of case decided* ex parte *before execution process—Plea not raised before lower appellate Court if permissible in special appeal*—The question of the sufficiency of the grounds for admitting a review of judgment is one for the discretion of the Court admitting the application for review, and the order of the Court upon the point would be final under s. 13, Act VI of 1862 (B.C.) The defendants in this case having applied for a re-hearing of their case that had been decided *ex parte*, before any process for execution of the decree was carried out, it was *held* that they were within the time allowed by law for the purpose and that the Court had not acted illegally in reviving the suit. Although, as a general rule, no plea can be allowed to be taken on special appeal which has not been taken before the lower appellate Court, yet, there are cases of exceptions in which such rule ought not to be enforced. LAL MOHUN SEIN v. ANUND CHUNDER CHUCKERBUTTY, **4 W.R. Act X, Rul. 3.**

(18)—*Civ. Pro. Code, ss.* 623, 624, 626—*Review.*—Where an application for review of judgment has been presented to the Court under s. 623, Code of Civil Procedure, on grounds other than those mentioned in s. 624, and notice has been ordered to the other party to show cause against the application being

Review—continued.

3.—**Jurisdiction to Review**—*continued.*

granted, and the Judge is transferred before the hearing, his *locum tenens* has jurisdiction to hear and finally determine the application for review. RAMASAMI v. KURISU, **13 M. 178, F.B.** [*D.*, 7 P.R. 1894.]

(19)—*Review of judgment, if barred by preferring appeal against it.*—An appeal made against a judgment is no obstacle to the judgment being reviewed by the Court which passed it. RASH BEHAREE SINGH v. KOONJ BEHAREE SINGH, **W.R. 1864, Mis. 31.** [*Cons.*, 11 W.R. 511.]

(20)—*Review of judgment—Appeal against decree--Competency of Court to proceed with review.*—The only question in this appeal was whether the principal Sudder Ameen was right in having proceeded with a review after an appeal had been filed against the very decree, and the High Court *held* that it was competent to a Court to proceed with a review in such a case and decreed the appeal reversing the decision of the Zillah Judge. SYED AZUDOODMEEN HYDER v. KHAJAH ABDOOL KUREEM, **6 W. R. 110.** (5 W.R., 59. F.B., *F.*)

(21)—*Act* VIII *of* 1859, *s.* 377—*Review presented after time—Reasonable cause for not preferring within time—Appeal by one of several defendants—Other defendants may apply for review.*—Plaintiff sued to recover possession from the two defendants who had ousted him, adding other persons as co-defendants. He prayed for wassilat and costs against the defendants who had dispossessed him. One of the *pro forma* defendants objected to the plaintiff's executing the decree against him but his objections were disallowed. Within three months from this, the said defendant presented a petition to the first Court for review of the original decree, which was admitted and the case restored to file. On appeal, the Judge set aside this decision, holding that the Principal Sudder Ameen had no power, after an interval of five years from the date of the original decree, to admit a review. The High Court, on special appeal, *held* that the first Court was right in having held that there was reasonable cause for not preferring the application for review within the time limited so as to bring the case within s. 377 of Act VIII of 1859. The defendant appellant had no reason to suppose that a decree for wassilat against the "defendant," in the cause would be executed against him when he was not the person against whom the plaintiff sought for wassilat in the original plaint. As soon as he found that the decree was to be executed against him, he came into Court by petition for review to get the decree corrected, and he had very good reasons for not having come into Court till then. The fact that one of the several defendants in a suit has preferred an appeal against the decision in it does not preclude any of the other defendants from his right to apply for a review. BUNKOO LAL SINGH v. BASOOMUNISSA BIBEE, **7 W.R. 166.**

Review—continued.

3.—**Jurisdiction to Review**—*continued.*

(22)—*Act* VIII *of* 1859, *s.* 376—*Judgment appealed from, lower Court not competent to review—Judgment passed on review, appeal not entertainable against, by lower appellate Court.*—After the judgment of the Munsiff had been appealed against, the Munsiff entertained an application for review and gave the appellant a decree, and this order was afterwards upheld by the Principal Sudder Ameen on appeal, *Held* that the Munsiff had no power to review his judgment, and that all the proceedings taken since the date of the first order on appeal were without jurisdiction and consequently illegal. Under s. 376 of Act VIII of 1859, the Munsiff had no authority to review his original order, inasmuch as that order had been the subject of an appeal to a higher Court, and had been decided on appeal. Equally the Principal Sudder Ameen had no power to take up the case on appeal from the Munsiff, and try it on its merits, there having been no jurisdiction in the Court of first instance, and no amount of subsequent enquiry into the merits of a case can cure the original want of jurisdiction. BROJONATH KOONDOO CHOWDHRY v. JUMEEROONISSA BIBEE, **7 W.R. 218.**

(23)—*Reg.* XXVI *of* 1814—*Admission of application for review—Removal of inability to review without permission of superior Court—'Further appeal' in s. 4, meaning of—Act* VIII *of* 1859, *s.* 377, *scope of.*—The sole question in this appeal was whether the Court below, in admitting to review the judgment in appeal passed by a former Judge in 1848, was wrong in law. The Judge's competency to admit the review was denied: 1st.—Because the previous permission of the High Court had not been obtained in accordance with the law before 1859; 2nd.—Because, a special appeal having been admitted in this case, the review was barred. 3rd.—Because, more than 12 years having elapsed during which time the defendants had been in quite possession, all further proceedings were absolutely barred. With regard to the first of these objections, it was contended that Reg. XXVI of 1814, s.4, applied, and that, although the Regulation had been repealed, yet, under the principle of s 387, Civ. Pro. Code, the present case must be dealt with as a suit pending at the time when the Code came into operation, and, therefore, governed by the law previously in force. The High Court was however of opinion that s. 387 had no bearing on the question. The proviso contained in the latter part of the section merely maintains the rights of parties to pending suits in reference to the procedure of the suits and does not affect the enlarged powers given to certain Courts or the restraints removed by the Code. Whereas, by the law previously in force, the subordinate Courts could not review their judgments without the permission of a superior Court, the Code removed that inability, and the removal extended to suits past and pending as well as future. On the second question whether the previous admission of a special appeal barred the review;

Review—continued.

—3.—Jurisdiction to Review—*continued.*

it was held that an applicant for review of a judgment passed in 1848 can claim to be governed rather by the terms of the old law, XXVI of 1814, *viz.*, "from which decree no further appeal may have been admitted by a superior Court," and the words "further appeal" in s. 4 of the Regulation include both a special or second appeal described in s. 2, cls. 1 and 2 of the same Regulation, and also a summary appeal mentioned in cl. 3, s. 3. It was therefore held in the result that nothing in the proceedings in special appeal barred the application for review in this case. Upon the third objection, it was clear that there was no quiet possession in good faith by the defendants so as to bar the suit by limitation. The Limitation Act, XIV of 1859, is wholly silent on the subject; and s 377, Civ. Pro. Code, assigns no limit to the time, after the expiration of 90 days, at which the application for review may be filed on the stamp-paper prescribed for plaintiffs, provided that the applicant can satisfy the Court that there was just and reasonable cause for the delay. In the present instance, cause was shown for the delay; the Judge took evidence as to its truth, and, after full consideration, decided that the cause had been made out. The order of the Judge thereon granting the review was final and could not be disturbed unless it be shown to be contrary to law or usage having the force of law. JOOGUL KISHORE SINGH v. OOGUR NARAIN SINGH, **8 W.R. 483.**

(24)—*Act* X *of* 1859, *s.* 78—*Suit for arrears of rent—Deposit of rent by tenant during pendency of suit--Review after special appeal.*--When a tenant is sued for arrears of rent, although he may have brought the rent into Court during the suit, he is nevertheless liable to have a decree passed against him, inasmuch as the arrear was due when the suit was instituted. He is also liable to pay interest upon it up to the date when it was brought into Court, and the costs of suit. A District Judge is not competent to hear a review in a case after a special appeal has been admitted by the High Court. BABOO SHEO NATH SINGH v. RAM THUL RAE, **1 N.W.P. 97.**

(25)—*Act* VIII *of* 1859, *ss.* 376, 377—*Special appeal admitted—Review—Delay in applying for review—Special appeal pending.*—The mere fact that a special appeal has been preferred and admitted in the High Court against the decretal order of a lower appellate Court, prevents any party to the suit, no matter whether or not he be the party who preferred the special appeal, from having the right, under s. 376, Act VIII of 1859, of applying to the lower appellate Court for a review of the judgment. [*F.*, 14 W.R. 438; *R.*, 11 W.R. 511, 12 C.W.N. 885.] Where an application for review of judgment is not made within 90 days and absolutely no reason is given for the delay except the fact that a special appeal has been pending in the meanwhile, it was held that the pendency

Review—continued.

—3.—Jurisdiction to Review—*continued.*

of a special appeal would not be "a just and reasonable cause" for the loss of time, such as the Court to which the application is made is bound to arrive at, under the provisions of s. 377 of Act VIII of 1859, before it can entertain the application at all. L. T. LUCAS v. W. STEPHEN, **9 W.R. 301=5 Wym. 195.** [*F.*, 8 B.H.C.A.C. 234.]

(26)—*Special appeal from judgment—Review after disposal of appeal—Civ. Pro. Code*, 1859, *s.* 376—*Admission of special appeal, what is.*—*Held* that a Judge was right in refusing to entertain an application for a view of his judgment, after a special appeal from that judgment had been admitted, tried, and disposed of. The words "special appeal shall have been admitted" in s. 376 of Act VIII of 1859, refer to cases which have got beyond the inchoate stage of appeals, and in which it had been shown *prima facie* that there were errors in law. RAJ DHAREE LALL v. MAHADEO SINGH **11 W.R. 511.** (5 W.R. 25, F.B.; *D.*, 9 W.R. 301 & 471, *F.*)

(27)—*Act* VIII *of* 1859, *s.* 376—*Admission of special appeal, meaning of—Review after dismissal of special appeal—Discovery of new evidence.*—If a special appeal is presented to the Court and is registered, it must be considered as having been "admitted" by the Court within the meaning of s 376 of Act VIII of 1859. It is none the less admitted, although the Court might have rejected the application for the admission of special appeal, if it had examined the application in the first instance and without admitting it.—*Per Loch, J.*—When a petition for the admission of a special appeal is once registered, and the notices have been served, and the records have been sent for, the special appeal must be considered as admitted. Where, after the dismissal of a special appeal by the High Court, the special appellant applied to the lower appellate Court for a review of its judgment on the ground of the discovery of fresh evidence, the lower appellate Court had no jurisdiction to entertain the application for review. (9 W. R. 301, 9 W.R. 471, *R.*) *In the matter of the petition of* JADUNATH MOOKERJEE, **6 B.L.R. 333.**

(28)—*Dismissal of special appeal—Review—Discovery of fresh evidence — Jurisdiction.*—When a special appeal has been dismissed, an application for review of the judgment of the lower appellate Court, on the ground of the discovery of fresh evidence, can be entertained by the lower appellate Court. *In the matter of the petition of* GANGABISHEN SAHU, **6 B.L.R. 334, Note.**

(29)—*Civ. Pro. Code*, 1859, *s.* 375—*Effect of—Special appeal—Admission--S.* 25, *Act* XXIII *of* 1861.—The effect of s. 375 of Act VIII of 1859 is that, if the party dissatisfied with the judgment of the lower appellate Court chooses to appeal on questions of law, upon a state of facts as found by it, to the High Court, he is precluded from afterwards making a new case

Review—continued.

——3.—Jurisdiction to Review—*continued.*

by going back to the first Court and asking it to alter its finding of facts. Under s. 375 of Act VIII of 1859, if a special appeal is not rejected or returned for the purpose of being corrected but is registered, it becomes, upon such registration, a case pending in the Court. In other words, it must be taken as having been admitted. Special appeals, if duly stamped and drawn up in the mode prescribed by s. 374 of Act VIII of 1859, are not the less "admitted" within the meaning of the words as used in s. 376, because they are received and registered as a matter of course under the rules and practice of the High Court, without the power conferred by s. 25 of Act XXIII of 1861 being exercised. JODOONATH MOOKERJEE v. PUNCHANUND MOOKERJEE, **14 W.R. 438.**

(30) - *Civ. Pro. Code*, 1859, *ss.* 376, 378—*Review of District Judge's judgment after admission of special appeal—Cancellation of order admitting special appeal.* — After a special appeal had been admitted, the special appellant withdrew it with permission to apply for a review of the lower appellate Court's judgment. His application for a review was refused by the District Judge on the ground that the law did not allow a review of a judgment against which a special appeal had been admitted. The High Court, to remove the difficulty raised by the District Judge, reviewed and cancelled its own order admitting the special appeal and directed that a review should be again applied for. NARAYAN *bin* SIDOJI v. DAVUDBHAI *valad* FATEBHAI, **9 B.H.C. 238.** (9 B.H.C. 89, *F.*) [*F.*, 7 B. 287; *R.*, 30 B. 625=8 Bom. L.R. 842.]

(31)—*Withdrawal of suit—Permission to bring fresh suit asked for but not recorded through inadvertence--Review.* -*Civ. Pro. Code*, 1859, *s.* 97. —Where the plaintiff put in a petition asking to be allowed to withdraw his suit and to have permission given to him to bring a fresh suit, but that permission was not recorded on the petition through inadvertence, and the Munsiff subsequently made an order giving plaintiff the permission. *Held* that this was an order in the nature of a review of the original order and that there was nothing to prevent the passing of such an order. PEAREE MOHUN DUTT v. GOOROODOSS DUTT, **20 W. R. 401.** [*Cons.*, 9 C.P.L.R. 3.]

(32)—*Civ. Pro. Code*, 1877, *ss.* 5 & 623—*Act* XI *of* 1865.—*Held* that a review lay of decrees or orders of Small Cause Courts constituted under Act XI of 1865 under Chapl XVII, Civ. Pro. Code, 1877. SITA RAM v. HUKM SINGH, **29 P.R. 1879, F.B.**

(33)—*Mofussil Small Cause Court—Review of judgment.*—A Mofussil Small Cause Judge may entertain an application for a review of judgment under the Code of Civil Procedure. ISAN CHUNDER BANERJEE v. LUCHUN GOPE, KEMP v. PREM NARAYAN SINGH, **5 C. 699=5 C.L.R. 539.**

Review—continued.

——3.—Jurisdiction to Review—*continued.*

(34)—*Punjab Act* XXVIII *of* 1868, *ss.* 2, 19—*Suit for ousting occupancy tenant on payment of compensation—Price of hereditary tenure—Jurisdiction value—30 years occupation necessary to exempt tenant from liability to ejectment.* —The valuation of the subject-matter for the purpose of jurisdiction of a suit for ejectment on payment of compensation under s. 19 of the Tenancy Act, should be computed on the value of the hereditary right of occupancy, the price which the tenure would fetch if put up to sale, and not the sum which the landlord has to pay to buy the tenant out under s. 19 of the Act. The operation of the last clause of s. 19 of the Tenancy Act cannot be limited to those tenants only who can prove a continuous separate holding for 30 years by themselves or by their immediate ancestors. The clause is applicable as well to the case of a tenant who can show a continuous occupation for thirty years by himself or by his immediate predecessor, as to a case where the periods during which the two have held, the one immediately following the other, together amount to thirty years. BUTA SINGH v. PUNJAB SINGH, **28 P.R. 1879.**

(35)—*Act* XIX *of* 1865, *s.* 22 *and Act* IV *of* 1866, *s.* 13—*Financial Commissioner and Chief Court, not competent to review decisions of each other—Financial Commissioner's power to review his own decision.*—The classes of suits specifically provided for in s. 13 of Act IV of 1866 are not "business" transferred to the Chief Court within the meaning of s. 13 of Act VII of 1868. The Chief Court has consequently no authority to hear petitions for review of the decisions of the Financial Commissioner given under s. 13 of Act IV of 1866; nor, on the other hand, has the Financial Commissioner power to review the decisions of the Civil Court passed before the settlement may have commenced, or, before his investment by the Local Government with powers as a Court of final appeal. Moreover, whether the Financial Commissioner has power to hear petitions for review of his own decisions after the settlement operations have been declared at an end by notification in the Gazette, would depend on the terms of the notification investing him with power to hear appeals. DEVI DITTA v. GHUSEETA, **38 P.R. 1869.** [*F.*, 5 P.R. 1881; *D.*, 16 P.R. 1871.]

(36)—*Financial Commissioner's order—Review—Acts* XXVII *and* XIX *of* 1865.—The Judicial Commissioner until Act XXVII of 1865 was passed could have reviewed a judgment of the Financial Commissioner given in his judicial capacity before those functions were taken from him by Act XIX of 1865, and the Chief Court which took the place of the Judicial Commissioner could also do so. (38 P.R. 1869, *D.*) BIJJA SINGH v. NAMDAR, **16 P.R. 1871.** [*D.*, 5 P.R. 1881.]

(37)—*Order of Financial Commissioner during settlement, Chief Court not competent to review.*—The Chief Court cannot entertain an

Review—continued.

——3.—**Jurisdiction to Review**—*concluded.*

application for review of an order of the Financial Commissioner passed during a settlement of land revenue. NIAMUTULLA v. KAIMUDIN, **5 P.R. 1881.** (38 P.R. 1869, *F.* ; 16 P.R. 1874, *R.*)

See LIMITATION ACT, 1908, ss. 4, 5, 20 W.R. 101.

——4.—**Practice and Procedure.**

(1) — *Review, application for — Civ. Pro. Code*, 1859, *s.* 374. — All applications for review of judgments should be drawn up in the same manner as applications for the admission of special appeals, *i.e.*, they should set forth concisely the grounds of objection to the decision of which a review is sought, without argument or narrative, and such grounds should be numbered consecutively. MAHADAJI RAMCHANDRA v. VITHAL VISHVANATH, **1 B.H.C. 185.**

(2)—*Review—Act* VIII *of* 1859, *s.* 378—*Oral application for enlarging grounds for review.*—Upon an application for review of judgment before the Sudder Court, the written grounds for review impugned the correctness of the decision of the Court below, on grounds that related solely to the immoveable estate, and not to the moveable estate also in question in the suit, *Held* that, notwithstanding the terms of s. 378 of Act VIII of 1859, it was competent to the Judges, by whom the order allowing the application for review was made, to enlarge those grounds, on an oral application, by including moveables, if satisfied that there was a proper case on the merits for so doing. Even if the Court below had been wrong in its procedure, its miscarriage will not prevent the Judicial Committee from deciding the question touching the disposition of the moveable estate on its merits The Judges of the Sudder Court admitting an application for review were competent to make a qualified order, leaving in the Court, which was to review the decision, a discretion as to the extent to which the review should be carried. BHUGWANDEEN DOOBEY v. MYNA BAEE, **9 W.R. P. C. 23=11 M.I.A. 487.** [*F.*, 9 C. 209, 12 C.L.R. 64 ; *Rel. on*, 11 Ind. Cas. 102.]

(3)—*Review of judgment—Observance of preliminaries—Presumption.*—The Court will presume that the proper preliminaries have been observed in admitting a review, and unless anything appears to have been contrary to law, it will not set aside the decision. AKKUL SAHOO v. ABDOOL GUFFOOR, **18 W. R. 15.**

(4)—*Act* VIII *of* 1859, *s.* 378—*Finality of order of review.*—The terms of s. 378, Act VIII of 1859, declaring that the order granting the application for review shall be final, only means that the grounds on which a review is held to be necessary may not be called in question. F. GEORGE v. HAMILTON BROWN AND CO., **4 N.W.P. 74.**

Review—continued.

——4.—**Practice and Procedure**—*continued.*

(5)—*Order rejecting application for review, finality of—Practice of High Court.*—Under s. 378 of Act VIII of 1859, an order rejecting an application for review of a judgment passed by the Court is final. No second application as for re-consideration of such an order should be received in the office, but the party should, in such cases, be referred to the Bench receiving motions. KANTO LALL SINGH v. BROJO LALL SINGH, **3 W.R. Mis. 3.**

(6)—*Mistake—Correction—Power of Court.*—An application for review of judgment was made and the case was re-heard with the result that the review was rejected. Subsequently a second application for review was made and it was admitted by mistake. The Court later on discovered the mistake and rectified it by rejecting the second application. *Held* that the Court was competent to do so, notwithstanding the admission of the second appeal. NUND LAL PODDER v. DEBNATH CHOWDHRY, **3 W.R. 191.**

(7)—*Grant of review on particular ground—Discretion of Court as to rehearing.*—On the grant of a review on a particular ground, the Court has a discretion to rehear the whole case or only on the particular ground. HURBANS SAHYE v. THAKOOR PURSHAD, **9 C. 209.** [*F.*, 7 O.C. 345 ; *R.*, 158 P.R. 1889.]

(8)—*Power to reverse order of co-ordinate Court.*—A Court has no power to reverse an order of a co-ordinate Court which has determined the precise question, after a suit has proceeded to its conclusion in pursuance of that order. PALAVARAPU MUTTANNA v. CHANDURI NARAPPA, **2 M.H.C. 349** [*R.*, 3 M. 26].

(9)—*Order admitting review, Duty of Court to give reasons for.*—The Principal Sudder Ameen had admitted a review in this case without assigning any sufficient reason for so doing. The High Court, observing that he was wrong in not having thoroughly gone into the merits and given reasons for having come to a different conclusion to that which he had formed in his previous judgment, remanded the case to the lower Court with instructions to try the appeal as if it had come up for hearing for the first time. ANUND MOYEE DOSSIA v. KALEE KOOMAR ROKHEET, **6 W.R. 18.**

(10)—*Order rejecting application for review, Court bound to keep record relating to.*—An application for review of judgment is an application which the law permits parties to make and on which, they are entitled to have an expression of the judicial opinion of the Judge. It would therefore be most irregular for a Judge to reject an application for review without recording any order upon it, and, as the Judge did in this case, without making any record of the application itself, of which it was his duty to preserve a memorandum. *In re* SHUMBOONATH BAROOREE, **6 W.R. Mis. 108.**

(11)—*Review of judgment—New points raised in review — Procedure— Agricultural land—*

Review—continued.

——4.—Practice and Procedure—*continued.*

Building of homestead—Right of occupancy.—Both the parties to a suit for recovery of possession of certain land treated the land as agricultural only, although the plaint described the land in question as partly *bastoo* and partly agricultural. Both the Court of first instance and the lower appellate Court held that the plaintiffs had obtained a right of occupancy, as they had held the land for upwards of twelve years. The lower appellate Court granted a review and reversed the decree on the grounds (1) that as the plaintiffs had stated in their plaint that the land in question was *bastoo* and agricultural, it was therefore impossible that it could be ryoti land of such a nature as the plaintiffs could acquire a right of occupancy in it and (2) that, as the suit was merely for turning the tenant out of his holding, the rule as to one year's limitation applied. *Held* that the two points taken on review ought not to have been entertained, without sending the case back for trial of fresh issues, and giving the plaintiff an opportunity of rebutting the fresh case set up by the defendant. *Held* further, that the first ground was not a good ground for review, and that one year's limitation did not apply, as the questions in the case were essentially questions of title. If, when the plaintiffs first took the land, it was agricultural, and if they afterwards built a homestead upon it, and turned a portion of it into a garden, without any objection being made by the landlord, that would not alter the nature of the holding or prevent the plaintiffs from acquiring a right of occupancy. KHOKESH MAHOMED v. MAHOMED TAKEE, **10 C.L.R. 106.**

(12)—*Review of judgment—Refusal to grant review — Observation of Judge — Splitting of cause of action—Successive suits for property purchased in different names—Act* VIII *of* 1859, *s.* 7.—A mere refusal to grant a review of judgment cannot alter the judgment sought to by reviewed and the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree. [*R.*, 6 C. 142, 1 Bom. L.R. 76=23 B. 597, 15 C.L.J. 258.] A person, who brought a suit in respect of property purchased in the name of G which he claimed to be joint property in respect of which he was entitled to a share, is not precluded by s. 7 of Act VIII of 1859 from bringing another suit in respect of other property which he has bought in the name of M at another time, inasmuch as the claim to property purchased in the name of M is no part of the claim arising out of the cause of action in respect of the other property. RAMHURRY MONDUL v. MOTHOOR MOHUN MONDUL, **20 W.R. 450** [*R.*, 6 C. 142, 1 Bom. L. 76=23 B. 597, 15 C.L.J. 258.]

(13)—*Act* X *of* 1877, *ss.* 3, 629—*Review—Second application for review.*—An application to review an order passed on an application for review cannot be entertained under the last clause of s. 629 of Act X of 1877. S. 3 of the Act saves only the procedure prior to decree in suits or appeals instituted before the new Act (X of 1877) came into force. It does not save the old procedure in regard to applications for review of judgment or any other procedure subsequent to decree. KHARAK SING v. PANJAB SING, **6 P.R. 1878.** [*D.*, 107 P.R. 1883.]

(14)—*Civ. Pro. Code.* (*Act* VIII *of* 1859), *ss* 98, 376 *and* 378—*Confession of judgment by agent holding general power of attorney how far binding on principal* — On 24th February 1877, A sued B to establish his right to the office of Diwan of a Khangah and to share in the management of the institution, as being a hereditary right. On 7th March, before the summons was served, B's general agent or C filed an '*Ikbaldawa*' or confession of judgment admitting plaintiff's claim, and a decree was passed in A's favour. On the 29th March, B applied for review of judgment, on the grounds, 1st, that the *ikbaldawa* had been accepted and judgment passed before the date fixed for hearing; 2nd, that the *ikbaldawa* had been filed without B's consent or authority. *Held* (1) that C had no authority, merely by virtue of his power of attorney, to file a confession of judgment, unless it could be shown that he had been expressly or impliedly authorized by B to do so; (2) that under the Civ. Pro. Code (Act VIII of 1859), even a decree by consent may be set aside, if the attainment of the ends of justice require it. ABDUL MAJID v. FAZL HAQ, **55 P.R. 1878.** (37 P. R. 1877, *F.*)

(15)—*Civ. Pro. Code—Review—Notice to decree-holder essential.*—Under the Civ. Pro. Code, no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. ZAHUR-UD-DIN v. NUR-UD DIN, **14 M.L.J. 7, P.C.**

(16)—*Procedure — Application for review—Admission—Hearing—Notice.*—A case should not be decided on the mere admission of the application for the review. The Court should by law, after the admission of the application for review, fix a day and give notice of it for the hearing of the case so admitted to be reviewed. PARBUTTY v. KHOOBUN, **3 W.R. 134.**

(17)—*Act* VIII *of* 1859, *s.* 378—*Admission of review without notice, effect.*—The admitting of a review without notice to the opposite party is not a mere irregularity but is a defect wholly vitiating the proceeding itself and, in no way binding on that party. S. 378 of the Civ. Pro. Code (Act VIII of 1859) expressly provides that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited. MUSSAMUT GOLABOO v. RAM DYAL SINGH, **8 W.R. 304.**

(18)—*Review—Notice to opposite party—No objection—Admission of new evidence—No proof*

Review—continued.

——4.—**Practice and Procedure**—*continued.*

of inability to produce such evidence earlier—Special appeal.—Where a review of judgment was allowed after notice to the opposite party and without any objection on his part to the admission of fresh evidence, the opposite party cannot be permitted in special appeal to take objection that the applicant for review did not prove that the new piece of evidence was not within his knowledge and could not be produced at the time when the decree was passed as was required in 20 W.R. 84, F.B. RAM JOY GOOPTU v. SREEMUTTY JUGODESSUREE, **22 W.R. 399.**

(19)—*Suit for redemption, valuation of, for purposes of jurisdiction— Dekkhan Agriculturists' Relief Act* (XVII *of* 1879), *consent once given to disposal under provisions of, whether could be withdrawn—Review by Special Judge under Act necessity of notice to concerned parties.*—The proper valuation of suit for redemption is not the amount mentioned in the mortgage-deed but the amount actually remaining due on the mortgage, or claimed on it by the mortgagee. It is rather that amount and the rights connected with it which form the real subject of contention in a mortgage suit. The measure of the value of the subject-matter in contention is the sum which will have to be paid for the recovery of possession of the property. *Per Birdwood, J.*—Under the Court Fees Act, the valuation of a suit for redemption is estimated according to the principal amount expressed to be secured by the instrument of mortgage; but the rules contained in that Act are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for any purposes for which the Act does not provide, as, for example, for purposes of jurisdiction. In the present case, the amount of the mortgage claim not having exceeded Rs. 110, the suit was one in which consent could be given by the parties to application to it of the special procedure provided by Act XVII of 1879. And the consent given by the defendants' pleader to the disposal of the matter under the provisions of the said Act could not be withdrawn after the hearing had begun and proceeded to a certain stage on the footing of that consent. *Held* also that the Special Judge who had been appointed under the Act should, before granting review of the decree passed by the Subordinate Judge, have given sufficient notive to the party in whose favour the decree was passed. RUPCHAND KEMCHAND v. BALVANT NARAYAN, **11 B. 591.** [*Diss.*, 14 C.P.L.R. 154; *F.*, 13 B. 489, 14 B. 19.]

(20)—*Review—Review admitted by deciding Judge—Trial by new Judge.*—Where a case is admitted to review by the deciding Judge and tried afterwards by another Judge, the new Judge ought to try only the point directed by the order of review. HURRO CHUNDER CHUCKERBUTTY v. RAMKISSORE CHUCKERBUTTY, **W.R. 1864, 141.**

Review—continued.

——4.—**Practice and Procedure**—*continued.*

(21)—Res judicata—*Question decided by Judge—Competency of succeeding Judge to re-open the same.*—Where once the Subordinate Judge who first tried the issues relating to *res judicata* in the case held that the claim was not affected or barred by that rule, his successor who had only to try the remaining issues on the merits of the case was not competent to re-open the question again. If he differed in opinion from his predecessor on that question he might record his opinion. But under any circumstances he should record his opinion on the merits also. SALAHMUNISSA KHATOON v. MOHESH CHUNDER ROY, **16 W.R 85.**

(22)—*Review—Power of succeeding Judge—Additional evidence—Contribution—Per capita or proportionately.*—The plaintiffs and defendants were co-sharers in certain joint property. In respect of that property a suit had been preferred by all these parties together and had been dismissed with costs. The costs so imposed having been levied from the plaintiffs, they filed this suit for contribution. The Subordinate Judge passed a decree ordering the defendants to contribute *per capita* in equal shares. An application was then made to the Subordinate Judge who succeeded the last Judge to review that judgment. He admitted the review and called for some additional evidence in order to satisfy himself as to what their respective shares were. He then held that the parties were liable for the contribution according to their respective interests in the property and not simply *per capita*. *Held*, on appeal, that (*a*) the Subordinate Judge was legally competent to admit the review and call for the evidence if he thought that the interests of justice required it, and that (*b*) the assessment was perfectly correct. SHAIKH MURDEN ALI v. SHAIKH TUFUZZUL HOSSEIN. **16 W.R. 78.**

(23)—*Review—Re-opening point for which no review is applied for.*—When a Judge grants a review on one point, he is not justified in re-opening another question, and giving a fresh decision on a point which he has already decided finally, and on which no application for review is made. BYJNATH SAHOY v. WUZEER NARAIN, **24 W.R. 427.**

(24)—*Judgment of Sudder Court, application for review of, not entertainable by High Court.*—This application was made to the High Court to admit a review of a judgment of the late Sudder Court rejecting a special appeal. The application was based on the discovery of new evidence. *Held* that it should have been made to the Court of original jurisdiction and not to the High Court. As the Sudder Court merely rejected the special appeal and could not and did not look into the evidence, it was not for the High Court to receive any application for the admission of a review based on the discovery of fresh evidence. RAO BANEERAM v. NEWAZ BIBEE, **8 W.R. 511.**

(25)—*Review—Certificate by pleader who did not appear originally—Rejection of appeal.*—It is

Review—continued.

—4.—**Practice and Procedure**—*continued.*

the duty of a pleader to advise his client that the proper person to consult as to whether there are grounds for a review in a case where an appeal is rejected, are those who appeared originally in the appeal. If those persons refuse to certify the review, he should also abstain from doing so. TOOG ONUG v. THE BRITISH INDIAN STEAM NAVIGATION COMPANY, LTD., **24 W.R. 430.**

(26)—*Civ. Pro. Code, ss.* 623, 625—*Application for review, copy of decree or order or judgment whether should accompany.*—An application for review of judgment is perfectly legal, although it is not accompanied by a copy of the decree, order or judgment sought to be reviewed. In the absence of any specific provision to the contrary in the Civ. Pro. Code, it is not competent to a Court to impose on an applicant for review, the burden of procuring such a copy which, in most cases, might be superfluous, as the original record would be in the Court moved to review its order. WAJID ALI SHAH v. NAWAL KISHOR, **17 A. 213, F.B.=A.W.N. 1895, 61.** [*R.*, 2 O.C. 302.]

(27)—*Review of judgment—Time—Further investigation—Grounds — Time for obtaining copies.*—An application for a review of judgment, if presented out of time, can be admitted only when there is a special and sufficient cause for the delay. Nor can it be admitted merely for the purpose of having a further investigation in the absence of anything to show that the further evidence sought to be adduced might not have been produced at the original trial. The time for obtaining copies of judgment should not be allowed in applications for review. JHUBHOO SAHOO v. MUSSAMUT JUSODA KOOER, **17 W.R. 230.**

(28)—*Question of costs, appeal not preferable solely in respect of—Application for review of judgment—Time for filing—Suit for mesne profits by guardian—Minority.*—This appeal had been preferred solely on a question of costs and the High Court, following 2 W.R. 33, *held* that such an appeal will not lie. Where the Dusserah vacation intervened between the date of a judgment and the time allowed for filing a petition for review, and the application was filed on the re-opening day after the vacation, *held*, that the application was in time, the holidays being considered as *dies non.* In a suit for possession and mesne profits brought by the guardian of a minor, held, that mesne profits for more than 6 years may be awarded. CHOONULAL MISSER v. PATROO DEO, **6 W.R. 19.**

(29)—*Appeal—Limitation—Deduction of time occupied in review—Illegal omission of Court.*—The plaintiff got a decree against the defendants in the Court of the Tehsildar of Amritsar on the 23rd January, 1872 and on the 24th idem, the defendants presented a petition for review of judgment. On the 26th, the Tehsildar recorded an order that the plaintiff should be

Review—continued.

—4.—**Practice and Procedure**—*continued.*

summoned. No date was fixed for the further hearing of the petition and on the 19th April an order was passed dismissing the application for review, the defendants not having put in an appearance meanwhile. The defendants appeared to the Deputy Commissioner, but the appeal was dismissed because it was out of time. *Held* that, as the Court receiving the application for review disregarded one of the fundamental principles of the Civ. Pro. Code, *viz.*, that the parties interested in a matter before the Court should have due notice of the time appointed for hearing, consideration should be paid to the hardship sustained by the appellants owing to the laches of the Subordinate Court, and the time lost in the proceedings connected with the application for review should be allowed to the defendants, though, ordinarily, the time occupied in applying for a review could not be deducted from the period allowed for preferring an appeal. CHUNDA v. MIHAN, **35 P.R. 1872.**

(30)—*Order on review of judgment — Final decree—Appeal in such suit—Limitation—Grant of review on ground of clerical mistake in judgment, not to be construed as amendment of decree.*—An order passed on an application for review of judgment, in any way modifying or altering the original decree on however minor and insignificant a ground, becomes the final decree in the suit. [*R.*, 3 C.L.J. 188, 9 C.W.N. 605.] For purposes of an appeal from the decree in such suit, limitation runs from the date of such order passed on review. [*R.*, 22 M. 364.] Where a petition for review of judgment was allowed on the ground of a clerical mistake in the original decree, though, under the circumstances, it might have been rejected and an application ordered to be made under s. 206 of the Civ. Pro. Code for amendment of decree, such order, having been distinctly made on review, could not be so treated and was the final decree in the suit. JOYKISHEN MOOKERJEE v. ATAOOR ROHOMAN, **6 C. 22=6 C.L.R. 575.** [*R.*, 5 C.W.N. 192, 28 C. 177.]

(31)—*Civ. Pro. Code, s.* 630—*Review—Appeal—Extent of review.*—The fact that, subsequent to an application for review, an appeal has been preferred against the decree, does not preclude the Court from dealing with the review. [11 B.L.R. 423, F.B., *R.*] Where a Court grants a review on a particular ground, it is not barred, under s. 630 of the Civ. Pro. Code, from rehearing the whole case, but has a discretion to define the extent to which the review should be carried out. THACOOR PROSAD v. BALUCK RAM, **12 C.L.R. 64.** (11 M.I.A. 487, *R.*) [*R.*, 25 P.R. 1904, 7 O.C. 299, 7 O.C. 345; *D.*, 14 M.L.J. 321=27 M. 602.]

(32)—*Jurisdiction—High Court — Review — Modification of appellate decree in same suit—Effect on decrees not reviewed*—Where, in a suit to set aside alienations, the plaintiff having succeeded partly in the first Court and wholly in the appellate Court, the defendants preferred

Review—continued.

——4.—**Practice and Procedure**—*continued.*

special appeals, and, these appeals having been dismissed, two of the defendants applied for review of judgment, the High Court could not, where the modification of the decrees on review was not on grounds common to all the defendants, modify the decrees in which there were no applications for review and thereby prevent the execution of those decrees. MUSSAMUT PEGOO JAN v. MULLICK WAIZOODDEEN, **18 W.R. 464.**

(33)—*Review—Order granting application for, final—Portion of order finally disposing of case as on re-hearing, open to appeal.*—The respondents in this case objected that the order appealed against was merely an order granting an application for a review of judgment, and that, by s. 378 of Act VIII of 1859, such an order was final and not open to appeal. But it was *held* that the order happened to be not only an order granting a review, but was also an order disposing of the case on a re-hearing. Although so far as it merely granted the application, it was not open to appeal, yet, so much of it as went beyond that, and disposed of the matter finally, as on a re-hearing, was a distinct and separate order open to appeal in the ordinary manner. AHMUD HOSSEIN JAN v. SHARBANUND TEWAREE, **6 W.R. 301.** [*F.*, 13 W.R. 138.]

(34)—*S.* 624, *Civ. Pro. Code,* 1882—*Review—Special leave to appeal*—A Judge granting a review is bound to put his reasons on record as required by s. 624, Civ. Pro. Code, 1882, but his failure to do so cannot by itself be a sufficient ground for the admission of an appeal. The requirement is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it. THAKUR SHANKAR v. BALVANT, **2 Bom. L R. 596=27 C. 333=27 I.A. 79=4 C W.N. 203 =7 Sar. 686.**

(35)—*Admission of review by remaining Judge of Bench—Review—Appeal.*—Where a review has been admitted by the remaining Judge of the Court who heard the case originally, it is not open to the opposite counsel, on the rehearing of the appeal, to question the propriety of the order for admission. The Judge or Judges who hear the case originally, if they are in Court when the application comes for hearing, are the only Judges who can review the order passed by them. If the order admitting the review is wrong, the error cannot be rectified by the Bench appointed to hear the appeal which has been already restored to its original number in the file. MESSRS. JARDINE SKINNER AND CO. v. DHUN KISHEN SEIN, **13 W.R. 82.**

(36)—*Application for review—Order rejecting application—Appeal.*—No appeal lies to a superior Court from an order rejecting an application for review on the ground that the application was made many years after the passing of the original decision, and that no just or sufficient cause for the delay had been made out. BANEE RAM v. HOSSEIN ALI, **11 W.R. 184.**

Review—continued.

——4.—**Practice and Procedure**—*continued.*

(37)—*Application for correction of decree—Dismissal—Appeal from order of dismissal.*—Where a lower appellate Court to which an application was made for the correction of a decree which was alleged to differ from the judgment, treated the application as one for review and refused it on the ground that no just or reasonable cause was shown for the delay in discovering the alleged mistake, *held* that no appeal lay from the order of refusal. NOBIN CHUNDER CHOWDHRY v. GRIDHAREE LALL, **11 W.R. 264.**

(38)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 376 *and* 378—*Review of judgment—Appeal.*—Though the order granting a review of judgment is final and unappealable, objections to it can be urged in an appeal against the decision passed on review. Where a Court of appeal granted a review of judgment on the grounds that the appellate Court had failed to inspect certain very material documents that it had summarily discredited, and that it had misappreciated the evidence—*Held*, that the order granting the review was within the discretion vested in the Court by law. ABDUL RAHIM v. RACHA RAI, **1 A. 363** (11 B.L.R. 423, *R.*)

(39)—*Review—Grant of review on improper or insufficient grounds—Interference by High Court.*—The High Court on appeal will not interfere with the grant of a review though the ground on which the review was granted was improper or insufficient. GURUMURTHI NAYUDU v. PAPPA NAYUDU, **1 M.H.C. 164.**

(40)—*Review—Opening of original case—Fresh evidence—Upholding of former decision—Appeal.*—The lower Court had granted the review sought for and re-opened the original case and had gone on even to take fresh evidence; and, the fresh decision of the lower Court passed thereon having to be treated as a decision passed on the original case, and not on the application for review, the High Court ruled that, under such circumstances, an appeal would lie to the Judge. RUGHOONATH ROY v. ANUNDO PAURAY, **10 W.R. 387.**

(41)—*Review—Additional evidence in appellate Court at review-stage.*—A lower appellate Court should not allow points to be explained away in the review-stage by admitting additional evidence. TEKAET KHOOD NARAIN SINGH v. TOOLSEE ROY, **15 W.R. 9.** [*R.*, 2 C.L.J. 431; *D.*, 24 W.R. 188.]

(42)—*Review—Incomplete decree on proofs on record—Tender of further evidence by opposite party.*—The plaintiff sued the defendant to recover rent, and he made it a part of the relief which he asked for in the plaint that the defendant, in case of non-fulfilment within fifteen days of the decree, should be ejected. A decree was, in the first place, given to the plaintiff only for the rent. The plaintiff thereupon applied for a review on the ground that no der had been made in respect of his praye

Review—continued.

——4.—**Practice and Procedure**—*continued.*

for ejectment. The defendant then made a further application that he should be allowed to call witnesses to prove his pottah. *Held*, that the plaintiff's case before the Munsiff, when he applied for the review, was that he was entitled, upon the allegations and proofs on the record, to the full relief which he had asked. It was not open to the defendant *then* to repair his *laches* by citing witnesses whom he ought to have called and might have called at the trial. BANEE MADHUL LAHA v. SHAHZADA PAKARTUR, **20 W.R. 225.**

(43)—*Act* VIII *of* 1859, *s.* 378—*Review—Special appeal from decision passed after review—Impropriety of order granting review not to be questioned*—In a suit for ejectment, the plaintiff put in a document which he described as a lease of the land. The Munsif, M, held that that document created a mortgage and gave defendant a lien on the land and that plaintiff could not recover the land except by a suit for redemption. He, therefore, dismissed the claim in the form in which it was brought. Plaintiff then instituted a suit to redeem in another Munsif's Court when the Munsif D decided that the deed in question created a sale, and not a mortgage, and threw out the claim to redeem. This decree was affirmed in appeal. Plaintiff then applied to the Munsif L, the successor to M, to review the previous decree of his predecessor, and L admitted a review, re-heard the case, and decreed that the land should be restored to the plaintiff. This decree was affirmed in appeal by a new District Judge. In a special appeal preferred against this decision—*Held* that the act of the Munsif L, in admitting a review of his predecessor's decision, on the ground of the result of the suit for redemption, which had been instituted in conformity with the direction of that predecessor, was of a very questionable character, and that it was not competent to the Court in special appeal to enquire into the propriety or impropriety of the order made by the Munsif on that occasion, as the order granting the review was final. DHUNKA DEVLA v. HIRA RAMLA, **4 B.H.C.A.C. 57.**

(44)—*Special appeal—Order granting review—Irregularity.*—The Full Bench ruling in 20 W.R. 84, in which it was held that a special appeal did lie to determine whether, in an order granting a review, there had been any irregularity, and that the word "final" in s. 378, Act VIII of 1859, had to be taken only to exclude an appeal at the time, but not to prevent the appellate Court from considering afterwards the legality of the order admitting the review as well as any part of the case, applied to cases in which a regular appeal was preferred on the ground that the admission of the review was not justified by the evidence before the first Court, and the Judge was not precluded from looking into the whole facts of the case. JOY KISHEN MOOKERJEE v. PURBUTY CHURN GHOSSAL, **22 W.R. 183.**

Review—continued.

——4.—**Practice and Procedure**—*concluded.*

(45)—*Review—Omission not pointed to lower appellate Court—Special appeal—Costs.*—Where a plaintiff, when he applied to the lower appellate Court for review, failed to point out an omission on the part of that Court, he is not entitled to the cost of a special appeal to have it corrected. RAM GUTTY SURMAH v. ABDOOL ALI, **20 W.R. 73.**

(46)—*Review—Special appeal—Application heard by remaining Judge of Division Bench—Admission—Re-hearing—Court fees—Under valuation—Refusal of leave to appeal to Privy Council.*—The main question in dispute was as to the nature of the lease under which the defendant held the plaint property. The High Court on special appeal held that the lease was not hereditary. The effect of this decision was to reverse the decree of the Court below. Subsequently, the defendant applied for review of judgment and the application for admission of review was heard by only one of the two Judges constituting the Division Bench, inasmuch as the other Judge had by that time left the Court. The review having been admitted was heard by the remaining Judge and another Judge of the High Court. The Bench so constituted held that the lease was hereditary. Thereupon, an application was made by the plaintiff before the same two Judges for a review of this judgment and upon that application notice was issued to the defendant. The case was then re-argued and the Judges held that a sufficient ground for the admission of a review had not been made out by the plaintiff and dismissed the appeal. *Held* that there was a re-hearing of the case and the dismissal was of the appeal on the merits and not the application for the admission of the review. Where property worth Rs. 10,000 was undervalued and Court fee paid on the low valuation, the Court refused to grant leave to appeal to the Privy Council. LEKHRAJ ROY v. KANHYA SINGH, **18 W.R. 494.** [*Affirmed*, 3 C. 210, P.C.]

See APPEAL—ORDERS, 5 W.R. Mis. 58.

See COURT FEES ACT, 1870, ss. 6, 28, sch. I, arts. 4, 5, 12 A. 57 = A.W.N. 1889, 197.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 17, 5 P.R. 1894.

——5.—**Reviews after Time.**

(1)—*Review—Civ. Pro. Code*, 1882, *s.* 623—"*Sufficient reason*"—*Construction.*—The words "sufficient reason" in s. 623 of the Civ. Pro. Code, should receive a liberal construction and should be construed so as to do substantial justice to the parties. GOPAL CHUNDER LAHIRY v. SOLOMON, **11 C. 767.** [*R.*, U.B.R. 1892—96, Vol. II, 153.]

(2)—*Application for review of judgment—Time for—Act* VIII *of* 1859, *s.* 376—"*Sufficient reason*"—*What amounts to Privy Council decison on question of fact in another suit—Pendency of appeal in High Court.*—A decision of the Privy Council passed in 1871 with regard to a question of fact in

Review—continued.

——5.—Review after Time—*continued.*

another suit, or the pendency of the appeal in the High Court, is no "sufficient reason" within the meaning of the expression as used in s. 367 of Act VIII of 1859, for not having preferred an application for review of a judgment within the limited period, *viz.*, 3 months from the date of the decree. BOLAKEE LALL v. MONJEE LALL, **17 W.R. 163.**

(3)—*Civ. Pro. Code (Act* VIII *of* 1859), *s.* 376—*Review when granted.*—The discovery of new evidence may make it proper to grant a review under s. 376, Act VIII of 1859. But the circumstances must be very special—the more so when the application to review is made many years after the date of the decree—and the evidence discovered must be of a clear and conclusive character. HEERA LALL GHOSE v. RAM TARUCK DEY, **23 W.R. 323.**

(4)—*Review of judgment, Ground for—Subsequent Full Bench decision.*—Where a plaintiff, unsuccessful in his first suit before the High Court, made an alternative claim in a second suit, and, upon a reference of the question in suit, a Full Bench unanimously decided that the course taken by the plaintiff in the second suit was wrong and that that in the first was right, the High Court would be justified in reversing the former judgment on review and carrying into effect the decision of the Full Bench. JONMENJOY MULLICK v. DASSMONEY DASEE, **8 C. 700.** (7 W.R. 405, 9 W.R. 102, B.L.R. Sup. Vol. 892=9 W R. 181, *D.*) [*F.*, 13 B. 330.]

(5)—*Final decision between parties—Close of Court's jurisdiction except for execution—New trial when could be held for the same matter.*—When once a Civil Court has passed a final decision between the parties, it loses jurisdiction over the suit, except for the purposes of executing the decree, and it cannot hold a new trial of the same, unless, for some reason within the Procedure Act, the first trial appears to have been unfair between the parties. SULEET MOHUN ROY CHOWDHRY v. SOWTRA BEBEE, **10 W.R. 42.** [*Expl.*, 11 W.R. 197.]

(6)—*Dismissal of suit—Review—Appeal—Reversal of judgment in review—Remedy of decree-holder.*—The first Court, having dismissed a suit, granted a review of its judgment and decreed the suit even though the plaintiff did not afford proof to the satisfaction of the Court that such evidence was not within his power to produce at the time of the suit. The lower appellate Court dismissed the suit holding that the petition of review was improperly admitted contrary to the Full Bench ruling in 11 B.L.R. 423. *Held*, that the lower appellate Court was right in interfering with what the first Court had done illegally and without jurisdiction, and reversing the judgment so obtained. In answer to the decree-holder's contention that he would have no remedy as regards the objection by which the suit was first dismissed by the Munsiff, *held*, that the plaintiff might make an application to the lower appellate Court for leave to appeal against the judgment first pronounced, and that it was entirely within the discretion of the lower appellate Court to admit the appeal or not, regard being had to the mistaken proceedings which followed upon the petition for review. MR. C. G. D. BETTS v. BONSI MUNDUL, **25 W.R. 343.**

(7)—*Review of judgment—Time—Further investigation—Grounds—Time for obtaining copies.*—An application for a review of judgment, if presented out of time, can be admitted only when there is special and sufficient cause for the delay. Nor can it be admitted merely for the purpose of having a further investigation in the absence of anything to show that the further evidence sought to be adduced might not have been produced at the original trial. The time for obtaining copies of judgment should not be allowed in applications for review. JHUBHOO SAHOO v. MUSSAMUT JUSODA KOOER, **17 W.R. 230.**

(8)—*Civ. Pro. Code*, 1859, *s.* 376—*Review—Executor—Legatee—English and Indian Law.*—The plaintiff's suit was decreed as prayed for, though a certain issue was decided against him. Subsequently the defendants applied for review of judgment and the Court admitted the review and dismissed the suit as barred by limitation. Thereupon the plaintiff applied for a review of both the former and present judgment, although the application as to the former judgment was barred. *Held*, that the plaintiff was entitled to have both the judgments reviewed, as he had not been aggrieved by the first decree and as only the second decree was adverse to him. An executor is not under any obligation under the Indian law as he is in England, to shed his character of executor before he can appear in his new character of legatee. MUSSAMUT BAGOOJAN v. CHOWDHRY ZUHOORUL HUQ. **13 W.R. 69.**

(9)—*Reg.* XXVI *of* 1814, *s.* 4—*Admission of application for review—Removal of inability to review without permission of superior Court—'Further appeal' in s.* 4, *meaning of—Act* VIII *of* 1859, *s.* 377, *scope of.*—The sole question in this appeal was whether the Court below, in admitting to review the judgment in appeal passed by a former Judge, in 1848, was wrong in law. The Judge's competency to admit the review was denied, firstly, because the previous permission of the High Court had not been obtained in accordance with the law before 1859; secondly, because, a special appeal having been admitted in this case, the review was barred, thirdly, because more than 12 years having elapsed during which time the defendants had been in quiet possession, all further proceedings were absolutely barred. With regard to the first of these objections, it was contended that Reg. XXVI of 1814, s. 4, applied, and that, although the Regulation had been repealed, yet, under the principle of s. 387, Civ. Pro. Code, the present case must be dealt with as a suit pending

Review—continued.

—5.—**Reviews after Time**—*continued.*

at the time when the Code came into operation and, therefore, governed by the law previously in force. The High Court was however of opinion that s. 387 had no bearing on the question. The proviso contained in the latter part of the section merely maintains the rights of parties to pending suits in reference to the procedure of the suits and does not affect the enlarged powers given to certain Courts, or the restraint removed by the Code. Whereas, by the law previously in force, the Subordinate Courts could not review their judgments without the permission of a superior Court; the Code removed that inability, and the removal extended to suits past and pending as well as future. On the second question, whether the previous admission of a special appeal barred the review; it was held that an applicant for review of a judgment passed in 1848 can claim to be governed rather by the terms of the old law, Reg. XXVI of 1814, *viz.*, "from which decree no further appeal may have been admitted by a superior Court," and the words "further appeal" in s. 4 of the Regulation include both a special or second appeal described in s. 2, cls. 1 and 2 of the same Regulation, and also a summary appeal mentioned in cl. 3, s. 3. It was therefore held in the result that nothing in the proceedings in special appeal barred the application for review in this case. Upon the third objection, it was clear that there was no quiet possession in good faith by the defendants so as to bar the suit by limitation. The Limitation Act, XIV of 1859, is wholly silent on the subject; and s. 377, Civ. Pro. Code, assigns no limit to the time, after the expiration of 90 days, at which the application for review may be filed on the stamp paper prescribed for plaints, provided that the applicant can satisfy the Court that there was just and reasonable cause for the delay. In the present instance, cause was shown for the delay; the Judge took evidence as to its truth, and, after full consideration, decided that the cause had been made out. The order of the Judge thereon granting the review was final and could not be disturbed unless it be shown to be contrary to law or usage having the force of law. JOGUL KISHORE SINGH v. OOGHUR NARAIN SINGH, **8 W.R. 483.**

(10)—*Review—Effect—Procedure.*—Where a suit is admitted to review, it becomes, in all respects, a new one between the parties, and its decision will be guided by the precedents then in force; and if there exists a Full Bench Ruling at that time which was contrary to other rulings on the same point, the Court is bound to follow it. ALLAD MONEE DOSSIA v. JOY SUNKER ROY, **7 W.R. 408.** [*R.*, 6 A. 292=A.W.N. 1884, 89.]

(11)—*Civ. Pro. Code*, 1859, s. 377—*Review of judgment—Limitation.*—An application for review of judgment cannot be granted after the proper time, on grounds which should have been but were not, urged at the hearing of suit,

Review—continued.

—5.—**Review after Time**—*continued.*

unless just and reasonable cause were shown to the satisfaction of the Court for not preferring it within the time allowed by law. MADHO DAS v. RUKMAN SEVAK SINGH, **2 A. 287.**

(12)—*Review of judgment, application for, after long delay—Delay to be explained.*—A Court commits an error in law if it assumes that it is sufficient for a party applying for review after 90 days to account only for omitting to apply within that period. Though the admission of a review applied for after the prescribed period lies in the discretion of the Court, still an error in the principle governing the exercise of that discretion is an error of law which may be urged in special appeal. In determining whether such discretion should be exercised in favour of an applicant who is out of time, it is incumbent upon the Court to take into account the additional period, which has been allowed to elapse after the prescribed period, when it is considerable in point of duration, and to determine whether it is satisfactorily explained. HYAT v. RAHIM-UD-DIN, **114 P.R. 1876.**

(13)—*Act* VIII *of* 1859, *s.* 378—*Review—Second application—Petition for review presented after* 90 *days—Reason for delay.*—Under s. 378, Act VIII of 1859, no second application for review of a judgment can be entertained after the dismissal of the first application. An application for review of judgment presented after the prescribed period of 90 days from the date of the decree, should be rejected unless the delay is satisfactorily accounted for. KASHEENATH ROY v. LUCHHEE NARAIN CHATTERJEE, **W.R. 1864, 91.**

(14)—*Review if grantable after ninety days—Power of Court—S.* 28, *Act* XXIII *of* 1861—*Extortion, Charge of—Civil Court, Jurisdiction of.*—A Judge has power to grant a review of a judgment, notwithstanding that a period exceeding ninety days has elapsed. Where the possibility was that a Judge might feel some difficulty on a point of law when he came to determine a case upon review of judgment, *held* that he might refer that point of law for adjudication by the High Court under s. 28, Act XXIII of 1861. Civil Courts have jurisdiction to entertain charges of extortion. RAMGUTTEE DOSS v. GHOLAM AHMED KHOUDKAR, **W.R.F.B. 84.**

(15)—*Review of predecessor's judgment—First application rejected—Second application after* 90 *days.*— A Judge acts without jurisdiction in admitting a second application for review of a judgment passed by his predecessor after the expiry of 90 days from the rejection of the first application, without a finding of any just and reasonable cause for such admission. SREENATH CHOWDHRY v. KRITTATTO MOYEE DOSSEE, **18 W.R. 286.**

(16)—*Review—Application made out of time—No reason shown for delay—Jurisdiction.*—

Review—continued.

——5.—**Review after Time**—*continued.*

Where an application for review of judgment is clearly out of time and no reason for the delay is shown at all, the Judge has no jurisdiction to grant a review; if he grants it under such circumstances, all the proceedings taken subsequently are without jurisdiction and bad. GOUR PERSHAD SURMAH v. ANJUB ALI, **24 W.R. 294.**

(17)—*Act* VIII *of* 1859, *s.* 377—*Petition of review—Limitation—Permission of Court.*—Under Rule 1 of the 1st of May 1863 and under s. 377 of Act VIII of 1859, a petition of review ought not to be admitted after the time prescribed in that section, without the leave of the Court or a Judge. OMRAO SINGH v. MONGULA BEBEE, **3 W.R. 113.**

(18)—*Review, Admission of, after time—Just and reasonable cause to be proved.*—A party applying for a review beyond time must show, in order that the application may be heard, just and reasonable cause to the satisfaction of the Court for not having preferred such application within the limited period of 90 days; and where a Court entertains an application for review beyond time, though the applicant has not shown just and reasonable cause for the delay, the Court acts without jurisdiction and its order is null and void. MUSSAMMAT FATTO v. LASHKA KHAN, **101 P.R. 1876.**

(19)—*Application for review of judgment, made after* 90 *days—Sufficient cause for delay to be established.*—The order of a Court admitting a review should show or state that it was satisfied that there were good reasons for the delay in presenting the petition of review. The review in this case, having been admitted after the expiration of 90 days without any just or reasonable cause having been shown to the satisfaction of the Court for not having preferred the application within the limited period, the order admitting the review and the subsequent proceedings thereon were set aside as illegal. (*Pundit, J., dissentiente*). GUNGANARAIN ROY v. GONOMONEE, **8 W.R. 184.** [*Appr.*, 14 B.L.R. 373 = 2 I.A. 58; *R.*, 9 W.R. 181, F.B.]

(20)—*Review—Application presented after time—Reasonable cause for delay*—In this case, no reason was assigned, in the application for review presented to the District Court, for the delay in its presentation, nor had the Judge in his order allowing the review, made any reference to the subject. A special appeal had been preferred by the defendant to the High Court, but the time so occupied was held not to constitute a just and reasonable cause for the delay. Further, there was beyond the above period, a delay of more than two years altogether unaccounted for. The High Court therefore held that the Judge had no jurisdiction to admit the application for review and that all that had been done under it must fall to the ground. FAKIRA v. BASAPA M. SHETTI, **8 B. H.C.A.C. 234.** [*F.*, 8 B. 263.]

Review—continued.

——5.—**Review after Time**—*continued.*

(21)—*Review, application for, after time—Just and reasonable cause for delay—Appeal.*—An order granting a review moved for after the time allowed by law, without any adjudication as to the goodness and the sufficiency of the cause of delay, is illegal; and an appeal lies as to the sufficiency of the cause of delay. KRISTO GOBIND JOARDAR v. JUGOBUNDHOO SIRCAR, **12 W.R. 94.** (9 W.R.F.B. 181, *R.*)

(22)—*Review of judgment several years old—Delay—Ground of review—Decision of Privy Council—Act* VIII *of* 1859, *s.* 377.—It would give rise to considerable confusion and great inconvenience if suits which were considered to have been finally disposed of could be opened by review after the lapse of several years from the date of decree, upon the ground that, in some other suit, the Privy Council had come to a different decision. PANCHANAN BOSE v. GURUDAS ROY, **9 B.L.R. 187 = 18 W.R. 317.** (3 B.L.R.A.C. 287, *Doubted.*)

(23)—*Application for review after* 90 *days—Just and reasonable cause—Appellate Court, powers of.*—*Lindsay, J.*—The Chief Court has authority to consider every act of the lower Courts previous to the decree and it can legally consider whether just and reasonable cause for the delay in presenting an application for review has been shown. A new exposition of the law by the High Court is not a just and reasonable cause for not having applied for a review within the period of 90 days, but when the application has been granted on good cause shown, then the exposition of the law laid down since the date of the judgment sought to be reviewed may properly govern the case. Two cases in which plaintiffs were proprietors of the same village and the defendants, two brothers, were filed together, were heard on the same days, rested on the same point and evidence in one was held good in the other. While one case was fought on up to the Chief Court, in the other defendant held back waiting for the decision in the case of his brother and believing his case would be decided according to the decision in his brother's case. His application for review was filed before the judgment of the Chief Court was given. *Held* by *Campbell* and *Boulnois, JJ.* (*Lindsay, J.*, dissenting) that the Deputy Commissioner was quite justified in being satisfied that the cause assigned by petitioner for filing his application for review after 90 days was just and reasonable. HURREE SING v. MUKHA, **51 P.R. 1871.**

(24)—*Cognate cases—Appeal to Privy Council—High Court reversing its own decision—Application for review of judgment—Lapse of time.*—An application for review of judgment of three out of five analogous cases decided by the High Court, the judgment in two of which had been reversed by the Privy Council, made after the lapse of more than 90 days from the date of the judgment of the High Court, but made within ninety days from the Privy Council decision was granted under the circumstances

Review—continued.

—5.—**Review after Time**—*continued.*

of the case. Where of five cognate cases which one decision of the High Court governed, two were appealed to the Privy Council, and the decision was reversed, the High Court reversod its own decision in the rest. SUTTO SURRUN GHOSAL BAHADOOR v. TARINEE CHURN GHOSE, **12 W.R. 154 = 3 B.L.R. A.C. 287.** (9 W.R.F.B. 181, *Dist.*; 3 W.R. 1, *R.*) [*Appr.*, 13 W.R. 439; *Diss.*, 18 W.R. 317.]

(25)—*Act* VIII *of* 1859, *s.* 377—*Review*—"*Just and reasonable cause*" *for delay*--*Subsequent Full Bench decision.*—An application for review of a judgment passed 3 years previously, was found to be a renewal of an application made within the time limited for that purpose by s.377 of Act VIII of 1859. The only justification for the delay was that a judgment of a Full Bench had since that date laid down the law in conformity with the contention made by the petitioner in his former petition of review. *Held* that this fact did not constitute a just and reasonable cause within the meaning of s. 377, and that the Court ought not, merely on the ground of the Full Bench decision, to admit a petition for the purpose of interfering, in review, with a determination of the law by a competent tribunal which was come to before that decision was given. DWARKANATH DOSS BISWAS v. MANICK CHUNDER DOSS, **9 W. R. 102.** [*D.*, 13 W.R. 82, 8 C. 700, 11 C.P.L.R. 41.]

(26)—*Act* VIII *of* 1859, *s.* 377—*Application for review after* 90 *days*—*Subsequent different construction of law by High Court, no excuse for delay.*—In this case, the lower appellate Court admitted a review after the period of 90 days prescribed by s. 377 of Act VIII of 1859 had expired since the original case was decided. The only cause shown for not having preferred the application within time was that, prior to the admission of the review, the High Court in another case had laid down the law in a different manner from that in which the lower appellate Court had laid it down in the decision admitted to review. *Held* that the new construction of the law might be a ground for review, but would amount to no execuse for not having applied in time. PRAN KISHEN BHUTTACHARJEE v. BUKSHEE CAZEE, **10 W.R. 26.** (9 W.R. 181, F.B. at p. 185, *F.*)

(27)—*Civ. Pro. Code*, 1859, *s.* 378—*Decision eight years old*—*Review.*—A review may be granted in 1862 of a decision of 1854, and the order admitting the review is final under s. 378, Act VIII of 1859. MAHADEO LALL v. LALLA GOUR PERSAD, **W.R. 1864, 232.**

(28)—*Review of predecessor's judgment*--*Application made beyond* 90 *days from date of decree*—*Procedure*—*Decision regarding admission of review.*—In this case, there was no proper decision as to the admission of the application for review, because the Principal Sudder Ameen had admitted a review of the judgment of his predecessor without deciding whether there was just and reasonable cause for the delay in the

Review—continued.

—5.—**Review after Time**—*continued.*

application for review which was presented after 90 days from the date of the decree. He should not have admitted the application merely because, in his opinion, the evidence was such as to lead to a different conclusion, since he was not an appellate Court competent to revise the decision of his predecessor. The judgment of a preceding Judge cannot be reviewed merely because the succeeding Judge would have recorded a different judgment. If any new evidence is offered, the applicant is bound under the law to show that it "could not be adduced by him" at the trial, before the review could be admitted for the re-consideration of such judgment. DOOKHOO PASEE v. SHAIKH MAHOMED HOSSEIN, **6 W.R. 98.**

(29)—*Application for review of judgment*—*Subsequent decision of High Court or Privy Council modifying law or practice, not sufficient ground for admission of review after limited period.*—The party who applied for review in this case failed to show any cause whatever for not having preferred his application within the limited period. He relied upon a new interpretation that had been put upon the law relating to the matter decided in the suit. It was, however, *held* that, though it might be a good reason for preferring an application at the present time, it could be no reason for not having preferred such application in the past. It is not consistent with law or reason that questions which have been long ago finally decided by competent tribunals are to be re-opened at any period of time, however remote, in consequence of a decision either in this Court or in the Privy Council which is supposed to modify the law or practice which prevailed at the time of such decisions. ONOOP CHUNDER PAUL v. EKKOWREE SINGH, **6 W.R. 167.** [*R.*, 7 W.R. 166, 11 C.P.L.R. 42.]

(30)—*Rejection of first application for review*—*Second application based on construction given in a subsequent Full Court decision, to be made within* 90 *days from such decision.*—A previous application for review of a judgment of the Division Court, which had been made within 90 days from the date of the judgment, was rejected. On the ground that a Full Court subsequently sitting in appeal had put a particular construction on a "teep" or Indigo contract, a second application for review was presented. It was contended for the applicant that inasmuch as an application had been made within 90 days from the date of the original decree, he was not bound to show just and reasonable cause to the satisfaction of the Court for not having preferred his *second* application within 90 days from the date of the judgment of the Full Court sitting on appeal under s. 15 of the Charter; but the High Court was of opinion that the applicant was bound to make his application within 90 days from the date of the decision of the Full Court, and, there having been no just and reasonable cause shown for the delay beyond

Review—continued.

——5.—**Review after Time**—*continued.*

that period, rejected also the second application for review. FORBES v. SHAIKH DYANUTTOLLAH, **10 W.R. 415.**

(31)—*Ss.* 376, 377, *Act* VIII *of* 1859—*Admission of review of judgment after* 90 *days—Discretion of first Court under s.* 377, *Civ. Pro. Code, lower appellate Court not competent to interfere with.*—In this case, the Principal Sudder Ameen reversed the decision of the Sudder Ameen admitting a review. The application for the review had been presented more than 90 days from the date of the original decree, and the Sudder Ameen exercising the discretion vested in him by s. 377 of Act VIII of 1859, granted a review, and it was not competent to the principal Sudder Ameen to interfere with the exercise of such discretion. It is the duty of the Judge of the Court to whom an application for review has been made to satisfy himself, not only of the existence of proper grounds for questioning the prior decision but also of the existence of just and reasonable cause why the application was not made within the limited period; and where he is not satisfied on the latter point, he ought to dismiss the application without reference to any other question. SHAIKH BURA BOODHOO v. KOYLASH CHUNDER NUNDEE, **6 W.R. 99.**

(32)—*Application for review—Limitation Act* (XV *of* 1877), *s* 5—*Pendency of appeal not sufficient ground for delay in applying for review—Applicant's ignorance of legal effect of judgment, not sufficient excuse for delay—Small Cause suit—Interlocutory order—Appeal* — The application for review in this case was presented long after the prescribed period; the District Judge however granted the review, being of opinion that there was sufficient cause for the delay in the circumstance that an appeal by the applicant was all along pending. The High Court held that the application for review should not have been admitted after the long delay for which there was no sufficient excuse. The mere pendency of an appeal or a second appeal would not constitute "sufficient cause" within the meaning of s. 5 of Act XV of 1877. Nor can the Court allow an applicant for review to plead his ignorance of the legal effect of the judgment as a justification of his delay, for, that would be exposing the decree-holder to the possibility of a review for an indefinite period. GULAM HUSEN MAHAMED v. SAYAD MUSA MIYA HAMAD ALI, **8 B. 260.**

(33)—*Reversal of decree in another case—Ground for admitting review after time—Review after* 90 *days—Appeal.*—Where an application for review of an order in execution of a decree was made more than 5 months after the date of the order, and not within 90 days as required by the Code, and the only ground upon which the review was sought was that, in the execution case of another person, but apparently upon the same decree, the decision which proceeded apparently upon the same ground as the decision

Review—continued.

——5.—**Review after Time**—*concluded.*

in this case, had been reversed by the High Court. *Held* that the reversal by a Court of appeal of any decree or order in another case is no ground for admitting a review after the expiration of 90 days, and that the order admitting a review under such circumstances was open to appeal and should be set aside. ROY GOODUR SUHAYE v. ACHEBUR LALL, **13 W.R. 120.** (9 W.R. F.B. 181, *F.*; 12 W.R. 184, *R.*, 2 B.L.R. 183=11 W.R. 56, *D.*) [*R.*, 17 W.R. 163.]

(34)—*Act* VIII *of* 1859, *ss.* 376, 377—*Special appeal admitted—Review—Delay in applying for review—Special appeal pending.*—The mere fact that a special appeal has been preferred and admitted in the High Court against a decretal order of a lower appellate Court prevents any party to the suit, no matter whether or not he be the party who preferred the special appeal, from having the right, under s. 376, Act VIII of 1859, of applying to the lower appellate Court for a review of the judgment. [*F.*, 14 W.R. 438; *R.*, 11 W.R. 511 (12 C.W.N. 885).] Where an application for review of judgment is not made within 90 days and absolutely no reason is given for the delay except the fact that a special appeal has been pending in the meanwhile, it was held that the pendency of a special appeal would not be "a just and reasonable cause" for the loss of time, such as the Court to which the application is made is bound to arrive at, under the provisions of s. 377 of Act VIII of 1859, before it can entertain the application at all. L.T. LUCAS v. W. STEPHEN, **9 W.R. 301=5 Wym. 195.** [*F.*, 8 B.H.C. A.C. 234.]

(35)—*Special appeal—Remand order—Legal effect—Subsequent change of law—Review.*—The fact that the High Court, subsequently to a remand in a special appeal, takes a different view of the law from that held at the time of the remand, is not in itself sufficient ground for questioning validity of a remand order made by that Court under what turns out to have been a mistaken apprehension of law, or for seeking a review of it after the prescribed time. An application for review of the remand order within the time allowed by the law is the proper course to follow. Failing that, the remand order is a conclusive determination upon the point of law, and its validity cannot be questioned in another special appeal. RAMKUVARBAI v. DAMODHAR NARBHERAM, **6 B.H.C. A.C. 146.** [*F.*, 10 O.C. 350.]

See LIMITATION ACT, 1908, ss. 4 and 5, 39 P.R. 1879.

See SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 15 W.R. 143.

——6.—**Review by Judge other than Judge in original Case.**

(1)—*Civ. Pro. Code*, 1882, *ss.* 624, 626 (*c*)—*Act* VII *of* 1888, *s.* 59—*Review—Grant of application—Hearing by successor.*—An application for review of judgment upon grounds other than

Review—continued.

— 6.—**Review by Judge other than Judge in original Case**—*continued.*

those mentioned in s. 624 of the Code (which are the existence of new and important matter or evidence or of some apparent clerical error), if presented to the Judge who delivered it, and who has thereupon directed notice to be given to the opposite party, may be heard and disposed of by his successor. The language used in proviso (c) of s. 626 of the Code is not felicitous, for s. 624 does not provide for the making of any application to the Judge who delivered the judgment; it only forbids the making of certain applications to any Judge other than the Judge who delivered the judgment. The intention, however, of the Legislature in inserting the proviso by Act VII of 1888 is plain. Under s. 623, there are three grounds upon which applications for review can be made:—(1) new and important matter of evidence, (2) mistake or error apparent on the face of the record, and (3) any other sufficient reason. When, therefore, s 624 provides that no application except on grounds (1) and (2) can be made to a Judge other than the Judge who delivered the judgment, while tacitly allowing that, to the Judge who delivered the judgment, applications on all three grounds can be made, it in effect enacts that to him alone shall applications on ground (3) be made. GANPAT v. JIVAN, **16 B. 603.** [*R.*, 16 C.P. L.R. 151.]

(2)—*Act* VIII *of* 1859, *s.* 7—*Case in progress of trial not within scope of review—Court passing judgment the only Court to grant review.*—The Court which has pronounced a judgment is the only Court that can review such judgment. Where, by inadvertence or from design, an application for review of the judgment of a Subordinate Judge has been presented in the Judge's Court, it is the duty of the latter to return the petition to the party in order that it might be put in before the Subordinate Judge. S. 6 of Act VIII of 1859 gives a Judge power to withdraw a case from a Court subordinate to him. It does so, however, solely to enable the Judge to himself try the case so withdrawn or to refer it for trial to some other Court. According to the section, such transfer must take place on the institution of the suit, and it could not have been intended that a case in progress of trial should be taken off the file of the Court trying the same, in order that it should be completed by the Judge himself or some other Court. RAM NATH v. GOWHUR, **2 N.W.P. 230.**

(3).—*Civ. Pro. Code, s.* 627—*Application for review— Constitution of Benches—Powers of Chief Justice.*—The latter part of s. 627 of the Code provides that no other Judge or Judges of the Court, excepting the Judge or Judges who was or were parties to the original judgment, shall hear the application for review of the Judge or Judges or any one of them is still attached to the Court; so that although the Chief Justice of the High Court has in general the duty cast upon him of appointing the

Review—continued.

—6.—**Review by Judge other than Judge in original Case**—*continued.*

Judges who are to constitute particular Benches for particular business, in cases to which s. 627 applies the constitution of the Bench is taken out of his hands, and is provided for by the Code. AUBHOY CHURN MOHUNT v. SHAMONT LOCHUN MOHUNT, **16 C. 788.** [*R.*, 9 C.W.N. 502.]

(4)—*Civ. Pro. Code, ss.* 623, 624—*Review of judgment—Abolition of Court and transfer of business to another Court.*—S. 624 of the Civ. Pro. Code must be considered as a priviso to s. 623, and so, when there has been a change of the presiding Judge, no application can be made to the new Judge, for review of judgment whether of the Court which passed the decree or of the Court substituted for it, except on the grounds mentioned in s. 624. SARANGAPANI v. NARAYANASAMI, **8 M. 567.** [*Appr.*, 16 B. 603.]

(5)—*Transfer of case from one Court to another for purposes of review.*—A Judge cannot, by transferring a case to his own file, confer on himself the power to review the dismissal order passed by a principal Sudder Ameen. GOLAM ESHA v. HURRISH CHUNDER MOOKERJEE, **W.R. 1864, Mis. 29.**

(6)—*Review—Appeal heard before two Judges —One Judge leaving Court—Application for review heard before other Judge—Appeal to be heard by two Judges if review granted—Sufficient reason—Discretion of Court.*—When an appeal is heard by two Judges of the High Court, one of whom leaves the Court, the Judge who continues in the Court is competent to hear an application for a review of the decree made in the appeal, and also the application for a rule for the review and the rule. If the rule is made absolute, the appeal should be heard by a Bench of two Judges. The discretion of a Court in saying what constitutes good and sufficient reason for an application for review, or what are the proper requisites for the ends of justice to support such an application, is not limited. MAKSUD MAHI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **9 Ind. Cas. 532.**

(7)—*St.* 24 *and* 25 *Vic., c.* 104 (*High Court's Act*) *s.* 15—*High Court's powers of superintendence — Review of judgment.*—Where a Subordinate Judge rejected an application for review of judgment, on the ground that he had no right to interfere, as the judgment sought to be reviewed was that of his predecessor, *held*, that the High Court, under the general powers of superintendence vested in it by s. 15 of the Letters Patent, is competent to point out to the Subordinate Court its error and to direct it to reconsider the application presented to it, and to dispose of it according to law. *In re* MATHRA PRASHAD, **I.A. 296.** [*R.*, 9 A. 104 = A.W.N. 1886, 309, F.B.]

(8)—*Application for review of judgment, succeeding Judge considering and deciding, powers*

Review—continued.

—6—Review by Judge other than Judge in original Case—*continued.*

of.—No distinction is made by law between the power of a Judge who had originally heard the case and subsequently has an application for review before him, and the power of a Judge subsequently succeeding to the same office, who has such an application before him (not being barred, by the circumstances stated in s. 379 of Act VIII of 1859, from considering such application). AMAN ALI CHOWDHRY v. KASIM ALI, **6 W.R. 316.**

(9)—*Review of predecessor's judgment—Discretion of Court.*—A Subordinate Judge has the power under the law to review the decision of his predecessor, although this is a power which should be exercised very sparingly. KANGALEE CHURN JOSH v. DURSUNEE DOSSEE, **18 W. R. 198.**

(10)—*Review of judgment, application for—Notice—Hearing by successor--Civ. Pro. Code, s.* 624.—An application for review of judgment, upon a ground other than those mentioned in s. 624 of the Civ. Pro. Code, if presented to the Judge, who delivered it, and who, thereupon, directs notice to issue to the opposite party, may be heard and disposed of by his successor. KAROO SINGH v. DEO NARAIN SINGH, **10 C. 80=13 C.L.R. 261.** (4 A. 278, *Diss.*) [*F.*, 13 C. 231; *Appr.*, 13 M. 178. F.B., 16 B. 603; *R.*, 12 M. 509; *Cons.*, 10 C.P.L.R. 62.]

(11)—*Review, application for, heard by successor of the Judge that passed the decree—Civ. Pro. Code,* 1882, *s.* 624.—Where an application for review is presented to the Judge who made the decree, and he thereupon issues notice to the other side, the application is "made" to him within the meaning of s. 624 of the Civ. Pro. Code, and may be heard and disposed of by his successor in office. FAZEL BISWAS v. JAMADAR SHEIK **13 C. 231.** (10 C. 80. *F.*) [*Appr.*, 13 M. 178. F.B.; *R.*, 16 B. 603, 10 C.P. L.R. 62, 3 O.C. 363.]

(12)—*First decree in favour of plaintiff—Appeal to Privy Council—Second decree in plaintiff's favour based on first decree—Payment of money into Court pending result of previous appeal to Privy Council—Reversal of decree by the Privy Council—"New and important matter"—Application for review—Civ. Pro. Code,* 1882, *ss.* 623, 624.—The proprietor of certain taluqdari villages sold the suit lands, which were described as *nakri* (rent-free), to the father of the plaintiff under a deed dated 9th May 1858, and covenanted to the effect that, if the Government should, at any future time, levy any assessment and the vendee were compelled to pay the same, the latter would be entitled to recover the same from him. The Government having levied assessment for the years 1872 1876, the plaintiff instituted a suit in 1876 against the taluqdar for the recovery of the amount paid by him. The suit having been decreed in plaintiff's favour in 1883 by the High Court, the defendant (taluqdar) appealed to the Privy Council. The Government

Review—continued.

—6—Review by Judge other than Judge in original Case—*continued.*

levied assessment on the *nakri* lands again for the years 1877—1882, and a second suit was filed by the plaintiff to recover from the taluqdar the amount levied from him. The defendant not having contested the suit, an *ex parte* decree was passed against him on the strength of the decree of the High Court in the former suit. When the plaintiff took out execution of this decree, the defendant paid money into Court and applied for stay of further proceedings in execution pending the result of the appeal to the Privy Council in the previous suit. The application was granted. The Privy Council having reversed the decree of the High Court and decided in favour of the defendant in 1887, he applied for a refund of the money in Court's deposit. At the suggestion of Court, the defendant applied for a review of the decree in the second suit. But the District Judge, who was not the Judge who had decided the case, rejected the application, on the ground that he had no jurisdiction to entertain it under the provisions of s. 624, Civ. Pro. Code, 1882. *Held*, that it was competent to the District Judge to entertain the application for review, the decision of the Privy Council which reversed the decree of the High Court in the first suit, and which had been passed subsequent to the decree in the second suit, which depended on the reversed decree of the High Court, being "new and important matter" within the meaning of ss. 623 and 624 of the Civ. Pro. Code, 1882. WAGHELA RAISANGJI v. SHAIK MASLUDIN, **13 B 330** [*R.*, 8 Bom. L.R. 932=31 B. 128, 4 M.L.T. 86.]

(13)—*Civ Pro. Code, ss.* 624 *and* 626, *cl.* (*c*)—*Review of judgment, application for, before Judge other than one who delivered judgment—Jurisdiction.*—On the ground that he was not competent to entertain it, an Assistant Collector dismissed an application for a review of the judgment of his predecessor, who had admitted the application, issued notice to the parties, and subsequently partly heard the application. *Held*, that under clause (*c*) of s. 626 of the Code of Civil Procedure, where an application for a review of judgment upon grounds other than those mentioned in s. 624 is presented to the Judge who delivered it, and he has thereupon directed notice to be given to the opposite party, the application may be heard and disposed of by his successor; *held*, therefore, that the Assistant Collector had jurisdiction to hear and dispose of the application for the review of his predecessor's judgment. DUNYAPAT v. GANESHI, **3 O C. 363.**

(14)—*Civ. Pro. Code, s.* 624—*Review of judgment by another Judge—Clerical error—Minors, application for review of judgment by—Limitation Act,* 1877, *ss.* 7 & 8.—In a declaratory suit, the Judge passed a decree to the effect that the amount due under certain deeds of the plaintiffs had priority over the amount due under the deeds of the defendant. One of the

Review—continued.

——6.—**Review by Judge other than Judge in original Case** —*continued.*

plaintiffs' deeds the Court omitted to mention in the judgment, and consequently it was not entered in the decree. The judgment was dated the 8th January 1897, and on the 21st September 1897, the plaintiffs (all of whom, with the exception of one, were minors) applied, under s. 623, Civ. Pro. Code, for a review of judgment before another judge. On behalf of the defendant, it was contended that the application for review of judgment was beyond time, and that the Judge could not review the judgment of his predecessor. *Held*, that the application was notbarred by limitation. S. 7, Limitation Act, applies when only some of the judgment-creditors, and not all, are affected by a legal disability. *Held*, further, that it was owing to an oversight or clerical error that the Court did not grant the relief prayed for in respect of one of the plaintiffs' deeds and the Judge was competent to review the judgment of his predecessor under s. 624, Civ. Pro. Code. A "clerical error" is intended to mean in s. 624, Civ. Pro. Code, an error in recording what, on the face of the record, was the decision which the Court had arrived at. LACHMI NARAIN v. RAM PRASAD, **3 O.C. 316.** [*F.*, 9 O.C. 269.]

(15)—*Review—No new evidence—Co-ordinate Court.*—It was never intended by the Legislature that one judicial officer should review the judgment of another officer of the same grade, not upon any new evidence or for any error patent in the decision of his predecessor, but simply because it is stated that his predecessor has not taken a right view of the evidence. WOLFUT v. NUSRUTOOLLAH, **25 W.R. 48.**

(16)—*Review of judgment—Civ. Pro. Code*, 1877, *ss.* 623, 624—*Meaning of term "made" in s.* 624.—The term "made" in s. 624 of the Civ. Pro. Code, does not mean merely "presented" but must be construed to include a hearing and determination of the application for review. Therefore, while applications for review of judgment, when based upon the ground of discovery of new and important evidence, or on account of some mistake or error apparent on the face of the record, may be made to any Judge of the Court that passed the decree or made the order, as being matters not impeaching the essence of the original judgment, or the correctness of the decision, either in law or fact, of the Judge that passed it upon the material before him, those in which "other sufficient reasons" are alleged, attacking the accuracy of his statement of the facts or otherwise assailing the judgment itself on points admissible in review, must be preferred to, and can be heard and determined only by the identical Judge who delivered the judgment. PANCHAM v. JHINGURI, **4 A. 278 = A.W.N. 1882, 26** [*Diss.*, 10 C. 80; *Not F.*, 13 M. 178, F. B.; *R.*, 12 M. 509, 16 B 603 10 C.P.L.R. 62, 3 O.C. 363, 33 C. 1323 = 3 C.L.J. 545, 548, 556 = 10 C.W.N. 986.]

Review—continued.

——6.—**Review by Judge other than Judge in original Case**—*continued.*

(17)—*Act* VIII *of* 1859, *s.* 376—*Review—Any other sufficient cause—Different conclusion upon same state of facts.*—A Judge is not at liberty to review and reverse his predecessor's judgment merely because he happens to arrive at a different conclusion upon the same state of facts. BANEE MADHUB BOSE v. KALEE CHURN SINGH ROY, **24 W.R. 387.** [*F.*, 25 W.R. 48.]

(18)—*Civ. Pro. Code, s.* 624—*Judgment to be reviewed only by Judge originally delivering it.*—Under s. 624 of the Civil Procedure Code, it is not competent to a Judge other than the one who has delivered the original judgment to entertain an application for review of the judgment. The mere fact that the application has been once presented to the proper Judge and notice issued by him, cannot be taken as authorising his successor to proceed with such application. CHERU KURUP v. CHERU KANDA KURUP, **12 M. 509.** [*F.*, 10 C.P.L.R. 62; *R.*, 13 M. 178, F.B.]

(19)—*Review of predecessor's judgment—Different conclusions from facts.*—A Judge is not authorised to admit a review of a judgment delivered by another Judge merely because he thinks that that judgment is not justified by the facts of the case. SHAIKH MUNOOROODEEN v. KADIR BUKSH, **24 W.R. 410.**

(20)—*Power to review predecessor's judgment—Grounds for review.*—A Judge ought not to review his predecessor's judgment except on the grounds specifically mentioned in the Civ. Pro. Code, (VIII of 1859), ss. 376 and 378 = (XIV of 1882), ss. 623 and 624. [*F.*, 24 W.R. 186, 24 W.R. 387, 25 W.R. 48, 2 M. 10; *D.*, 6 C. 236 = 6 C L.R. 549] A review can be granted only on the ground of discovery of new evidence or for the correction of a patent and indubitable error or omission, or any other similar ground justifying a review. ROY MEGHRAJ v. BEEJOY GOBHIND BURRAL, **1 C. 197 = 23 W.R. 438.** [*F.*, 24 W.R. 186, 25 W.R. 324, 2 M. 10; *D.*, 1 M. 396; *R.*, 24 M. 1 = 2 Bom. L.R. 771, P.C.]

(21)—*Act* VIII *of* 1859, *s.* 378—*Review of predecessor's judgment — Legality—Appeal.*—One Principal Sudder Ameen ought not to review the judgment of his predecessor except upon grounds of grave importance. Even if there is anything wrong in point of law in granting a review upon the said ground, such decision cannot be reversed on appeal inasmuch as the Legislature has made such decision not appealable, s. 378, Act VIII of 1859, declaring that the order, whether for rejecting the application or granting the review, shall be final. RANEE SURUT SOONDUREE DEBIA v. RAJENDUR KISHORE ROY CHOWDHRY, **9 W.R. 125.**

(22)—*Review by judge of order made by his predecessor, previous absence of notice not a ground for.*—It is not competent to a Subordinate Judge to review an order passed by his predecessor in office in an execution proceeding

Review—continued.

——6.—**Review by Judge other than Judge in original Case**—*continued.*

for striking off the same, on the mere ground, that such order was passed in the absence of the deceased decree-holder and without having given him notice of the day fixed for the hearing of the *darkhast*. The application for review under such circumstances not being one based on the ground of the discovery of new and important matter of evidence or of a clerical error apparent on the face of the order, could not, by reason of s. 624 of the Civ. Pro. Code, be heard by any other Judge than the one who made such order. KHEMA KANUJI v. DHANJI FRAMJI, **14 B. 101.**

(23)—*Review of judgment—Application made to successor—Civ. Pro. Code.* 1877, *s.* 624 —An application for review of judgment delivered by a Subordinate Judge who had retired after delivering it, was made by the plaintiff to his successor, upon grounds other than that falling within the exception mentioned in s. 624. *Held* that such application was rightly rejected by the Subordinate Judge. BHAGMANI KUAR v. RAM NARAIN, **A.W.N. 1882, 96.**

(24)—*Judgment by predecessor — Application for review to successor—Civ. Pro. Code*, s. 624. —Where a judgment is passed by a predecessor in office, an application for review cannot be made to a successor on the ground of supposed error of judgment. (*Vide* s. 624, Civ. Pro. Code). BEHARI LOLL MOOKERJEE v. MUNGOLANATH MOOKERJEE, **5 C. 110=4 C.L R. 371.**

(25)—*Judgment by predecessor of present Judge—Review—Limitation.*—A lower Court Judge is incompetent to admit a review of the judgment passed by his predecessor after the lapse of 90 days, unless there is just and reasonable cause for not having preferred the application within the period fixed. GOSSIE DOSS v. NARAIN DOSS, **W R. 1864, 287.**

(26)—*Judgment passed on compromise—Review—Reversal of predecessor's judgment—Personal grounds.*—No review of judgment can be admitted from a decision passed on a compromise. To allow one Munsiff to review and reverse the decree of his predecessor on personal grounds and after eight months' delay, is altogether opposed to the spirit of the law. BABOO PURMESSUREE NARAIN SINGH v. SYUD ROMEEZOODDEN AHMED CAZEE, **5 W. R. 226.**

(27)—*Review of Small Cause judgment, only on grounds in s. 624 of Act X of 1877—Small Cause Judge, not competent to alter decree by fixing instalments.*— The Judge of a Small Cause Court cannot entertain an application for the review of a judgment delivered by his predecessor except upon grounds specified in s. 624 of Act X of 1877, nor could he under s. 210 of the Code alter the decree by fixing instalments except with the consent of the decree-holder which was not given in the present case. The Chief Court, under the circumstances, interfered under s. 622 and set aside the order by which the decree debt was made payable by instalments extending over 2 years, as made without jurisdiction. GOPIMAL v. AHMED NASSAN, **144 P.R. 1879.**

(28)—*S. 5, Limitation Act—Review—Application to surviving member of—Bench to review judgment of—Bench on plea of limitation—Practice.*—Where, after the death of one member of a Bench of two Judges, an application was made to the survivor to review their joint judgment on the plea that the appeal in which the judgment sought to be reviewed was passed had been, at the time of presentation, insufficiently stamped, and when the deficiency was supplied, was beyond time, the Court, under the circumstances, declined to interfere, on the grounds, *inter alia*, that the objection of limitation was not taken at the hearing of the appeal and that there was nothing to show that the Court would not at that time have granted an extension under s. 5 of the Limitation Act. GANPAT RAI v. IDU, **A W.N. 1891, 65.**

(29)—*Review of predecessor's judgment—Judgment of reviewing Judge erroneous in law—High Court's power of supervision—Jurisdiction.*—The High Court may, without the exercise of its powers of supervision, set aside an erroneous decision of a District Judge reviewing the judgment of his predecessor, and setting it aside on a ground involving a misconstruction of the leading facts of the case. GOUR HUREE SHAHA v. RASH MONEE, **20 W.R. 313.**

(30)—*Resumption of invalid* lakhiraj, *suit by Government for, under Reg.* II *of* 1819—*Intervention of Zemindar—Interlocutory orders, Suitors not obliged to resort to appeal from—Application for review of judgment—Re-consideration by same Judge as contradistinguished from appeal—Causes accounting for delay in applying for review—Exceptional cases of review before another Judge.*—In this suit for resumption of invalid *lakheraj* brought by the Government, under Reg. II of 1819, the zemindar, apprehending that his interest might be affected by the decision of the Collector declaring the *lakheraj* lands to be more extensive than they really were, intervened by petition. It was *held* that, in any view of the case, he had an interest which justified him in so doing; for, even assuming it to be true that the Collector's report as to the extent of the land subject to revenue, was not binding on the zemindar, and that he had a remedy against such a proceeding in another Court, still he had clearly an interest in averting an erroneous decree being made to his prejudice, the creation of *prima facie* evidence prejudicial to himself, and the necessity of resorting to the Civil Courts to remedy an evil already inflicted. There is no law or regulation prevailing in India which renders it imperative upon the suitor to appeal

Review—continued.

— 6.—Review by Judge other than Judge in original Case—*concluded.*

from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. Nothing can be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby, on the one hand, he might be harassed with endless expense and delay, and, on the other, inflict upon his opponent similar calamities. [*F.*, 28 C. 324=5 C.W.N. 509; *Appr.*, 11 W.R. P.C. 19; *R.*, 7 B.H.C. 149, 11 A. 35, 11 C. 232, 23 C. 406, 29 C. 758=5 C.W.N. 617, 12 C.W.N. 590=6 C.L.J. 547; *D.*, 23 C. 279.] An application for review is perfectly distinct from an appeal. From the regulations passed relative to the question of granting reviews, the primary intention of granting a review clearly appears to be to secure a re-consideration of the same subject by the same Judge as contradistinguished from an appeal which is a hearing before another tribunal. There might no doubt be cases in which a review may be had before another Judge as where death or some unexpected cause has prevented the Judge from reviewing it; such exceptions, however, are allowable only *ex necessitate*. In all practicable cases, the same Judge ought to review and, for the attainment of such object, expeditious presentation of the petition for review is indispensable. The Regulations relating to review by the Sudder Court are applicable to the proceedings of the Special Commissioners granting a review of their own decrees. Also, the causes accounting for the delay and intended to justify the grant of a review ought always to be of grave importance. On a consideration of the proceedings in this case, the Judicial Committee came to the conclusion that the reasons assigned in this case for the grant of the review were wholly insufficient; that the requisites of the Regulations had not been complied with; that no such reasonable cause had been shown for the delay in the presenting of the petition; and that the petition itself did not state any circumstance which, in justice, required the granting of the review. MOHARJAH MOHESHUR SINGH v. THE GOVERNMENT OF INDIA. **3 W.R. P C 45=7 M I.A. 283=1 Suther. 325 =1 Sar. 645.** [*F.* W.R 1864, 91. 8 W R. 184; *Appl.*, 8 B.H C.A C. 44; *R.*, 9 W R. 125, 9 W.R 181 F B., 9 W.R. 301, 10 W R. F.B. 1. 2 N.W.P 230, 14 W.R 334, 20 W.R. 313, 14 B.L.R. 373=2 I.A. 58, 4 A. 278, 13 M. 178, 16 B. 603.]

See U.P. ACT XII OF 1881, s. 185, 19 A. 522 =A.W N. 1897, 139.

See CIV. PRO. CODE, 1908, sch. II, rr. 16, 20 and 21, 5 O.C. 27.

— 7.—Review when lies.

(1)—*Act* X *of* 1859—*Provision for review—Principle—Act* VIII *of* 1859.—If it is the case

Review—continued.

— 7.—Review when lies—*continued.*

that there is no clause in Act X of 1859 showing how a review should be admitted, it is just possible that the best principles, under which such review should be allowed, are the just and equitable principles stated in Act VIII of 1859. MONEEKURNIKA CHOWDHRAIN v. THE COLLECTOR OF MYMENSINGH. **16 W.R. 159.**

(2)—*Act* X *of* 1859—*Appeal from Revenue Court—Review of judgment.*—The provisions of Act X of 1859 do not define the power possessed by the Judge when cases instituted in the Revenue Court are heard by him in appeal, nor the procedure to be observed in the Judge's Courts in such cases. They do not define the powers possessed by the Collector as an appellate Court and the procedure to be followed. There is no illegality in the order of a Judge admitting a review of his judgment in an appeal from a Revenue Court. KOER HURCHUND SINGH v. MUSSUMAT ROOPA KOOER, **4 N.W.P. 171.**

(3)—*Decrees by Revenue Courts in appealable cases—Review—Act* X *of* 1859, *ss.* 151, 154—*Review by Revenue Court*—Under ss. 151 and 154 of Act X of 1859, the Revenue Courts have no power to admit a review against any decree passed by them in appealable cases. A review in such a case was admitted and its former order was upheld by the first Court; and an appeal presented against such order was rejected on the ground that no appeal lay from an order rejecting a review. On a special appeal having been made to the High Court, the latter Court suspended its final order in the case, in order to enable the appellant to make an application to the lower appellate Court for the re-admission of the appeal and pending an intimation from that Court that sufficient cause existed for extending the time of the appeal, because the appellant was misled by the first Court receiving and entertaining his review, and he would have appealed in time even from the first decree, had the first Court rejected the application for review. SOOKHANUNDAMOYEE DABEA v. BANEY MADHAB MOOKERJEE, **1 W.R. 73.** [*R.*, 12 W.R. 489.]

(4)—*Act* X *of* 1859, *ss.* 151 *and* 154 *to* 158—*Review of judgment.*—It is expressly enacted by Act X of 1859, s. 151, that no judgment of a Collector or Deputy Collector shall be open to revision or appeal otherwise than as expressly provided in the Act; and there is in the Act no general provision for a review of judgment though in certain special cases (see ss. 154 to 158) the Revenue Courts are authorized to order a re-hearing. MAHOMED TUCKEE v. MUSSUMAT AHMUDEE BEGUM, **3 N.W.P. 22.**

(5)—*Judgment of appellate Court, review of—Jurisdiction—Act* X *of* 1859, *s.* 58 *scope of.*—The Court of first instance cannot review a judgment passed by the appellate Court. S. 58 of Act X of 1859 applies to the Court of first instance, not to the appellate Court. An appellate Court has therefore no authority to direct the first Court to determine whether there are grounds for admitting for a re-hearing a case in

Review—continued.

—7.—**Review when lies**—*continued.*

which decree had been passed by the appellate Court. SREENATH DUTT v. RAM GOPAL CHATTERJEE, **11 W.R. 108.**

(6)—*Act* X *of* 1859, *s.* 78—*Decree for ejectment of ryot—Review of judgment after execution.*—There is no section of the law that enables a Collector, after execution has once been taken out against a ryot under s. 78 of Act X of 1859, to review his judgment or put back the ryot into possession of the land. RAM JEBUN DOSS v. DOYALEE DOSSEE, **11 W R. 246.**

(7)—*Act* X *of* 1859, *s.* 58—Ex parte *decree—Review—Previous notice—Jurisdiction.*—A suit which had been decreed *ex parte* was revived by the Deputy Collector on the application of the defendant that he had no notice of the suit. The Deputy Collector fixed a day for the hearing and the plaintiff was informed that he could make any objection on that day against the revival of the suit. Though the plaintiff asked for the examination of the defendant as a witness to the fact that he did actually receive notice of the suit, he did not put any question to the defendant whether he received the notice or not. *Held* that the revival of the *ex parte* decree was not contrary to the provisions of s. 58, Act X of 1859, as previous notice had been given to the plaintiff to show cause against such revival. ALI AZIM v. RAM MANICK ROY, **12 W.R. 195.**

(8)—Ex parte *decree—Review of judgment—Civ. Pro. Code*, s. 623.—It is competent to a party against whom an *ex parte* decree has been passed, to apply for review of judgment. BIBI MUTTO v. ILAHI BEGUM, **6 A. 65.**

(9)—*Act* VIII *of* 1859, *s.* 376, *inapplicability of, to* ex parte *judgments—Application under s.* 119—*Procedure.*—S. 376 of Act VIII of 1859 applies to cases heard and decided in the presence of both parties, but not to the case of a person who has come in under s. 119 alleging that he had no knowledge of the suit at all. Such a person should be allowed an opportunity of proving that the summons was not duly served on him or that he was prevented from appearing for some good and sufficient cause. MOTEE CHAND BABOO v. RADHA MADUB CHUND BABOO, **2 W R. Mis. 34.**

(10)—*Act* X *of* 1859, *s.* 58—*Appeal—Review of judgment—Jurisdiction.*—After the modification of his decree by the Judge in appeal, a Deputy Collector has no jurisdiction to entertain a petition for review of his judgment under s. 58 of Act X of 1859. SOOBUL CHUNDER GOOHO v. TUMEEZOODDEEN CHOWDHRY, **14 W R. 414.**

(11)—*Act* X *of* 1859, *ss* 58, 151—*Non-appearance of defendant—Revision, construction of the word—Jurisdiction.*—A defendant who has appeared on one or more occasions and contested the suit up to a certain point, is not a defendant who has not appeared, in the sense of s. 58 of Act X of 1859, merely because, at some

Review—continued.

—7.—**Review when lies**—*continued.*

subsequent stage of the proceedings, he was not present when the suit was heard. The proper construction of the word "revision," as used in s. 151 of Act X of 1859, is not "review," but such revision as the Board of Revenue and Commissioners, as superior officers, exercise over the proceedings of the Collectors and Deputy Collectors, or the High Court over the proceedings of the lower Courts in criminal trials under ss. 404 and 405 of the Crim. Pro. Code. Independently of any provision contained in Act X of 1859, there may be cases in which a Collector has power to admit a party to come in and be heard when a proceeding has taken place in his absence. Every presumption should be made in favour of his having jurisdiction in such cases, especially where, if the review had not been admitted, the party would have been entirely without a remedy. RADHA PERSHAD SINGH v. SANSAR ROY, **14 W. R 27.** [*R.*, 16 W. R. 159, 28 A. 554, F.B.=A.W.N. 1906, 101=3 A. L J. 394=1 M.L T. 219.]

(12)—*Review by Court without application by party—Jurisdiction*—Ex parte *decree—Review—Civ. Pro. Code*, 1859, *s.* 376.—A Judge reviewing his previous judgment without any application having been made to him by the party aggrieved, acts without jurisdiction. There is nothing in the law which prevents an *ex parte* decree being reviewed, so far at all events as it relates to matters other than the question of the defendants being served with summons or being unable to appear. PORESH NATH MUNDUL v. KHETTRO MONEE DEBIA, **20 W.R. 284.**

(13)—*Civ. Pro. Code*, 1882, *ss.* 108, 623—*Appearance of parties*—S. 623 of the Civ. Pro. Code, 1882, applies to all cases whether they are disposed of in the presence of the parties, or *ex parte* in the absence of the defendants. HARIHUR PERSHAD NARAIN SINGH v. BUDDU PERSHAD, **13 C.L.R. 254.**

(14)—*Review, when inadmissible.*—A review is not admissible merely for the purpose of having a point argued again, upon the same materials, by some other counsel. RAMEY v. BROUGHTON, **10 C. 652.**

(15)—*Act* VIII *of* 1859—*Order passed in execution of decree—Review of such order—Power of Court.*—Under the New Code of Civil Procedure, 1859, a Judge is empowered to review an order passed by himself in the course of the execution of a decree (*Morgan, J., dissentiente*). HARADHUN MOOKERJEE v. CHUNDER MOHUN ROY, **W.R.F.B. 66=1 Hay 577=Marsh 205.**

(16)—*Order in execution passed by Judge, power of Judge to review.*—The High Court, on rejecting an application for the review of a judgment, amended an error in the decretal order regarding the mode in which the amount of interest was to be calculated and this alteration made a considerable difference in the amount recoverable by the appellant. The

Review—continued.

——7.—**Review when lies**—*continued.*

money due under the decree, as originally directed, has been deposited in full by the respondent, and the appellant, though aware of the existence of the subsequent amendment by the High Court, applied to the Court below and took away the whole of the money. Under the circumstances, the High Court upheld the order of the Judge requiring the decree-holder, appellant, to refund the sum thus taken away by him in excess. It was of opinion that the Judge had jurisdiction in the matter because the application was capable of being considered as of the nature of a review and, according to the rulings, a Judge has power to review an order passed by him in execution of a decree. SYED LOTF ALI KHAN v. THE COURT OF WARDS, **6 W.R. Mis. 127.**

(17)—*Civ. Pro. Code, provisions of. for review of judgment—Act* XXVII *of* 1860.—The provisions in the Civ. Pro. Code, for review of judgment are not applicable to Act XXVII of 1860. Where the Civil Court granted a certificate under the Act to S and subsequently made an order granting a certificate to C, the High Court set aside the latter order. SIVU v. CHENAMMA, **5 M.H.C. 417.** [*Diss.*, 24 W.R. 376=1 C. 101.]

(18)—*Act* XXVII *of* 1860—*Review, power to grant.*—An application for review might be entertained in proceedings under Act XXVII of 1860 (Certificate of Heirship), notwithstanding the absence of provision therefor in that Act. *In the matter of the petition of* POONA KOOER, **1 C. 101=24 W.R 376.**

(19)—*Application under Administrator-General's Act*—Res judicata—*S.* 63, *Act* II *of* 1874—*S.* 13, *Civ. Pro. Code*, 1877.—An application by petition under s. 63 of Act II of 1874 is a suit within the meaning of s. 13 of the Civ. Pro. Code (X of 1877), and is barred by the disposal of a similar former application in the same matter, though the order passed is capable of being reviewed. ELIZA SMITH v. THE SECRETARY OF STATE, **3 C. 340.**

(20)—*Civ. Pro. Code*, 1877, *ss.* 409, 413, 623, 625—*Order under s.* 409 *reviewable under s.* 623.—Nothing in s. 413 of the Civ. Pro. Code, affects the right of a petitioner, to whom leave to sue as a pauper has been refused under s. 409, to obtain a review of such order of refusal under s. 623 of the Code. The applicant for review should file a memorandum of the grounds of objections to the order sought to be reviewed and also a copy of such order. ADARJI EDULJI GOLAKHANA v. MANIKJI EDULJI, **4 B. 414.** [*R.*, 20 B. 86; *D.*, 17 A. 213, F.B.]

(21)—*Review—Chief Court's ruling on case stated by Small Cause Court Judge—"Decree"—Act* VIII *of* 1859, *s.* 376.—The ruling of the Chief Court upon a reference made by the Judge of a Small Cause Court is not a "decree" in the suit within the meaning of s. 376, Act VIII of 1859, and an application for review of such ruling is not admissible. SIRDAR JULLALUDDEEN v. KALU MULL, **74 P.R. 1873.**

Review—continued.

——7.—**Review when lies**—*continued.*

(22)—*Review—Power of High Court—Judgment passed on reference by Subordinate Judge with Small Cause powers—Civ. Pro. Code*, 1882, *ss.* 617, 619, 623—*Nature of judgment passed by High Court—Not a decree.*—The power to review is expressly given to the High Court by s. 623 of the Civ. Pro. Code, 1882, in the case of a judgment on a reference from a *Court of Small Causes*. But no such power is given in the case of judgment, on a reference under s. 619, Civ. Pro. Code, 1882, from a *Subordinate Judge* exercising the powers of a Small Cause Court. Nor is the judgment in the case mentioned above, a decree or order with in s. 623, cl (*b*), of the Civ. Pro. Code, 1882; but it is simply a statement of the grounds, in conformity with which the Subordinate Judge is to dispose of the case as provided by s. 619 of the Civ. Pro. Code. 1882. RAMACHANDRA BALAJI v. SITARAM VINAYAK, **10 B. 68.**

(23)—*Application to review order refusing a petition for leave to sue in* forma pauperis, *High Court—St.* 24 *and* 25, *Vic., c.* 104, *s.* 15.—An application to review an order refusing a petition for leave to sue in *forma pauperis* can be entertained by a Court of original jurisdiction. The High Court has power to set aside an order of a Court of original jurisdiction, refusing to entertain such an application, on the ground that the Court had not jurisdiction to entertain it. *In the matter of the petition of* RANI UMASUNDARI DEBI, **5 B.L.R. App. 29.** [*F.*, 64 P.R. 1896; *R.*, 1 A. 101, F.B.]

(24)—*Application for review made in* forma pauperis—*Petitioner not previously allowed to sue or to appeal as pauper.*—An application for review of judgment presented after the prescribed period could not be admitted without stamp, though presented in *forma pauperis*, where the petitioner had not been admitted at any previous stage of the case to sue or appeal as a pauper. BULDEO DASS v JEEWUN SINGH, **24 P.R. 1870.** [*Appr.*, 91 P.R. 1895.]

(25)—*Application for, time occupied in—Admission of appeal after time—Limitation—Discretion of Court when liable to review or appeal.*—The fact of an application for review having been made is not a good cause for admitting an appeal after time, if the application for review was not made on reasonable grounds. (L.B.R. 1893-1900,) 515, 7 W.R. 529, *R.*; 5 A. 591, 9 B. 452, 14 M. 81, 18 B. 84, *F.*) The discretion of a Court is liable to review or appeal where such Court is acting through caprice or prejudice, or where the discretion is exercised without any proper legal material to support it. MAUNG PO LU v. MAUNG KYIN, **1 L.B R. 313.** (6 B. 304, 15 C. 242, 183 P.R. 1888, *F.*)

(26)—*Remand on appeal—Reasonable time—Default—Application under s.* 376, *Act* VII *of* 1859 (*Civ. Pro. Code*).—On a case being remanded in appeal, a reasonable time was

Review—continued.

——7.—**Review when lies**—*continued.*

given to the parties to appear and conduct their case. The petitioner not having appeared, the lower Court treated it as a case of default. The petitioner, therefore, made an application under s. 376, Act VIII of 1859. *Held*, that, as this was not the proper form in which the petitioner had to apply, and as the time for applying had expired, the application should not be granted. *In re* KALEE MOHAN DOSS, **17 W.R. 70.** [*Rel. on*, 4 N.L.R. 166.]

(27)—*Act* VIII *of* 1859, *s.* 367—*Reviews of judgment—Decrees and orders not amounting to decrees.—Proof of arrears of rent before Deputy Collector — Decree for ejectment — Deputy Collector not competent on execution to refuse ejectment under s.* 78, *Act* X *of* 1859.—It was first doubted in this case whether, with reference to the terms of s. 367 of Act VIII of 1859, an order not being in any shape "a decree," could be made the subject of a review, but, on further consideration and adverting to a Full Bench decision in Sp. No. W.R. 66, the High Court came to the conclusion that although s. 367 of the Code makes mention only of reviews of judgment in respect to decrees of Court, it should be construed as authorising reviews also of orders not strictly amounting to decrees. Under Act X of 1859, a Deputy Collector had decided a suit for ejectment, on proof of arrears due in favour of the plaintiff, but afterwards, however, on execution being applied for, ordered that, as the arrear had been paid up within 15 days of the passing of the decree, the tenant could not be ejected in accordance with s. 78 of the Act. *Held* that there was no appeal from the Deputy Collector's order which was one passed in execution of decree, and that the proceedings of the Deputy Collector in execution were illegal, and that the party's remedy was by applying to the High Court under its extraordinary powers of revision. DEEN DYAL PURMANICK v. RAM COOMAR CHOWDHRY, **10 W.R. 345.**

(28)—*Appeal struck off for default--Application for re-admission of appeal dismissed—Review of judgment—Act* VIII *of* 1859, *s.* 347.—The law does not permit an appellant who has unsuccessfully applied for the re-admission of his appeal, under s. 347, Act VIII of 1859, to apply for the review of the judgment given against him in default. ABDULA v. MORAD SHAH, **52 P.R. 1873.**

(29)—*Special appeal, application to admit—Rejection of—Review--Grounds.*—Where the Court refuses to admit a special appeal, an application for a review of such order cannot be entertained in the absence of some satisfactory explanation. BURRAMOLLAH v. NILCHAND DUTT, **17 W.R. 484.** [*R.*, 18 W R. 475.]

(30)—*Order admitting appeal to Privy Council, High Court not competent to review.*—The rule formerly obtained by the petitioners to show cause why the appeal to the Privy Council preferred by the opposite party should not be rejected, having been thrown out by the High Court, which admitted the appeal to England, the petitioners sought for a review of the High Court's order throwing out the rule and for a revival of the same. The High Court declined to interfere on the ground that the appeal having been once admitted, whether properly or erroneously, it had no further jurisdiction to entertain the present objections of the petitioner and again declare the appeal rejected. AMEERUNNISSA BEGUM v. RANEE INDURJEET KOONWAR, **6 W.R. Mis. 97.**

(31)—*High Court—Extraordinary powers—Giving right of appeal where law provides none—Superintendence of High Court—Application for execution of decree—Order passed on appeal—Interference to work an injustice—Review.*—The High Court should not, in the exercise of its extraordinary powers, interfere with an order of the lower appellate Court, where such interference would be equivalent to giving an appeal, in a case where the law has provided none. Under ss. 378 to 380 of Act VIII of 1859 and s. 38 of Act XXIII of 1861, a District Judge has power to review an order passed by him on appeal, in an application for the execution of a decree. The High Court should not, in the exercise of its extraordinary powers, interfere where the effect of its interference would be to work an injustice. NARAYANBHAI LALBHAI v. GANGAKRISHNA BALKRISHNA, **4 B.H.C.A.C. 87.**

(32)—*Civ. Pro. Code*, 1859, *ss.* 114, 119, 376—*Suit dismissed for default of prosecution—Re-admission of suit under s.* 119—*Improper dismissal and improper re-admission—Review of judgment—Erroneous procedure--Interference by High Court.*—A suit was dismissed under s. 114, Civ. Pro. Code, for default of prosecution in the Court of first instance, as no evidence was produced on the part of the plaintiff who was absent though his pleader was present. The Munsiff re-admitted the suit on the application of the plaintiff under s. 119 and decreed his claim. The lower appellate Court on appeal by the defendants confirmed the judgment of the original Court. *Held* on special appeal to the High Court, that the terms of ss. 114 and 119 were not strictly applicable, as the suit had not been dismissed for default of appearance, that the plaintiff should have applied for a review of judgment under s. 376, and that the erroneous procedure not having produced error or defect in the decision on the merits, was no ground for disturbing the decrees of the lower Courts. MAHOMED AZEEM-OOL-LAH v. ALI BUKSH, **5 N.W.P. 74.** [*R.*, 22 A. 66, F.B.; *Appr.*, 7 N.W.P. 126; *D.*, 34 C. 235.]

(33)—*Dismissal of suit—Splitting of causes of action—High Court's power of revision—Review—Act* XXIII *of* 1861, *s.* 35—*Act* VIII *of* 1859, *s.* 7.—Where a subordinate Court dismisses a suit on the ground that there was a splitting of causes of action, it is not a case of refusing to exercise jurisdiction which would be open to

Review—continued.

——7.—**Review when lies**—*continued.*

revision by the High Court, the remedy of the aggrieved party being by way of review of judgment. JUSSA SINGH v. NOORA, **36 P.R. 1872**.

(34)—*Application for review of judgment, discovery of fresh evidence not sole ground to support—"Other good and sufficient reason" in s. 376, Civ Pro. Code.*—It could not be contended that a Court had no power to admit a review of judgment merely because no fresh evidence was tendered. Once the Court has admitted a review, the presumption should be that that Court had considered that there was good and sufficient reason for having so admitted it, and that the review was requisite for the ends of justice within the meaning of s. 378. ISLAM KHAN v. MUSST. SABOO KHANUM, **6 W R 248**.

(35)—*Act* VIII *of* 1859, *ss.* 110, 119, 376—*Dismissal of suit as for 'default of prosecution'—Application for re-admission, whether can be deemed as application for review of judgment.*—In this case, the plaintiff having failed to deposit talabana for summonses to witnesses and having omitted to bring forward his witnesses, notwithstanding that time was allowed him, his claim was dismissed on the ground of default of prosecution. Plaintiff subsequently presented an application praying for the re-admission of the suit, because he had been prevented by illness from depositing talabana in time. This petition was opposed by the defendants who objected that the suit had, in reality, been dismissed for want of evidence, that there was no proper ground for application for a review of judgment and the petition for the review was also insufficiently stamped. The Munsiff treated the application as one under s. 119 of the Civ. Pro. Code, and directed the re-admission of the suit. The High Court *held* that the above application of the plaintiff might fairly be regarded as an application for a review of judgment under s. 376 of Act VIII of 1859, and the Munsif was wrong in having treated it as an application under s. 119 of that enactment. An application under s. 376 was the proper course to adopt, and the misconstruction by the Munsif of the nature of the application was not a sufficient reason for depriving the applicant of the relief which he, not inequitably obtained by the order passed upon it. RAM SUNDAR SINGH v. RAM BANDHAN SINGH, **7 N.W.P. 126.**

(36)—*Interest—Execution of decree—No provision for interest in decree—Refusal of claim in course of execution—Subsequent claim in execution of same decree.*—An application for execution of a decree having been dismissed by the first Court as barred by limitation, the decree-holder appealed to the High Court. The High Court, being of opinion that the application was not barred, made the requisite order for the issue of execution, but coupled it with this qualification, that inasmuch as the decree of which execution was sought did not give interest, no order would be made for

Review—continued.

——7.—**Review when lies**—*concluded.*

interest. In pursuance of the above order the first Court having refused interest, the decree-holder again appealed to the High Court. *Held* that, if the judgment-creditor was in any way taken at a disadvantage by the previous order of the High Court, he could have got it rectified by a proper application for review. As the former order stood uncancelled, the judgment-creditor could not execute the decree with the term for interest. ENAYET ALI v. MAHOMED ZUHOORUL HUQ, **22 W.R. 534.**

(37)—*Judgment passed on compromise—Review—Reversal of predecessor's judgment—Personal grounds*—No review of judgment can be admitted from a decision passed on a compromise. To allow one Munsiff to review and reverse the decree of his predecessor on personal grounds and after eight month's delay, is altogether opposed to the spirit of the law. BABOO PURMESSUREE NARAIN SINGH v. SYUD ROMEEZOODDEEN AHMED GAZEE, **5 W.R. 226.**

(38)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 246, 378—*Review of claim disallowed—Finality of order granting review.*—The Court had power to grant a review of an order, which it had passed under s. 246 of Act VIII of 1859, disallowing a claim made to property attached in execution of decree and the order granting the review, being final under s. 378 of the Code, could not be disturbed on appeal. MR. COCHRANE v. HEERA LAL SEAL, **7 W. R 79**. [*F.*, 18 W.R. 475; *R.*, 16 W.R. 59.]

See MAD. ACT VIII OF 1865, ss. 57, 65, 4 M.H.C. 251.

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 6 W.R. Mis. 122, 15 W.R. 414.

Practice in testamentary matters before Act V of 1881—*See* PRACTICE AND PROCEDURE, 5 B. 638.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 14 W.R. 442.

——8.—**What questions can be raised on review.**

(1)—*Civ. Pro. Code*, 1859, *ss.* 376, 378—*Review—Admission of—Principles to be observed.*—In dealing with cases of review, the Court is not required to re-adjudicate points which were considered and adjudicated when brought before it by the pleader then employed, although they may be better argued and put in a different point of view by another pleader subsequently. But the Court is to be guided in its admission of reviews by the definite terms of ss. 376 and 378 of the Civ. Pro. Code, 1859. CHOONEE MUNDEL v. CHUNDILALL DASS, **14 W.R. 334.**

(2)—*Review when to be granted—Civ. Pro. Code (Act* VIII *of* 1859), *ss.* 376, 380—*Sufficient reasons for grant of review—Hope of change*

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Review—continued.

——8.—**What questions can be raised on review**—*continued.*

of opinion by new points urged by pleader absent formerly.—An applicant for review of a case must show some good and sufficient reason why he should be re-heard. Under ss. 376 to 380 of Act VIII of 1859, a Court should not allow a re-hearing upon the possibility of an alteration of its opinion upon new points being put and new arguments urged, after the decision, by another pleader not present at the first hearing. RAJENDRO PROTAB SAHEE v. BHOWABUL SINGH, **14 W.R. 105.**

(3)—*Review of judgment—High Court.*—The absence of a formal finding on an issue tried and decided by a Court is not an error calling for review of judgment. A party, who not only had an opportunity of raising a question, but who did raise it in appeal and on argument abandoned it, cannot, under ordinary circumstances, be allowed to agitate the question on review. SABAPATHY v. SUBRAYA AND RAMANADHA, **2 M. 58.** [*F.*, 3 O.C. 280.]

(4)—*Review of judgment — Re-hearing of matter previously argued—Discretion of Court.*—Parties applying for a review of judgment are not absolutely debarred from asking for a re-hearing of a matter which has been already argued and considered, nor are they debarred from raising a point which has not, but which might have, been raised previously. But, in every case, it lies upon the party making the application to show the Court some good ground upon which that indulgence is asked for, and it is in the discretion of the Court to allow or to refuse such an application. HUREE PERSHAD MUNDUL v. BABOO NUND KISHORE SINGH, **17 W.R. 479.**

(5)—*Civ. Pro. Code (Act* VIII *of* 1859), *s.* 376—*Review—Re-arguing point already discussed.*—It cannot be treated as a universal rule that no point can be raised on application for a review which has been already discussed and decided on the original hearing of the appeal, or that no new point which has not been raised on the hearing of the appeal can be agrued on the application for a review. In each case, the Court to which application is made must consider and decide whether a review is necessary to correct any evident error or omission, or is otherwise requisite for the ends of justice. *In the matter of the petition of* CHINTAMANI PAL. CHINTAMANI PAL v. PYARI MOHAN MOOKERJEE, **6 B.L.R. 126, F.B.=15 W.R. F.B., 1.** [*F.*, 17 W.R. 479, 1 B. 543.]

(6)—*Of judgment in second appeal—Fresh points not raised at former hearing.*—In an application for review of judgment in second appeal, fresh points should not be taken, which might have been raised at the former hearing, unless to exclude them would amount to a denial of justice. U. OKTAMA v. MA BWA, **L.B.R. 1893—1900, 575.** (L.B.R. 1893—1900, 568, *Affirmed*; 4 M. 308, *R.*) [*R.*, 1 L.B.R. 13.]

Review—continued.

——8.—**What questions can be raised on review**—*concluded.*

(7)—*Act* VIII *of* 1859, *s.* 374—*New grounds in appeal—Review.*—A party wishing to be heard in support of new grounds ought to apply under s. 374, Act VIII of 1859, for permission of the Court to be so heard; he cannot be permitted to raise them in an application for review. FUKUROODDEEN MAHOMED ASHAN CHOWDHRY v. RAJAH ANUNDNATH ROY, **9 W.R. 370.**

(8)—*Review—Permission—Effect.*—When a review of a judgment has been admitted, the whole case is thereby reopened. SAINAL RANCHHOD v. DULLABH DVARKA, **10 B.H.C. 360.** [*R.*, 7 O.C. 345, 9 Bom. L.R. 789, F.B.=32 B. 111; *Diss.*, 158 P.R. 1889.]

——**9.—Miscellaneous.**

(1)—*Civ. Pro. Code*, 1877, *ss.* 626, 629—*Review of judgment.*—If a Court be of opinion that an application for review should be granted, it shall grant the same, and the Judge shall record, with his own hand, the reasons for such opinion. Such an order must necessarily be quite distinct from the final order made in the matter. BHAIRON DIN SINGH v. RAM SAHAI, **3 A. 316.**

(2)—*Application for review points that can be considered in.*—An applicant for review is limited to the points on which the rule granting the review was allowed. [This judgment was passed on review of 4 C. 380.] DHURONIDHUR v. THE AGRA BANK, **5 C. 86=4 C.L.R. 434.** [*R.*, 158 P.R. 1899, 7 O.C. 345.]

(3)—*Distinction between questions raised in applications for review and those raised in suit.*—The question raised in applications for review are totally different from those raised in the suit. A review can only be granted on special grounds, and it may well be that, although an appeal is not allowed from the final decree in the suit, an appeal is allowable from an order granting a review which would re-open the case after it had been disposed of. GYANUND ASRAM v. BEPIN MOHUN SEN, **22 C. 734.** [*F.*, 24 P.L.R. 1902=33 P.R. 1902; *Diss.*, 23 M. 496.]

(4)—*Review—Grounds — Court having no jurisdiction to try case.*—If a party brings a suit in a Court, which according to his own showing, has no jurisdiction to try the case, it does not lie in him failing in that Court, to ask to have the plaint back in order to file it in the proper Court. *In the matter of the petition of* TUFANI SINGH, **6 B.L.R. App. 141.**

(5)—*High Court decision bearing on case—Civ. Pro. Code*, s. 623.—Where an appellant applied for review of judgment, on the ground that a decision of the High Court on a point of law which arose in the case, was not published till a month after the hearing of the appeal, it was considered that the appellant was not to blame for his omission to bring the decision

Review—continued.

——9.—**Miscellaneous**—*continued.*

to the notice of the Court, when the appeal was argued, and the application for review of judgment was granted. ACHUTA v. MAMMAVU, **10 M. 357.** [*R.*, U.B.R. 1892—1896, Vol. II, 154, 11 C.P.L.R. 41.]

(6)—*Review—Application insufficiently stamped—Application not returned to party—Objection at hearing—Making up proper valuation.*—Where an application for review is not sufficiently stamped and the applicant is not required by the Court to furnish the additional stamp requisite to make up the proper valuation until the case comes on for hearing, the Court should not refuse to permit him to furnish the additional stamp at the time of the hearing. SHAHAZADA FUKEEROODDEEN AHMED, PETITIONER, **15 W.R. 278.**

(7)—*Rectification of decree—Limitation.*—An application for rectification of a decree which is not different from an application for a review could not be received after 90 days without good reasons made out by evidence for the delay. ASSUR ALI v. WOOLFUTOONISSA, **13 W.R. 33.**

(8)—*Review of judgment—Civ. Pro. Code, s. 623—"Any other sufficient reason"—Act* VI *of* 1882, *s.* 16—*Appeal from order passed in course of liquidation proceedings—Notice of appeal—Power of Court to extend time for giving notice of appeal.*—In s. 623 of the Code of Civil Procedure, the words "any other sufficient reason" do not necessarily imply that such reason is to be of a like nature with the other two reasons for review previously stated in that section; but a Court is competent, if it considers any other reason than the first two sufficient, to review its previous order, if it deems it necessary in the ends of justice to do so. In s. 169 of Act VI of 1882, the phrase "in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure" implies that the appeal must first be filed and then notice served through the Court in the customary manner. It is competent to a Court on cause shown to extend the time limited for serving notice of appeal under s. 169 of Act VI of 1882 even after such period has expired, and after notice has in fact been served beyond time. (4 C. 704, *R.*) Where an appellant under s. 169 of Act VI of 1882 filed his appeal fifteen days after the passing of the order appealed against and the Court did not issue notice to the respondent until after the twenty-one days limited by s. 169 had expired, it was *held* that no unreasonable delay could be charged to the appellant, and that the Court was justified in its discretion in extending the time allowable for service of notice of appeal. THE HIMALAYA BANK, LD. v. DORA E. JERVIS, **A.W.N. 1894, 148.**

(9)—*Appeal against order granting review, ground of—Appeal on merits against the final order passed on review—Civ. Pro. Code, O.* 43, *r.* 1 (*w*) *and O.* 47, *r.* 7—*Held*, that an appeal against an order granting review can be made only on the specific grounds mentioned in O. 47, r. 7, Civ. Pro. Code, and no others. The right of appeal granted under O. 43, r. 1 (*w*), is a right of appeal subject to the restrictions set forth in O. 47, r. 7. *Held* further, that there is no right of appeal upon the merits against the final order passed on review. INDAR KUAR RANI v. THAKUR BALDEO BAKHSH, **13 O.C. 248.**

(10)—*Order rejecting review — Appeal—Act* VIII *of* 1859, *s.* 378.—No appeal lies from an order of a Munsiff rejecting an application for review. JEWUN BIBEE v. BUDDUN MUNDUL, **9 W.R. 489.**

(11)—*Application for review—Order rejecting application—Appeal.*—No appeal lies to a superior Court from an order rejecting an application for review on the ground that the application was made many years after the passing of the original decision, and that no just or sufficient cause for the delay had been made out and that there was no precedent for the adoption of such a course. BANEE RAM v. HOSSEIN ALI, **11 W.R. 184.**

(12)—*Review, granting of—Appeal—Delay.*—Where the plaintiff applied on 12th March for review of a decree passed on 31st January, and the review was granted on 9th April. *Held* that there was no decree from which an appeal could be preferred, until the order granting the review is set aside. Excuse of delay is a matter of discretion with the Court, and if it had been properly exercised, the High Court will not interfere. RAMASWAMI IYENGAR v. JANAKI AMMAL, **7 M.L.T. 387=6 Ind. Cas. 723.**

(13)—*Order granting review of judgment, no second appeal from—Civ. Pro. Code,* 1882, *s.* 629.—No second appeal lies against an order, under s. 629 of the Civ. Pro. Code, granting a review of judgment. THAN SINGH v CHUNDUN SINGH, **11 C. 296.** [*F.*, 12 M. 125, *R.*, 6 C.L.J. 225; *D.*, 13 B. 496.]

(14)—*Review of appellate judgment improperly granted — Special appeal.* — Although an order granting review cannot be made the subject of appeal standing alone, yet the appellate Court can take notice of it in special appeal, and if the review was improperly granted, can set aside the judgment passed in furtherance of such review. BHYRUB CHUNDER SURMAH CHOWDHRY v. MADHUBRAM SURMAH, **11 B.L.R. 423, F.B.=20 W.R. 84.** [*Appl.*, 22 W.R. 183; *R.*, 23 W.R. 438=1 C. 197.]

Revision.

1.—GENERAL.

2.—SMALL CAUSE COURT CASES.

See CIV. PRO. CODE, 1908, S. 115.

——1.—**General.**

(1)—*General — Copies of judgment, order or decree sought to be revised, not necessary to be filed.*—*Held*, that no copy of order or judgment

Revision—continued.

——**1.—General**—*continued.*

sought to be revised is *by law* rendered necessary as an annexure to the petition of revision. MEHAR SINGH v. GURBACHAN, **74 P.W.R. 1907=146 P.L.R. 1906.** (72 P.W.R. 1907=114 P.R. 1907, *R.*)

(2)—*High Court's powers of revision—Civ. Pro. Code*, 1877, *s.* 622.—*Per Pearson, Oldfield and Straight, JJ.*—When the High Court has called for the record, under s. 622 of the Civ. Pro. Code, in a case in which no appeal lies to it, it may, under the provisions of that section, pass any order thereon which it might pass, if it dealt with the case as a second appeal under Chap. XLII of the Civ. Pro. Code. *Per Stuart, C.J.*—Under s. 622, the High Court can pass any order, whether in regard to fact or law, which it may think proper, for the purposes of the justice of the case. (By the Division Bench.) Where, therefore, in a case of the execution of a decree in which no second appeal lay, the Appellate Court, on the question of construction of the decree, held that it awarded interest on the principal amount, it was competent for the High Court, in revision, to find that the interest awarded was only on the costs, and to modify the order of the first Appellate Court accordingly. *In the matter of the petition of* MAULVI MUHAMMAD v. SYED HUSAIN, **3 A. 203, F.B.** [*F.*, 3 A. 417; *R.*, 7 B. 341, F.B., 7 A. 345, 8 A. 111, 9 A. 398, 1 C.W.N. 617.]

(3)—*Civ. Pro. Code*, 1882, *ss.* 575, 647, *Applicability of—Quære.*—Having regard to the explanation to s. 647, Civ. Pro. Code, it is questionable whether s. 575 of the Code is applicable when an application is made to the High Court under s. 622 of the Code. MANCHARAM v. FAKIRCHAND, **3 Bom. L.R. 58=25 B. 478.**

(4)—*When revision lies—Civ. Pro. Code*, 1882, *ss.* 407, 622 (=*s.* 115, *new Code*)—*Revisional powers of High Court—Practice.*—It is incorrect to state that all orders passed under s. 407 of the Code are excluded from the exercise of the revisional powers of the High Court under s. 622. (7A. 661, *Commented on.*) In second appeals, it is not the duty of the High Court to enter into the merits of the evidence, *a fortiori*, in cases of revision. All that the High Court, as a Court of revision, is required to do, is to see whether the requirements of the law have been duly and properly obeyed by the Courts whose orders are subjected to revision, and whether the irregularity as to failure of exercise of jurisdiction is such as would justify interference by the High Court. MUHAMMAD HUSAIN v. AJUDHIA PRASAD, **10 A. 467=A.W.N. 1888, 179.**

(5)—*Order nullifying provisions of Civ. Pro. Code—High Court's powers of.*—The High Court is ordinarily very slow to interfere in revision with an order made by a Subordinate Court in the exercise of its discretion. But when the effect of an order is to nullify the provisions of a section of the Code, the High Court will interfere in setting it aside as an order made in the illegal exercise of jurisdiction. BRAJA BALA DEVI v. GURUDAS MANDAL, **3 C.L.J. 293=33 C. 487.** (1 C.W.N. 617, *R.*)

(6)—*S.* 622, *Civ. Pro. Code*, 1882—*Revision—Court below committing error of law in construing s.* 108, *Civ. Pro. Code.*—Where the Court below has committed an error of law in the construction it has put upon s. 108, Civ. Pro. Code, revision lies under s. 622, Civ. Pro. Code. GANODA PRASAD ROY v. SHIB NARAIN MUKERJEE, **29 C. 33.** (20 C. 8, 22 C. 767, *F.*; 1 C.W.N. 626, *D.*)

(7)—*Civ. Pro. Code, s.* 622—*Revision—Power of High Court to interfere.*—Where a Subordinate Judge proceeded upon an erroneous construction of s. 329 of the Code and passed summary orders, the High Court interfered in the exercise of their extraordinary jurisdiction and discharged the rule. SALAMVA v. MARTYAVA, **16 B. 711, Note=P.J. 1887, 52.** [*R.*, 16 B. 708.]

(8)—*Civ. Pro. Code, s.* 622—*Revisional jurisdiction of High Court.*—Where a lower Court fails to exercise a jurisdiction vested in it by law, the High Court can, under s. 622, interfere in revision. VISHVANATH GOVIND DESHMANE v. RAMBHAT, **15 B. 148.** [*R.*, 8 O.C. 257.]

(9)—*Reg.* VIII *of* 1827—*Revision—High Court—Civ. Pro. Code*, 1882, *s.* 622.—Where a District Judge has illegally exercised his jurisdiction, the High Court has power, under s. 622 of the Code, to interfere in the exercise of its extraordinary jurisdiction. SHRI VISHVAMBHAR PANDIT v. SHRI VASUDEV PANDIT, **16 B. 708.**

(10)—*Civ. Pro. Code*, 1882, *s.* 622—*Failure to exercise jurisdiction—Returning of plaint—Disclosure of cause of action—Revision.*—A Court will fail to exercise a jurisdiction vested in it by law by s. 622, Civ. Pro. Code, if, when a plaintiff files a plaint, stating facts, which, if true, constitute in law a cause of action, it rejects such plaint or dismisses the suit merely on the ground that these facts constitute no cause of action. HABIB-UL-LAH v. MUSSAMMAT FATTEH BIBI, **75 P.R. 1890, F.B.** (206 P.R. 1889, *R.*) [*F.*, 78 P.R. 1896, 16 P.R. 1910.]

(11)—*Framing of issue—Irregularity in—Revision.*—A material irregularity in framing the issues and a material irregularity in not deciding the case presented for adjudication by the parties to the Court will make the decree that follows liable to be set aside in revision. MULA SHAH v. NIZAM DIN, **108 P.R. 1890.** [*R.*, 26 P.R. 1892.]

(12)—*Erroneous view of Chief Court's ruling—Ground for revision—Erroneous procedure.*—It is a material irregularity in an appellate Court, to decide a case without going into the question on the merits which had been decided by the lower Court and was before the appellate Court for determination, on an admittedly

Revision—continued.

——1.—**General**—*continued.*

perverse view of a Full Bench ruling of the Chief Court. An error of procedure amounting to a material irregularity may be due to a misapprehension of the law substantive or adjective. DIPU MAL v. GOKAL CHAND, **34 P.R. 1897.** (115 P.R 1890, F.B., 11 B. 488, *R.*)

(13)—*Civ. Pro. Code, s.* 623—*Discovery of fresh authority—Judgment on erroneous view of law.*—While the discovery of a fresh authority may not entitle a party to a review of judgment, yet when a Judge is satisfied that his judgment has proceeded upon an erroneous view of the law, he may, under s. 623, Civ. Pro. Code, review his judgment and decide according to law. VELLAYA v. JAGANATHA, **7 M. 307.** [*R.*, U.B.R 1892—1896, Vol. II, 287, U.B.R. 1892—1896, Vol. II, 153, 11 C. P.L.R. 41, U.B.R. 1902, Fourth Quarter, p. 3.]

(14)—*Omission to consider if instrument is single bond—Application of wrong section or wrong assumption of fact or law—Grounds for revision—Material irregularity — Instances.*—The misrepresentation of a fact apparent upon the record or the erroneous assumption of a fact or the applicability of a rule or a failure to appreciate the true points for determination raised by a general issue, such as one of *res judicata* or limitation, are irregularities which may be material when they result in the dismissal of a suit on a technical ground, apart from the merits, which can be shown to be erroneous. GURDITTA MAL v. PAL SINGH, **26 P.R. 1892** (105 P.R. 1888, 42 P.R. 1889, 130 P.R. 1889, 206 P.R. 1889, 6 P.R. 1890, 108 P.R. 1890, 60 P.R. 1891, 65 P.R. 1891, 15 C. 47, 11 M. 303, 11 M. 220, 12 B. 617, *R.*)

(15)—*Erroneous assumption of fact—Wrong decision—Revision.*—A wrong decision by a Court is *per se* no ground for saying that it has exercised jurisdiction illegally or with material irregularity. But when the wrong decision arises from an erroneous assumption that a certain fact or view of law actually not existing does exist, the case is quite different and a revision will lie. SARDAR FAKIR MUHAMMAD KHAN v. KASIM, **105 P.R. 1888.** (64 P.R. 1885, 22 P.R. 1886, 3 C.L.R. 569, 9 B. 308, 8 A. 531, 532, 15 C. 47, 12 Ind. Jur. N. S. 49, *R.*; 11 C. 6, *Expl.*) [*R.*, 26 P.R. 1892.]

(16)—*S.* 622, *Civ. Pro. Code*, 1882 — *Wrong assumption of fact or law—Material irregularity.*—It is a material irregularity corrigible in revision when the Court below has assumed a fact to exist or has *assumed* the application of a rule or a section of an Act which does not exist at all or is wholly inapplicable though a mere error in law in the lower Court may not be matter for revision. SHIB DIAL v. JHANDA MAL, **42 P.R. 1889.** [*R.*, 26 P.R. 1892.]

(17)—*Omission to consider important materials on record—Material irregularity on the part of the Court rendering its order subject to revision under s.* 70 (1) (*a*) *of the Punjab Courts Act.*—Where a Court, having had before it materials for a decision, ignored certain vital portions of those materials, which, if considered, must have led the Court to a different conclusion from that actually arrived at; *held*, the matter was one analogous to the improper refusal by a Court to admit important evidence and if it could be established that, using all the available materials, the Court should or must have come to a different conclusion, 'the Court must be deemed to have acted with material irregularity' within the meaning of cl. (1) (*a*) of s. 70 of the Act and its order was consequently subject to revision under that section. CHUNI LAL v. MEHR CHAND, **29 P. R. 1906=97 P.L.R. 1906.** (11 C. 6, 60 P.R. 1891, 26 P.R. 1899, *R.*) [*R.*, 106 P.R. 1908=173 P.L.R. 1908.]

(18)—*Revision—Finding of fact—Misinterpretation of evidence of witnesses—Not considering the loss of an important document in the case—S.* 70 (1) (*a*) *of Act* XVIII *of* 1884—*Long delay in suing.*—*Held*, that an obvious misinterpretation of the testimony of witnesses or other evidence, or not considering the loss of an important document in a case, is material irregularity within the meaning of s. 70 (*a*) of Act XVIII of 1884, which justifies interference with the finding of fact by the lower Courts. Unnecessary long unexplained delay in suing goes against plaintiff. UMRA v. ILAHI BAKSH, **97 P.W.R. 1910=7 Ind. Cas. 713.**

(19)—*Punjab Courts Act* (XVIII *of* 1884) *as amended, s.* 70 (1) (*a*), *Revision—Civil cases—Material irregularity—Assumption by Court against evidence on record.*—Where the lower Appellate Court reversed the judgment of the Original Court merely on an assumption, and there was no evidence in support of it, the Chief Court, on revision, set aside the judgment of the the lower appellate Court and restored that of the original Court. THAKAR DAS v. BARKHURDAR, **127 P.L R. 1910=8 Ind. Cas. 552.**

(20) — *Misrepresentation of documentary evidence—Material irregularity—Absence of cause of action in first suit*—Res judicata.—Where there is a mis-statement of fact and a misrepresentation of what is apparent on the face of the record, there is material irregularity; where the plaint in the first suit was rejected at the first hearing on the ground of its not showing a cause of action, a fresh suit is not barred. BASAWA SINGH v. SEWA, **130 P.R. 1889.** (105 P.R. 1888, *R.*) [*R.*, 26 P.R. 1892.]

(21)—*Incorrect issue—Irregularity—Revision—Misrepresentation of documentary evidence*—Res Judicata—*Erroneous decision.*—The framing of an incorrect issue or the making of an incorrect statement of the points for determination in an appeal is an irregularity which *may be material.* The misrepresentation of documentary evidence, as distinguished from

Revision—continued.

——**1.—General**—*continued.*

the misconstruction of a document, is an irregularity as distinguished from an errror of law. In 11 C. 6, it was not decided by the Privy Council that a Court, which erroneously decides upon a plea of *res judicata* does not act illegally or with material irregularity and therefore its decision cannot be set aside on revision. GURBAKSH SINGH v. BALA, **206 P.R. 1889.** (11 C. 6, *Expl.*) [*R.*, 26 P.R. 1892.]

(22)—*Judgment on alleged admission—No evidence of admission—Material irregularity—Revision—Civ. Pro. Code, s.* 622.—Where a Judge gave the plaintiff a decree on the ground that the defendant admitted the claim when in fact the defendant denied the claim and there was no evidence on record either in support of the claim or to show that the defendant had admitted the same, *held*, there was a material irregularity for a revision under s. 622, Civ. Pro. Code, and the case was accordingly remanded for fresh trial. THAKUR MAL v. RAM NATH, **29 P. R. 1886.** [*R.*, 6 P.R. 1901, Rev. =36 P. L.R. 1901.]

(23)—*Civ. Pro. Code, s.* 622—*Decree against defendant without admission or evidence, power of High Court to set aside in revision.*—A Court has no jurisdiction or power to pass in a contested suit a decree adversely to a defendant, except where there is a balance of evidence or some evidence or admission on the part of the defendant, to support the finding on which such decree is based or where, from the nature of the case, the whole burden of proof was, or continued to be, upon the defendant. Where the Judge, therefore, passes a decree against the defendant in the absence of any admission or evidence supporting the decree, he exercises a jurisdiction not vested in him by law, so that it is competent to the defendant to seek to set it aside in revision under s. 622 of the Civ. Pro. Code. SHIELDS v WILKINSON, **9 A. 398 =A.W N. 1887, 44.** (3 A. 203, 3 A. 417, *R.*) [*F*, 10 C.W.N. 14.]

(24)—*Order under Civ. Pro. Code*, 1908, *O.* XX, *r.* 6—*Amendment of decree—Appeal or revision.*—A mere order, which directs a decree to be amended, is not a decree and is not appealable and is, therefore, open to revision on the ground of being made without jurisdiction. KHAN SINGH v. NASIR KHAN, **101 P.R 1888.**

(25)—*Civ. Pro. Code*, 1882, *ss.* 206, 588, 622 — *Order amending decree — Revisional powers of High Court.*—An order passed under s. 206, Civ. Pro. Code, is a separate adjudication; it is not appealable under s. 588; it is not a part of the original decree and cannot form the subject of appeal with the original decree. Hence a revision of such an order lies under s. 622, Civ. Pro. Code. RAGHUNATH DAS v. RAJ KUMAR, **7 A. 876, F.B. =A W. N. 1885, 256.** (*on Letters Patent Appeal from* 7 A. 276). [*F.*, 15 A. 121; *R.*, 21 A. 140; *D.*, 14 A. 226.]

Revision—continued.

——**1.—General**—*continued.*

(26)—*Civ. Pro. Code*, 1882, *s.* 622—*Revision—Rejection of application to bring decree into conformity with judgment—Illegal refusal to exercise jurisdiction.*—The plaintiff, mortgagees, brought a suit against their mortgagors and the assignees of the property. Three of the defendants appeared and defended the suit, the rest made no appearance. The plaintiffs obtained a decree, which was framed as against the answering defendants only, though the judgment did not indicate any intention of excluding the other defendants. The answering defendants appealed and their appeal was dismissed. Subsequently, the decree-holders applied to the Court which passed the decree to bring the decree into conformity with the judgment by making it applicable to the non-answering defendants. The application was rejected on the ground that it was made after unreasonable delay. The decree-holders then applied to the High Court for revision. *Held* that it was immaterial whether or not an appeal had been filed by the answering defendants There was nothing to show that the decree-holders had delayed unreasonably in making their application to bring the decree into conformity with the judgment and the Court in rejecting that application had illegally declined to exercise jurisdiction vested in it. DWARKA PRASAD v. GHULAM KAMBAR, **A.W N 1891, 114.**

(27)—*Revisional jurisdiction, exercise of—Civ. Pro. Code, s.* 622.—Where no appeal is allowed against an order by the Civ. Pro. Code, and the High Court is convinced that the order sought to be rectified would, if allowed to stand, work an unjust and great hardship in the circumstances of the case, the Court would properly exercise its revisional jurisdiction. BENODE MOHINI CHOWDHRAIN v. SHARAT CHUNDER DEY CHOWDHRY, **8 C. 837.**

(28)—*Revision—Appellate Court not noticing all important grounds of appeal—Material irregularity.*—The Chief Court in the exercise of its revisional jurisdiction set aside the appellate judgment of the District Judge and remanded the appeal for retrial, holding that there was material irregularity in the District Judge's judgment inasmuch as he entirely failed to notice some of the grounds of appeal. RAM DITTA v. MAGHI, **P.L.R. 1900, p. 200.**

(29)— *Appeal dismissed for default though date of hearing not fixed—Revision—Act* XXIII *of* 1861, *s.* 35.—An appeal was entered on the Register but no date was fixed for the hearing. It was brought forward in the absence of the appellant and dismissed for default. *Held* that, in so dismissing the appeal for default, the lower Court had exercised a jurisdiction not vested in it by law; the order of dismissal was accordingly set aside as illegal and the Court directed to restore the appeal to the pending file and proceed according to the provisions of the Civ. Pro. Code. MUSSUMAT UTTER KOUR v. UTTER SINGH, **60 P.R. 1869.**

Revision—continued.

— **1.—General**—*continued.*

(30)—*Second petition for revision—Civ. Pro. Code, ss.* 622 *and* 623—*Second application for revision—Review.—Held* by the Full Bench that the dismissal of an application for revision in default of appearance does not bar the entertainment of a second application, but, in other cases, a second application should not be received, and that an application for review of judgment may be entertained by the Chief Court, where the Court has exercised or declined to exercise jurisdiction on the revision side. UMAR DIN v. ALA BAKSH, **45 P.L.R. 1901 = 54 P.R. 1901.** (17 B. 514, *Concurred*; 75 P.R. 1881, 16 I.A. 104, *R.*; 23 P.R. 1898, *Overruled.*) [*D.* 97 P.R. 1907.]

(31)—*Second revision petition— Revision—Review of an order passed on an application for revision.*—There can be no review of an order passed on an application for revision filed in the Chief Court. The Court treated the petition for review as a second petition for revision and ordered the petitioners to file distinct grounds on which they asked for revision, and to comply with the directions contained in correction slip No. 154 dated 13th December 1899, regarding the form of applications for revision. UMAR DIN v. ALA BAKSH, **P.L.R. 1900, 543.**

(32)—*Revision—Ground upon which Chief Court will interfere*—Res judicata—*Whether rule applies to subsequent suit where first suit withdrawn—Punjab Courts Act* (XVIII *of* 1884), *s.* 70.—In civil cases, interference on the revision side is permissible only where a final decree or an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant. Where a suit is withdrawn and the Court has expressly refrained from adjudicating upon any question or issue in the case, the rule of *res judicata* will not apply to a suit subsequently brought by the same plaintiff against the same defendant upon the same cause of action. MUSSAMMAT SAADAT SULTAN BEGAM v. MUHAMMAD MUNIR KHAN, **149 P.W.R. 1911 = 11 Ind. Cas. 831.**

(33)—*Wrong decision as to* res judicata *when a ground for—Financial Commissioner when would interfere in.*—A wrong decision as to *res judicata* would naturally be a good ground for revision, if it prevented a case being heard on the merits. The discretion of the Financial Commissioner to exercise revisional powers in any case is quite unfettered, and the broad principle to follow is to interefere only when a refusal would result in injustice or failure of justice. IMAM DIN v. JIWAN, **2 P.R. 1910, Rev. = 6 Ind. Cas. 735 = 101 P.L.R. 1910.**

(34)—*High Court's power of revision against orders of Revenue Court—Civ. Pro. Code* (*Act* V *of* 1908), *s.* 115.—*Held* that a High Court has power to interfere in revision with the orders of Courts of Revenue exercising jurisdiction under the Rent Act, in those cases in which the course of appeal lies to the Court of the District Judge and to High Court. INDAR PERSHAD LALA v. BABU FATEH CHAND, **14 O.C. 38 = 9 Ind. Cas. 747.**

Revision—continued.

— **1.—General**—*continued.*

(35)—*Decision by* Mamlatdar—*Reference by Collector to High Court—Revision—Civ. Pro. Code,* 1882, *s.* 622.—Where in a possessory suit, a *Mamlatdar* has passed a decision, it is not competent to the High Court to interfere with it on a motion by the Collector by way of a reference made to the High Court. It is the practice of the High Court to decline to interfere in such a matter on the application of the Collector. It is open to the aggrieved party to directly apply to the High Court under s. 622 of the Civ. Pro. Code. PANDU v. BHAVDU, **21 B. 806.**

(36)—*Revision—Practice—Crim. Pro. Code, s.* 476—*Order passed by Civil Court—Civ. Pro. Code, s.* 622.—In this case, the Court entertained, as an application under s. 622 of the Code of Civil Procedure, an application purporting to be one presented in accordance with the provisions of s. 439 of the Code of Criminal Procedure for revision of an order passed by a Civil Court under s. 476 of the latter Act. EMPEROR v. DURGA PRASAD, **A.W.N. 1904, 170.**

(37)—*Civ. Pro. Code,* 1882, *s.* 622—*Crim. Pro. Code, Act* V *of* 1898, *ss.* 195, 439, 476—*Revision.*—An application to revise the order of a Munsif granting sanction for prosecution under s. 476 of the Crim. Pro. Code, should be made to a Civil Bench of the High Court under s. 622 of the Civ. Pro. Code, and not under s. 439 of the Crim. Pro. Code. KALI PROSAD CHATTERJEE v. BHUBAN MOHINI DASI, **8 C.W.N. 73.** [*F.*, 4 L.B.R. 138; *R.*, 1 C.L.J. 161 = 9 C.W.N. 364 = 32 C. 367 = 2 Cr. L.J. 110, 10 C.L.J. 450.]

(38)—*High Court—Revision—Power to interfere and quash sanction proceedings of lower Courts.*—The High Court has power to interfere on revision with the sanction proceedings of the lower Courts and quash them. ABDUL KHADIR v. SAHIB MEERA, **2 M.L.J. 148 = 15 M. 224.**

(39)—*Jurisdiction, Question of, decided by Lower Court—Power of Chief Court to consider Lower Court's findings on facts.*—The Chief Court may look into the grounds on which a question of jurisdiction has been decided by the lower Court, in order to see if there is ground for interference on the revision side, but, at best, this ought to be done only under very special circumstances. Ordinarily the findings of facts on which jurisdiction is decided ought to be accepted. (*Per Chatterji, J.*) DEVI DYAL v. HARI CHAND, **79 P.R. 1902.** [*D.*, 10 P.R. 1903 = 42 P.L.R. 1903.]

(40)—*Question of jurisdiction—High Court's power to go into.*—The Chief Court has power to consider the correctness of a lower appellate

Revision—continued.

—1.—General—*continued.*

Court's findings on facts concerning questions of jurisdiction. ASA RAM v. TARA CHAND, **44 P R. 1899.** [*R.*, 77 P.R. 1909.]

(41)—*High Court's powers of revision—Civ. Pro. Code*, s. 622—"*Jurisdiction*"—"*Illegality*"—"*Material irregularity.*"—*Effect of Amir Hasan's Case* (11 C. 6) *and* 7 A. 336.—In a suit for the recovery of a sum of Rs. 49 due on a bond which was said to have been recovered from the obligor by the defendant, the District Munsiff was of opinion that he had no jurisdiction in the case because the title to a larger sum than Rs. 1,000 was involved in the question whether the plaintiff was entitled to recover the sum of Rs. 49 for which alone the action was brought. He therefore returned the plaint for presentation to the proper Court under s. 57 of the Civ. Pro. Code. *Held*, by the Full Bench that the Munsiff's view was erroneous, as the only subject-matter of the suit was the Rs. 49, that he had consequently failed to exercise a jurisdiction vested in him by law, and that his order was therefore open to revision under s 622 of the Civ. Pro. Code. [*F.*, 15 B. 148.] The result of the ruling in (11 C. 6) and 7 A 336 (F.B.) is that the questions to which s. 622 of the Civ. Pro. Code, applies are questions of jurisdiction only. If the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that when no appeal is provided, its decisions on questions of both kinds are final. BADAMI KUAR v. DINU RAI, **8 A. 111, F B. = A.W.N. 1886, 28** [*Diss.*, 1 C.W N. 633; *F.*, 8 A. 519; *Expl.*, 9 A.104, F.B. = A.W N. 1886, 309; *R.*, 8 A. 519, 10 A. 467, A.W.N. 1888, 148, L.B.R 1872—1892. 487, L.B.R 1872—1892, 509, 17 M. 410, F.B. 1 C.W.N. 617, 25 A. 509, F.B. = A.W.N. 1903, 104, 2 L.B.R. 333.]

(42)—*Jurisdiction—Second Class Subordinate Judge—Subject-matter of suit within jurisdiction—Decree amount with interest accumulated exceeding jurisdiction—Application for execution where to be made - Civ. Pro. Code*, 1882, *s.* 622—*No second appeal — Revision.*—Where the subject-matter of the suit, which was the sum due on the mortgage sought to be redeemed, was within the jurisdiction of the Second Class Subordinate Judge, being less than Rs. 5,000, *held* that his jurisdiction would continue whatever might be the result of the suit, in all such matters in the suit, as, by the Civ. Pro. Code, are brought within his cognizance, amongst which are matters in execution in that suit (8 B. 31, *R.*) The mere circumstance that the amount due under the decree, by process of accumulation, now exceeds Rs. 5,000, cannot oust the Subordinate Judge from the jurisdiction he has hitherto had over the suit. In this case, the Subordinate Judge and the District Judge in appeal both held that the execution

Revision—continued.

—1.—General—*continued.*

application was beyond the jurisdiction of the Subordinate Judge, and a second appeal was preferred to the High Court.—*Held* that no second appeal lay, but that, however, it may be treated as an application for revision under s. 622 of the Civ. Pro. Code, and as the Subordinate Judge was wrong in refusing to exercise his jurisdiction the High Court can grant relief under its extraordinary jurisdiction under s. 622, Civ Pro. Code. SHAMRAV PANDOJI v. NILOJI RAMAJI, **10 B. 200.**

(43)—*Court acting without jurisdiction—Reopening of question finally determined* It may be a ground for revision that that the Judge of the lower appellate Court re opened a question on which his predecessor had already expressed an opinion, final as regards appeal; yet, the High Court would not interfere on revision, where it is not satisfied that the earlier opinion was correct and where it is found that the Court had jurisdiction over the appeal and exercised it. MOHAN LALL v. NANAK CHAND, **16 P.R. 1894.**

(44)—*Civ. Pro. Code*, s. 622—*Revision—Lower Court exercising jurisdiction not vested in it* —In a suit for the issue of an order directing the defendant to close certain windows which had recently been enlarged and which the plaintiff alleged, interfered with his privacy and caused him inconvenience, it was found that there was no recognised right of privacy to house-holders by the custom of Dehra Ghazi Khan. Nevertheless, holding that the defendant should not have anything different from what he had before, the Courts below decreed the demolition of the windows.—*Held* that the Courts below, having virtually held that the plaintiff had no cause of action, had, in decreeing the demolition of the windows, exercised a jurisdiction not vested in them by law. ASA RAM v. UDAN MAL, **70 P.R. 1886.** (64 P.R. 1885, *D.*)

(45)—*Perpetual liability—High Court—Revision.*—The High Court will exercise its extraordinary jurisdiction in cases where the effect of a decree of a lower Court is to impose a perpetual liability and thus affect the parties to an extent far beyond the mere money value of the suit. BALKRISHNA v. JANARDANA, **6 Bom. L.R. 642.**

(46)—*Civ. Pro. Code* (1882), *s.* 516 (=*sch.* II, *para* 10, *new Code*)—*Notice of filing of award not given to parties—Passing of decree—Material irregularity.*—Where the Court passing a decree in terms of an award filed in it, omits to give notice of the filing to the parties as mentioned in s. 516, Civ. Pro. Code, such omission is a material irregularity, and the High Court can exercise its revisional powers in respect of that decree, on the ground of such omission, although the applicant in revision had in fact knowledge of the filing of the award before the passing of the decree and

Revision—continued.

——1.—**General**—*continued.*

had kept quiet. CHATARBUJ DAS v. GANESH RAM. **20 A 474 = A.W.N. 1898, 132.** (11 M. 144. *F.*) [*F.*, U.B.R. 1897—1901, Vol. II, 24.]

(47)—*Revision — Alternative remedy being available not necessarily a bar to revision—Arbitration, reference by Court to—Munsarim's power to fix date for hearing—Hearing of case fixed for a date subsequently declared a holiday—Civ. Pro. Code* (V *of* 1908), *s.* 115—*Civ. Pro. Code* (V *of* 1908), *sch.* II, *cl.* (8).—Although the practice of the Court has been to discourage applications for revision where other remedies are available to the applicant, yet the existence of an alternative remedy is not necessarily a bar to the exercise of revisional jurisdiction. A suit was referred to arbitration. Several applications were made for extension of the time fixed for filing of the award, and ultimately May 28th was fixed for that purpose. On that date no award was filed and neither party appeared. At the instance of the Court, the plaintiff's pleader applied for further extension of time and the Court then fixed June 20th. On that date also no award was filed and neither party appeared, but the Subordinate Judge was himself unable to attend the Court on that day, and the Munsarim made an order adjourning the case to June 24th. Subsequently this date was declared to be a holiday and the case was taken up on June 25th when the Subordinate Judge made an order superseding the arbitration and dismissing the suit. *Held*, that the Munsarim had no power to fix a date for the next hearing of the suit. *Held* further, that, as the case could not be taken up on the 24th on account of the holiday and there was nothing to show who fixed the following day for the hearing of the case, there was no justification for calling the case up on the 25th, the day on which it was dismissed *Held* also, that the words "and in such case shall proceed with the suit" in cl. (8) of the second schedule to the Code of Civil Procedure do not necessarily mean that the Court shall proceed at once on that same day to examine witnesses. KUNDAN LAL v. CHAINU LAL, **13 O.C. 341 = 8 Ind. Cas. 876.**

(48)—*Mortgage by conditional sale—Reg.* I *of* 1798, *s.* 2—*Scope—Exercise of jurisdiction not vested by law.*—S 2, Reg. I of 1798, limits the functions of a District Judge acting under it to merely ministerial and not to judicial ones. A District Judge has, therefore, no jurisdiction in case of other mortgages, than mortgages by conditional sale in reference to which only he is competent to act under s. 2 of the Regulation, to receive moneys tendered as the amount due on the mortgages and to issue notice to the mortgagee and decide summarily what was actually due. SANWANT v. DYA RAM, **107 P R. 1890.**

(49)—*High Court's powers of revision under s.* 622, *Civ. Pro. Code—Reg.* XVII *of* 1806—

Revision—continued.

——1.—**General**—*continued.*

Redemption of mortgage.—When, in the case of mortgage of immoveable property, foreclosure proceedings under Reg. XVII of 1806, were perfected by the expiry of the year of grace without the deposit of the mortgage-money, and the mortgagor's right to redeem is gone, the Judge has no jurisdiction to entertain an application by the mortgagor for redemption, or any objections in support of such application which the mortgagor could only take by way of defence in a suit by the mortgagee for possession. Orders passed by the Judge on such an application, that the mortgage-money deposited by the mortgagor should be paid over to the mortgagee, and that the latter should surrender the property of which he is in possession, would also be without jurisdiction, and would be subject to revision by the High Court under s. 622, Civ. Pro. Code. HAZARI LAL v. KHERU RAI, **3 A. 576.** [*F.*, 119 P.R. 1892.]

(50)—*Liability of person other than maker of note—Burden of proof—High Court's powers of revision—Civ. Pro. Code*, 1877, *s.* 622.—Where a person wants to make a person other than the one who executed a note liable, on the ground that the maker of the note borrowed the amount on the latter's behalf, it is for the plaintiff to prove the latter's liability by showing that the maker had expressed or implied authority to borrow. Where a decree is passed in the absence of such evidence, the High Court will reverse the decree under s. 622, Civ. Pro. Code, 1877. ABDUL AZIZ v. JARBANDHAN SINGH, **A W N. 1881, 65.**

(51)—*Suit for refund of fees paid to barrister—Civ. Pro. Code*, 1882, *s.* 622—*Revisional jurisdiction of High Court.*—A client sued a barrister for refund of the fee paid to the latter for professional services which, however, were not rendered, and the lower appellate Court reversed the decree of the original Court and *held* that the suit would lie. *Held*, on an application for revision against the decision, by *Stanley, C.J.*, and *Blair, J.* (*Banerji, J., dissenting*), that the High Court could interfere in the exercise of its revisional jurisdiction. C. ROSS ALSTON v. PITAMBAR DAS, **25 A. 509 = A.W N. 1903, 104. F. B.** (11 C. 6, *R. & D.*; 15 C. 47, 1 M. 220, 18 B. 369, 7 A. 336, 8 A. 111, 3 C.W N. 581, 17 A. 422, 20 A. 78, *R.*) [*R.*, 2 L B R. 333, 31 C 385, 3 N. L. R. 47, 11 C.L J. 426.]

(52)—*House-tax—High Court—Civil Court—House-tax—Municipality — Jurisdiction.*—The plaintiff filed a suit in a Civil Court to recover from a town Municipality the amount of house-tax illegally assessed and recovered from him. The Court came to the conclusion that there was an illegality in the assessment and recovery complained of, but the Court by itself went into the question of assessment and fixed the amount of house-tax, and dismissed the plaintiff's suit: *Held*, setting aside the decree and awarding the plaintiff's claim, that the

Revision — continued.

——**1.—General**—*continued.*

High Court could interfere under s. 622 of the Civ. Pro. Code, inasmuch as the Court in fixing the amount of house-tax exercised the function which the legislature vested elsewhere, and so far exercised its jurisdiction improperly. HAMIRSING v. AMOD TOWN MUNICIPALITY, **7 Bom. L.R. 288.**

(53)—*Civ. Pro. Code*, 1882, *s.* 622—*Guardians and Wards Act*, *s.* 48.—Orders passed under s. 48 of the Guardians and Wards Act, 1890, can be revised under s. 622 of the Civ. Pro. Code, 1882. NAGARDAS v. ANANDRAO, **9 Bom. L.R. 495 = 31 B. 590.**

(54)—*Revision—Civil cases—Satisfaction of decree out of Court is no bar to revision—Plaintiff can succeed only by strength of his own title.* An application for revision is not barred by the mere fact that the petitioner has satisfied the decree out of Court. The plaintiff can succeed by the strength of his own title and not by the weakness of the defendant's case. KANYHA LAL v. NARPAT RAI, **35 P L.R. 1912 = 168 P. W.R. 1912 = 14 Ind. Cas. 793.** (16 P.R. 1907 = 127 P.W.R. 1908, *R.*).

(55)—*Failure to exercise jurisdiction—Application to release attached property—Refusal.*—A lower Court fails to exercise a jurisdiction, if, upon an application to release certain property from attachment, it declines jurisdiction under the impression that the application is barred by authority and not because it found that the applicant had no case on the merits. MUSSAMMAT CHAND KAUR v. MELA RAM, **8 P.R. 1897.** (13 C. 90, 7 B. 341, *F.*; Unrep. case No. 6 of 1888. *R.*; 10 A. 119, 15 A. 405, 8 M. 493, 15 C. 446, 11 A. 383, *D.*) [*R.*, 128 P.R. 1906.]

(56)—*Provincial Small Cause Courts Act*, IX *of* 1887. *s.* 25, *refusal of revision under, by single Judge of High Court—Letters Patent, cl.* 10—*Appeal.*—The order of a single Judge of the High Court declining to exercise the discretionary power given to the Court, by s. 25 of Act IX of 1887, is not a judgment within the meaning of cl. 10 of the Letters Patent, and is not, therefore, appealable. GAURI DATT v. PARSOTAM DAS, **15 A. 373 = A. W. N 1893 122.** (14 A. 226, *R.*) [*F.*, 28 A. 133 = A.W.N. 1905, 218.]

(57)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 25—*Revision—Mistake of Law—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 75—*Bond payable by instalments.*—In the exercise of its Revisional Jurisdiction, under s. 25 of the Provincial Small Cause Courts Act, the Chief Court is not bound to interfere when a Small Cause Court has erred on a point of law, but it would interfere when a wrong decision on a question of law *e.g.*, question of limitation, has resulted in a failure of justice. The Chief Court cannot decline to decide a law-point raised merely because it is intricate and difficult, if the case itself is such that the Court's revisional action is necessary in the ends of justice. (19 P. R. 1901 = 68 P. L. R. 1901, *Consd.*; 21 B. 250, 16 A. 476, 7 B. 342, 21 A. 89, *R.*) When a suit on a bond payable by instalments providing that the whole amount will become payable at once in case of default in payment of any instalment was dismissed by the Small Cause Court as barred by limitation under art. 75 of the Limitation Act and the plaintiff applied under s. 25 of the Provincial Small Cause Courts Act for revision of the order of dismissal and contended that art. 75 was not applicable to the case and there was waiver as regards the default of the first instalment. *Held*, that the Chief Court was competent to consider the legality or otherwise of the order. *Held*, also, that the order of the Small Cause Court was not contrary to law. (188 P.R. 1883, F.B., *F.*; 8 B. 561, *R.*) *Per Robertson, J.*—The Chief Court should not interfere in the exercise of its revisional jurisdiction under s. 25 of the Provincial Small Cause Courts Act except where a clear case of injustice resulting from a decree or order clearly not according to law has been made out. *Per Chatterji, J.*—It is not allowable in construing an Act to refer to the report of the Select Committee and the debates in the Legislative Council on the Bill which subsequently is passed into the Act. In an appeal it is the right of the appellant to obtain an adjudication, and one in his favour, if his grounds are made out, irrespective of the question whether substantial justice is or is not thereby dispensed in the case. A point of law or procedure may, in a particular case, work a great hardship, but in an appeal the Court is bound to give effect to it, without regard to the consequences. In cases of revision, it is quite otherwise. No party has the right to obtain an adjudication, and it is entirely within the discretion of the Court to interfere or not, as it thinks fit. It will not interfere to perpetrate an injustice, but only to promote the ends of justice. S. 622 of the Civ. Pro. Code is not a safe guide for the exercise of the revisional powers under s. 25 of the Provincial Small Cause Courts Act. SAYAD MIR SHAH v. ATAR SINGH, **138 P.L.R. 1903 = 66 P.R. 1904.**

(58)—*Suit referred to arbitration—Disposal of suit in contravention of s.* 508, *Civ. Pro. Code*, —*Civ. Pro. Code*, *s.* 622.—The Small Cause Court Judge in this case set aside the award of the majority of the arbitrators without showing any ground for so doing, and this was a contravention of s. 521 of the Code. Further, instead of postponing the decision of the case for ten days, after the presentation of the award to his Court, in order to allow the party dissatisfied with it to file his objections, the Judge proceeded to deal with the matter, which had been referred to arbitrators, by taking evidence himself upon the merits of the case Such a course is expressly prohibited by s. 508 of the Code. *Held* that the decree of the Small Cause Court Judge must be set aside under s. 622 of the Civ. Pro. Code. The case was accordingly

Revision—continued.

—**1.—General**—*continued.*

returned to the Judge directing him to fix, in presence of the parties, a date after a period of not less than 10 days, on which the award of the majority should be confirmed unless sufficient cause for setting it aside, under s 521 of the Code, be shown by the plaintiff. DULA v DAUDZAI, **80 P R. 1879.**

(59)—*Occupancy rights decreed without reference to tests enunciated in previous rulings*—*S.* 8, *Act* XVI *of* 1887—*Material irregularity.*—A claim to occupancy rights under s. 8, Punjab Tenancy Act, 1887, should not be decreed on vague grounds without reference to the test enunciated in 4 P.R 1875 (Rev); a breach of this principle will constitute a material irregularity. LEKHA MAL v. MUHAMMAD BAKSH, **17 P R. 1892, Rev.**

(60)—*Occupancy*—*Punjab Tenancy Act (Act* XVI *of* 1887)—*No reference to*—*Revision.*—It is a material irregularity to decide a claim to occupancy rights without reference to the new Tenancy Act (XVI of 1887) AZIMULLA v. JEHANGIR KHAN, **16 P.R. 1892, Rev.** (7 P. R. 1890, Rev. *R.*)

(61)—*Revision*—*Interlocutory orders*—*Order made on application for permission to sue as a pauper liable to revision.*—*Held*, that an application for permission to sue as a pauper is in itself a case within the meaning of that term as used in s. 115 of Act V of 1908 *Held*, further, that orders under Chapter XXVI of Act XIV of 1882 are open to revision under s. 622. *Held* also, that interlocutory orders are not liable to revision under s. 115 of Act V of 1908. *Held* also, that the provisions of s. 405 of Act XIV of 1882 are imperative, in requiring the presentation of an application for permission to sue as a pauper by the party in person, except in cases mentioned in ss. 640 or 641. SHAMI UD-DIN v. AMIR HUSSAIN, **12 O.C. 381=4 Ind. Cas. 777.**

(62)—*High Court's powers of revision*—*Civ. Pro. Code*, ss. 622, 623, 629, 103—*Interlocutory order*—*Order refusing to deal with appeal under Civ. Pro. Code*, s. 629.—Where a Judge declines to deal with an appeal presented under s. 629 of the Civ. Pro. Code from an order granting an application for review of judgment under s. 623, on the ground that the lower Court's order was passed under s. 103 and that no appeal would lie from such order, he refuses to exercise his jurisdiction, and such refusal may be dealt with by the High Court in revision under s. 622 notwithstanding that an appeal lies from the final decree. KALAP NATH MAN TIWARI v. BINDHYA CHAL MAN TIWARI, **A.W.N. 1889, 179.**

(63)—*Revision*—*Interlocutory order*—*Material irregularity*—*S* 115 *of Act* V *of* 1908—*Arbitration*—*S.* 70 (*a*) *of Act* XVIII *of* 1884—*Held*, that the word "case" should not always be strictly construed, and that interlocutory orders, *i.e.*, orders which do not finally dispose of a case, may form the subject of revision, if

Revision continued.

—**1.—General**—*continued.*

the matter they relate to, though part of and connected with a case, stands by itself and is a definite part of a case, and in which the ends of justice would be defeated if the power of revision is not exercised. So, where a claim was based on the award of a private arbitrator and on the merits in the alternative, the defendant attacked the award but not on the ground of misconduct, the plaintiff, seeing the force of the defendant's objection, consented to limit his claim to the award, and the lower Court allowed the defendant at a very late stage of the proceedings to plead misconduct of the arbitrator, but refused to grant the plaintiff's prayer to fall back upon the alternative causes of action originally alleged in the plaint: *Held* that the order of refusal amounts to a material irregularity within the meaning of s. 70 (*a*) of Act XVIII of 1884, and the plaintiff is entitled to get it set aside in revision without waiting for the final result of the case. THE DELHI CLOTH AND GENERAL MILLS COMPANY, LD. v. R B. HARDHIAN SINGH, **72 P.W.R 1910=6 Ind. Cas. 939.** (60 P.R. 1897, 51 P.R. 1899, *F.*)

(64)—*Civ. Pro. Code*, 1882, s. 622—*High Court, Power of*—*Pauper suits*—The plaintiff applied to file a suit in *forma pauperis* on a claim which required the Court-fee of Rs. 1,775 on the plaint. The Subordinate Judge finding that she had property of the value of Rs. 1,600, determined that she was not a pauper. The plaintiff applied to the High Court: *Held*, (1) that the High Court had jurisdiction to interfere, under s. 622 of the Civ. Pro Code, 1882, (2) that the determination by the lower Court was erroneous for it was obvious that the possession of Rs. 1,600, even if it could properly be taken into account, would not enable the applicant to pay the Rs. 1,775 which was the fee prescribed by the Court for the plaint. GANGABAI v SHRIDHAR, **8 Bom. L.R. 642.**

(65)—*Application to prefer appeal* in forma pauperis—*Rejection by lower Appellate Court*—*Revision*—*Civ. Pro. Code*, 1882, s. 622.—Where a lower appellate Court rejects under s 592, Civ. Pro. Code, Act XIV of 1882, the application of a person to prefer an appeal *in forma pauperis*, it is open to the Chief Court to exercise its powers of revision under s. 622, Civ. Pro. Code, on the ground that in rejecting such an application, the lower Court has acted illegally, or with material irregularity, as no appeal lies to the Chief Court in such a case. BARKAT ALI v. GHULAM KADIR, **21P.R 1885.** (4 A. 91, *F.*) [*D.*, 125 P.R. 1892.]

(66)—*Court taking mistaken and wrong apprehension of facts*—*Material irregularity*—*Civ. Pro. Code*, 1882, s. 622—*Revisional powers of High Court*—*Limitation*—*Reg.* II *of* 1827, s. 5, *cl.* 2.—Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs in law or in fact in its decision of any such questions with which it has jurisdiction to deal, its

Revision—continued.

——**1.—General**—*continued.*

error can only be corrected in due course of appeal; and, where no appeal is permissible, there would be no remedy under s. 622 of the Civ. Pro. Code, 1882, or under the provisions of s. 15 of the Statute 24 and 25, Vic. c. 104, whatever remedy there might be in the Bombay Presidency, under cl. 2 of s. 5 of Regulation II of 1827. But it would be otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really arise in the case and bases its decision of the case on its determination of that issue. By so doing, it acts with material irregularity in the exercise of its jurisdiction even if it has not failed to exercise a jurisdiction vested in it. A suit was filed on 29th Nov., 1886, on a bond, dated 29th Nov., 1881, and payable in two years. The plaintiff stated in the plaint that the cause of action arose on 29th Nov., 1883. The lower Court dismissed the suit as time-barred, being of opinion that the cause of action arose on 28th Nov., 1883 and not on the 29th Nov., 1883 as alleged in plaint. The plaintiff having made an application to the High Court under s. 622, Civ. Pro. Code, 1882, *held*, (1) that the decree of the lower Court must be set aside. The claim was not time-barred, because the cause of action accrued only on 29th Nov., 1883. The period of two years specified in the bond must be held to have terminated on the day of the month corresponding with the day on which the bond was dated. (2) The High Court could interfere in the exercise of its revisional jurisdiction under s. 622 of the Civ. Pro. Code, 1882, because the lower Court had mis-stated and misunderstood the obvious facts of the case. VENKUBAI v. LAKSHMAN VENKOBA KHOT, **12 B. 617.** (11 C. 6 P. C., *Expl.*) [*Cons.*, 2 L.B.R 333; *D.*, 20 A. 299.]

(67)—*S. 622, Civ. Pro. Code,* 1882 (=*s.* 115, *present Code*)—*Revisional powers of High Court —Limitation.*—Where the lower Courts have entertained an application which is, on the face of it, barred by limitation without adverting to the question of limitation, the High Court can interfere under s. 622, Civ. Pro. Code, 1882. *Semble.*—In dealing with a case under s. 622, Civ. Pro. Code, 1882, the High Court can look into the evidence and itself investigate the facts. KAILASH CHANDRA HALDAR v. BISSONATH PARAMANIC, **1 C.W. N. 67.**

(68)—*Revision — Question of limitation—Refusal to enquire into—Error of law—Jurisdiction—Power of interference.*—Where the lower Court refused to enquire into the question of limitation, *held*, that the lower Court must be deemed to have held that it had no jurisdiction to go into the question, and that its order is open to revision, by the Judicial Commissioner. HABIBULLAH v. KARANJU, **9 N.L.R. 35=19 Ind. Cas. 425.**

(69)—*Punjab Tenancy Act,* 1887, *s.* 59 (4)—*xtinguishment of right of occupancy by tenant dying without heirs—Effect of extinguishment on mortgage of occupancy rights by tenant—s.* 84 (3)—*Reference made with great delay and without appeal having been filed—Court of Wards—Revision — Material irregularity.*—*Held*, that a landlord is entitled to recover possession of land from the mortgagee of occupancy right upon the death of the tenant without heirs, and it is not necessary for him to pay off the mortgage-debt. The Financial Commissioner disallowed the contention that the case should be thrown out because the Court of Wards had never appealed. The Deputy Commissioner's want of leisure on account of plague in his district was considered sufficient cause for not filing appeal. *Held*, that the application of a rule of limitation which in fact does not apply to a case amounts to a material irregularity. S. NARINDAR SINGH v. LEHNA SINGH, **36 P.L.R. 1901=6 P.R. 1901, Rev.**

(70)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 377—*Review—Application after ninety days—Just and reasonable cause for delay—Proof.*—An order admitting a review of judgment after the expiration of ninety days from the date of the decree, would be illegal if the party preferring the same fails to show just and sufficient cause to the satisfaction of the Court for not having preferred such application within the period limited. The order improperly granting the review in the absence of proof of such sufficient cause and all subsequent proceedings under it would be invalid and liable to be set aside. LUCHMUN SINGH v. TIRBANI BUKSH, **14 B.L.R. 373, P.C.=2 I.A. 58=3 Sar. 437.**

(71)—*Cases where no revision lies—Civ. Pro. Code,* 1882, *s.* 622—*Revision—Practice—Civil cases.*—The Chief Court will not, in the exercise of its revisional powers, minutely examine every phase of the litigation and scrutinize elaborately the authorities on which a party's agents professed to act, in order to determine whether there was any flaw in their acts which might be held to invalidate them. NABI BAKSH v. THE MUNICIPAL COMMITTEE OF HISSAR, **132 P.L.R. 1901.**

(72)—*Revision, when any other remedy open to the applicant—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622.—*Held*, that the High Court will not exercise its revisional jurisdiction, as long as there is any other remedy open to the applicant. MUHAMMAD AKBAR ALI v. TAHIR HUSAIN, **12 O.C. 109=2 Ind Cas. 284.** (15 A. 405, 11 A. 383, 10 A. 110, *R.*; 17 A. 222, *D.*) [*Diss. & Expl.*, 13 O C. 341.]

(73)—*Powers of High Court — Revision — Where a suit is open.*—The High Court will not interfere with a decision, even where a question has been wrongly decided, when the petitioners have a remedy by suit. A.M. MURUGAPPA CHETTIAR v. NARAYANASAWMY PILLAY, **M.W.N. 1912, 956=17 Ind. Cas. 889.**

Revision—continued.

—— **1.—General**—*continued.*

(74)—*Civ. Pro. Code, ss.* 281, 283 (=*O.* XXI, *rr.* 61, 63), 622 (=*s.* 115, *new Code*)—*Revision —Power of High Court.*—When there is any other remedy open to an appellant, the High Court will not as a general rule exercise its revisional jurisdiction under s. 622. Accordingly, the High Court refused to interfere in revision with an order of a Subordinate Judge under s 281 refusing to release property attached before judgment, on the ground that the applicant had a remedy by way of suit under s. 283. J. J GUISE v. JAISRAJ, **15 A. 405=A. W N. 1893. 172** (8 M. 484, 10 A. 119, 11 A. 383, *R.*) [*R.*, 18 A. 163=A.W.N. 1896, 18, 80 P.L.R 1901, 57 P.L.R. 1903=13 P.R. 1903, 2 A L J. 370, 28 A. 72=2 A.L J. 749=A.W.N. 1905, 191, 12 O.C. 109; *D.*, 1 L.B.R. 180.]

(75)—*High Court, interference of—Civ. Pro. Code, s.* 281—*Revision.*—The High Court will not interfere in revision with an order passed under s. 281, Civ. Pro. Code, as the party has a remedy by suit. ITTIACHAN v. VELAPPAN, **8 M. 484, F.B** [*F.*, 15 A. 405=13 A.W.N. 172; *D.*, 1 L.B.R. 180]

(76)—*Civ. Pro. Code*, 1882, *ss.* 25, 622—*Transfer of suit—Revision.*—Where the decree in a suit would be appealable, an order under s. 25, Civ. Pro. Code, transferring such suit, is not subject to revision by the High Court. FARID AHMED v. DULARI BIBI, **6 A. 233=A. W.N. 1884. 45.** [*Diss.*, 14 C. 768; *Appr.*, 20 A. 395; *R.*, A W.N. 1899, 210, 22 P.L.R. 1900, 76 P.R. 1903=170 P.L.R. 1903.]

(77)—*Order appealable—Revision does not lie.* —No application for revision can lie to the High Court when the order sought to be revised is capable of being appealed against. GNANA SUMBANDA PANDARA SANNADHI v. DAVID NADAR, **14 M.L.J. 433.** [*D.*, 31 M. 24=17 M.L J. 441=3 M L.J. 19.]

(78)—*High Court's powers of revision—Civ. Pro. Code, s.* 622. Where a second appeal was based on grounds on which a second appeal is not allowed by Chap. 42 of the Civ. Pro. Code, and such grounds did not relate to the jurisdiction of the Court, such appeal could not, be allowed to proceed under s. 622 of the Civ. Pro. Code. MAGNI RAM v. JIVA LAL, **7 A. 336, F B.=A.W N. 1885. 32.** (11 C. 6, *R.*) [*F.*, 7 A. 661, F.B.; *Appr.*, 8 A. 111, F.B.; *Cons.*, 13 C. 225; *Expl*, 7 A. 345; *R.*, 8 A. 519, 17 M. 410, F B, 1 C.W.N 617, 20 A.W.N. 214, 2 L B.R. 333; *D.*, 25 A. 509]

(79)—*Revision — Civil cases—Quantum of evidence—Question of fact.*—The Chief Court will generally refuse to exercise its powers of revision in Civil Cases on questions of fact, when there is evidence on record which the lower Court has considered. It cannot be said that the lower appellate Court has committed a material irregularity merely because it may possibly have come to a wrong conclusion in weighing the evidence. AYA RAM v. KARM NARAIN, **208 P.L.R. 1908=220 P.W.R. 1908.** (9 P.R. 1894, *R.*)

Revision—continued.

——**1.—General**—*continued.*

(80)—*Civ. Pro Code*, 1882, *s.* 622—*Revision —Wrongly rejecting evidence—Error of Law, no ground for interference under s.* 622, *Civ. Pro. Code.*—Where the Judge in the lower Appellate Court had jurisdiction to decide the case and decided it wrongly, by failing to admit some evidence which he ought to have admitted, he did not exercise his jurisdiction illegally, and s. 622, Civ. Pro. Code, would not apply.—*Per Maclean, C.J.*—The error of the lower Appellate Court in rejecting the document as unstamped in contravention of s. 34 of Act I of 1879, comes within that part of s. 622, Civ. Pro. Code, which speaks of a Court's acting with material irregularity in the exercise of its jurisdiction. The rejection of the document is more in the nature of a materially irregular act than of an erroneous decision on a point of law. (*Per Banerjee, J.*) [*F.*, 25 A. 509=A.W.N. 1903, 104, 13 C.W.N. 797=10 C.L.J. 33.] *Per Maclean, C.J.*—An error of law does not amount to acting, in the exercise of jurisdiction illegally, or with material irregularity within the meaning of s. 622, Civ. Pro. Code. (11 C. 6, *Relied on*; 1 C.W.N. 626, 1 C.W.N. 617, *R*)—*Per Banerjee, J.* What 11 C. 6 must be taken to have settled is that it is not every error of law that will come within the scope of s. 622, Civ. Pro. Code; but it does not follow that no error of law, unless it is also an error of jurisdiction, can come within the operation of that section. Where the error was gross and palpable and was likely to have led to injustice, it is an error such as s. 622, Civ. Pro. Code, was intended to correct. ENAET MONDUL v. BALARAM DEY, **3 C.W.N. 581.** (11 C. 6, *Expl.*; 1 C. W.N. 626, 1 C.W.N. 617, 1 C.W.N. 633, *R.*) [*F.*, 13 C.W.N. 797=10 C.L.J. 33; *R.*, L.B.R. 1900—1902, 142.]

(81)—*S.* 70-*A*, *Act* XVIII *of* 1884 (*Punjab Courts*), *as amended—Revision—Civil Case—Material irregularity—Hearing of case on merits in the absence of party—Civ. Pro. Code*, 1882, *s.* 568—*Act* V *of* 1908, *O.* XLI, *r.* 27—*Evidence—Revision—Production of additional evidence.*—Where an appeal was heard on merits in the absence of one of the respondents, who was not served with the notice of the appeal, the Chief Court on revision set aside the judgment of the Appellate Court and remanded the case for fresh decision after hearing the parties. *Held*, that the Chief Court was not competent to admit additional documentary evidence produced for the first time on revision and to remand the case for re-hearing, as it could not be said that a material irregularity was committed by the lower Courts. NATHU RAM v. NUR ILAHI, **55 P.L.R. 1909=59 P.W.R. 1909 =4 Ind. Cas. 550.** (31 B. 381, *F.*)

(82)—*Decision as to inadmissibility of document—High Court's interference under s.* 622, *Civ. Pro. Code—Mistake on question of law—Illegality or irregularity—Per Farran, C J.*—When Courts, in the exercise of their judicial functions, decide that a document is inadmissible in evidence, having exercised their

Revision—continued.

—**1.—General**—*continued.*

judgment upon the question of its admissibility or inadmissibility, the High Court have no jurisdiction to interfere in the matter under s. 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake on a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law is not an illegality or a material irregularity within the meaning of s. 622 of the Civ. Pro. Code, 1882. MADHAVRAV v. GULA BHAI, **23 B. 177**. [*Cons.*, 2 L.B.R. 333.]

(83)—*Civ. Pro. Code*, 1882, *s.* 622—*Misappreciation of documentary evidence, not sufficient ground for revision.*—Where the gist of the contention on behalf of the appellant in a petition for revision was merely that the lower Court failed to properly appreciate the effect of a deed of compromise between the parties, such misappreciation on the part of the Court was *held* not to constitute a sufficient ground for the High Court to interfere by way of revision under s. 622, Civ. Pro. Code. DASRATH RAI v. SHEODIN RAI, **16 A. 39 = A.W.N. 1893, 199**. [*R.*, 4 N.L.R. 184.]

(84)—*Civ. Pro. Code*, 1882, *s.* 622 (=*s.* 115, *new Code*)—*Revision—Wrong decision by Court having jurisdiction.*—Where a Court has jurisdiction to decide a question, and does decide it, the High Court cannot, under s. 622 of the Civ. Pro. Code, interfere merely because the Court has wrongly decided the question. RAM RAKH NATH v. SUNDAR NATH, **20 A. 299 = A. W.N. 1898, 36.**

(85)—*High Court's powers of revision—Civ. Pro. Code, s.* 622.—Where a Court, having jurisdiction in a matter, passes an erroneous order or decision from which an appeal is not given, such order or decision will not be revised by the High Court, if the aggrieved party has a remedy by suit provided by law. SUNDER DAS v. MANSA RAM, **7 A. 407 = A W N 1885, 87.** (7 B. 341, 11 C. 6, *R.*) [*F.*, 10 A. 119.]

(86)—*Decision on merits—Wrong decision—Interference with questions of fact—Revision.*—However erroneous a decision may be upon the merits, whether it be in conclusions drawn from the evidence, or in the application of the law to the facts, it is not an irregularity to give a wrong decision upon the merits and the High Court would not interfere in revision. HIRA SINGH v. BHANA, **9 P.R. 1894.** [*R.*, 13 P.R. 1903 = 57 P.L.R. 1903.]

(87)—*Civ. Pro. Code*, 1882, *s.* 622—*No assumption of fact—Wrong inference—Revision.*—Where the Court did not assume any non-existing fact, but only drew a wrong inference from admitted facts, no revision lies, though, if an appeal lay from the order, it could be set aside. CHIRAGH v. PIR BUKHSH, **6 P. R. 1890.** [*R.*, 26 P.R. 1892.]

Revision—continued.

—**1.—General**—*continued.*

(88)—*Civ. Pro. Code, s.* 622—*Erroneous decision on point of law—Revision.*—Where an appellate Court, having jurisdiction to decide an appeal from which no further appeal was allowed, wrongly decided on a question of jurisdiction involved therein, *held* that such an error could not be made a ground for the Chief Court's interference under s. 622, Civ. Pro. Code. DOWLAT RAM v. ASA RAM, **46 P.R. 1886.** [*F.*, 4 P.R. 1911 = 45 P.L.R. 1911 = 9 Ind. Cas. 674; *R.*, 105 P.R. 1888.]

(89)—*Civ. Pro. Code*, 1882, *s.* 622, *interpretation of—Chief Court, power of—Erroneous decision as to existence of cause of action.*—S. 622 of the Civ. Pro. Code does not authorise the Chief Court to interfere with an erroneous decision on the ground that the Court which passed it has acted in the exercise of its jurisdiction illegally; and so long as such Court has jurisdiction over the subject-matter of a suit, the mere circumstance that it decides wrongly is no ground for saying that it has exercised its jurisdiction illegally or with material irregularity. Where it was alleged that a lower appellate Court had decided wrongly on the question whether there was a cause of action for the relief prayed for, the Chief Court refused to interfere in revision, as that Court had jurisdiction to decide whether a cause of action existed or not. RAMA v. JOWAHIR, **64 P.R. 1885.** (11 C. 6, *F.*; *The Colonial Bank of Australia* v. *William*, 5 P.C 417, *R.*) [*Rel. on*, 22 P.R. 1886; *R.*, 46 P.R. 1886, 1900 P.L.R. p. 137, 33 P. R. 1904, 207 P.L R 1912; *D.*, 70 P.R. 1886, 105 P.R. 1888, 75 P.R. 1890, F.B.]

(90)—*Civ. Pro. Code, ss.* 566, 622—*Appellate Court's powers of remand—Remand to Court which did not try original suit.*—Where an Appellate Court, in remanding a case under s. 566, Civ. Pro. Code, sends it to some inferior Court other than the one which originally tried the suit, it is at most only an error of procedure and not an illegal exercise of jurisdiction not vested in it by law so as to afford in itself a ground for revising the decree subsequently made under s. 622, Civ. Pro. Code. BHOJAN DAS v. MUSSAMUT MURADDU, **111 P.R. 1886.**

(91)—*Civ. Pro. Code*, 1882, *s.* 622 — *High Court's powers of revision—Mamlatdar's decision declining jurisdiction.*—In this case, the Mamlatdar had come to the conclusion that the defendant was not in possession of the land under the *lavni* kabuliyat upon which the plaintiff relied as proving the defendant's tenancy and its termination within six months of suit, and upon such finding, his decision that the defendant could not be dispossessed was correct. Plaintiff applied to the High Court for revision arguing that the Mamlatdar had wrongly admitted evidence, and that, upon the evidence and admissions made before him, he should have come to a different conclusion. *Held* that the High Court was not competent to exercise, in such a case, its extraordinary

Revision —continued.

——**1.- General** - *continued.*

powers under s. 622 of the Civ. Pro. Code. The Mamlatdar had not declined jurisdiction. He had come to a certain conclusion after having considered the materials laid before him. That conclusion, if erroneous, ought to be corrected in a regular suit and not by an application under s 622, especially as no substantial injustice had resulted from it. KASHINATH v. NANA, **21 B. 731.** [*R.*, 80 P.L.R. 1901, 13 P. R. 1903=57 P.L.R. 1903, 8 Ind. Cas. 613.]

(92)—*Revision — Civ. Pro. Code, s.* 622—*Punjab Courts Act,* 1899, *s.* 70-*A—Order to furnish copies under s.* 6, *Act* XVIII *of* 1891.—*Held*, that the order passed by the District Judge to the Agra Bank, to furnish copies of the entire account of Mr. H, from their books, though not proper, was not open to revision under s. 622, Civ. Pro. Code, or s. 70-A, Punjab Courts Act, 1899. The proper course was to allow the inspection of the Bank books of the whole account, and then to permit copies of all entries, which it was considered necessary to have after inspection. THE AGRA BANK v. KASHI RAM, **P.L.R. 1900, p. 237.**

(93)—*Civ. Pro. Code,* 1877, *s.* 622—*High Court's powers of revision--Non-judicial order.*—Where an order of a District Judge is not a judicial order, but one of a merely interlocutory and ministerial character, referring to a transaction of a non-judicial nature connected with a surety for a party to a litigation, *held* that the High Court was not competent to interfere with such order in revision. SUNDAR LAL v. BUDH PRAKASH, **A.W N. 1882, 143.**

(94)—*Revision — Interlocutory order—Ordinarily not open to revision.—Held*, that, ordinarily, an interlocutory order is not open to revision. It is only in cases in which irreparable injury would be the result of non-interference that the Chief Court will revise an interlocutory order. NIHALA MALL v. BAGU RAM, **164 P.W R. 1911.** (43 P.W.R. 1910=6 Ind. Cas. 647. *F.*)

(95)—*Interlocutory order not open to revision when final order in case appealable.*—G L purchased a Court-fee stamp for a certain suit; he never used the stamp, but kept it and did not apply for a refund of the money. Some considerable time afterwards, his daughter C instituted the present suit and engrossed her plaint on the stamp which G L had purchased and which he gave her for the purposes of the suit. The District Judge held that the plaint was not properly stamped within the meaning of s 28 of the Court Fees Act because a damaged or spoilt stamp had been used, and directed the plaintiff to file proper Court-fees within two weeks. The plaintiff applied to the Chief Court to revise this order, but it was objected on behalf of the defendant that the revision could not be entertained because another remedy was open to the plaintiff, namely, to refuse to comply with the order of the District Judge, in which case the plaint would be rejected and the plaintiff could appeal from such order of rejection.

Revision —continued.

——**1.—General**—*continued.*

Held, that the objection was sound, and as the ordinary rule of Court was not to interfere on revision with the interlocutory order in a case in which an appeal would lie from the final order of the Court, the revision application must be disallowed. (7 Ind. Cas. 92, *Cited.*) *Obiter* :—It is open to an individual to make a gift of a Court-fee stamp to another person. BIBI CHANDOO v. JOWALA PERSHAD, **169 P.W.R. 1911.**

(96)—*Civ. Pro. Code, ss.* 622, 591—*Revision—Interlocutory order liable to question in appeal from final decree - Such order not open to revision.—Held*, that in the case of an interlocutory order against which no immediate appeal lies, the remedy is, under s. 591 of the Code, by way of objection in the appeal against the final decree, and not by way of revision. NIZAMUDDIN v. HAJ MUHAMMUD MUSA, **A.W.N. 1899. 210.** (6 A. 233, 5 A. 293, A.W N. 1898, 73, 18 B. 35, *R.*)

(97)—*Civ. Pro. Code, ss.* 130, 387, 591, 622—*Interlocutory orders not subject to revision.*—Neither an interlocutory order passed under s. 387 of the Civ. Pro. Code, refusing an application for the issue of a commission, nor one under s. 130 directing the production of certain documents, is subject to revision under s. 622 of the Code. *In re* THE NIZAM OF HYDERABAD, **9 M. 256.** [*F.*, 30 M. 230=17 M.L.J. 79 =2 M. L.T. 88; *Appr.*, 18 B. 35; *R.*, 22 P.L.R. 1900.]

(98)—*Practice - Point not raised in the lower Court in an application for review, whether can be raised in revision.*—A point, which is not raised in the Courts below even in an application for review, will not be allowed to be raised in the Court of revision. MUNIAPPA CHETTIAR v. BALARANGAYA CHETTY, **8 M.L.T. 85.**

(99)—*Civ. Pro. Code, s.* 622—*Revision—Order wrong in law but within jurisdiction of Court making it.*—Where a Court erroneously decided that a certain suit was, in respect of the valuation thereof, not within the cognizance of a Subordinate Judge but within the cognizance of a Munsif, and made an order returning the plaint for presentation to the proper Court, it was held that no application for revision of this order could be entertained. MUHAMMAD BAQUAR KHAN v. NANDO TIWARI, **A W N. 1898, 74.** (7 A. 230, 13 A. 320, A.W N. 1894, 55. 16 A. 286, A.W.N. 1896, 203, 20 A. 78, 11 C. 6 and 17 A. 422, *R.*)

(100)—*Chief Court's power to interfere on questions other than that in respect of which application for revision was admitted.*—Under cl. 3 of the proviso to s. 70 (1) (*b*) of the Punjab Courts Act, 1884, the Chief Court cannot exercise its powers of revision, except in regard to those questions, in respect of which the application for revision was admitted under s. 70 (1) (*b*) of the Act. SOBHA SINGH v. KISHORE CHAND, **65 P.R. 1907=203 P.L.R. 1908.**

Revision—continued.

——**1.—General**—*continued.*

(101)—*S. 622. Civ. Pro. Code,* 1882—*Objection as to jurisdiction—Disallowed as not taken earlier—Revision.*—The refusal of the Court to accept the objection as to jurisdiction on the ground that the allegation upon which it was founded had not been made at an earlier stage and was inconsistent with the oral pleas of the defendant was held to be one not calling for interference by way of revision. MAHTAB RAI v. KAMAN LAL, **51 P.R 1899.** (21 P.R. 1898, F.B., *R.*) [*R.*, 70 P.R. 1910; *Cited*, 31 P.R. 1902, F B.=8 P.L.R. 1902; *Observed*, 12 O.C. 405; *Disc.*, 70 P.R. 1910=4 P.W.R. 1910.]

(102)—*Civ. Pro. Code, s 622—Power of revision of High Court.*—Questions to which s. 622, Civ. Pro. Code applies are questions of jurisdiction only. If the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and the High Court has no jurisdiction under s. 622, Civ. Pro. Code, to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but, when no appeal is provided, its decision on questions of both kinds is final. ABU SAID KHAN v. HAMID UN-NISSA, **A W. N 1886, 39.** (A.W.N. 1886, 28, F.B. *F.*) [*Diss.*, 8 A. 519.]

(103)—*Civ. Pro. Code,* 1882, *ss.* 13, 43—*No irregularity—No revision.*—A suit dismissed by the first Court as barred by s. 43, Civ. Pro. Code of 1882, was by the lower appellate Court also held barred but under s 13, Civ. Pro. Code, 1882 (=s. 11 of the new Code). *Held*, that there was no irregularity either in the Court's conception of the facts or in its method of reasoning and that no revision lay. BARU MAL v. AMIR-UD-DIN, **26 P R 1899.** [*R.*, 33 P.R. 1904; *F.*, 121 P.R, 1906]

(104)—*Rejection of plaint—No revision.*—Where a plaint is rejected on the ground that it was filed by an unauthorised person, no revision lies. THAKAR TARA NATH v. THAKAR JAMNA NATH, **5 P.R. 1899.**

(105)—*Ss.* 622, 560, *Civ. Pro. Code,* 1882—*Absence of notice at adjourned hearing—Non-diligence of party--Revision.*—Where a respondent, though appearing at the first hearing, took no steps to ascertain the date of the adjourned hearing, *held* that he could not complain of absence of notice to him of such adjourned hearing. KARAM SINGH v. CHANDU, **34 P.R. 1890.**

(106)—*Civ. Pro. Code, s.* 622—*Small Cause Court granting new trial—Notice to opposite party not given—Irregularity.*—However desirable and fitting it may be that a new trial should not be granted until the opposite side has been allowed an opportunity to show cause against it, there is nothing in s. 21 of Act XI of 1865 to prescribe such a course so as to make a neglect to issue such notice an irregularity or

Revision—continued.

——**1.—General**—*continued.*

illegality within the meaning of s. 622, Civ. Pro. Code. MAHNA v. HARCHARN SINGH, **102 P.R. 1886.**

(107)—*Contract relating to* badni *transaction, Suit on—Compromise—Unlawful agreement—Refusal of Court to decree in terms of compromise—Revision—Civ. Pro. Code, ss.* 375, 622.—An agreement may be unlawful within the meaning of s. 375 of Act X of 1877, if it professes to bind the defendant to pay a sum which could not be lawfully recovered, as well as if the particular terms of the agreement itself are unlawful. Where there was a finding of fact by a Small Cause Court that a suit had been brought on a *badni* transaction, there being some evidence to support such finding, and the Court, on such finding, refused to pass a decree in terms of a compromise between the parties, the Chief Court refused to interfere as a Court of revision under s 622 of the Civ. Pro. Code. JOWALA SINGH v. DITTUMAL, **104 P.R. 1880.**

(108)—*Civ. Pro. Code, s.* 622—*Failure to exercise jurisdiction.*—Where the terms of a contract on which the plaintiff sued were reduced to writing, but the document was not signed by the defendant, and the Judge dismissed the plaintiff's suit on the ground that no extraneous evidence of the contract could be given because it had been reduced to writing, and that the document could not be proved because it was not signed by the defendant. *Held* that such action on the part of the Judge was not a failure to exercise a jurisdiction vested in him by law within the meaning of s. 622, Civ. Pro. Code. HASAN SHAH v. RAM RATAN, **A.W.N. 1890, 234.**

(109)—*Signing order forms and receiving bills with head lines as to interest—Liability to pay interest—Discretion of Court—Revision—Act* XXXII *of* 1839 (*Interest*).—In considering the fitness of allowing interest, Courts in this country exercise the functions of jurors and discretion is vested in them, which should not be interfered with under Act XXXII of 1839 in revision by the Chief Court, except where such discretion has been abused. When ordering goods, a debtor signed order forms headed with the printed words, "Terms one month's credit, interest at 12 per cent. charged on expiry," and the account rendered was similarly headed. *Held* that this circumstance did not raise an inference that the debtor contracted to pay interest. EDULJI & CO. v. MCDONALD, **55 P R. 1901.** (36 P.R. 1894, 23 M. 41 *R.*)

(110)—*Revision, application for —Order of Court directing issue of commission to examine female witness and refusing to decide preliminary issues of law—Civ. Pro. Code,* 1882, *s.* 621 —*Jurisdiction.*—On an application under s. 622, Civ. Pro. Code, for revision of an order of the Subordinate Judge of Unao, directing the issue of a commission for the examination of a Hindu lady, one of the defendants in the suit, and refusing the prayer of the plaintiff that

Revision—continued.

——**1.—General**—*continued.*

four preliminary issues of law should be forthwith decided upon the documentary evidence upon the record, *held* that he exercised his discretion in a proceeding which was not tainted with any irregularity and had jurisdiction to decide the question before him. SUKHDEI v. RAMDEI, **5 O.C. 151.**

(111)—*Revision—Transfer of appeal by District Judge to Subordinate Judge after remand —Objection as to jurisdiction.*— In this case, the defendant's appeal from the Munsif's order was filed in the Court of the District Judge, who, after a remand to the Munsif, transferred it to the Court of the Subordinate Judge for disposal. After several adjournments, the appeal was accepted and the plaintiffs' suit dismissed. The plaintiffs contended in revision that the order of transfer passed by the District Judge was invalid and the decree passed by the Subordinate Judge was without jurisdiction. *Held*, that the contention raised by the plaintiffs cannot be entertained in revision, for the Subordinate Judge was competent to hear the appeal but for the fact that it was sent to his Court by an invalid order of transfer; and the plaintiffs were precluded from raising the question of jurisdiction by their conduct in the lower Court in not objecting to the validity of the order of transfer. PHUNAN MAL v. ILAHI BAKSH, **P.L.R. 1900, p. 354.**

(112)—*Resumed* lakhiraj *land—Settlement—Power of Revenue Board—Commissioner.*—A settlement of resumed *lakhiraj* land made by a Collector "subject to the orders of the Board of Revenue," may be set aside by that Board. Under the Board's rules, a Commissioner has authority to set aside such a settlement, and is limited to no time in the exercise of his powers of revision. HARLAL TEWARI v. THE COLLECTOR OF BHAGULPORE, **3 B.L.R. App. 82 =12 W.R. 6.**

(113)—*Revision—Power of High Court on revisional side—Order of District Magistrate fixing route for procession during Moharram.* —The High Court cannot, in the exercise of its revisional jurisdiction, interfere with a memorandum issued by a District Magistrate for the instruction of his subordinates respecting the route to be followed by a certain procession. *In the matter of the petition of* BHAGELU, **A. W. N. 1891, 178.**

(114)—*Crim. Pro. Code, Act* V *of* 1898, *ss.* 439, 476—*Civ. Pro. Code, Act* XIV *of* 1882, *s.* 622—*Jurisdiction of High Court to interfere with orders of Civil Courts under s.* 476.—The High Court has no jurisdiction to interfere in revision on the criminal side with an order under s. 476 of the Crim. Pro. Code, made by a Subordinate Civil Court. But, it has such jurisdiction conferred by s. 622 of the Civ. Pro. Code, which is exercisable, however, only

Revision—continued.

——**1.—General**—*continued.*

where the Subordinate Court has acted without jurisdiction or has failed to exercise its jurisdiction or has acted illegally or with material irregularity. (26 M. 98, 8 C.W.N 73, A.W.N. 1902, 202, *R.*) *Per Banerji, J.*—The High Court has power under s. 439 of Crim. Pro. Code to interfere with an order made under s. 476 by a Civil or Revenue Court. *In the matter of the petition of* BHUP KUNWAR, **26 A. 249, F.B.** (26 M. 98, 8 C.W.N. 73, A.W.N. 1902, 202, 16 A. 80, 23 A. 249, 16 C. 730, 20 C. 349, 21 M. 124, 13 B. 109, 26 B. 785, *R.*) [*F.*, 28 A. 554. F.B. = A.W.N. 1906. 103 = 3 A.L.J. 394 = 1 M.L.T. 219 = 3 Cr. L. J. 400 ; *R.*, A.W.N. 1904. 170, U.B.R. 1907, 1st Qr., Cr. P.C p. 1 = 6 Cr. L J. 25, 4 A.L.J. 701 = A.W.N. 1907. 277, 32 M. 49 = 19 M.L J. 42.]

(115)—*High Court's power of revision of District Judge's order granting sanction to prosecute —Criminal revision—Code of Criminal Procedure, ss* 195 *and* 439—*Civil Procedure Code, s.* 622, *meaning of any case-in-jurisdiction—Penal Code, ss.* 109 *and* 110.—An application purporting to be under s. 622, Code of Civil Procedure, for revision of an order of the District Judge reversing an order of the Subordinate Judge and granting sanction to the respondent to prosecute the applicant for offences under ss. 209 and 210, Penal Code, was made to the Court of the Judicial Commissioner. *Held*, that the application should not have been made under s. 622, Code of Civil Procedure. The words "any case" in that section are very wide but they must be confined to suits or proceedings governed or at least believed to be governed by the Code of Civil Procedure, whereas applications for sanction to prosecute are not governed by that Code but by s. 195, Code of Criminal Procedure. *Held*, further, that the Court of the Judicial Commissioner could not interfere with the District Judge's order under cl. (6) of s. 195, Criminal Procedure Code. The words "any sanction given or refused under this section" in that clause mean any sanction given or refused upon an original application and the clause does not provide for interference by a third Court at all. *Held*, further, that s. 439 of the Code of Criminal Procedure provides for the case of "any proceedings" and expressly authorizes the High Court to exercise the power conferred upon the Court of appeal by s. 195 and that, therefore, the Court of the Judicial Commissioner had jurisdiction under s. 439 to revise the District Judge's order. MUSAJI v. MOHAMMED WALAYATULLAH KHAN, **6 O C. 216.**

(116)—*Revision—Civil Procedure Code, s.*622 —*Failure to exercise jurisdiction.*—Where a Subordinate Judge decided an objection to an attachment on the preliminary ground that the property in question was, as a matter of law, not capable of being attached under the particular decree; *held*, that the Judge, whether his decision was right or wrong, could not be said either to have failed to exercise a jurisdiction vested in him by law, or to have acted

Revision—continued.

——**1.—General**—*continued.*

illegally in the exercise of a jurisdiction vested in him by law. RADHA KISHAN v. DILLI, **A.W.N. 1890, 233.**

(117)—*Revision—Civ. Pro. Code*, ss. 622, 310-A, 311.—From an order dismissing an application under s. 310-A, Code of Civil Procedure, upon the ground that the applicant had filed an application under s. 311 of the Code, no application for revision would lie. DEBI DAS v. SAGAR MAL, **A.W.N. 1898, 78.** (20 A. 78, *R.*)

(118)—*Civ Pro. Code*, ss. 310-A, 311, 622—*Order dismissing application under* s. 310-A *because application under* s. 311 *had been made.*—A revision petition under s. 622, Civ. Pro. Code, would not lie on the ground that a Court had rejected an application under s 310-A of the Code for the reason that the applicant had previously filed an application under s. 311. UGGAR SEN SINGH v BANDHU PRASAD, **A.W.N. 1898, 148.** (A.W.N. 1898, 78, *Appr.*)

(119)—*Civ. Pro. Code*, s. 622—*Application to set aside order rejecting appeal from order refusing to set aside* ex parte *decree—'Case' meaning of, in* s. 622.—Where a Commissioner rejected an appeal from an order passed by a Judicial Assistant refusing to set aside an *ex-parte* decree, an application by the defendant to the Chief Court, to set aside the Commissioner's order was held properly not to fall under s. 622, inasmuch as that section only applies to "cases" in which no appeal lies to the High Court, while in the present an appeal would have lain to the Chief Court in the ordinary course if the defendants had chosen to adopt the remedy of appeal which the law allowed to them from an *ex parte* decree under the general provisions of s. 540 of the Code instead of adopting the alternative remedy allowed by s. 108 by an application to set aside the *ex parte* decree. The ward "case" in s. 622, Civ. Pro. Code, must be construed to mean the whole case, and not a branch of it. GUNDA MAL v. SHIBJI RAM. **114 P.R. 1883.** (105 P.R. 1880, *R.*) [*Disappr.*, 60 P.R. 1897; *F.*, 125 P.R. 1892; *R.*, 51 P.R. 1899=22 P.L. R. 1900; *D.*, 22 P.R. 1897.]

(120)—*Review—Order refusing to grant review—Revision—Amendment of decree.*—No revision lies against an order refusing to grant an application for review. An application for revision can be made, if the Court has refused to exercise its jurisdiction in the matter of amendment of an order absolute so as to bring it into conformity with the judgment. BALBAHDAR SINGH v. CHUNNI LAL SAHU, **6 Ind. Cas. 707.**

(121)—*Civ. Pro. Code*, ss. 206, 622—*Order amending decree—Miscellaneous appeal—Revision.*—Plaintiff, decree-holder, presented an application for amendment of decree to the first Court and that Court, after giving notice to the judgment-debtor under s. 206 of the Civ. Pro. Code, amended the decree in the suit

Revision—continued.

——**1.—General**—*continued.*

so as to bring it into conformity with the judgment. A miscellaneous appeal brought by the judgment-debtors from the amended decree to the Commissioner having been rejected by him as barred by limitation, the judgment-debtors (applied for revision of the Commissioner's orders. *Held* that the remedy of the defendants was to bring a regular appeal on full stamp to the Commissioner from the amended decree within the period of limitation; and, since from such appeal a further appeal would have lain to the Chief Court, the present application under s. 622 of the Civ. Pro Code, was barred. Also, the mere fact that the judgment debtors delayed in appealing to the Commissioner's Court till their appeal was barred by time could not give them a right to make the present application or confer any power on the Chief Court to entertain it. ABDUL GHUNNI v. KUNDAN LAL, **71 P.R. 184.**

(122)—*Award—High Court—Revision.*—An application under s. 622 of the Civ. Pro. Code to set aside an award is not allowable. In the case of an award, revision is more objectionable than an appeal. GHULAM JILANI v. MUHAMMAD, **4 Bom. L.R 161=29 C 167=6 C.W.N. 226=29 I.A. 51=12 M.L.J. 77=8 Sar. 154, P.C.**

(123)—*Suit—Arbitration—Setting aside award for defect in reference—Revision—Civ. Pro. Code*, ss. 521, 622.—In a suit referred to arbitration, after oral and documentary evidence had been taken, the Judge set aside the award owing to certain defects in the agreement for reference and remitted the case to the arbitrators with certain directions. *Held*, on an application for revision of the order, that the High Court could not interfere at that stage and that there are other remedies by way of appeal after the final decision of the case by the lower Court. LALCHAND v. KISHORI DAS, **A.W.N. 1888, 123.**

(124)—*Civ. Pro. Code*, 1882, ss. 521, 622—*—Misconduct of arbitrators—Apreal Revision.*—An order under s. 521 of the Civ. Pro. Code, setting aside an award made under Ch. 38 of the Code on a reference to arbitration in the course of a suit on the ground of the arbitrator's misconduct is not subject to revision under s. 622 of the Code. DAMODAR v. RAGHUNATH, **4 Bom. L.R. 267=26 B. 551**

(125)—*Civ. Pro. Code*, ss 522, 622—*Award—Decree on judgment following award—Revision.*—An application to set aside an award on the ground of the arbitrator's misconduct was refused by a District Judge, who found in fact that there was no such misconduct and passed a decree not in excess of the award made under s. 522 of the Code. *Held*, that the Chief Court had no authority to interfere with the decree based on this finding either by way of appeal or revision, as the Court below had not exercised a discretion not vested in it by law, or failed to exercise a discretion so vested, or acted in the

Revision—continued.

——**1.—General**—*continued.*

exercise of its jurisdiction illegally or with material irregularity. HANSRAJ v. GANGA RAM, **88 P.R. 1902, F.B.=119 P.L.R. 1902.** [*R.*, 1 P.R. 1908=58 P.W.R. 1907, 80 P.R. 1908=138 P.L.R. 1908=12 C.W.N. 585=7 C.L.J. 520=10 Bom. L.R. 581=18 M.L.J. 266=99 P.W.R. 1908=14 Bur. L.R. 146=4 M.L.T. 25=35 C. 648.]

(126)—*Arbitration—Setting aside an award for arbitrator's misconduct—High Court's powers of revision—Civ. Pro. Code, ss.* 521, 622. — An order under s. 521, Civ. Pro. Code, setting aside an award made on a reference to arbitration in the course of a suit, on the ground of the misconduct of the arbitrator, being and interlocutory order, is not open to revision by the High Court under s. 622 of the Civ. Pro. Code. CHATTAR SINGH v. LEKHRAJ SINGH, **5 A. 293=A.W.N. 1883, 39.** [*Diss.*, 14 C. 768; *F.*, 31 M. 345=18 M.L.J. 228=3 M.L.T. 315; *Appr.*, 18 B 35, 26 B. 551; *R.*, 9 A. 253, A.W.N. 1899, 210.]

(127)—*Ss.* 622, 525, *Civ. Pro. Code*, 1882—*Arbitration—Award—Refusal by the Subordinate Judge to file the award—Appeal—Revision—High Court.*—The High Court followed the practice which permits applications under s. 622 of the Civ. Pro. Code, in cases where the Subordinate Judge refuses to file an award which has been presented to the Court for being filed under s. 525 of the Code. ABDEALI v. YUSUFALI, **8 Bom. L.R. 570.** [*R.*, 1 S.L.R. 86.]

(128)—*High Court's powers of revision under s.* 622 *of the Civ. Pro. Code*, 1877—*Delay in application.*—Where an application by an auction-purchaser, praying the High Court to set aside, under s. 622 of the Civ. Pro. Code, an order of a lower Court setting aside a sale of immoveable property in execution of a decree on the ground that such order, was illegal, was preferred seventeen months after the date of such order the Court refused to interfere on account of the long delay. *In the matter of the petition of* DURGA PRASAD v. SHEO CHARAN LAL, **4 A. 154.**

(129)—*Civ. Pro. Code, s.* 622—*High Court's powers of revision—Construction of document.*—Where a Court, in a suit in which it had jurisdiction interpreted the plaint bond in a particular manner holding the suit to be within limitation, it was not open to the defendant in revision under s. 622, Civ. Pro. Code, to contend that the suit must have been held to be barred by limitation on the ground that the plaint bond was capable of a different interpretation from that put upon it in the lower Court MALLU v. RAM BHAROSE, **A.W.N. 1888, 148.**

(130)—*Civ. Pro. Code*, 1882, *s.* 622 (=*s.* 115, *new Code*) — *Revision — Erroneous decision on point of limitation.*—Where a Court having jurisdiction to decide whether a certain matter was or was not barred by limitation under

Revision—continued.

——**1.—General**—*continued.*

s.230, Civ. Pro. Code, erroneously decided that it was not barred and proceeded to deal with it, *held* that it was no ground for revision under s. 622. SUNDAR SINGH v. DORU SHANKAR, **20 A. 78=A.W.N. 1897, 168.** (11 C. 6, 17 A. 422, *R.*) [*R.*, A.W.N. 1898, 74, 78, 25 A. 509, 2 L.B.R. 333, 4 N.L.R. 184.]

(131)—*Civ. Pro. Code, s.* 622—*Revision—Question of limitation.*—Where a Court having jurisdiction over a suit or other proceeding, has to consider a plea of limitation and does consider and decide it, but erroneously, such error is not an irregularity within the meaning of s. 622, Civ. Pro. Code, so as to open a door to revision. HARI SINGH v. DIT MAL, **22 P.R. 1886.** [*F.*, 204 P.L.R. 1911=11 Ind. Cas. 60; *R.*, 105 P.R. 1888, 207 P.L.R. 1912=213 P.W.R. 1912.]

(132)—*Revision—Technical legal error—Discretion—Suit for mortgage-money and rent—Cause of action—Provincial Court of Small Causes* (*Act* IX *of* 1887), *s.* 25.—*Held*, that, where a mortgagor agrees to give possession of the mortgaged property to the mortgagee, and executes a separate lease in his favour, it is questionable whether, in the suit for the principal mortgage-money, the mortgagee is bound to include therein the amount of rent due from the mortgagor up to that time. (19 A. 496, *D.*; 28 P.R. 1907=140 P.W.R. 1907, 53 P.R. 1868, *R.*) It is discretionary with the High Court to interfere on revision, and it will not exercise its powers, merely because the lower Court has erred on a technical point, if it appears that the lower Court's decision does substantial Justice between the parties. ABDUL, RAHMAN v. BHAGWAN DAS, **59 P.W.R. 1912=120 P.L.R. 1912=13 Ind. Cas. 720.** (93 P.R. 1911=11 Ind. Cas. 445=151 P.W.R. 1911, *F.*)

(133)—*Civ. Pro. Code*, 1882, *s.* 622—*Powers of revision of High Court.*—A suit on a bond filed in the Small Cause Court was dismissed on the ground that that Court had no jurisdiction to entertain the suit as by the bond immoveable property was mortgaged and the suit was therefore one for relief in respect of immoveable property. On an application for revision to the High Court under s. 622, Civ. Pro. Code, *held* that that was not a case for revision and that the application should be rejected. The Small Cause Court had not refused to exercise its legitimate jurisdiction in respect of the applicant's suit. On the contrary, it received the suit, and, having considered its character and found (whether rightly or wrongly) that it was a suit for relief in respect of immoveable property, it non-suited the applicant. In all this proceeding, jurisdiction had neither been refused nor usurped. The Court had jurisdiction to decide, and was bound to decide, whether the suit was or was not within its cognizance, and exercising that jurisdiction, dismissed the suit. Therefore, there was no case for the

Revision—continued.

—1.—General—*continued.*

High Court exercising its revisional powers under s. 622, Civ. Pro. Code. BHAGWANT SINGH v. JAGESAR SINGH, **A.W.N 1886, 57** [*Diss.*, 8 A. 519.]

(134)—*Revision—Review — Erroneous order set aside on review—Discretion—Interference by High Court.*—The revisional powers of the High Court should not be exercised to restore an erroneous order, passed by a Judge of a Small Cause Court but set aside by him on review. It is in the discretion of the Judge to deal in review with an order proceeding on a mistaken view of the law. MAUNG AUNG NUYN v. N. K. A. RAMANATHAN CHETTY, **12 Ind. Cas. 903.**

(135)—*Rejection of application to appeal as a pauper—High Court's powers of revision—Civ. Pro. Code*, 1877, *ss.* 592, 622.—The order of a District Judge under s. 592 of the Civ. Pro. Code rejecting an application to appeal as a pauper on the ground that it was presented, not by the applicant himself, but by his pleader, is one of so purely an interlocutory character that it cannot be revised by the High Court under s. 622. HARSARAN SINGH v. MUHAMMAD RAZA, **4 A. 91=A.W.N. 1881, 136.** [*Diss.*, 14 C. 768; *Disapproved*, 99 P.R. 1882; *Not F.*, 21 P.R. 1885; *R.*, 20 B. 86.]

(136)—*Civ. Pro. Code*, 1882, *ss.* 401, 407—*Application for permission to sue in* forma pauperis—*Possibility of professing pauper's raising money on his claim no ground for rejecting his application—Revision.*—Money which may be borrowed on the strength of the claim in a suit, which a person is seeking permission to institute *in forma pauperis*, cannot be regarded as property in the possession of such person so as to disentitle him to sue *in forma pauperis*. An order rejecting an application for permission to sue *in forma pauperis* is not a decree, and, being unappealable, may form the subject of an application for revision. AZMAT ALI v. KIFAYAT UL LAH, **A.W.N. 1893, 11.**

(137)—*Act* XL *of* 1858 (*Minors*), *s.* 3—*Certificate of administration—Right of holder of certificate to defend suit against minor—High Court's powers of revision—Civ Pro. Code*, *s.* 622.—A Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Bengal Minors Act to defend on a minor's behalf a suit brought against such minor. When the Civil Court does refuse to admit such person to defend the suit, its order is not open to revision. BALDEO DAS v. GOBIND SHANKAR, **7 A. 914=A.W.N. 1885, 294.**

(138)—*Erroneous decision on question of* res judicata—*Failure to exercise jurisdiction—Revisional powers of High Court under s.* 622, *Civ. Pro. Code*, 1882.—The question for decision in this case was whether a Court determining that a particular question in a case is *res judicata* and thereon declining to try it again, fails to exercise jurisdiction, in the event of its view being wrong, so as to give occasion for the exercise of the power given to the High Court by s. 622 of the Civ. Pro. Code, and it was held that the decision of a question of *res judicata*, as of limitation or the like, raised in a case, is not, even though wrong, a failure, or acause of failure, to exercise jurisdiction, any more than a wrong decision on the whole litigation. Where the law speaks of exercise of jurisdiction, or failing to exercise jurisdiction, it means using or failing to use authority in entering on an inquiry and carrying it to a judicial conclusion. The exercise of jurisdiction is not declined when such a conclusion has been arrived at, merely because, had the decision on a particular point been different, further questions would have had to be disposed of. AMRITRAV KRISHNA DESHPANDE v. BALA KRISHNA GANESH AMRAPURKAR, **11 B. 488.** [*Appr.*, 4 N.L.R 184]

(139)—*Civ. Pro. Code*, 1882, *s.* 622 — *High Court's powers of revision—Wrong decision on question of* res judicata.—Even where the decision of the lower Court on a question of *res judicata* happens to be wrong in law, it is not competent to the High Court to interfere with such decision in its extraordinary jurisdiction under s. 622, Civ. Pro. Code. Where the proceeding is itself within the jurisdiction of the Court, such Court has jurisdiction also to determine whether the defendant's plea of *res judicata* was made out or not; and assuming that the decision of the Court on the question of *res judicata* is wrong, it cannot be said that, in passing the decision, the Court exercised a jurisdiction not vested in by law or has acted illegally or with material irregularity within the meaning of s. 622 of the Code. HARI BHIKAJI v. NARO VISHVANATH, **9 B. 432.** [*F.*, 11 B. 488; *R.*, 11 B. 596.]

(140)—*Civ. Pro. Code*, 1882, *s.* 622—*Misconstruction of judgment and decree—Irregularity—Revision.*—In the case of an apparent variation between a judgment and the decree as to costs, the defendant applied to the successor of the Judge who had passed the judgment to bring the decree into conformity with the judgment. The new Judge refused the prayer interpreting the judgment to mean what was expressed in the decree. *Held* that, though the interpretation may be wrong, it was not an irregularity. UTTAM SINGH v. DHARM SINGH, **60 P.R. 1891.** [*R.*, 26 P.R. 1892, 29 P.R. 1906.]

(141)—*Revision— Civ. Pro. Code* (*Act* V *of* 1908), *s.* 73 (2)—*Order of rateable distribution of judgment-debtor's assets among rival decree-holders in execution of decree.*—*Held*, that an order under s. 73 (2) of Act V of 1908, that a certain decree-holder is or is not entitled to share rateably the assets realised from the judgment-debtor's property is not open to revision—it is immaterial whether the order has been actually carried out or not at the time of filing or hearing the revision, (65 P.R. 1905, 82 P.R.

Revision—continued.

——1.—**General**—*continued.*

1905, 128 P.R. 1906, *F.*) *Obiter* :—Any decision on the merits in revision by the Chief Court still leaves the aggrieved party to bring a regular suit. The general policy of the law and the usual practice of the superior Courts is not to interfere on the revision side, except in cases where the petitioner has no other remedy or his only alternative remedy is so cumbrous or expensive that to refer him to it would be tantamount to denying him relief. RADHE KISHEN v. BHOLU MAL, **171 P.W.R. 1912 = 146 P.L.R. 1912 = 17 Ind. Cas. 254.** (76 P.R. 1902, *R.*)

(142)—*Civ. Pro. Code, s. 622 — Pre-emption—Decreed pre-emptive price paid into Court by pre-emptor—Subsequent partial withdrawal, by creditor of decree-holder, of money so paid in—Revision—Practice.*—The holder of a decree for pre-emption paid the decreed pre-emptive price into Court within the period fixed by the decree. A creditor of the decree holder applied for attachment of the money so paid in, and was allowed by the Court to withdraw it. *Held* that the decree-holder was entitled to obtain possession of the pre-empted property, and that it was not competent to the Court to allow the money paid in to be withdrawn by an attachment under a decree of a third party. Except under special circumstances, the High Court will not interfere on revision where another remedy was open to the petitioner. SANT SINGH v. GHASITA, **179 P.L.R. 1901 = 21 P.R. 1902.** [*R.*, 93 P.R 1902, F.B., 13 P.R. 1903 = 57 P.L.R. 1903, 128 P.R. 1906]

(143) —*Revision—Civil cases—Application for revision against decree in a suit under s. 9, Specific Relief Act.*—A decree in a possessory suit under s. 9, Specific Relief Act, in favour of the plaintiff is not open to revision by the Chief Court, where the ground for revision is that the Court below has misapprehended and misinterpreted the evidence, oral or documentary on the record BABU SAFDAR JANG v. SARDAR SHANKAR SINGH, **57 P.L.R. 1903 = 13 P.R. 1903.**

(144) — *Dismissal of appeal for default—Omission to apply for restoration to file—Revision —Civ. Pro. Code, ss. 558, 622.* —An appeal having been dismissed for default, the appellant applied to the Chief Court for revision, under s. 622 of the Civ. Pro. Code. *Held* that the case was not one for revision, because the appellant had failed to take steps to have his appeal restored to file under s. 558 and the final order of the Appellate Court on appeal would be open to appeal to the Chief Court. KARM BUKSH v. BALMOKAND. **13 P.R. 1881.**

(145)—*Agent to the Governor of Fort St. George—Order under Agency Rule 18 not open to revision by High Court—Rules 19 and 20.*—An order passed, under Rule No. 18 of the Agency Rules, by the Governor's Agent at Vizagapatam, dismissing an appeal preferred to him from a decision of his special assistant, is not open to revision by the High Court under Agency Rule No. 20 Rule 20 only applies to cases in which the Agent has passed a judgment under Rule 19. JAGANNADHA v. GOPANNA, **16 M. 229.**

(146)—*Civ. Pro. Code, 1882, s. 622 ; orders under Madras Act VIII of 1865, not open to revision by High Court* —An order under s. 10, Madras Rent Recovery Act, having been reversed on appeal, the appellant applied to the Revenue Officer for being restored to possession of the land from which he had been ejected under the original order and such application was dismissed by that officer. It was held that such order of dismissal by the Revenue Officer could not be interfered with by the High Court on revision, since, s 622 of the Code of Civil Procedure was not applicable to orders passed under Madras Act VIII of 1865. APPANDAI v. SRIHARI JOISHI, **16 M. 451.** (9 M. 332, *F.*) [*F.*, 17 M. 298 ; *R.*, 22 M. 68.]

(147)—*Rent Recovery Act, s. 76—Civ. Pro. Code, ss. 4, 622* —Orders passed under Madras Act VIII of 1865 by a Collector are not open to revision under s. 622, Civ. Pro. Code. VENKATANARASIMHA NAIDU v. SURANNA, **17 M. 298** (9 M. 332, *F.*)

(148)—*Civ. Pro. Code, 1877, ss. 25, 622—Infringement of patent—Suit instituted in Sub-Court—Transfer to District Court—Revision —Act XV of 1859, s 22.*—Where a suit for infringement of patent was instituted in the Subordinate Court, but was transferred by the District Judge to his own file, *held* that the High Court would not interfere in revision with such interlocutory order. PETMAN v. BULL, **A.W.N. 1882, 62.**

(149) —*Civ. Pro. Code, 1877, s. 622—Interest disallowed —Revision.*—It cannot be deemed to be a material irregularity that a Court has not seen proper to award interest to a litigant. That cannot be raised as a ground for revision. ABUL HASAN v. QUTUB HUSAIN, **A.W.N. 1882, 118.**

(150) —Ex parte *decree by Appellate Court in favour of appellant —Revisional powers of High Court—Civ. Pro. Code, 1882, s. 622.*—An *ex-parte* decree passed by an Appellate Court in favour of the appellant, will not be interfered with by the High Court in revision under s 622, Civ. Pro Code, 1882. RAM PRASAD v. RAM LAL, **A.W.N. 1885, 261.**

(151)—*Application to set aside* ex parte *decree —Second appeal — Civ. Pro. Code, ss. 588, 622.* — No appeal lies against an appellate order reversing a refusal to set aside an *ex parte* decree, nor would the High Court interfere in revision in such a case AUBINASH CHUNDER MOOKERJEE v. MARTIN, **8 C. 832.**

(152)—*Civ. Pro. Code, ss. 108, 622—Revision —Order restoring a suit to file of pending suits.*—*Held* that no application would lie for revision of an order under s. 108 of the Code of Civil

Revision—continued.

——**1.—General**—*continued.*

Procedure restoring a suit to the file of pending suits. KALIAN v. BEGAM, **A.W.N. 1898, 73.** [*F.*, 2 A.L.J. 370.]

The proper remedy on refusal to bring legal representative on record is an appeal and not an application for — *See* ABATEMENT OF SUITS, 9 O.C. 354.

Proceedings under Act XIX of 1841—Revision when lies—*See* ACT XIX OF 1841, s. 3, 65 P. L.R. 1911.

See ACT XIX OF 1841, ss. 3, 4, 15, 66 P.R. 1882.

See ACT XIX OF 1841, ss. 3, 5, 8, 24 M. 364 =7 M.L.J. 78.

Order under s. 18 (Act XX of 1863), whether open to—*See* ACT XX OF 1863, s. 18, 7 M.L.T. 126=5 Ind. Cas. 291= 33 M. 412.

Grant of leave to sue on unverified letter not presented in Court—Material irregularity—Civ. Pro. Code, s. 622—*See* ACT XX OF 1863, s. 18, 24 M. 685=11 M.L.J. 326.

Power of High Court to interfere in, in proceedings, against pleader, commenced, but not heard and decided by District Judge—*See* ACT XVIII OF 1879, ss. 13 and 14, 12 C.W.N. 381=7 Cr. L.J. 252=35 C. 317.

Order under s. 36, Legal Practitioners Act—High Court's power of—*See* ACT XVIII OF 1879, s. 36, 11 C.L.J. 513=6 Ind. Cas. 327= 11 Cr. L.J. 320.

Judge declaring certain persons to be touts —Application to Division Bench of High Court under ss. 15, 24 and 25 Vic., Cap. civ—Power of Bench to revise such order—*See* ACT XVIII OF 1879, s. 36, A.W.N. 1908, 279=6 A.L.J. 22=31 A. 59=1 Ind. Cas. 143.

See ACT XVIII OF 1879, s. 36, 21 A. 181= A.W.N. 1899, 15.

Compensation money paid to Hindu widow—Reversioner's application for reference to Civil Court—Order by Judge on reference directing refund of money already paid by Collector—Order not one under s. 32, Land Acquisition Act—Incompetency of Judge to proceed under s. 32—No appeal from order under s. 32—Power of High Court to interfere in revision—*See* ACT I OF 1894 ss. 32 and 54, 12 C.W.N. 1039 =35 C. 1104.

Powers of Chief Court, for revision under s. 70 (1) (*b*), Punjab Courts Act, 1884, of order under s. 19, Act IX of 1899—*See* ACT IX OF 1899, ss. 2 and 19, 144 P.R. 1908.

By High Court—S.15, Charter Act—*See* BEN. ACT X OF 1859, ss. 109. 110, 151, 15 C.W.N. 863.

High Court's power of revision where aggrieved party has other remedy available, (*e.g.*) by regular suit—*See* BEN. ACT VII OF 1876, s. 55, 12 C.W.N. 16=35 C. 120=8 C.L.J. 245.

Revision—continued.

——**1.—General**—*continued.*

An agreement of parties cannot authorize a superior Court to revise a judgment of an inferior Court in any other mode of proceedings than that which the law prescribes—*See* BEN. ACT I OF 1879, ss. 135, 136, 137, 144, 9 C.W. N. 956=2 C.L.J. 384.

See BEN. ACT I OF 1895, ss. 19, 32, 33, 30 C. 619=7 C.W.N. 433.

Revisional powers of Special Judge under Bom. Act XVII of 1879—*See* BOM. ACT XVII OF 1879, s. 3, cl. (*u*), 14 B. 387.

Contract merged in decree—Decree not subject to—*See* BOM. ACT XVII OF 1879, s. 13, 7 B. 330.

Powers of revision of Special Judge—*See* BOM. ACT XVII OF 1879, ss. 53, 54, 15 B. 180.

Revisional powers of Special Judge—Withdrawal of suit—*See* BOM. ACT XVII OF 1879, s. 54, 12 B. 684.

By Collector—Appealable nature of decision —*See* BOM. ACT I OF 1880, s. 33, 21 B. 244.

See MAD. ACT I OF 1889, s. 73, 21 M. 363.

See PUN. ACT XVIII OF 1884, s. 39 (*a*), 22 P.L.R. 1902=36 P.R. 1902.

See PUN. ACT XVIII OF 1884, s. 40 (1) (*d*), 27 P.R. 1895.

See PUN. ACT XVIII OF 1884, ss. 40, 70, 93 P. R. 1886, 86 P.R. 1896.

See PUN. ACT XVIII OF 1884, s. 40 (2), 86 P.R. 1889, 68 P.R. 1897.

See PUN. ACT XVIII OF 1884, s. 70, 80 P. L.R. 1901=15 P.R. 1901.

Appeal triable by High Court decided by Lower Court—Powers of revision of the Chief Court of the Punjab—*See* PUN. ACT XVIII OF 1884, s. 70, 16 P.L.R. 1907.

Powers of—Exercised by the Chief Court of the Punjab—Orders under s. 295, Civ. Pro. Code—*See* PUN. ACT XVIII OF 1884, s. 70, 82 P.R. 1905=199 P.L.R. 1905.

See PUN. ACT XVIII OF 1884, s. 70 (*a*), 36 P.R. 1902, F.B.

Misapplication of a ruling—Revisability by Chief Court—*See* PUN. ACT XVIII OF 1884, s. 70 (*a*), 45 P.R. 1909=66 P.L.R. 1909=68 P. W.R. 1909=2 Ind. Cas. 76.

See PUN. ACT XVIII OF 1884, s. 70 (*a*) (*b*), 12 P.L.R. 1904.

Erroneous decision by appellate Court as to jurisdiction of lower Court—Revision—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*a*), 45 P.L. R. 1911=4 P.R. 1911=26 P.W.R. 1911=9 Ind. Cas. 674.

Wrong interpretation of documents, whether amounts to material irregularity—Lower Court completely ignoring terms of a document and

Revision—continued.

——**1.—General**—*continued.*

placing upon it a perversely erroneous construction — Chief Court's power of revision—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*a*), 173 P.L.R. 1908=106 P.R. 1908=151 P.W.R. 1908.

Erroneous finding as to bar by limitation when precludes—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*a*), 118 P.R. 1906=79 P.L.R. 1907.

Wrong interpretation of words— Material irregularity—Revision—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*a*), 125 P.L.R. 1911.

Execution of decree — Land-suit — Costs allowed to defendants—Right of *pro forma* defendant, against whom proceedings were held *ex parte*—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*a*), (*b*), 196 P.L.R. 1905.

See PUN. ACT XVIII OF 1884, s. 70 (1) (*a*) (*b*), 170 P.L.R. 1903.

Order declining rateable distribution under s. 295, Civ. Pro. Code—whether lies from such order—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*a*), (*b*), 65 P.R. 1905=130 P.L.R. 1905.

See PUN. ACT XVIII OF 1884, s. 70 (1) (*b*), 107 P.L.R. 1903.

By Chief Court of an interlocutory order where an appeal lies from final decree—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*b*), 101 P.L.R. 1905=64 P. R. 1905.

Discretion of Divisional Judge—Interference of Chief Court—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*b*), 109 P.L.R. 1905.

Civil cases—Question of law—*See* PUN. ACT XVIII OF 1884, s. 70 (1) (*b*), 119 P.L.R. 1911.

See PUN. ACT XVI OF 1887, s. 84 (5), 144 P.L.R. 1903.

See U.P. ACT XII OF 1881, ss. 30, 95 (*c*), A. W.N. 1894, 92.

See U.P. ACT XII OF 1881, ss. 183, 199, 12 A. 198=A.W.N. 1890, 59.

Against order of Assistant Collector refusing execution—*See* U.P. ACT II OF 1901, ss. 167, 177, 196, 197, 6 A.L.J. 552=2 Ind. Cas. 377 =31 A. 445.

Order of dismissal of appeal under s. 556 of the Civ. Pro. Code, applicability of—Revision, proper procedure—Application under ss. 556 and 558, Civ. Pro. Code, treated as one for—*See* APPEAL—GENERAL, 8 O.C. 261.

See APPEAL—ARBITRATION, 92 P.R. 1903.

See APPEAL—CASES WHERE APPEAL LIES OR NOT, 88 P.R. 1902, F.B.

See APPEAL—DECREES AND EXECUTION OF DECREES, 14 A. 520=A.W.N. 1892, 99.

See APPEAL—ORDERS, 75 P.R. 1881, 78 P.R. 1886, 72 P.R. 1902.

Revision—continued.

——**1.—General**—*continued.*

Power of High Court to exercise its jurisdiction of its own accord—*See* ARBITRATION—PRIVATE ARBITRATION, 10 C.W.N. 609, F.B. =3 C.L.J. 450=33 C. 757.

Order rejecting application for filing award in Court under s. 525, Civ. Pro. Code, 1882, appeal from—Memorandum of appeal to be treated as application for revision under s. 622, Civ. Pro. Code, 1882—*See* AWARD, 1 O.C. Sup. 22.

Arbitration proceedings—Appeal not allowed —Revision whether lies—*See* AWARD, 1 P.L. R. 1911=9 Ind. Cas. 385=12 P.W.R. 1911.

See AWARD, 120 P.L.R. 1902, F.B.=89 P. R. 1902, F.B., 5 B.L.R. App. 75=14 W.R. 33.

Order holding portion of claim not sustainable and directing amendment—Revision—*See* CIV. PRO. CODE, 1908, ss. 2 (2), 115, 216 P.L. R. 1911.

See CIV. PRO. CODE, 1908, ss. 2, 11, 96, O. XXVI, rr. 13 and 14, 56 P.L.R. 1902=49 P.R. 1902.

Dismissal of appeal rightly though on wrong grounds—High Court's power of revision—*See* CIV. PRO. CODE, 1908, ss. 10, 11, 115, 16 M. L.J. 526=2 M.L.T. 40.

Sale of joint immoveable property in foreign territory by order of British Insolvency Court —Suit for refund of portion of sale-proceeds by co-owners, a suit for an interest in immoveable property, not cognisable by British Courts —Proper remedy was by suit in Court having jurisdiction—Not a fit case for revisional interference—*See* CIV. PRO. CODE, 1908, s. 16, 122 P.R. 1908.

Powers of—Possessed by the High Court—High Court's power to call for records for—Of its own accord—Powers of—Where other remedies are open—*See* CIV. PRO. CODE, 1908, ss. 47, 115, A.W.N. 1905, 191=2 A.L.J. 749= 28 A. 72.

Claim by judgment-debtor as shebait to deity—Appeal—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 58, 8 C.W.N. 353.

Application by owner objecting to sale of property in execution of a decree under s. 88, order in appeal on—Memorandum of appeal to High Court treated as petition in revision—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 58, A.W.N. 1906, 62.

Partition decree—Execution by Collector—Not subject to revision by Civil Court—*See* CIV. PRO. CODE, 1908, s. 54, 15 B. 527.

Against Collector's order—Execution proceedings transferred under s. 330, Civ. Pro. Code, 1882 (=ss. 68, 71, Civ. Pro. Code, 1908)—To whom lies—*See* CIV. PRO. CODE, 1908, ss. 68, 70, 71, 5 N.L.R. 121=3 Ind. Cas. 572.

An order under s. 295, Civ. Pro. Code, whether open to—*See* CIV. PRO. CODE, 1908, s. 73, 128 P.R. 1906.

Revision—continued.

——**1.—General**—*continued.*

Power to interfere in, where other remedy exists—*See* CIV. PRO. CODE, 1908, ss. 73, 115, 5 M.L.T. 125=19 M.L.J. 307=32 M. 334.

Misapprehension of true effect of statutory provision—Refusal to exercise jurisdiction—Revision—*See* CIV. PRO. CODE, 1908, ss. 73, 115, 14 C.L.J. 50.

Grant of sanction by Collector for removal of Mohunt—Revision—*See* CIV. PRO. CODE, 1908, ss. 92, 93, 104 P.R. 1910.

See CIV. PRO. CODE, 1908, s. 99, 65 P. R. 1891.

See CIV. PRO. CODE, 1908, s. 115, 54 P.R. 1896.

See CIV. PRO. CODE, 1908, s. 152, O. XX, r. 6, s. 115, 24 M. 646.

Refusal to add party—Revision—*See* CIV. PRO. CODE, 1908, O. I, r. 3, 11 C.L J. 426=14 C.W.N. 703=6 Ind. Cas. 549.

See CIV. PRO. CODE, O. I, rr. 8 (2), 10 (2), (3), (5), 11, s. 115, A.W.N. 1885, 259.

See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), (5), 11, O. XXII, r. 10, 5 O C. 91.

Service not effected on a respondent for more than a year—Substituted service—Reason for—Appeal—Revision—*See* CIV. PRO. CODE, 1908, O. V, rr. 19, 20 (1), O. IX, r. 5, s. 107 (2), O. XXII, r. 11, 46 P.L.R. 1902.

Relinquishment of part of claim—Court-fee—*See* CIV. PRO. CODE, 1908, O. VII, rr.1, 2, 4, 5, 6, O. XXXIII, r. 1, s. 115, A.W.N. 1900, 214.

Summons served on Railway servant without sending it through officer—*Ex parte* decree—Power of High Court to interfere in revision—*See* CIV. PRO. CODE, 1908, O. IX, rr. 6, 13, s. 104, O. XLIII, r. 1, 6 A.L.J. 45=1 Ind. Cas. 163.

See CIV. PRO. CODE, 1908, O. IX, rr. 8, 9, O. XVII, r. 2, s. 115, 12 M.L.J. 473.

See CIV. PRO. CODE, 1908, O. IX, r. 8, O. XV, r. 4; O. XVII, r. 2, s. 115, A.W.N. 1887, 65.

High Court's power to interfere in, with order of restoration—*See* CIV. PRO. CODE, 1908, O. IX, r. 9, O. XVII, r. 2, 17 M.L.J. 225=30 M. 274.

See CIV. PRO. CODE, 1908, O. IX, r. 9, O. XVII, r. 3, s. 104, O. XLIII, r. 1, A.W.N. 1893, 44.

See CIV. PRO. CODE, 1908, O. XVII, r. 2, s. 104, O. XLIII, r. 1, s. 115, 31 C. 344.

See CIV. PRO. CODE, 1908, O. XVIII, r. 8, A.W.N. 1882, 184.

Ordering execution on an application put in more than three years after the last application—Illegality—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, ss. 48, 115, U.B.R. 1905, Civil Procedure 26.

Revision—continued.

——**1.—General**—*continued.*

Practice of High Court—*See* CIV. PRO. CODE, 1908, O. XXI, r. 60, s. 115, 11 Bom. L. R. 754=3 Ind. Cas. 780.

Execution of decree—Delivery of possession of property not specified in sale proclamation or sale certificate—Power of High Court to interfere in—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 95, 96, 18 A. 163=A.W.N. 1896, 18.

See CIV. PRO. CODE, 1908, O. XXI, rr. 88, 90, 5 A. 42=A.W.N. 1882, 146.

Revision petition when may be treated as memorandum of appeal—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, s. 47, 13 C.L.J. 467.

Lower Court's order not passed on illegal exercise of jurisdiction or on failure to exercise jurisdiction—Power of High Court to interfere in—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, s. 115, A.W.N. 1905, 193=2 A.L.J. 711=28 A. 84.

Application under s. 373, Civ. Pro. Code (1882)—Order—Appeal treated as application for revision—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 1, 10 Ind. Cas. 346.

Improper order for withdrawal of suit—Revision—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 1, 11 C.L.J. 45=5 Ind. Cas. 187.

See CIV. PRO. CODE, 1908, O. XXXII, r. 7, 37 P.R. 1895.

See CIV. PRO. CODE, 1908, O. XXXIII, r. 1, O.VII, r. 17, 99 P.R. 1882.

See CIV. PRO. CODE, 1908, O XXXIII, r. 5, 130 P.R. 1894.

See CIV. PRO. CODE, 1908, O. XXXIII, r. 5, s. 115, 2 C.W.N. 474.

See CIV. PRO. CODE, 1908, O. XLI, r. 4, A. W.N. 1891, 207.

Pleader present but unable to argue case owing to physical disability—Dismissal for default—Revision—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 11, 17, 9 Ind. Cas. 857.

Appeal wrongly dismissed as for default—Remedy, by way of—Not appeal—*See* CIV. PRO. CODE, 1908, O. XLI, r. 17, s. 104, O. XLIII, r. 1, s. 115, 18 A. 119=A.W.N. 1896, 9.

See CIV. PRO. CODE, 1908, O.XLI, rr. 17, 19, s. 115, A.W.N. 1884, 167.

See CIV. PRO. CODE, 1908, O. XLI, r. 19, O. XIII, r. 1, and ss. 104, 115, 3 C.P.L.R. 166.

See CIV. PRO. CODE, 1908, O. XLI, r. 23, s. 115, A.W.N. 1883, 171.

See CIV. PRO. CODE, O XLI, r, 31, 72 P.R. 1890.

Rejection of application for review on the erroneous view that Court had no jurisdiction—Revision—*See* CIV. PRO. CODE, 1908, O, XLVII, rr. 4, 7, 9, 6 A.L.J. 884=31 A. 610=4 Ind. Cas. 23.

Revision—continued.

——**1.—General**—*continued.*

See CIV. PRO. CODE, 1908, O. XLVII, rr. 7, 9, ss. 100, 115, 11 A. 383 = A.W N. 1889, 151.

Decree on award passed without jurisdiction —Appeal—*See* CIV. PRO. CODE, sch. II, rr. 14, 15, 16, 21, 18 M. 423, F.B.

Suit for declaration—Decree for possession—Material irregularity—Revision—*See* COMPROMISE—GENERAL, 199 P.L.R. 1911.

See CONTRACT—MISCELLANEOUS, 19 P. R. 1894.

See CONTRACT ACT, 1872, s. 65, 66 P.R. 1895.

Damages allowed by Small Cause Court—Interference in—*See* CONTRACT ACT, 1872, s. 73, 9 Ind. Cas. 470.

See CONTRACT ACT, 1872, ss. 112, 118, 79 P.R. 1888.

For order to pay, *ad valorem* Court fee—Material irregularity—*See* COURT FEES ACT, 1870, 5 O. C. 319.

See CRIM. PRO. CODE, 1898, s. 145, 6 C.W.N. 882

Nature of High Court's revisional jurisdiction—Initiation of criminal proceedings, under s. 476, Crim. Pro. Code—Considerations for High Court in exercising powers of revision—Stay of criminal proceedings pending civil appeal to High Court, whether justifiable, and when—Civ. Pro. Code, s. 622—Charter Act, s. 15—*See* CRIM. PRO. CODE, 1898, s. 476, 35 C. 909.

See CRIM. PRO. CODE, 1898, s. 476, 23 A. 249 = A.W.N. 1901, 59.

See DECREE — ALTERATION OR AMENDMENT OF DECREE, 1 Agra 57; 7 A. 411 = A.W.N. 1885, 256, 7 A. 875 = A.W.N. 1885, 256, 15 A. 121 = A.W.N. 1893, 44, 15 A. 169 = A.W.N. 1893, 78, A.W.N. 1882, 60.

See DECREE — DECREE, CONSTRUCTION OF, A.W.N. 1889, 173.

Rent suits—Powers of District Judge—*See* DISTRICT JUDGE, JURISDICTION OF, 15 C. 327.

Equitable decision given by lower Court—No revision lies—*See* EASEMENT, 101 P.L.R. 1909 = 153 P.W.R. 1909.

Execution—High Court's orders in revisional jurisdiction—Procedure—Civ. Pro. Code, 1882, ss. 583, 647—*See* EXECUTION OF DECREE—APPEAL, REVIEW, ETC., EXECUTION OF DECREE AFTER, 16 B. 550.

Appeal treated as application for—*See* EX-PARTE DECREE, 11 M.L.T. 199.

Error in law—Substantial justice done to parties—Whether revision lies—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 5 P.W.R. 1910 = 5 Ind. Cas. 590.

Revision—continued.

——**1.—General**—*continued.*

Court has no jurisdiction to allow guardian to spend ward's property after termination of guardianship—No appeal against such order—Appeal converted into revision petition—*See* GUARDIAN—MISCELLANEOUS, 17 M.L.J. 199.

See GUARDIANS AND WARDS ACT, 1890, ss. 12, 25, 47, 13 P.R. 1897.

Jurisdiction— Appeal — Consular Court of Zanzibar—High Court at Bombay—Zanzibar Order in Council, 1884, art. 21—Civ. Pro. Code, 1882, s. 622—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 20 B. 480, F.B.

See HIGH COURT, JURISDICTION OF—BOMBAY, 7 B. 341.

Non-compliance with the provisions of Act XIX of 1841—High Court's power of—*See* HINDU LAW—JOINT FAMILY, 34 C. 929 = 12 C.W.N. 65.

Of appellate orders under s. 588, Civ. Pro. Code—*See* JURISDICTION—CAUSES OF JURISDICTION, 77 P.R. 1909 = 124 P.L.R. 1909 = 125 P.W.R. 1909 = 3 Ind. Cas. 607.

Partition under Reg. XIX of 1814—By Civil Court—*See* JURISDICTION OF CIVIL COURTS, 4 C. 510.

Case in which a petition of appeal was treated as a petition for—*See* JURISDICTION OF CIVIL COURTS, 2 A.L J 18 = A.W.N. 1905, 10 = 27 A. 380.

See JURISDICTION OF CIVIL COURTS, 4 N. W. P. 7, 5 O. C. 332.

Board of Revenue, powers of—*See* JURISDICTION OF REVENUE COURTS, 6 A.L.J. 164 = 31 A. 279 = 2 Ind. Cas. 32.

Lower Appellate Court ignoring vital facts—Material irregularity— Revision —*See* LANDLORD AND TENANT—EJECTMENT, 35 P.L.R. 1910 = 8 Ind. Cas. 227.

Right decision—Defect of jurisdiction—Revision whether lies—*See* LANDLORD AND TENANT—MISCELLANEOUS, 8 Ind. Cas. 733.

Refusal to grant certificate to mukhtar to practise in Criminal Courts—Jurisdiction of High Court—Rules for Kamon and Garhwal districts issued under s. 6 of Act No. XIV of 1874 (Notification No. 45 A, dated the 23rd May, 1879)—Crim. Pro. Code, s. 439—Letters Patent, s. 15—*See* LEGAL PRACTITIONERS—MUKHTEAR, A.W.N. 1892, 236.

See LIMITATION—GENERAL, 6 P.R. 1901.

Delay in filing petition for—Effect—*See* LIMITATION ACT, 1908, s. 5, 140 P.L.R. 1911 = 10 Ind. Cas. 129.

Claim barred by limitation—Oral acknowledgment—Decree given by lower Court—Revision—Interference with order doing substantial justice—*See* LIMITATION ACT, 1908, s. 19, 228 P.L.R. 1911.

Revision—continued.

——**1.—General**—*continued.*

Amendment of plaint whether allowed in—*See* LIMITATION ACT, 1908, s. 19, 8 M.L.T. 199=7 Ind. Cas. 797.

Custody of wife—Third person harbouring wife—Continuing wrong—*See* LIMITATION ACT, 1908, s. 23, 14 P.L.R. 1903.

See LIMITATION ACT, 1908, art. 23, 9 M. L.J. 133.

See LIMITATION ACT, 1908, art. 164, 7 A. 345=A.W.N. 1885, 73.

Court overlooking relevant provisions of an Act — Material irregularity — Revision— *See* MAINTENANCE, 157 P.W.R. 1911.

See MORTGAGE—FORECLOSURE, 119 P.R. 1892.

See MORTGAGE — REDEMPTION, A.W.N. 1888, 119.

Burden of proof thrown on wrong party—Revision—*See* NEGOTIABLE INSTRUMENTS—HUNDIS — GENERAL, 25 P.W.R. 1910=24 P.L.R. 1910=5 Ind. Cas. 891.

Omission to regard the qualification of an obligation created by law and to frame a definite issue in connection therewith—Material irregularity—Revision—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 30, 93, 98 (*c*), 96 P.W.R. 1911.

Power of High Court to correct a mere error of law--*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 118, 2 M.W.N. 1911, 253.

See PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 9 A. 486=A.W.N. 1887, 133.

Civ. Pro. Code, 1882, ss. 401, 407—Application for permission to sue in *forma pauperis*—Possibility of professing pauper's raising money on his claim no ground for rejecting his application—Revision—*See* PAUPER SUITS, A.W.N. 1893, 11.

Civ. Pro. Code, 1882, ss. 407, 408—Application for leave to sue in *forma pauperis*—Rejection of application on grounds other than those mentioned in s. 407—Revision—*See* PAUPER SUITS, A.W.N. 1893, 218.

Amendment of pleadings and issues— Discretion—Revision—*See* PLAINT—AMENDMENT OF PLAINT, 9 Ind. Cas. 267=51 P.L.R. 1911.

Material irregularities justifying interference in revision, what are—*See* POSSESSION—ADVERSE POSSESSION, 4 Ind. Cas. 314=18 P. W.R. 1909.

Question of abandonment is a question of fact—Revision—*See* POSSESSION—ADVERSE POSSESSION, 102 P.L.R. 1909=154 P.W.R. 1909.

Order of District Judge that he has jurisdiction to entertain application for letters of administration—Revision—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 86, 94 P.W.R. 1910=70 P.R. 1910=7 Ind. Cas. 710=123 P. L.R. 1910.

Revision—continued.

——**1.—General**—*continued.*

Dismissal of first application for maintenance—Whether it is a bar to second application on same facts—Where substantial justice has been done by the lower Court, whether High Court will interfere in revision—*See* RES JUDICATA—GENERAL, 14 Bur. L.R. 259.

See RES JUDICATA—CAUSE OF ACTION, 1 Agra 152.

Order refusing to grant review—Such order whether can be revised—*See* REVIEW—GENERAL, 2 M.W.N. 1911, 252.

See REVISION—GENERAL, A.W.N. 1882, 62.

When Chief Court will interfere on—Order allowing claimants the share of their missing brother—Revision—*See* RIGHT OF OCCUPANCY—GENERAL, 17 P.W.R. 1911=9 Ind. Cas. 744.

See RULES OF HIGH COURTS AND SUPREME COURTS—N.W.P., A.W.N. 1903, 12.

See SANCTION TO PROSECUTE, A.W.N. 1892, 242, A.W.N. 1893, 147, A.W.N. 1903, 170, A. W.N. 1903, 172.

Suit under s. 9, Specific Relief Act, dismissed—Another remedy open—Revision does not lie—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 8 A.L.J. 791.

Possessory suit by immediate landlord of dispossessed tenants—Tenants not made parties—Interference by High Court—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 13 C.W.N. 303=1 Ind. Cas. 150.

Dispossession of tenant—Suit by landlord—Refusal to decree in favour of landlord—Revision—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 13 C.W.N. 835=10 C.L.J. 30=3 Ind. Cas. 466.

Other remedies open to aggrieved party—High Court whether will interfere—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 5 A.L.J. 297=A.W. N. 1908, 142=30 A. 331.

Memorandum of appeal insufficiently stamped—Stamp not supplied within time fixed—Dismissal of appeal—Appeal—Revision—*See* STAMP, A.W.N. 1881, 51.

Powers of—Of High Court—*See* ST. 24 AND 25 VIC , C. 104, s. 15, 4 C.W.N. 36.

High Court interfering in revision in public interest — *See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 13 C.W.N. 966, F.B.=10 C. L.J. 180=36 C. 936=3 Ind. Cas. 492.

Suit in Mamlatdar's Court—Erroneous procedure of Mamlatdar, High Court—Revision—*See* SUPERINTENDENCE OF HIGH COURT, 9 B. 97.

Plaint, return of, for presentation to proper Court—Refusal by other Court to entertain plaint—Jurisdiction—High Court's power of—*See* SUPERINTENDENCE OF HIGH COURT, 20 B. 50.

evision—continued.

——1.—**General**—*concluded.*

Revisional powers of High Court—Acting in the exercise of jurisdiction illegally or with material irregularity — *See* SUPERINTENDENCE OF HIGH COURT, 1 C.W.N. 626.

No revision in case of erroneous decisions—*See* SUPERINTENDENCE OF HIGH COURT, 1 C.W.N. 633.

See SUPERINTENDENCE OF HIGH COURT, 6 W.R. Mis. 26, 28 C. 680=6 C.W.N. 114, 7 C.L.R. 191, 8 M. 192.

Court overlooking provisions of a Legislative enactment—Material irregularity—Revision—*See* TRANSFER OF PROPERTY ACT, 1882, s. 107, 11 Ind. Cas. 849.

——2.—**Small Cause Court Cases.**

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF.

See SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF.

(1)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 25—*Exercise of revisional powers by High Court.*—The powers conferred by the section are purely discretionary. It was not intended by the section to give in effect a right of appeal in all Small Cause Court cases, either on law or on fact [A.W.N. (1890), 121, 201, *Appr.*]. The High Court would not interfere under the section, unless it clearly appeared to them that some substantial injustice to a party to the litigation had directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes. MUHAMMAD BAKAR v. BAHAL SINGH, **13 A. 277, F.B.=A.W.N. 1891, 81.** [*R.*, 13 A. 533, 15 A. 139, 16 A. 476, L.B.R. 1893-1900, 61, 21 B. 250, 11 C.P.L.R. 91, 21 A. 89, 23 B. 334.]

(2)—*Revision--Act* IX *of* 1887, *s.* 25--*Erroneous decision on question of limitation.*—Under s. 25 of the Provincial Small Cause Courts Act, 1887, the fact that a Court of Small Causes has come to an erroneous decision on a point of limitation is no ground for revision. SARMAN LAL v. KHUBAN, **17 A. 422=A.W.N. 1895, 112.** (11 C. 6, *R.*) [*F.*, 20 A. 78=A.W.N. 1897, 168, 21 A. 89, A.W.N. 1898, 74; *R.*, 21 B. 250, 25 A. 509, F.B.=A.W.N. 1903, 104, 6 A. L.J. 944=3 Ind. Cas. 817.]

(3)—*Small Cause Courts Act* (IX *of* 1887), *s.* 25—*Court's discretion—Civ. Pro. Code, s.* 622—S. 622 of the Civ. Pro. Code should be taken as a guide indicating the lines along which a Judge will do well to exercise his discretion in dealing with an application under s. 25 of the Small Cause Courts Act. This does not mean that the Judge is bound to refuse any such application, under the above s. 25, which could not be admitted under s. 622 of the Civ. Pro. Code. The Court's discretion

Revision—continued.

——2.—**Small Cause Court Cases**—*continued.*

in the matter is left unfettered, and s. 622 of the Code is to be taken as merely indicating to the Court a line which it might well follow, and a general principle which it should apply. VIAS RAM SHANKAR v. RALLA RAM MISIR, **21 A. 89=A.W.N. 1898, 157.** (16 A. 476, 17 A. 422, *R.*) [*R.*, 5 C.L.J. 413, 66 P.R. 1904=138 P.L.R. 1903, 9 Bom. L.R. 466, 5 A.L.J. 295=A.W.N. 1908, 141.]

(4)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 25—*Discretion of High Court — Circumstances empowering revision under s.* 622, *Civ. Pro. Code.*—In enacting s. 25 of the Provincial Small Cause Courts Act (IX of 1887), the Legislature could not have intended to practically give an appeal on law and on facts from the decisions of Courts of Small Causes, which were final, subject only to the power given by that section. S. 622, Civ. Pro. Code, should be taken as indicating the line of discretion to be exercised by the Judge in considering whether he should or should not apply s. 25 of the Act. SARMAN LAL v. KHUBAN, **16 A. 476=A.W.N. 1894, 183, F.B.** [*Diss.*, 11 C.P.L.R. 91, 66 P.R. 1904, 138 P.L.R. 1903; *R.*, 21 A. 89, 5 C.L.J. 413, 19 P.R. 1901=68 P. L.R. 1901, 113 P.L.R. 1903, 27 A. 192=A.W. N. 1904, 227=1 A.L.J. 697, 6 A.L.J. 944=3 Ind. Cas. 817.]

(5)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s* 25—*Error of law in Small Cause Court—Power and discretion of High Court to interfere.*--This was an application by the defendant Municipality under s. 25 of the Provincial Small Cause Courts Act, 1887, by which they sought for a reversal of a decree passed against them in the Poona Small Cause Court, on the ground that the decree was passed against them on an erroneous construction of their Revised Octroi Rules and a question arose as to the extent and nature of the powers conferred upon the High Court by the said s. 25 and it was held that an error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed to it by the section. The powers conferred by the section are purely discretionary and it was not intended to give by that section a right of appeal in all Small Cause Court cases, either on law or on fact. The limits within which such discretionary power of the High Court should be exercised depend on the circumstances of each individual case but, generally it has not been the practice of the High Court to interfere under s. 25 when there are no substantial merits in the applicant's case. It interferes to remedy injustice, but even where technically the plaintiff or defendant may have a legitimate ground of attack or defence, where the Small Cause Court has done substantial justice in the matter the High Court will be reluctant to interfere. The provisions of s. 622 of the Civ. Pro. Code, are not to be taken to afford any safe guide for the exercise of the High Court's discretion under s. 25 of the Provincial Small Cause Courts Act. The wording of the

Revision—continued.

——**2.—Small Cause Court Cases**—*continued.*

two sections is wholly different. The provisions of the former section have to be construed in a very restricted and limited sense whereas in the latter, s. 25 of the Act, the Legislature has used the widest words with intention to confer the most ample discretion on the High Court. POONA CITY MUNICIPALITY v. RAMJI, **21 B. 250.** [*F.*, 11 C.P.L.R. 91; *Appr.*, 23 B. 334; *R.*, 21 A. 89=A.W.N. 1898, 157, 27 B. 563, 66 P.R. 1904=138 P.L.R. 1903]

(6)—*Exercise of powers of revision in case of error of law or procedure in Small Causes Court.*—An error of law or procedure in the Small Causes Court confers jurisdiction upon the High Court to exercise the power committed to it by s. 25, Small Cause Courts Act, but the exercise of such power is purely discretionary and cannot be claimed as of right. BHAIYALAL WANI v. JAMNADAS POTDAR, **11 C P.L.R. 91.** (21 B. 250, *F.*)

(7)—*Act* IX *of* 1887, *s.* 25—*First application for revision rejected—Second application whether barred.*—There is nothing in the Code or in Act IX of 1887 to prevent a Court from entertaining a fresh petition for revision under s. 25 of the latter Act, after the dismissal of a previous petition under the same section. KAHAN CHAND v. MUSST. INDAR KUAR, **23 P.R. 1898.**

(8)—*Revision—Technical legal error—Discretion—Suit for mortgage-money and rent—Cause of action—Provincial Court of Small Causes Act* (IX *of* 1887), *s.* 25.—*Held*, that, where a mortgagor agrees to give possession of the mortgaged property to the mortgagee, and executes a separate lease in his favour, it is questionable whether, in the suit for the principal mortgage-money, the mortgagee is bound to include therein the amount of rent due from the mortgagor up to that time. (19 A. 496, *D.*; 28 P.R. 1907=140 P.W.R. 1907, 53 P.R. 1868, *R.*) It is discretionary with the High Court to interfere on revision, and it will not exercise its powers, merely because the lower Court has erred on a technical point, if it appears that the lower Court's decision does substantial justice between the parties. ADUL RAHMAN v. BAGWAN DAS, **59 P.W.R. 1912=120 P L.R. 1912=13 Ind. Cas. 720.** (93 P.R. 1911=11 Ind. Cas. 445= 151 P.W.R. 1911, *F.*)

(9)—*Civ. Pro. Code*, 1882, *s.* 622—*Suit maintainable on Small Cause side of Court instituted on original side—Power of High Court to interfere in revision.*—A suit maintainable on the Small Cause side of a Court was instituted on its original side. From a decree passed in the suit an appeal was preferred. No question of jurisdiction was raised either in the first Court or in the Appellate Court. The question was whether the High Court should interfere in revision with the decisions of the Courts below. *Held* that as the Court of first instance and the Court of Appeal had exercised a jurisdiction not vested in them by law, the High Court was bound to interfere and exercise

Revision—continued.

——**2.—Small Cause Court Cases**—*continued.*

the powers conferred by s. 622, Civ. Pro. Code. The plaint was therefore ordered to be returned for presentation to the proper Court. RAMASAMY CHETTIAR v. R. G. ORR, **26 M. 176=12 M.L.J. 264.** [*Not F.*, 27 M. 478; *F.*, 36 C. 130; *Appr.*, 6 M.L.T. 121.]

(10)—*Small Cause Court suit—Provincial Small Cause Court Act* (IX *of* 1887), *s.* 25—*District Court—High Court.*—A Subordinate Judge holding Small Cause Courts powers decided a Small Cause Court's suit as one under his ordinary jurisdiction. On appeal, the District Judge also dealt with the suit as such the parties in both the Courts not objecting to the procedure adopted. The plaintiff applied to the High Court contending that the jurisdiction exercised by the District Judge was bad in law: *Held*, that the character of the suit was not altered by the mode in which the Subordinate Judge exercised his jurisdiction, and that therefore no appeal lay to the District Court. SHANKARBHAI v. SOMABHAI, **3 Bom. L.R. 129=25 B. 417.**

(11)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 25—*Small Cause Juage not stating points for decision—High Court's pewer in revision to remand suit.*—In a Small Cause suit for the recovery of the balance of purchase money due to plaintiff by defendant, the District Court delivered the following judgment—"Plaintiff fails, and the suit is dismissed, but, under the circumstances, each party will bear his own costs." On an application to the High Court under s. 25 of the Provincial Small Cause Courts Act to revise the proceedings of the District Judge, *held* that, as the Judge had not stated the points for decision nor his decision upon them, the decree should be set aside and the suit remanded for hearing. RAMACHANDRAIER v. MUTHUKARUPPA PILLAI, **6 M.L.J. 50.**

(12)—*Revision of a Small Cause decree—Difference of view among the Judges—Letters Patent*, *s.* 15—*Civ. Pro. Code*, 1882, *s.* 375. —Where a revision petition to the High Court against a Small Cause decree comes on for hearing before a Bench, and one of the Judges is of opinion that the decree of the lower Court should be set aside and the suit remanded for disposal after evidence, and the other Judge thinks that the case is not a fit one for revision as the defence set up by the defendant has not been raised in the lower Court, the adjudication by the Bench is a judgment within the meaning of s. 15 of the Letters Patent and the case is governed by s. 575, Civ. Pro. Code. NARAYANASAMI REDDI v. OSURU REDDI, **25 M. 548.** [*R.*, 16 M.L.J. 27.]

(13)—*Provincial Small Cause Courts Act*, IX *of* 1887, *s.* 25, *application under, when entertainable—Civ. Pro. Code*, 1882, *s.* 622 (=*s.* 115, *new Code*)—*Erroneous decision as to limitation not proper ground for revision.*—In this case there was an application to the High Court

Revision—continued.

——2.—**Small Cause Court Cases**—*continued.*

under s. 25 of Act IX of 1887. *Held* that such an application ought not to be entertained except in cases in which a similar application would be allowed under s. 622, Civ. Pro. Code. The sole question for determination being whether the lower Court's judgment was right or wrong on a point of limitation: *held*, the application did not lie. RAGHU NATH SAHAI v. THE OFFICIAL LIQUIDATOR OF THE HIMALAYA BANK, LTD., **15 A. 139 = A.W.N. 1893, 59.** (11 C. 6, *Appl.*) [*Appl.*, 16 A. 39 ; *R.*, 16 A. 476, 21 B. 250, 11 C.P.L.R. 91. 21 A. 89, 2 L B.R. 333, 4 N.L.R. 184, 6 A.L.J. 944 = 3 Ind. Cas. 817.]

(14)—*Revision—Review—Erroneous order set aside on review—Discretion—Interference by High Court.*—The revisional powers of a High Court should not be exercised to restore an erroneous order, passed by a Judge of a Small Cause Court but set aside by him on review. It is in the discretion of the Judge to deal in review with an order proceeding on a mistaken view of the law. MAUNG AUNG NUYN v. N. K. A. RAMANATHAN CHETTY, **12 Ind. Cas. 903.**

(15)—*Practice—Revisional jurisdiction of High Court over Presy. S. C. Court under s. 622, Civ. Pro. Code*, 1882 (= *s.* 115, *new Code*).—The revisional jurisdiction of the High Court over the Presy. S. C. Court, under s. 622, Civ. Pro. Code, 1882, is one exercised in its original side and not on the appellate side. An application for the exercise of such jurisdiction must be made in the usual way by an advocate of the Court instructed by an attorney, and not by a vakil. SARAT CHANDRA SINGH v. BROJO LAL MUKERJI, **30 C. 986.**

(16)—*High Court—Revision—Power to revise proceedings in the Bombay Court of Small Causes—Practice—Presidency Small Cause Courts Act* (XV *of* 1882), *s.* 9—*Charter Act.*—The High Court in the exercise of superintending powers under its extraordinary jurisdiction will not ordinarily interfere except in cases of grave and otherwise irreparable injustice. ISMALJI v. MACLEOD, **8 Bom. L.R. 969 = 31 B. 138.**

(17)—*S.* 6, *Presidency Small Cause Courts Act*, 1882—*S.*622, *Civ.Pro. Code*, 1882 (= *s.* 115, *new Code*)—*High Court's jurisdiction to revise orders passed without jurisdiction.*—Having regard to s. 6, Presidency Small Cause Courts Act, the High Court has jurisdiction to revise, under s. 622, Civ. Pro. Code, 1882, orders which are said to have been made without jurisdiction in the Presidency Small Causes Court. HALADHAR MAICTI v. CHOYTONNA MAITI, **30 C. 588 = 7 C.W.N. 547.**

Power of High Court in a Small Cause suit to exonerate defendant, against whom a decree has been passed, and pass a fresh decree against another—*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, s. 141, 17 M.L.J. 62.

Revision—concluded.

——2.—**Small Cause Court Cases**—*concluded.*

See HIGH COURT, JURISDICTION OF—N.W.P. A.W.N. 1892, 160.

See JUDGMENT—FORM AND CONTENTS, 13 A. 533 = A.W.N. 1891, 172.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 26, A.W.N. 1897, 138.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 12 A. 581 = A.W.N. 1890, 203.

Revival.

Appeal—Revival of abated appeal—Substitution of new appellant—*See* PRIVY COUNCIL, PRACTICE OF—RESTORATION OF APPEAL, 21 C. 997, P.C. = 21 I.A. 163.

Revival of Attachment.

On reversal of sale in execution of decree—*See* ATTACHMENT—STRIKING OFF EXECUTION PROCEEDINGS, 2 Ind. Jur. O. S. 1 = 5 W.R.P.C. 7 = Marsh 592 = 9 M.I A. 324.

Revival of Claim.

Application for amendment of plaint—Revival of claim abandoned in excess of jurisdiction—*See* PRACTICE AND PROCEDURE, 1 C.W.N. 32.

Revival of Suit.

(1)—*Act* X *of* 1859, *s.* 58—*Decree* ex parte—*Revival of suit—Notice to opposite party.*—Under s. 58 of Act X of 1859, in all cases decided *ex parte*, if the party against whom judgment has been passed shall appear, either in person or by agent, if a plaintiff, within fifteen days from the date of the Collector's order, and, if a defendant, within fifteen days, after any process for enforcing the judgment has been executed, or at any earlier period, and shall show good and sufficient cause for his previous non-appearance, and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms and conditions as to costs, or otherwise, as he may think proper, revive the suit and alter or rescind the decree according to the justice of the case; but no decree shall be reversed or altered without previously summoning the adverse party to appear and be heard in support of it. HURO MOHUN MOOKERJEE v. MOHENDRONATH GHOSE, **16 W. R. 135.**

Suit for partition revived, after plaintiff's death on behalf of his minor sons with permission of first Court—Appellate Court not competent to object to—*See* APPELLATE COURT—POWERS OF APPELLATE COURT, 5 M.H.C. 193.

Revival of suit decreed—*See* CIV. PRO. CODE, 1908, O. XVII, rr. 2 & 3, 11 C.P.L.R. 94.

See COLLECTOR, 6 W.R. Act X, Rul. 54.

Revival of Suit—*concluded.*

Original suit when revived—*See* CONSENT-DECREE, 10 Ind. Cas. 355.

Application for revival of suit—Application in pending suit—Limitation—*See* PARTIES TO SUIT—SUBSTITUTION OF PARTIES TO SUIT. 3 C.W.N. 756.

See PRACTICE AND PROCEDURE, 5 C. 726=5 C.L.R. 569.

Revivor.

(1)—*Barred claims—Change in the law of limitation, effect of.*—A claim, whether for arrears of maintenance, possession of land or anything else, once barred, cannot be revived by a change in the law of limitation. KRISHNA MOHUN BOSE v. OKHILMONI DOSSEE, **3 C. 331.** [*Disc.*, 3 C.L.R. 336; *Overruled.* 6 C. 340=7 C.L.R. 121; *R.*, 4 C. 665, 53 P.L.R. 1901.]

See CIV. PRO. CODE, 1908, ss. 38, 39, 41, O. XXI, rr. 4, 5, 22 C. 921.

See LIMITATION ACT, 1908, s. 28, 4 C. 708.

Application to revive a suit and restore it to the Board--Limitation—*See* LIMITATION ACT, 1908, art. 181, 6 C. 60=6 C.L.R. 345.

Of decree—What amounts to—*See* LIMITATION ACT, 1908, art. 183, 11 Ind. Cas. 216.

See LIMITATION ACT, 1908, art. 183, 20 C. 551.

What constitutes—*See* LIMITATION ACT, 1908, art. 183, 4 Ind. Cas. 402.

See LIMITATION ACT, 1908, art. 183, 30 C. 979=7 C.W.N. 793.

See PRIVY COUNCIL, PRACTICE OF—MISCELLANEOUS, 16 C. 184=15 I.A. 209, P.C.

Revivor of Judgment.

Law as to—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 9 C.L.J. 271=36 C. 543=1 Ind. Cas. 168.

Revocation.

Of probate—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 50, 4 Bom.L.R. 637=26 B. 792, 4 Bom.L.R. 979.

Revocation of Agent's Authority.

See CONTRACT ACT, 1872, ss. 201, 202, 203, 2 Bom. L.R. 778=24 B. 403.

Revocation of Certificate.

See ACT XL OF 1858, s. 16, A.W.N. 1881, 44.

Revocation of License.

Revocation of license to boats—*See* ACT X OF 1889, 4 Bom.L.R. 773.

Reza Milkiat.

Reza milkiat, *meaning of—Grove-holder—Settlement decree—Wajib-ul-arz.—Held*, that the term "Reza milkiat" means a proprietary or under-proprietary title in a small plot of land. SHEO DAYAL SINGH v. SURAJ KUMAR, **11 O.C. 164.**

Right of Appeal.

See APPEAL.

(1)—*Absence of the defendant on the day of trial of appeal—Act X of* 1859, *s.* 58.—*Held* that s. 58, Act X of 1859 does not take away the right of appeal in cases where the defendant having once appeared is absent on the day of trial. MESSRS. R. WATSON AND CO. v. PORANDHON TEHSILDAR, **W.R. 1864, Act X, Rul. 18.**

(2)—*Dismissal of suit—Defendant's rights.*—No opinion which may have been expressed in the judgment of a Court dismissing a suit in its entirety, can affect the defendants' right in any future litigation which may arise between the parties. CHOWDHRY MOHAMED MOMIN v. LUTAFUT HOSSEIN, **13 W.R. 239.**

(3)—*Act* VI *of* 1871, *s.* 29—*Jurisdiction—Investiture with Small Cause powers—Right of appeal--Principle - Pending suits.*—The investiture of a Munsiff with the powers of a Small Cause Court Judge under the provisions of s. 29 of Act VI of 1871 (the Bengal Civil Courts Act), cannot affect pending suits so as to take away any right of appeal which the parties to such suits might have had; the general rule is that, when the law is altered pending an action, the law, as it existed when the action commenced, must decide the rights of the parties in the suit, unless the legislative authority expresses a clear intention to vary the rights of the parties to each other. GHOTAE MUNDUL v. KAJROO, **16 W.R. 227.**

(4)—*Right of appeal—Appeal by a defendant against whom suit dismissed.*—One of the members of a family sued the other members of the family for a partition. A creditor of the family got himself made a party to the suit. The original Court, while he was a party, made some decree which was considered by the creditor to have injuriously affected his claim. On appeal, the decree of the lower Court was set aside *in toto* in favour of the creditor-appellant and the suit of the plaintiff as against him was dismissed and the case remanded for re-trial. Against the decision, the creditor appealed. *Held* that the appeal should be struck off the file as having been presented by a person who was no longer a party to the suit. GOKOOL PERSHAD DISCHEET v. BROJO MONEE DEBIA, **24 W.R. 259.**

(5)—*Act* VIII *of* 1859, *s.* 73—*Appeal by intervenor—Remand—Whole case re-opened—Right of appeal—Evidence.*—The plaintiffs sued to recover possession of certain lands which had been leased to him by the defendant. A third party intervened, claiming to hold these lands under a lease previously given to him by the defendant, and he was made a party to the suit under s. 73 of the Civ. Pro. Code. The case was decided in the first instance by the Munsif, but the Judge on appeal remanded it with directions to expunge the intervenor's name from the record, he not being a party interested in the suit. The order of remand re-opened the whole case. On remand, the Munsif again gave a decree in favour of the

Right of Appeal—*continued.*

plaintiff. The Judge on appeal reversed this decision. In special appeal, it was contended that the present defendant had no right to appeal against the judgment of the Munsif, inasmuch as on the first occasion, it was not he who appealed to the Judge, but the intervenor. *Held* that, if the defendant was satisfied to let the intervenor only appeal against the original judgment, it would by no means follow that he was to be debarred from appealing in his own proper person. *Held* further that, directly the intervenor's name had been struck off on the ground that he had no interest in the case, all the evidence which he had put in ought to have been removed with him. BUCHA SINGH v. MIRZA MASHOOK ALI BEG, **15 W. R. 572.**

(6)—*Pro forma defendant—Right of appeal.*—A person, who is formally made a defendant and against whom no judgment had been passed, has no right to appeal, even though the finding of the Court is that the land claimed by him belongs to another person. Such finding or expression of opinion carries with it no legal consequences as against him. RAM DASS LUSHKAR v. HUREEHUR MOOKERJEE, **23 W.R. 86.**

(7)—*Act* XXIII *of* 1861, *s.* 11—"*Party to a suit*"—*Purchaser of decree—Purchaser entitled to vendor's rights of appeal.*—The contention of the judgment-debtor in this appeal was that the appellant below, who was purchaser of the decree had no right of appeal because he was not a party to the suit, within the terms of s. 11, Act XXIII of 1861. But the High Court *held* that the words "party to the suit" in the section include the heirs, assignees and representatives of such party. Consequently, it cannot be successfully contended that a person who has taken a decree by assignment, a transaction which is distinctly recognised and authorized by s. 208 of the Civ. Pro. Code, is not a party to the suit, and has not all the rights of appeal, and otherwise, that his vendor had. HURO LALL DOSS v. SOOJAWUT ALI, **8 W.R. 197.** [*Diss.*, 15 W.R. 283; *F.*, 10 W R. 205; *Expl.*, 3 C. 371=1 C.L.R. 331.]

(8)—*Certificate under Act* XXVII *of* 1860—*Opposition not to grant of certificate, but to will set up—Right of appeal—Finding as to will.*—An application for a certificate under Act XXVII of 1860, in respect of the estate of a deceased person, was made by his widow on the allegation that, under the provisions of a will made by her husband, she was entitled to succeed to his estate. Upon notice by Court, the brother of the deceased came in, not as a claimant of the certificate, but to oppose and impugn the allegation that his deceased brother had made a Will. The Court upon the brother's objection, framed an issue as to the making of the Will in question, and evidence was gone into very fully on the subject, and the result was that the Judge found in favour of the Will and granted a certificate in accordance with it. Against this order, the brother appealed to the High Court. *Held* that the appeal contemplated by s. 6 of Act XXVII of 1860 should be limited to persons who are in conflict with the original petitioner in claiming the certificate, and that therefore the appellant had no *locus standi* either in the Court below or in the High Court in opposing the grant of the certificate; that the certificate to that extent, and the order of the Judge to that extent, must be upheld; but that the Judge ought not to have determined that the widow was entitled to the certificate under the Will. All finding as to the making of the Will was declared to be of no effect and the determination of that question was reserved for a Civil Court in a suit to be brought by the person whose interest it was to bring it. RAM LALL MOOKERJEE v. KOMOLA KAMINEE DEBEE, **24 W.R. 92.**

(9)—*Heirs, Competency of, to proceed with appeal as against co-heirs—Act* VIII *of* 1859, *s.* 102.—There is nothing in s. 102 of Act VIII of 1859 having the effect of precluding heirs from proceeding with an appeal as against their co-heirs. MUSSAMUT LATEEFOONISSA BIBEE v. SYED RAJAOOR RUHMAN, **8 W.R. 84.**

(10)—*Suit by widow and her sons jointly—Appeal by sons alone—Right of action.*—Where a Hindu widow and her sons sue jointly for confirmation of title, and both the Courts below have found adversely to her title, holding that the property was acquired by the joint family, and was not separate property, her sons, who have no interest in the result of the suit, are not competent to prefer a special appeal without her. DOORGA PERSHAD MOHAPATTAUR v. RADHA MOHUN MYTEE, **15 W. R. 536.**

(11)—*Mortgage—Sale of equity of redemption prior to suit for foreclosure—Right of mortgagor to appeal against foreclosure decree.*—Where the equity of redemption has been sold prior to the institution of a suit for foreclosure, one of the co-mortgagors cannot be permitted to prefer an appeal against the decree for foreclosure passed in the suit, inasmuch as the mortgagors had lost all interest in the property prior to the suit. KOTTALE UPPI v. KALLIYATT PANOLI KUNNI KUTTI, **1 M.H.C. 7.**

(12)—*Defendant disclaiming any right or interest in suit land—Right of appeal on adverse judgment not affected.*—Plaintiff, respondent, contended that one of the special appellants, defendants, had no right to appeal, because, in the Court of first instance, he had disclaimed all right or interest in the land in suit. But the High Court was of opinion that, notwithstanding the disclaimer on his part, the circumstance of a judgment having been given against him in both the lower Courts with costs entitled him to keep the place among the defendants which had been given to him by the plaintiff himself, and to claim therefore to appear as an appellant. NUND COOMAR SINGH v. GUNGA PERSHAD NARAIN SINGH, **10 W.R. 94.**

(13)—*Act* VIII *of* 1859, *s.* 246—*Declaratory suit by the decree-holder—Execution of decree—*

Right of Appeal—*continued.*

Reversal of executed decree on appeal—Restitution—Claim for wasilat—Appeal against principle of liability for wasilat, though wasilat yet to be ascertained.—A decree-holder having attached a certain tenure as the property of his judgment-debtors, objections were raised successfully under s. 246, Act VIII of 1859. Thereupon the decree-holder instituted a regular suit for a declaration that the said property belonged to his debtors, and obtained a decree in the High Court. In execution of this decree, he brought the property to sale and purchased it himself. But the decree of the High Court having been reversed by the Privy Council, the objector took out execution for costs and wasilat for the period during which the decree-holder was in wrongful possession of the property. The Court in spite of the objections of the decree-holder allowed execution to proceed and deputed an Ameen to ascertain the amount of wasilat collected. Both the objector and the decree-holder appealed, the former contending that there could be no appeal by the latter as the judges' order was not a final one. *Held* that, as the Judge's decision was in no sense an order prior to decree within the meaning of s. 363 of the Civ.Pro.Code, the decree-holder was fully entitled to appeal against the *principle* that he was liable to pay back the mesne profits collected by him, without waiting for the result of the Ameen's investigation; that, as there was not a word in the Privy Council's decree declaring the objector entitled to any mesne profits collected during the time of his wrongful dispossession, that decree could not be held to include complete restitution of everything that he would have enjoyed had the property not been sold in execution; and that the objector must bring a fresh suit for that purpose, but could not recover them in execution proceedings. GOPAL CHUNDER CHUCKERBUTTY v. OODOY LALL ROY, **12 W.R. 411.**

(14)—*Civ. Pro. Code, ss.* 244, 331, 332—*Decree on compromise—Objection by person not party to compromise.*—Where a party to a suit, but not to the compromise on which it was decreed, being dispossessed in execution of the decree, objects that the decree is not binding on him, such objection must be investigated and determined under s. 244, Civ. Pro. Code, and the order rejecting such objection is appealable. SANKARAVADIVAMMAL v. KUMARASAMYA, **8 M. 473.** [*Diss.*, 6 C.W.N. 10=30 C. 134, 23 A. 346; *Appr.*, 23 M. 361; *R.*, 17 B. 49, 2 O. C. 51.]

(15)—*Defendant against whom decree has not been specifically made, right of appeal of.*—Where a Court of first instance had given a decree to the plaintiffs as second assignees of a debt, certain defendants alleged to be the prior assignees of the debt, against whom there was nothing specifically mentioned in the decree, were held entitled to appeal against it on the ground that in the result, the decree fully and necessarily implied a finding that their assignment had become void. JAMNA DAS v. UDEY RAM, **21 A. 117=A.W.N. 1898, 201.** [*Doubted*, 57 P.R. 1907=66 P.W.R. 1907; *R.*, 56 P.R. 1904=84 P.L.R. 1904, 9 C.W.N. 584.]

(16)—*Appeal—Object.*—The object of an appeal is to correct something done which has been injurious to the appellant, and the law points out what that instrument is, which must have been the cause of the injury in order to there being any appeal, and that instrument is declared to be the "decree." If, therefore, the decree of the first Court, so far from being injurious to the appellant, is actually in his favour, the decree cannot be the subject of an appeal on his part, simply because there may have been some expression in the judgment which led to the decree which may be considered prejudicial. SHAMA SOONDUREE DEBIA v. DIGAMBUREE DEBIA, **13 W.R. 1.** [*F.*, 13 W. R. 239, 6 N.W.P. 19.]

(17)—*Appeal—Rights of, defendant not appealing.*—Where the Court has expressly decided that the plaintiff is heir of a deceased person to the exclusion of a defendant who has not appealed, the rights of the latter cannot be asserted by the other defendants in appeal for the purposes of defeating the plaintiff's suit. BHUGOBUTTY MISRAIN v. DOMUN MISSER, **24 W.R. 365.**

(18)—Kabooliut, *Suit for—Appeal.*—There is nothing in s. 77 of Act X of 1859, to bar a right of appeal to the Judge in a suit for *kabooleut.* GOLAB BEBEE v. RUHMUTOOLLAH MUJEE, **1 W.R. 33.**

(19)—*Act* VIII (*B.C.*) *of* 1869, *s.* 102—*Right to vary rent—Appeal.*—An appeal is not taken away by s. 102, Act VIII of 1869, in a case where a question of right to vary the rent of the ryots has been substantially raised. SHETUL SHAIKH v. HILLS, **24 W.R. 184.**

(20)—*Suit dismissed for default—Non-appearance as witness—Appeal on the ground that appellant should not have been summoned—Appeals under Act X of* 1859—*Decisions on default—Dismissal after evidence put in—Default of plaintiff—Admission by defendant—Procedure.*—Where a case is decided against a party for his non-appearance as a witness, the right of appeal is not lost to such party. Where, in a suit dismissed for default of appearance, the plaintiff appeals, not to show that he was absent and could not attend, but to show that he should not have been summoned at all to appear personally, the appeal would lie. The prohibition to hear appeals against decisions on default appears to apply only to cases of dismissal made *before* issues are fixed, and not to orders passed *after* evidence has been put in on both sides. When a defendant admits liability and the plaintiff commits default, the entire claim of the plaintiff cannot be dismissed but the case should be decided according to the admission of the defendant. LAKRAJ ROY v. W. BUCKLAND, **5 W.R. Act X, Rul. 65.**

(21)—*Jurisdiction—Right of appeal from decree so far only as it relates to costs.*—A Court

Right of Appeal—*concluded.*

could in regular appeal review the exercise of the discretion of the lower Court as to the award of costs, but, in special appeal, the Chief Court could not interfere unless the order made as to costs was contrary to law PREMA v. GOBIND LAL, **23 P R. 1880.** (6 W.R.F.B., 187, *F.*; 1 C. 385, 4 B.H.C.A.C. 41, *R.*)

(22)—*Civ. Pro. Code* (1877), *ss.* 230, 244, 540, 588—*Act* XII *of* 1879, *s.* 2—'*Decree*'—*Appeal.*—The question "whether a decree-holder had used due diligence in the execution of his decree within the meaning of s. 230, Civ. Pro. Code., 1877," was one relating to the execution of the decree, and was therefore one of the questions mentioned or referred to in s. 244, Civ. Pro. Code, and the order determining it, not being one of those specified in s. 588, Civ. Pro. Code, came within the definition of a "decree" given in s. 2 of the Code as amended by Act XII of 1879 and was appealable under s. 540, Civ. Pro. Code. BALMOKAND v. MUERJOO, **45 P.R. 1880.**

(23)—*Decree for part of claim — Decreed amount, acceptance of, by decree-holder—Appeal for part disallowed, if maintainable.*—The mere fact that a decree-holder, without executing his decree, has accepted from the judgment-debtor the amount under the decree which allowed him only a part of his claim, does not debar him from appealing for the remainder of his claim. MUHAMMAD HASSAN v. GHOUS BAKSH, **49 P.R. 1880.** (82 P.R. 1868, *D.*) [*R.*, 31 P.R. 1907, F.B.=1 P.L.R. 1908.]

(24)—*Act* X *of* 1877, *s.* 540—Ex parte *decree, appeal against, whether maintainable.*— As there is no express provision precluding an appeal from an *ex parte* decree under the Civ. Pro. Code, Act X of 1877, an appeal lies from such a decree under the general provision of s. 540. MUSSAMUT SAHIB DAI v. JAGA SINGH, **105 P.R. 1880.** [*F.*, 60 P.R. 1883.]

See LIMITATION ACT, 1908, ART. 182—JOINT DECREES, 6 W.R. Mis. 18.

See PLAINT—CONSTRUCTION OF PLAINT, 21 W.R. 59.

See RES JUDICATA — RES JUDICATA IN EXECUTION PROCEEDINGS, 5 W.R. Mis. 14.

Appeal against appellate decree by a party who did not appeal against Original decree—*See* SUPERINTENDENCE OF HIGH COURT, 8 M. 192.

See SURETY — ENFORCEMENT OF SECURITY, 12 B. 71.

Right of Occupancy.

1.—GENERAL.
2.—ACQUISITION OF RIGHT.
3.—LOSS OF RIGHT.
4.—TRANSFER OF RIGHT.
5.—MISCELLANEOUS.

See EJECTMENT, SUIT FOR.
See ENHANCEMENT OF RENT.
See LANDLORD AND TENANT.

Right of Occupancy—continued.

——1.——General.

(1)—"Right of occupancy," *Meaning of.*—A right of occupancy means nothing but the right to live on and cultivate land as one's own. *Petheram, C.J.*, ABADI HUSAIN v. JURAWAN LAL, **7 A. 866, F.B.**

(2)—*Occupancy right—Definition.* — Occupancy right is a right established by a tenant against his superior holder to hold his land in perpetuity conditionally on the payment of the rent from time to time lawfully due by him to the superior holder. RAGHUNATHRAV v. VASUDEV, **1 Bom. L.R. 436=23 B. 769.**

(3)—*Occupancy tenure, Nature of—N.W.P. Rent Act* (XII *of* 1881), *s.* 9.—Occupancy tenure itself is the creation of Statute, and as such governed and regulated by the restrictions which the statutory law itself creating the tenure has imposed upon such rights. Those restrictions are contained in s. 9 of the Rent Act of which the last paragraph, whilst laying down that such tenures are to devolve as if they were land, subjects such devolution to the restriction of rendering it available only to lineal descendants of the original occupancy tenant, and, in the case of collateral relatives, to those who take part in the cultivation of the land to which such occupancy right related. DAYA RAM v. UDAI SINGH, **A.W.N. 1887, 298.**

(4)—"*Right of occupancy*" *and* "*right to occupy,*" *distinction between.*—A right of occupancy must not be confounded with a right to occupy. Those two rights may co-exist in the same person, as when an occupancy-tenant himself or by his servants, cultivates his occupancy-holding. Or, those two rights may be vested in two different persons, the right of occupancy being vested in the occupancy-tenant, and the right to occupy being vested in his tenant during the currency of the latter's tenancy. In the latter case, the position is similar in some respects to the position of a proprietor who lets his land to a tenant, the proprietary right remaining vested in the landlord and the right to occupy the land vesting in the tenant. KHIALI RAM v. NATHU LAL, **15 A. 219, F.B.=A.W.N. 1893, 125.** [*R.*, 29 A. 129=A.W.N. 1906, 300=3 A.L.J. 731.]

(5)—*Right of occupancy at fixed rates—*"*Ancestral property*"—*Act* XII *of* 1881 (*N.W.P. Rent*), *s.* 9.—A right of occupancy at fixed rates is "property" within the meaning of s. 9 of the Rent Act; and under Hindu law, the sons take a vested interest in it by birth. MAHABIR PRASAD v. BASDEO SINGH, **6 A. 234=A.W.N. 1884, 47.**

(6)—*Suit for proprietary rights—Proof as to occupancy rights—Duty and procedure of Court.*—If, in an action for proprietary right, the evidence tendered only establishes the plaintiff's right not to ownership but his right to occupancy tenure, the Court should go into that question and decide it, as the claim to proprietary title is one to a permanent title or

Right of Occupancy—continued.

——1.—General—*continued.*

status of some kind in the land and covers a claim to occupancy rights. NIHAL v. HUSHIARA, **4 P.R. 1882, Rev.**

(7)—*Occupancy right in Assam—Pykes—Their rights and privileges.—Held* that the defendant in the suit—a pyke—was not liable to ejectment; the rights and privileges of such tenants explained and discussed. DINABUNDHU SURMA v. BODIA KOCH, **15 C. 100.**

(8)—Luthbundi—*What is—Right of occupancy.*—The tenure *luthbundi* had been created by custom in order to induce men to spend their capital in bringing waste land under cultivation which the proprietor could not effect either from want of capital or energy, and the man who supplied the means and had in fact given his money and brought labourers for that purpose was the man entitled to be considered *luthbundi.* It was immaterial whether he personally used the instrument necessary for the work and carried the mud and stones for the *luths* or small embankments for the storage of water. *Held luthbundi* had rights of occupancy in the land which he had reclaimed from waste. MOOSA KHAN v. MAHOMED NOWRUNG KHAN, **24 P.R. 1871.** [*F.*, 40 P.R. 1901=93 P.L.R. 1901; *R.*, 6 P.R. 1900.]

(9)—*Occupancy tenant—Lease—Right of lessee to hold possession—Absconding of occupancy tenant—Right of Occupancy—Abandonment.*—A tenant having a right of occupancy can create a lease and the lessee from him is entitled to hold the land under the terms of the lease. If the zemindar, who is entitled to receive the rents of the land from the ryots having the right of occupancy do eject their lessees, the latter are entitled to recover possession under the terms of their lease, the zemindar being entitled to nothing but the amount of rent which the ryots who hold from him immediately have agreed to pay. [*Appr.*, 15 A. 219=A.W.N. 1893, 125.] Even if the zemindar thinks that the ryot has absconded, that would not give him a right to take possession of the land without the intervention of the law. The mere fact of a man taking his house from one village and going to another is no proof of his having absconded and given up the land, nor would such an act on his part entitle the zemindar to treat the land as if deserted, and allow him to enter into possession of it. JAMIR GAZI v. GONEYE MUNDUL, **13 B.L.R. 278, Note=12 W.R. 110.**

(10)—*Occupancy-tenant—Proprietor—Right to cut trees.*—The plaintiff, a tenant with rights of occupancy, sued for the value of the trees and grass cut and taken away by the defendants, proprietors. The proprietors had on several occasions attempted to exercise their asserted rights, but the result of the litigation that ensued had invariably been favourable to the plaintiff. In the *wajib-ul-arz* of the village where the land in suit was situated it was recorded that a tenant with rights of occupancy

Right of Occupancy—continued.

——1.—General—*continued.*

might cut down trees with the consent of the landlord for specified purposes. But there was no mention of the rights of proprietors. *Held,* that in respect of this suit, the proprietors had not the right, without plaintiff's consent, to enter upon the land occupied by him and take therefrom trees and grass growing on it. *Quære*:—Whether proprietors, when there is an entry in the *wajib-ul-arz* limiting the right of cultivators as to felling trees growing on the land they occupy, have as owners, the right to cut trees without the consent of the cultivators? KALIAN DAS v. BUTA, **61 P.R. 1873.** [*F.*, 61 P.R. 1881, 9 P.R. 1904, Rev.=45 P.L.R. 1905, 52 P.R. 1906=102 P.L.R. 1906.]

(11)—*Occupancy rights in land re-appearing after submersion—Relinquishment—Estoppel.*—In the absence of a custom to the contrary, a hereditary cultivator of land which is swept away, by, or submerged in, a river, does not lose his rights of occupancy therein, if it re-appears on the same site. And where the tenant is not estopped, he has a legal right to bring a suit to recover the land, if he has lost it involuntarily, within 12 years from his cause of action. A portion of lands held by a hereditary tenant was submerged for about 2 years, and then re-appeared in the same site. The tenant thinking that his rights were lost by submersion, remained quite, while the proprietors entered into possession and arranged for its cultivation by tenants-at-will. The portion that was not submerged became the *banjar* and pasture ground of the village, but the tenant continued to pay revenue thereon, while the revenue on the submerged portion was paid by the proprietors both during the period of submersion and afterwards. In a suit for the land recovered from the river, brought by the tenant about 8 years after the proprietors took possession of it: *held* that the fact that the tenant allowed the proprietors to take possession of the land on its re-appearance, without any objection, and had not even made a demand for it for a period of about 8 years, did not amount to a voluntary relinquishment of his claim, inasmuch as the tenant had all along been under the impression that all his rights were gone for ever on the land being submerged. *Held* also that the circumstances of the case did dot estop the tenant from asserting his claim, and that he was entitled to recover the land. SULTAN KHAN MALIK KHAN AND MAHOMED KHAN v. SYAD MAHOMED SHAH, **59 P.R. 1877.** [*F.*, 127 P.R. 1879, 8 P.R. 1901, Rev.=54 P.L.R. 1901, 97 P.R. 1902=121 P.L.R. 1902; *Appl.*, 1 P.R. 1880; *Appr.*, 96 P.R. 1879.]

(12)—*Occupancy rights, loss of, on submersion of land—Custom.*—According to the custom of *Mouza* Kachwala, Tahsil and Zilla Shahpur, the rights of a hereditary cultivator are lost by diluvion of the land and are not revived on subsequent re-appearance of the land. MIAN MAHOMED SHARAF v. KHODA BUKSH, **89 P. R. 1877.** [*R.*, 152 P.R. 1883.]

***Right of Occupancy*—continued.**

——1.—General—*continued.*

(13)—*Landlord and tenant—Settlement—Forced compromise in respect of occupancy right, whether valid.*—Where a tenant who has been influenced by the strong opinion held by the Settlement Officer that occupancy rights should be much restricted, enters into a compromise or agreement with the owners, protesting against it all along and never really accepting it, such agreement cannot be considered sufficient to extinguish his right of occupancy. KRIPA SINGH v. KHAN SINGH, **67 P. R. 1880.** (13 P.R. 1874. *F.*; 77 P. R. 1877, *D.*)

(14)—*Agra Tenancy Act* (II *of* 1901), *s.* 32—*Division of occupancy holding—Suit for declaration of right—Suit maintainable.*—A suit for a declaration of right to a share in an occupancy holding is maintainable. A declaration as to his rights obtained by one co-sharer against the other co-sharers does not and cannot effect any division of the holding or distribution of the rent thereof. NAJIB ULLAH v. GULSHER KHAN, **6 A.L.J. 343, F.B.=31 A. 348=1 Ind. Cas. 594.** (30 A. 90, *F.*; 29 A. 66, *Overruled.*) [*R.*, 7 A.L.J. 918.]

(15)—*Landlord and tenant—Relinquishment of land by permanent occupancy tenant—Grant of same by zemindar to another such tenant—Inclusion of land granted in tenant's patta—Nature of grant made.*—Where a permanent occupancy tenant relinquished the land held by him and the zemindar granted it to another such tenant and caused entry of the land to be made in the same patta as the lands from time immemorial in the enjoyment of such tenant, in the absence of proof to the contrary, the presumption was that such tenant held the land so granted as a permanent occupancy tenant. SRI RAJAH VENKATA NARASIMHA APPA ROW BAHADOOR v. NOOTULAPATE PARVATULU, **13 M.L.J. 81.**

(16)—*Occupancy holding, if devisable—Raiyati holding, if severable from occupancy right—Non-occupancy holding if heritable and transferable—Conflict of authorities—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 21, 22, 178 (3) 183, *illustrations.*—The state of the authorities on the question whether a non-occupancy holding is heritable or not is not satisfactory. The Full Bench in 34 C. 516 leaves the question undecided (24 C. 207, *R.*). *Quære*:—Whether an occupancy right may be severed from the tenancy right or whether in no circumstances is such a separation possible except to the extent and in the manner indicated in s. 22 of the Bengal Tenancy Act. UDAY CHANDRA DAS BAIRAGI v. HARI DAS BAIRAGI, **13 C.W.N. 937=3 Ind. Cas. 417=10 C.L J. 608.** (4 C.W.N. 569, *Doubted.*)

(17)—*Jurisdiction—Civil or Revenue Court—Suit by occupancy tenants to recover their holding from the possession of their landlords—Their getting share of the missing brother—Revision—Pleader's fee not to be allowed when new rules are not complied with.*—*Held*, that a suit by occupancy tenants to recover their holding from the possession of their landlords, who are in reality cultivating the land as tenants at will on behalf of the occupancy tenants but are denying the existence of their occupancy rights, is entertainable by a Civil and not a Revenue Court. *Held*, also, that on the Revision side the Chief Court is not justified in interfering with a decision of the Courts below unless it is substantially an unjust one; so the lower Court's order allowing the claimants the share of their missing brother, although not civilly dead, is not to be interfered with on revision. *Held*, further, that pleader's fee cannot be allowed where the Rules contained in the correction slip No. 225, page 340, Punjab Chief Court Rules and Orders, Vol. I, have not been complied with. AMIR DIN v. MEGHA, **17 P.W.R. 1911=9 Ind. Cas. 744.**

(18)—*Notice of ejectment—Suit to contest—Claim of tenant to status of proprietor—Competency of Court to decide on questions both of ownership and occupancy rights.*—Plaintiff, on service of notice of ejectment, filed the present suit claiming entry of his name in the proprietor's column and also praying that his cultivating possession may not be disturbed. *Held* that, as the present case had arisen on notice of ejectment, and the plaintiff had sued to contest it, asking also in his plaint that his cultivating possession should be maintained, there was no reason why his claim should not be treated as a claim both for ownership and occupancy rights. SRI RAM v. RAMBHAJ, **105 P.R. 1884.** (55 P.R. 1868, 90 P.R. 1882, *R.*)

(19)—*Resident son-in-law—Hereditary tenancy—Succession—Tenancy Act—Custom.*—Found that no custom was in force in the village of Dodha, *before* the introduction of the Tenancy Act, whereby a resident son-in-law was entitled to succeed to the occupancy rights of his father-in-law. BISHEN SINGH v. GULABA, **44 P.R. 1885.** (47 P.R. 1877, 64 P. R. 1877, 34 P.R. 1883, F.B., *R.*)

(20)—*Sister of a deceased occupancy tenant subject to Muhammadan Law, whether entitled to a share in the estate of the deceased—Punjab Tenancy Act*, s. 59.—On the death of one N, his sister M, sued his widow and another for a third share in her brother's estate as due to her in accordance with the principles of Muhammadan Law. Part of the estate comprised occupancy rights in certain gardens. As regards this, the first Court dismissed the plaintiff's claim holding that the deceased having been an occupancy tenant in the gardens, the succession to his rights therein must be governed by s. 59 of Act XVI of 1887 and not by custom or Muhammadan Law, and that under that section in the absence of male lineal descendants, the widow alone was entitled to succeed. On appeal plaintiff contended that she was entitled to a third share in the trees on the land even though she could claim no right to a share in the occupancy rights in the

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—1.—General—*continued.*

lands themselves and her contention was upheld by the Divisional Judge on the ground that the said s. 59 of the Tenancy Act related only to the succession to a right of occupancy in land, while the trees were governed by the ordinary rule of inheritance applicable to the parties. (15 P.R. 1892, F.B., 46 P.R. 1893, *D.*) On second appeal held, the rights in land of an occupancy tenant extend as well to the trees on the land, the rights to such trees being inseparable from the rights possessed by the tenant in respect of the land itself and therefore under s. 59 of the said Act the deceased's widow was alone entitled, to succeed not only to the land but also to the trees growing thereon. MALI MUHAMMAD v. MARIAM BI, **52 P.R. 1906=102 P.L.R. 1906.** (61 P.R. 1873, 4 P.R. 1875, 9 P.R. 1904, Rev., *R.*)

(21)—*Succession to—Presumption from long possession.*—In a case of succession to occupancy rights by the collaterals of the last tenant. *held* that, where the father of the deceased tenant, who was entered in the annual papers as a hereditary cultivator, is shown to have been in possession of the holding for 50 years, it may be presumed that it descended to the father from the grandfather. SIPADAR KHAN v. KADHERU, **101 P.R. 1908=166 P W.R. 1908 =11 P.L.R. 1909=4 Ind. Cas. 691.**

(22)—*Succession to—Co-mortgagees with distinct specified shares under one deed acquiring occupancy rights on motgagor's failing to redeem within a certain time—Difference between a joint tenant and tenant in common—Right of survivorship* — Jus-accrescendi.— By a deed dated 12th March, 1862, land was mortgaged to K. N. and K. S. in specified shares, each mortgagee exercising a third share in the entire property. It provided that, failing redemption within two years, mortgagees will acquire occupancy rights in the land. K died in 1867 and his interest passed to his three sons S, S and H. In the redemption suit of 1878, it was decided that the mortgagees had acquired occupancy rights, and that the mortgagors were entitled to merely redeem the mortgage *qua* their proprietary rights in the land. N also died about this time, and his sons succeeded to his share. In 1885, the holding was entered in the Revenue papers as joint between the mortgagees. On the death of K. S. in 1905, his brother H. and the descendants of S. and S. sued to succeed to the holding of K. S. *Held*, that the suit fails, as, under the above circumstances, the tenancy was not joint, but held in common, and though, in the case of a joint tenancy, on the death of one of the joint tenants, his interest does not pass to the landlord, this principle is not applicable in the case of the death of one of the several tenants in common, so as to entitle the other tenants to succeed to his interest by right of survivorship as by *jus accrescendi.* Difference between a tenant in common and joint tenant explained. *Obiter.*—The word "occupied" in s. 59 of the

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—1.—General —*continued.*

Punjab Tenancy Act (XVI of 1887), means "actually occupied" and does not include an occupation, which is merely such by implication of law. KHAN SINGH v. HARDIT SINGH, **46 P.W.R. 1907=100 P.R. 1908.** (209 P. R. 1894, *F.*; 2 P.R. 1867, 57 P.R. 1868, 36 P.R. 1870, 159 P.R. 1879, 4 P.R. 1880, 180 P R. 1882, 9 P.R. 1891, Rev., 6 P.R. 1892, *R. & D.*)

(23)—Kabzadarj *without right of transfer—Decree of Settlement Court—Mortgage of occupancy holding—Transfer in breach of terms of decree, validity of—Transfer of Property Act, s. 6—Contract Act, s. 23.*—Where the plaintiff, who held certain lands under a decree of the Settlement Court granting "*Kabzadarj*" without the right of transfer, mortgaged them with possession to the defendant, and subsequently brought a suit to recover possession thereof on the ground that the mortgage being of an occupancy holding was invalid, *held*, that the mortgage in breach of the conditions of the settlement decree was not a transfer "for an illegal purpose" within the meaning of s. 6 of the Transfer of Property Act, or "for an unlawful object or consideration" within the meaning of s. 23 of the Contract Act. *Held* further, that the condition forbidding transfer contained in the settlement decree was only for the benefit of the superior proprietor, and that the plaintiff was not entitled to the assistance of the Court in undoing his own act. HIRDAY BEHARI v. PARAG TIWARI, **14 O.C. 144.** (7 A. 878, 24 M. 401, *D.*; 24 B. 62, 26 M. 156, *R.*; 2 O C. 252, *F.*)

(24)—*Occupancy-holding—Mortgage — Mortgagee sub-letting holding to the mortgagor—Rent, Recovery of.*—Where an occupancy tenant, after usufructuarily mortgaging his holding, is put in as a sub-tenant, no rent can be recovered from him. MUSAMMAT MOHAN DEVI v. JAHANGIR MAL, **9 Ind. Cas. 605.** (29 A. 327, A.W.N. 1907, 76, 4 A.L.J. 306, *Appl.*)

(25)—*Occupancy-tenant—Mortgage of tenancy by tenant—Relinquishment of tenancy during subsistence of mortgage — Finding — Second appeal—Findings of fact—Practice—Mutation —Evidence of possession.*—An occupancy tenant, who has mortgaged his holding, cannot relinquish it during the subsistence of the mortgage and thereby derogate from his own grant. The mortgagee is entitled to remain in possession until the mortgage is redeemed or the tenancy is legally determined. In second appeal the High Court is bound to accept a finding of fact and cannot arrive at a contrary finding. An order as to mutation of names in favour of certain persons is not sufficient evidence of the actual period of possession by such persons. AMIR ALI v. KARAM ALI, **9 Ind. Cas. 456.**

(26)—*Landlord and tenant—Relinquishment by tenant—Occupancy holding mortgaged with possession.*—An occupancy tenant, after mortgaging his holding with possession, has no

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—1.—General—*continued.*

power to relinquish it in favour of the zemindar. CHHOTE LAL v. SHEOPAL SINGH, **8 A.L.J. 117 = 9 Ind. Cas. 217.** (27 A. 82, *F.*)

(27)—*Occupancy-holding—Non-transferability, question of, if may be raised by assignee of holding pending mortgage suit—Consent of landlord obtained subsequently to filing written statement—Civ. Pro. Code, (Act V of 1908), O. 5, r. 8.*—A purchaser of an occupancy-holding from the raiyat, after a decree for sale has been passed in favour of a mortgagee of the holding but before sale thereof, is bound by the sale, both because a mortgagor and consequently an assignee from him cannot be allowed to deny the mortgagee's title and also by reason of the operation of the rule of *lis pendens*. The rule of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale. The purchaser cannot be allowed to raise the question of non-transferability of the holding, when in his written statement he stated that his purchase had not been recognised by the landlord, by showing that such recognition on the part of the landlord has been subsequently obtained. An occupancy raiyat is estopped from setting up, as between himself and a mortgagee of the holding the invalidity of the mortgage. SHYAMA CHARAN BHATTACHARYA v. MOKHUDA SUNDARI DEBI, **15 C.W.N. 703.**

(28)—*Landlord and tenant—Non-transferable occupancy-holding—Mortgage of holding—Subsequent sale of holding in execution of rent-decree obtained by co-sharer landlord—Subsequent private sale—Title—Right of auction-purchaser to dispute transferability of holding.*—A non-transferable occupancy-holding was mortgaged to plaintiff. Defendant No. 1, a co-sharer landlord, subsequently purchased, in execution of a money decree for rent, the interest of some only of the tenants. After that, the tenants sold the holding to the plaintiff, the mortgagee. The plaintiff sued to recover possession. *Held*, that the defendant No. 1, purchased only the right, title and interest of the judgment-debtors whose representative he was, and that he could not raise the question of the transferability of the holding which could not have been raised by the tenants. KAILASH CHANDRA v. AKHOY NARAIN SOW, **10 Ind. Cas. 530.**

(29)—*Occupancy-holding—Mortgage—Possession delivered to mortgagee—Suit by mortgagor to get back possession without payment of money received from the mortgagee—Whether maintainable—Void contract—Refund of consideration.*—A usufructuarily mortgaged his occupancy holding to B. and delivered possession. The mortgage of the holding was void in law. The mortgagor sued for recovery of possession without offering to re-pay the mortgage-money: *Held*, that he could not recover possession of the property without refunding to his mortgagee the money he had taken as the consideration of the mortgage. RAM NIHORA RAI v. MANBODH UPADHEYA, **10 Ind. Cas. 248.** (A.W.N. 1888, 128, *F.*; 19 A. 35, *D.*)

(30)—*Occupancy holding, non-transferable—Usufructuary mortgage by tenant—Tenant remaining on land as sub-lessee of portion of holding and paying rent—Abandonment—Ejectment.*—The execution by a tenant of a mortgage of his non-transferable occupancy holding does not by itself amount to an abandonment of the holding, because it is only on the assumption that the tenancy continues in operation that the mortgagee can have any subsisting interest in the land. Where an occupancy raiyat executed a usufructuary mortgage of his holding, but continued to pay rent to the landlord and remained in possession of a portion of the holding as a sub-tenant under the mortgagor: *Held*—that the landlord was not entitled to treat the raiyat as a trespasser and sue him in ejectment. CHOWDHURY MOHADEO PERSHAD v. SHEIKH PACHKARI, **16 C.W.N. 322.** (10 C.W.N. 499, 10 C.W.N. 719, 4 C.L.J. 306, *R.*)

(31)—*Occupancy-holding—Mortgage—Subsequent sale of portion of holding with landlord's consent—Suit on mortgage—Purchaser if may question validity of mortgage—Estoppel—Evidence Act, s. 115.*—A raiyat mortgaged his occupancy holding to A; subsequently a portion of the holding was, with the landlord's consent, purchased by B, who, later on took a fresh settlement from the landlord at an enhanced rent: *Held* (*Chitty* and *Chatterjee, JJ., Coxe, J., contra*)—That, in a suit by the mortgagee, B was estopped from questioning the validity of the mortgage. RADHA KANT CHUCKERBUTTY v. RAMANANDA SHAHA, **16 C.W.N. 475.** (12 C.W.N. 720, *D.*; 14 C.W.N. 779, *R.*)

(32)—*Landlord and tenant—Non-transferable occupancy-holding—Sale in execution—Decree for share of rent by co-sharer landlord—Sale whether irregular or null—Legality of transaction—Law as understood when transaction took place.*—A non-transferable occupancy-holding cannot be sold at the instance of a landlord who has obtained a decree for rent for his share only. (24 C. 355, 1 C.W.N. 396, 26 C. 937, 3 C.W.N. 742, *R.*) But if a sale in execution of a decree by one of several joint landlords for his share of the rent takes place in fact, it is not necessarily a nullity but is merely irregular, and till the sale has been successfully impeached by appropriate proceedings in execution, it must be treated as a valid sale and cannot be set aside by a separate suit. KHODA BAKSH v. SADER PRAMANIK, **10 Ind. Cas. 417.** (26 C. 727, 3 C.W.N. 586, 9 C.W.N. 972, 35 C. 61, 11 C.W.N. 1011, 6 C.L.J. 320, *R.*)

(33)—*Tank used for rearing of fish—Tank not appurtenant to land—Act X of 1859, s. 6.*—Where a tank appears to be used only for the preservation and rearing of fish, and it does not appear to have formed part of any grant of land

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——**1.—General**—*continued.*

or that it can in any way be considered as appurtenant to any land, the provisions of Act X of 1859 with respect to acquiring a right of occupancy do not apply to such tank. SIBU JELYA v. GOPAL CHANDRA CHOWDHRY, **13 B.L.R. 423, Note = 19 W.R. 200.** [*R.*, 21 W.R. 386 = 13 B.L.R. 416, 8 C.W.N. 804 = 31 C. 937.]

(34)—*Enhancement of rent—Grounds must be specific.*—The grounds of the notice of enhancement must be specific so as to show exactly what the grounds are, on which the plaintiff seeks enhancement. KALI CHANDRA CHOWDHRY v. RATAN GOPAL BHADURI, **4 B.L.R. App. 62, Note = 11 W.R. 571.** (9 W.R. 200, *F.*; 5 W.R. Act X, 10, 6 W.R. Act X, 87, *R.*) [*Appr.*, 4 B.L.R. App. 61 = 21 W. R. 442, Note.]

(35)—*Suit for enhancement of rent—Defendant with occupancy rights under s. 6 of the Tenancy Act—Plea of holding such rights under s. 5, cl. 1—Presumption of holding in succession from long occupation.*—In this suit for enhancement of rent, the first Court omitted to make any enquiry whether the defendant's claim to an occupancy status under cl. 1, s. 5 of Act XXVIII of 1868 was well-founded or not, and proceeded only on its finding that he was recorded at the Settlement as holding occupancy rights under s. 6. On appeal to the Deputy Commissioner, the defendant urged that he was entitled to occupancy rights under s. 5, but as he could not say when his grandfather died, it having been long before his memory, though he was fifty years of age, the Deputy Commissioner held that though he and his father appeared to have held rights of occupancy, paying only the land revenue and cesses, the nature of his grandfather's tenure could not be ascertained, and, as the plaintiffs denied that the defendant's grandfather had possession of the land, the Deputy Commissioner considered that the claim to right of occupancy under s. 5, cl. 1 of the Tenancy Act must fail. *Held* that the Deputy Commissioner had not properly disposed of the appeal to his Court. If the defendant's father were recorded as occupancy tenant in 1842, there being no evidence forthcoming from which it might be concluded that he was the first tenant, there may be a presumption that he succeeded his father in the holding, and that his father, unless the contrary can be shewn, held the land on similar terms; and, if again it was inferable from the evidence that the defendant's ancestor settled with the founders of the village, he might be entitled to a right of occupancy under another clause of s. 5. PALTU v. MUHAMMAD HUSAIN, **62 P.R. 1882.** [*R.*, 90 P.R. 1883, 154 P.R. 1883, 56 P.R. 1906 = 101 P.L.R. 1906; *Appr.*, 101 P.R. 1908 = 11 P.L.R. 1909 = 4 Ind. Cas. 691.]

(36)—*Tenant by right of occupancy, death of—Possession by tenant's brother-in-law—Acquiescence by landlord—Recognition of association with deceased tenant.*—A certain person, the brother-in-law of a tenant with a right of occupancy, was permitted by the landlord to occupy a land, house and grove for nine years subsequent to the death of such tenant. *Held* in a suit by the landlord to eject such person, that the acquiescence by the former in the latter's occupation of house and land and especially of the garden, must be regarded as a recognition of his having been associated with the deceased tenant. CHATOOR SINGH v. MUSSUMAT HEERA KOOER, **5 N.W.P. 191.**

(37)—*Patta—Tenant under pattadar—Presumption of occupancy right.*—There is no statutory-rule that a ryot holding under a pattadar is a tenant from year to year. The grant of a patta by the Government could not have the effect of destroying the occupancy rights that may exist at the time of the grant. The use of the word "Porakudi" would not in itself denote the absence of occupancy right. With whomsoever the settlement may have been made by the Government, it had no intention whatever to affect the existing right of any class of persons. The bare fact that a man is the pattadar of the land is not sufficient to raise the presumption that the cultivators of the patta lands either originally are tenants from year to year under the mirasidar or subsequently agreed to hold as such. VENKATACHALA GOUNDEN v. RUNGARATNAM AIYAR, **M.W.N. 1913, 434 = 13 M.L.T. 450 = 24 M.L.J. 571.**

(38)—*Joint tenancy— Succession to share of deceased tenant in occupancy tenure—Survivorship.*—On the death of a joint tenant, his share of the occupancy tenure passes by survivorship to the surviving joint tenant. The mere circumstance that the name of the widow of the deceased tenant may have been associated with that of the surviving joint tenant when mutation was effected on his death, could not by itself enable the proprietor to come in and claim a resumption of the share of the deceased joint tenant. IMAM DIN v. MUSSAMMAT MAHABO, **180 P.R. 1882.** (57 P.R. 1868, 36 P.R. 1870, 4 P.R. 1880, *R.*) [*R.*, 145 P.R. 1890, 109 P.R. 1894, 6 P.R. 1902, Rev. = 11 P.L.R. 1903, 100 P.R. 1908; *F.* 9 P.R. 1891, Rev.]

(39)—*Joint occupancy holding—Right of survivorship.*—The rule of survivorship applies to two widows who were joint tenants of an undivided holding, and the survivor can claim occupancy rights in the whole. MAN SINGH v. MUSSAMMAT ZEHRO, **9 P. R. 1891, Rev.** (36 P. R. 1870, 4 P. R. 1880, 180 P. R. 1882, *F.*) [*R.*, 100 P. R. 1908, 6 P. R. 1902, Rev. = 11 P. L. R. 1903, 109 P. R. 1894, F.B.]

See ABATEMENT OF RENT, Marsh 325.

Occupier of a factory—*See* ACT XV OF 1881, s. 14, 10 Bom. L. R. 38.

See BEN. ACT X OF 1859, s. 6, 31 C. 1921 = 8 C.W.N. 860 = 31 I. A. 17, P.C.

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——1.—General—*continued.*

Right of Occupancy, abandonment of—*See* BEN. ACT X OF 1859, s. 6, 3 B. L. R. App. 123.

See BEN. ACT X OF 1859, ss. 6 and 7, 18 C. 349 = 18 I. A. 27.

Ejectment from homestead land — Raiyat with right of occupancy in agricultural land in the village in which he has homestead land —Right of settled raiyat—*See* BEN. ACT VIII OF 1885, ss. 21, 178, 182, 13 C.L.J. 255.

Purchase of — by co-sharer-landlord, effect of—*See* BEN. ACT VIII OF 1885, s. 22, 9 C.W. N. 249, F.B. =1 C.L.J. 1= 32 C. 386.

Transfer of—Transferable by custom—Transferee, Right of—*See* BEN. ACT VIII OF 1885, s. 73, 24 C. 642.

Raiyat holding at fixed rates if acquires occupancy right—*See* BEN. ACT VIII OF 1885, s. 160, 13 C.W.N. 1025=2 Ind. Cas. 675=11 C.L.J. 98.

Applicability to suits pending when Ben. Act VIII of 1885 came into force—Agreement restricting—*See* BEN. ACT VIII OF 1885, s. 178, 14 C. 621.

Person entering into possession by permission of tenant—Subsequently claiming title in himself and obtaining recognition from landlord—Adverse possession—Limitation—*See* BEN. ACT VIII OF 1885, sch. III, art. 3, 10 C.L.J. 89= 3 Ind. Cas. 398.

Occupancy, forefeiture of—*See* BOM. ACT V OF 1879, s. 56, 1 Bom. L.R. 505, 24 B. 34.

Meaning of—*See* BOM. ACT I OF 1880, s. 5, 1 Bom. L.R. 436=23 B. 769.

Law governing succession to occupancy holding — *See* C. P. ACT XI OF 1898, s. 46, 3 N.L.R. 112.

See MAD. ACT VIII OF 1865, s. 12, 16 M. 271.

Pendency of suit in ejectment or appeal at the time of the coming into force of Act I of 1908—Liability of tenant to be ejected—*See* MAD. ACT I OF 1908, s. 6, 9 Ind. Cas. 160=9 M.L.T. 340.

See PUN. ACT XXVIII OF 1868, s. 5 (3), 94 P.R. 1880.

Alienation of occupancy rights— Right of collaterals of alienor—*See* PUN. ACT XVI OF 1887, ss. 53, 59, 60, 9 Ind. Cas. 292=52 P.L.R. 1911.

Sale of occupancy land by widow—Void—*See* PUN. ACT XVI OF 1887, s. 59 (3), 9 Ind. Cas. 339=54 P.L.R. 1911.

See U.P. ACT XVIII OF 1873, ss. 7, 9, 2 A. 735.

—in land sold in execution of decree, mortgage of— *See* U.P. ACT XVIII OF 1876, s. 25, 7 O.C. 312.

Right of Occupancy—continued.

——1.—General—*continued.*

Sale of occupancy right in execution of decree —*See* U.P. ACT XII OF 1881, ss. 2, 9, 4 A. 371, F.B.=A.W.N. 1882, 41.

Occupancy tenant and ex-proprietary tenant not same—*See* U.P. ACT XII OF 1881, s. 7, 20 A. 219, F.B.=A.W.N. 1898, 47.

Sale of occupancy right in 1888—Sale questioned in 1908—Cause of action—Forum—Limitation—*See* U.P. ACT XII OF 1881, s. 9, 8 A.L.J. 458.

Occupancy tenancy sold as fixed rate tenancy —Effect—*See* U.P. ACT XII OF 1881, s. 9, 8 A.L.J. 404.

Mortgage of—Death of tenant without heir—Lapse of tenancy to Zamindar—Effect on mortgagee—*See* U.P. ACT XII OF 1881, s. 9, 9 Ind. Cas. 51.

Usufructuary mortgage of occupancy holding —Subsequent relinquishment — Effect upon mortgage—*See* U.P. ACT XII OF 1881, s. 9, 8 A.L.J. 695.

Occupancy tenant—mortgage of holding—Suit for ejectment—Cancellation of mortgage before suit—*See* U.P. ACT XII OF 1881, ss. 9, 93 (*b*), 149, 7 A. 691=A.W.N. 1885, 205.

Transfer of—Perpetual lease by occupancy tenant—*See* U.P. ACT XXII OF 1886, s. 5, 2 O C. 292.

Mortgage of occupancy holding—Suit by mortgagor to recover possession—Illegal contract—Restitution of benefit—*See* U.P. ACT II OF 1901, s. 21, 8 A.L.J. 931.

Occupancy holding—Mahomedan widow succeeding to her husband—Relinquishment by widow to the prejudice of the reversioner—*See* U.P. ACT II OF 1901, ss 22, 82, 9 Ind. Cas. 894.

Lease of—Under the N.W.P. Tenancy Act—A sub-lease of occupancy holding for more than five years is not void but voidable—*See* U.P. ACT II OF 1901, ss. 25 and 31, A.W.N. 1905, 53 =2 A.L.J. 156.

Effect of temporary absence of tenant on—*See* U.P. ACT II OF 1901, s. 41, 1 Ind. Cas. 70.

See BURDEN OF PROOF—LANDLORD AND TENANT, 15 M. 95.

Portion of land, in which defendant claimed right of occupancy—Onus—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 18 C. 349, P. C.=18 I.A. 27.

Transferee of holding, if may apply to set aside execution sale, when holding is not transferable—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 13 C.W.N. 652=3 Ind. Cas. 461.

Occupancy tenant—Mortgage of dwelling-house—Decree for sale of such house unlawful—*See* CIV. PRO. CODE, 1908, s. 60, 8 A.L.J. 190 =33 A. 136.

***Right of Occupancy*—continued.**

——1.—General—*concluded.*

Suit for possession of—Court Fees Act, s. 3, cl. 11 (*e*), applicability of—*See* COURT-FEES ACT, 1870, s. 7, cl. 11 (*e*), 32 C. 268.

Title by purchase from occupancy raiyat—Purchase at rent sale—Competition between rival purchasers — *See* EJECTMENT, SUIT FOR, 13 C.L.J. 479.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 1 C.L.R. 293.

See FISHERY, 4 C. 961.

Widow—Succession to an—Whether she can make absolute disposition of tenancy—*See* HINDU LAW—WIDOW, 5 N.L.R. 172.

Minor Inam—Grant out of Zemindari—Presumption as to nature of grant—Evidence necessary to show landlord's ownership of occupancy right—*See* INAM, 10 M.L.T. 54=21 M. L.J. 803=11 Ind. Cas. 545.

Usufructuary mortgage of occupancy holding —Relinquishment in favour of zemindar—*Ex parte* decree against mortgagee declaring him tenant—Effect of decree—*See* JURISDICTION OF CIVIL COURTS, 8 A.L.J. 940.

Sale of occupancy rights with zemindar's consent—Acceptance of rent by zemindar from vendee—Contract Act—*See* JURISDICTION OF CIVIL COURTS, 7 A. 878, F.B.=A.W.N. 1885, 260.

Declaratory suit that occupancy tenants are entitled to cut trees for making agricultural implements only — *See* JURISDICTION OF REVENUE COURTS, P.L.R. 1900, p. 165.

Suit for removal of structures erected by mortgagee of occupancy tenant—Limitation. —*See* LIMITATION ACT, 1908, arts. 32, 120, 8 A.L.J. 914.

Suit by occupancy tenant against landlord for possession of occupancy holding from which the tenant has been dispossessed—Limitation —*See* LIMITATION ACT, 1908, art. 142, 133 P.L.R. 1911.

Sale of—*See* MAHOMEDAN LAW — PRE-EMPTION—NATURE AND EXTENT OF RIGHT, 6 B.L.R. 386=14 W.R. 469.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 106 P.R. 1882.

Homestead land—Right of—*See* RECORD-OF-RIGHTS, 9 Ind. Cas. 804.

See REGISTRATION ACT, 1908, s. 49, 2 N.W.P. 35.

See RES JUDICATA—MATTERS IN ISSUE, 18 C. 647.

See SALE—SALE FOR ARREARS OF RENT—INCUMBRANCES, 5 B.L.R. App. 18=13 W. R. 410.

See TRESPASSER, 1 A. 448.

***Right of Occupancy*—continued.**

——2.—Acquisition of Right.

(1)—*Act* X *of* 1859 *—Classes of ryots—Ryots holding from Permanent Settlement at changing rates.*—Act X of 1859 provides for two classes of ryots and no more, namely, ryots who have held and cultivated the land for a period of 12 years, and ryots who have held at fixed rates from the time of the Permanent Settlement. The Act contains no trace of an intention on the part of the Legislature to provide for ryots who have held since the time of the Permanent Settlement at changing rates. DINOBUNDHOO DEY v. RAM DHONE ROY, **9 W.R. 522.**

(2)—*Right of occupancy—Acquisition—Occupation to be continuous for* 12 *years.*—To enable a tenant to acquire a right of occupancy by 12 years' occupation, there must have been continuous occupation. DEBIA v. BRIJ LAL, **3 N. W. P. 50.**

(3)—*Act* VIII *of* 1869 (*B.C.*), *s.* 6—*Nature of continuous possession for twelve years—Joint at inception becoming sole ultimately.*—The continuous possession for twelve years, which is the subject of s. 6 of the Rent Law, must be a possession under the one and the same right. This right might be, in its inception, joint with other persons; for if, by the death of the co-sharers, it ultimately becomes a sole right in a particular person, still it would be continuous throughout in its nature. A. T. FORBES v. RAM LALL BISWAS, **22 W.R. 51.**

(4)—*Continuous possession—Occupancy right —Execution creditor—Bankruptcy—Act* XIV *of* 1859, *s.* 21—*A right of occupancy can be constituted by continuous possession only.*—Where a decree-holder, two years after he obtained his decree, applied to the Bankruptcy Court to be registered as a creditor, the judgment-debtor having been adjudicated a bankrupt meanwhile, and again in the same year applied to the Court for payment of a dividend, *held*, in an application for execution subsequently made, that the first proceeding was a *bona fide* one within the meaning of s. 21 of Act XIV of 1859. BILLINGS v. THE BANK OF UPPER INDIA, **4 P.R. 1872.** [*Appr.* 74 P.R. 1873.]

(5)—*Act* VIII *of* 1869 (*B.C.*) *s.* 6—*Right o occupancy.*—The right of occupancy acquired under s. 6, Act VIII of 1869 (B.C.) must be an occupancy of one and the same kind, that is to say, it must be an occupancy by the person pleading it or by his father or some other person from whom he inherits. In this case, the plaintiff and another had held a piece of land for five years under a potta granted to them both. Since the expiry of the term of that potta, the plaintiff had alone been in occupation for seven years. *Held* in a suit to recover possession of the same on the ground that the plaintiff had acquired a right of occupancy, that he had acquired no such right. SHEIKH MAHOMED CHAMAN v. RAMPRASAD BHAGAT, **8 B.L.R. 338=22 W.R. 52, Note.** [*R.*, 22 W.R. 51.]

(6)—*Act* X *of* 1859, *s.* 6—*Applicability to actual cultivators deriving profits from produce.*—The

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

benefits of s. 6, Act X of 1859, are not restricted to those who, with their own hands, till the soil, but extend to those who are *bona fide* actual cultivators in the sense that they derive the profits from the produce directly and are not middlemen who have no connection with the produce except by receiving the rents in cash or kind from those who do directly derive their profits from the produce. KALEE CHURN SINGH v. AMEEROODDEEN, **9 W.R. 579.**

(7)—*Occupancy — Presumption — Permanent settlement.*—Payment of a uniform jumma for the land in dispute must be clearly found before the defendant can have the benefit of the presumption of occupancy from permanent settlement. ORMON KHATOON v. ROBERT SAVI, **1 W.R. 243.**

(8)—*Khas possession—Setting up title—Burden of proof—Stamp—Ticcadar.*—Where, after the expiry of the lease of a zemindari with all lands annexed thereto, the lessee delivered to the lessor all the properties comprised in the lease with the exception of some lands to which the lessee claimed a right of occupancy under a purchase from third parties who derived their title from the former zemindars, *held* that it was for the defendant to make out the special plea of occupancy right that he set up in defence. An objection that it was not competent to the lower appellate Court to call upon a party to supply a deficiency of stamp payable on a document which was admitted by the first Court without any objection, was overruled as having been made at a late stage. A ticcadar is bound to restore the lands to his zemindar in the same condition in which they were when the lease was granted. RAM SARUN SAHOO v. VERYAG MAHOTON, **25 W.R. 554.**

(9)— *Suit by tenant against landlord—Ouster*—Onus *of proof.*—The landlord is the proprietor of the estate ; and before a tenant can oust him by insisting on remaining on his land, without his consent, he must show that he had acquired by law some right to do so. SHEIKH KERAMOOLLAH v. SERAJUL HAQ, **23 W.R. 448.** [*D.*, 7 C.L.J. 152].

(10)—*Evidence — Admission by pleader—Hereditary holding*—Onus *of proof—Witness not believed—Documentary evidence.*—A statement by the defendant's pleader that L was the previous tenant and that L held the land after her son G, cannot be taken as an admission on the part of defendant of continuous hereditary holding as of right by the plaintiffs. It is for the plaintiffs to make out a continuous holding by them or by the persons under whom they claimed. A Judge who does not believe the evidence of certain mortgagors when they depose to the plaintiffs' hereditary occupancy, is not bound to take into consideration documentary evidence sworn to by the same witnesses. PHODY BISWAS v. FORBES, **18 W.R. 60.**

(11)—*Act* X *of* 1859, *s.* 6—*Right of occupancy—Evidence—Dakhilas—Termination of Ijara*

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

lease—Tenant's rights if affected—Act X *of* 1859, *ss.* 6 *and* 7—*Express stipulation—Tacit understanding.*—Dakhilas are not the only papers that can prove a right of occupancy under s. 6 of Act X of 1859. Under s. 6 of Act X of 1859, in order that a ryot may claim a right of occupancy, there must have been a continuous holding by him for 12 years. When this condition is satisfied, the fact that the term of the lease of the ijaradar, under whom the ryot has held, has determined, cannot affect the application of the section in his favour. A tacit understanding between the zemindar and the ijaradar that the latter should give up possession at the expiration of the ijara, cannot be considered an express stipulation under s. 7 such as can prevent the acquisition of occupancy rights by the ryot. GOLAM PANJA v. HURISH CHUNDER GHOSE, **17 W.R. 552.**

(12)—*Right of occupancy—Transfer—Tacking of possession—Act* X *of* 1859, *s.* 6—*Consent of zemindar.*—The right of occupancy stated in s. 6, Act X of 1859, is not a right which can be transferred except as laid down in the Act. Where a *jote* is transferred, even if the zemindar consented to the transfer, the transferee merely acquired a new *jote* on the same terms as the original tenure was held. He might in time acquire a right of occupancy, but he is not entitled, to make up his right of occupancy, to add the time during which his predecessor held it. TARAPRASAD ROY v. SURJOKANTO ACHARJEE CHOWDHRY, **13 B.L.R. 281, Note =15 W.R. 152.**

(13)—*Act* X *of* 1859—*Act* VIII (*B.C.*) *of* 1869—*Right of occupancy—Land used for dwelling-house.*—The provisions as to gaining the right of occupancy formerly contained in Act X of 1859, and now contained in Act VIII (B.C.) of 1869, are applicable to that portion of the tenure which is used for the purpose of a dwelling-house in the same way as to the portion which is used for cultivation. MOHESH CHUNDER GUNGOPADHYA v. BISHO NATH DOSS, **24 W.R. 402.**

(14)—*Ryots with tenures from date of Permanent Settlement—Conditions of their tenure—Enhancement of rent—Acquisition of occupancy rights—Reg.* V *of* 1812—*Reg.* VIII *of* 1819, *s.* 2—*Act* X *of* 1859, *ss.* 13, 19—*Special appeal—Facts, Question of.*—The condition and rights of those ryots at least whose tenures commenced since the date of the Permanent Settlement depend, not upon status, but upon contract and upon the laws and regulations which have been specifically enacted. The zemindars were in 1793, declared to be the proprietors of the lands and encouraged to cultivate their estates under the certainty that they would exclusively enjoy the fruits of their industry. But from 1793 to 1812, they were prevented from granting pottahs or leases to ryots for terms exceeding ten years and consequently could not, during that period, have created rights with hereditary rights of property in the

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

soil. After Reg. V of 1812, they were entitled to grant leases to all new ryots and to all ryots who were not entitled to demand a renewal of their leases, such as *Khoodkhast* ryots, at any rent and for any term that might specifically be agreed upon between them and such leases, whether in perpetuity or for any term, were binding upon the zemindars and their heirs or assigns, though not binding upon a purchaser under a sale for arrears of revenue and the Courts were to give effect to the definite clauses of the engagements and to enforce payment of the sums specifically agreed upon. By the retrospective effect of s. 2, Reg. VIII of 1819, leases in perpetuity or for terms, granted prior to 1812 were rendered valid and binding. When there is a fair case for enhancement of the rent and the statutory notice has been duly served, the ryot has an option of quitting his holding under s. 19. There is no authority for the position that a tenant who holds the land as a tenant under a lease, or as a tenant for an uncertain term, and pays rent for it for upwards of twelve years, gains a right by the Statute of Limitations to continue to hold the land after the expiration of the lease or the determination of the tenancy. In such a case, he holds during the tenancy under a contract expressed or implied, and does not gain a title by adverse holding. But for Act X of 1859, the ryot, assuming that he was not holding for a fixed term and that his tenancy commenced since the date of the Permanent Settlement, would have been liable to have his tenancy determined and to be turned out of possession at the end of 1267, if he and his landlord could not agree as to the rent to be paid for the future. But, if he had a right of occupancy, he was entitled to hold at a fair and equitable rate. The construction to be placed upon the expression "fair and equitable" rate of rent does not depend on the status of the ryot but upon the value of the produce and the cost of production. After the Permanent Settlement and before Act X of 1859, a right of occupancy was not acquired by a ryot merely by holding or cultivating land for a period of twelve years. If, when the right was created by the Act, it had been left to the arbitrary discretion of the zemindar to fix his own rent, he might have fixed it at any moment he pleased and might thus have frustrated the intention of the Legislature to give a right of occupancy. But s. 5 of Act, X of 1859, declared that ryots having rights of occupancy should be entitled to hold at "fair and equitable" rates, thus leaving it to the Courts to determine in every case of dispute what is a fair and equitable rate. To be fair and equitable it must be fair and equitable so far as both parties are concerned, not fair and equitable as regards the ryot and unfair and inequitable as regards the proprietor of the land, who, but for the Act, could have determined the old tenancy and relet the land to a new tenant at a higher rate. In cases in which there is no contract and to which the Statute of Limitations does not apply, the ryot cannot by occupying and cultivating, become the proprietor of the soil. Neither can he, by occupying with the consent of the zemindar, and paying rent for the land to him, become entitled to the proprietorship of the soil, even though he should acquire a right of occupancy by virtue of Act X of 1859. Where the Judge in the mofussil (that is, the Judge of the Court below), who is bound to give the reasons for his judgments, finds the facts specially, it being the proper course for him to adopt, his finding is in the nature of a special verdict, and if, in fixing the rent, the Judge had improperly deducted certain items from the value of the gross produce of the land, the High Court have power, on special appeal, to disallow such items. ISSHUR GHOSE v. JAMES HILLS, **W.R. F.B. 148.**

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

(15)—*Occupancy rights in unalienated land in Berar—Presumption—Registered occupants—Ss.* 69, 72 (1),(2),(5), *Berar Land Revenue Code.*—As regards occupancy rights in unalienated land in Berar, there is no presumption that they remain with the registered occupant until some other man is recognised as the registered occupant, or that a person newly recognised as such occupant is also entitled to the occupancy rights. All the decisions in suits for possession have proceeded on the assumption that no such presumption arises. KISAN v. HIRALAL, **8 N.L.R. 76=15 Ind.Cas. 899.** (6 N.L.R. 78, *D.*)

(16)—*Occupancy right by Government ryot in Assam.*—An occupancy right in lands cultivated by a Government ryot can be acquired by him under the Assam Rent Law. KONARAM GANSBURAH v. DHATOARAM THAKOOR, **6 C. 196=7 C.L.R. 47.**

(17)—*Acquisition of—Landlord and tenant—Procedure Act* (VIII *of* 1869, *B.C.*), *s.* 6—*Act* X *of* 1859—*Occupancy holding, submergence of—Rent, non-payment of—Extinguishment—Bengal Tenancy Act* (VIII *of* 1885).—To enable a raiyat to acquire a right of occupancy under s. 6 of Act VIII of 1869 (B.C.) or under Act X of 1859, his possession must ordinarily be continuous for twelve years, over the whole of the land, in respect of which a right of occupancy is claimed. (22 W.R. 228, *R*). The fact that the plaintiff was in occupation of different areas of lands in different years, would not entitle him to a right of occupancy in the whole, unless it was proved that he had a right of occupancy in a portion, and the parties intended that the additional lands also should be impressed with the existing rights in respect of the original lands of the holding. Under s. 6 of Act VIII of 1869, a raiyat retains his right of occupancy only so long as he pays rent. But, although mere non-payment of rent might not be conclusive evidence of abandonment, non-payment of rent taken with submergence of land is sufficient to indicate an extinguishment of right of occupancy (4 C. 894, *F.*; 13 M.I.A. 407, *R.*; 18 A. 290, *D.*) An occupancy holding was deluviated at a time when Act VIII of 1869

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

was in force, and the lands had continued under water for thirteen years before the present Bengal Tenancy Act was passed in 1885: *Held*, whatever right was acquired by the raiyat, was extinguished by non-payment of rent during the period of submergence before the Act of 1885 came into force; as he had no subsisting rights in 1885, the provisions of Act VIII of 1885 could create no new rights in his favour, nor revive those which had already been extinguished. SALIGRAM SINGH v. PULUK PANDEY, **6 C.L.J. 149.**

(18)—*Allegation of uniform rate for* 20 *years —Acquisition of right of occupancy—Right to pottah at fixed rates.*—Even where a ryot has asked for pottah at fixed rates, yet, where his object was not to ask for such pottah in perpetuity on the ground of s. 3 of Act X of 1859 but he had distinctly come into Court alleging that he had held the jote for 20 years, under two different pottahs and so had acquired a right of occupancy, such fact, if proved, would, under s. 5 of the Act, give the plaintiff a right to obtain a pottah for period specified in the plaint, or, if necessary, to be fixed by the Court, at fair and equitable rates. SHAIKH LOTF ALI v. MANICK CHAND CHUCKERBUTTY. **6 W.R. Act X, Rul. 76.**

(19)—*Ryot having mere right of occupancy—Interest in land—Right to share of rent.*—A ryot having a mere right of occupancy and not a right to hold at a fixed rate of rent, has no interest in the land which gives him a right to a share of the rent. He has merely a right to occupy the land in preference to any other tenant so long as he pays a fair and equitable rent. JAMES HILLS v. ISHORE GHOSE, **W.R.F.B. 131.**

(20)—*Jurisdiction of Civil or Revenue Court —Tenant—Entry on land essential—Suit for succession to occupancy rights of deceased tenant —Purchase of occupancy rights from deceased tenant's heir—Suit for redemption of occupancy rights—Suit to establish rights of occupancy.*—A person does not become a tenant until he has actually entered into possession of the land, though the right to enter upon and possess the land may have accrued to him. A suit by a person claiming to succeed to the occupancy tenure of a deceased tenant is cognizable not by the Revenue Courts but by the Civil Courts, in case the claimant has not entered into possession; upon entry, and not before, the claimant becomes a tenant. (44 P.R. 1891, *Rel. on*). A, an occupancy-tenant, mortgaged his rights with possession to B, the proprietor of the land. A died and on his death, his rights were mutated in favour of his brother and on the latter's death in favour of his sons, who sold the occupancy rights to C. Neither C nor the successors of A, ever entered into possession: *Held*, that a suit by C for possession by redemption of the occupancy rights was cognizable by a Civil Court and that C could not sue in a Revenue Court

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

to establish his occupancy rights. RIZA v. GIRDHARI RAM, **14 Ind. Cas. 236=188 P.W. R. 1912.**

(21)—*Pottah collusively granted by zemindar—Party in possession ejected by zemindar through ryot—Right of suit — Jurisdiction — Transfer assented to by landlord—Effect on ryot's possession.*—Where a party in possession has been ejected by a ryot on the strength of a pottah collusively granted by the zemindar, the latter is the real ejector within the meaning of the law, and he alone is liable for ejectment and not the ryot who is only the nominal ejector, and the case is cognizable under Act X of 1859. [*R.*, 10 C. 45.] Where a zemindar consents to the transfer of a tenure and had taken rent without demur from the ryot who was at different times in possession under these transfers, the possession would be considered to be continuous and the right of occupancy to date from the time of the first holder. HURO CHUNDER GOHO v. A. D. DUNN, **5 W.R. Act X, Rul. 55.** [*Cons.*, 15 W.R. 152.]

(22)—*Suit to recover land from defendant as trespasser—Plea of tenancy—Limitation—Act* X *of* 1859, *ss.* 6, 23—*Jurisdiction of Civil Courts —Right of occupancy—Prescriptive rights of occupancy—Sale.*—Where the plaintiff, denying the relationship of landlord and tenant between himself and the defendants, seeks to recover possession of lands from the defendants treating them as trespassers, and the defendants plead their right to hold as tenants from the plaintiff, *held* that the defendants cannot urge limitation against the plaintiff in whatever form he asserts his claim. By admitting the right of the plaintiff as owner of the lands and acknowledging themselves to be his tenants, the defendants precluded themselves from making any use of the general law of limitation. [*R.*, 10 C. 45, 21 B. 509, 27 B. 515=5 Bom. L.R. 274; *D.*, 8 W.R. 385, 15 W.R. 232.] Unless the case be one which comes under the provisions of cl. 5, s. 23, Act X of 1859, an action to eject is not barred in the Civil Court. Nor is the Civil Court barred from determining the question of a right of occupancy pleaded in answer to a prayer for ejectment by the plaintiff. It is only when occupancy is inherited that the occupancy of the predecessor is considered as the occupancy of the tenant in possession. The terms of the law, s. 6, Act X of 1859, are distinct on the point. Unless, therefore, the tenant held a transferable tenure, the sale by him of his jote to another party without the consent of the landlord does not transfer to the purchaser any right of occupancy which the seller might have possessed, or enable the present occupant to plead that the period of his own possession, joined to that of the former tenant, gives him a prescriptive right of occupancy. MESSRS. R. WATSON AND CO. v. RANEE SHURUT SOONDUREE DEBIA, **7 W.R. 395.**

(23)—*Act* X *of* 1859, *s.* 77—*Eviction of occupancy ryot on judgment in favour of intervenor*

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

—*Suit to establish title to possession—Jurisdiction of Civil Court.*—Plaintiff, who was in possession, was suing a ryot when the present defendant claiming to be the person entitled to receive the rent intervened under s. 77 of Act X of 1859; and the defendant having succeeded in obtaining a decree, plaintiff was compelled to bring the present suit to establish his title to be restored to possession under the latter clause of that section. The High Court was of opinion that, as a jotedar or a ryot having a right of occupancy, he had sufficient title to maintain an action under the provisions of the said section. TARANATH BHUTTACHARJEE v. OBHOY CHURN HOLDAR, **7 W.R. 471.**

(24)—*Special appeal—Right of occupancy—Finding of fact.*—Where, in a suit for ejectment, the finding of the lower appellate Court is that the defendant must be looked upon as having acquired a right of occupancy, the Judge must be deemed to have considered that the defendant continued to hold on as a tenant in spite of the litigation that had taken place, and this finding bars the interference of the High Court in special appeal. MAHOMED GAZEE CHOWDHRY v. NOOR MAHOMED, **24 W.R. 324, Note.**

(25)—*Act* X *of* 1859, *s.* 6—*Change of farmers—Right of occupancy, if affected—Rate of rent—Custom—Evidence.*—The mere change of the farmer cannot prevent the running of the time required by s. 6 of Act X of 1859 to give a right of occupancy. It is difficult to define what evidence is necessary to prove the current custom of a village as to rates of rent. To prove this, the Judge must require from plaintiff good evidence, both documentary and oral, of what is the general rate in the locality. SHEO CHURN SINGH v. GORA CHAND GHOSE, **3 W.R. Act X, Rul. 125.**

(26)—*Act* X *of* 1859, *s.* 25—*Suit to set aside illegal ejectment—Accrual of right of occupancy even during ejectment proceedings.*—An application by a landlord under s. 25 of Act X of 1859 to a Collector, for ejecting his ryot, is not of the nature of a suit, so as to cause a term of occupancy to cease to run, and if the ryot, in spite of the landlord's efforts to eject him, nevertheless continues in cultivatory possession and pays rent, he is entitled to count the time towards the 12 years required to found a right of occupancy. A tenant cannot legally be ejected during the currency of the agricultural year. Nor can an application under s. 25 of Act X of 1859, for immediate ejectment be received in the light of a notice to the tenant requiring him to resign his holding at the end of the agricultural year. SYUD MAHOMED SHAH v. SYUD USGUR HOSSEIN, **5 N.W.P. 151.**

(27)—Res judicata—*Relinquishment of holding by ryot—Right of occupancy*—Seer *land—Adverse possession—Computation of time.*—The decision in a former suit by the present defendant, a ryot, against the present plaintiff, to recover back his holding from which he had been dispossessed, in which the question of relinquishment of the land by defendant was in issue, is no bar to the present suit in which the question in dispute is, whether, as the plaintiff says, the land sued for is the *seer* land formerly belonging to the defendant's father, which the plaintiff had purchased, and from which he says he is entitled to eject the defendant, or whether, as the defendant insists, the land has been cultivated and held by him for twelve years as ryoti land, and, therefore, that he has a right of occupancy. If the ryot's occupancy of the land was not a peaceable one, but a matter of dispute and contention and the subject of litigation in the Courts, the period during which such contest and litigation occurred should be excluded in computing the period of twelve years' holding which creates a right of occupancy. NAIPAL SINGH v. RAM NARAIN, **2 Agra 93.**

(28)—*Ejectment of tenant—Procedure—Computation of time in s.* 5 (2), *Punjab Tenancy Act*—30 *year's possession—Presumption—Joint possession by members of family.*—A landlord desiring to eject a tenant can do so by giving a notice under s. 43, Punjab Tenancy Act or by filing a suit without previous notice under s. 77 (3) (*e*). The period of 30 years mentioned in s. 5 (2) ought to be calculated from the date of suit and not from the date of the Act. The presumption will be that a tenant proved to be in continuous occupation of land either by himself or through the members of his family for 30 years, without paying rent, except land revenue, rate and cesses chargeable on it acquired occupancy rights in the absence of evidence to the contrary. But this presumption will not hold good, if the landlord proves that, on 1st November, 1887, the tenant had not held for more than 2 generations in the male line or that the tenant then held for a period of less than 20 years or that, before that date, the tenant had paid rent beyond land revenue, rates and cesses. MAULA v. JIWAN BAKSH, **5 P.R. 1896, Rev.**

(29)—*Tenant with right of occupancy—Punjab Tenancy Act* (XXVIII *of* 1868), *s.* 6—*Suit to establish rights of occupancy under s.* 5—*Presumption as to acquisition of such right.*—Where a person who had been recorded as tenant with rights of occupancy under s. 6 of the Punjab Tenancy Act (XXVIII of 1868), sued to establish rights of occupancy under s. 5, it was held that, though a presumption arose that he acquired the land from his father, as he was very old and was recorded *maurusi* and his possession extended beyond the memory of living man, still it would not be correct to carry the presumption further back, and hold that the father got the land from his grandfather. GIRDHARI v. PIRTHI SINGH, **154 P.R. 1883.** (18 P.R. 1876, 62 P.R. 1882, *R.*)

(30)—Moostajiree *rights, purchase of—Suit for possession—Intervenor—Lease set up—Plea*

***Right of Occupancy*—continued.**

——2.—Acquisition of Right—*continued.*

not proved—Decree—Possession amounting to right to collect rent—Effect.—In a suit for possession, plaintiff alleging himself to be the purchaser of certain *Moostajiree* rights pertaining to the suit land, *i.e.*, the right to collect rent from the ryots, the defendant set up a plea of lease from the plaintiff, under which he was to collect the rents from the ryots and pay a certain stipulated sum to the plaintiff. *Held* that, the lease having been found to be not genuine but fabricated, the plaintiff was entitled to a decree as prayed for. A possession from which an occupancy right may be inferred is different from that which supports a mere right to collect rents. LALLA ISHUR DUTT v. BHAKA CHOWDHRY, **17 W.R. 242.**

(31)—*Act X of 1859, s. 6—What ryots are entitled to occupancy rights.*—Under s. 6, Act X of 1859, only those ryots, who cultivate their lands or sub-let them to other actual cultivators of the soil and thus keep alive their rights of occupancy are entitled to such rights. BINDRABUND CHUNDER CHOWDHRY v. ISSUR CHUNDER BISWAS, **W.R. 1864, Act X, Rul. 1.**

(32)—*Right of occupancy in land.*—A tenant cultivating land for more than the statutory period under a landlord who has no title to the land, nevertheless acquires a right of occupancy. The right is not one conferred by any lessor, but is one which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating land for the statutory period or upwards and paying rent due thereon. ZOOLFUN BIBEE v. RADHICA PROSONNO CHUNDER, **3 C. 560=1 C.L.R. 328.** (19 W.R. 388 and 8 B.L.R. 165, *F.*)

(33)—*Possession for 12 years continuously, right of occupancy created by.*—Plaintiff, a zemindar, sued to recover the land in question on the allegation that he had been dispossessed by the defendant. Defendant pleaded that he and his predecessors had been in possession of the land though without any pottah and that he had been paying rent to the plaintiff. The first Court gave the plaintiff a decree holding that the plaintiff had been ousted as alleged by him and also that mere possession for 12 years could not give the defendant a right to resist the plaintiff. The High Court observed that the first Court was wrong in law as regards the result of 12 years' continuous possession in respect of conferring a right of occupancy on the defendant, and *held* that such a continuous possession for 12 years creates a right of occupancy. MR. C. J. PHILLIP v. NUND COOMAR BANERJEE, **6 W.R. 156.**

(34)—*Farmers, when may acquire rights of occupancy.*—Rights of occupancy may be acquired by persons holding as simple ryots for 12 years before or after their holding as farmers. MESSRS. R. WATSON AND CO. v. KOER JOGENDRONARAIN ROY, **1 W.R. 76.**

***Right of Occupancy*—continued.**

——2.—Acquisition of Right—*continued.*

(35)—Nuksun *jote—Local custom—Rent not payable when land not culturable— Right of occupancy.*—Where, by the custom of a particular locality, rent was payable when the land could be cultivated, and not payable when the land was not culturable, and the ryot paid rent for the period that he could cultivate, and did not pay when he could not cultivate the land, he is to be considered as having held and as having paid the rent sufficiently to come within the meaning of the law which declares that a ryot, who held or occupied land for a period of twelve years, had a right to occupy that land so long as he paid the rent due thereupon. PREMANUND GHOSE v. SHOORENDRONATH ROY, **20 W.R. 329.**

(36)—*Rights of occupancy—Grazing ground.*—A right of occupancy may be gained in land used for grazing horses. FITZPATRIK v. GEORGE WALLACE, **2 B.L.R.A.C. 317=11 W.R. 231.** (8 W.R. 251, 9 W.R. 552, 1 Ind. Jur. N.S. 462, 3 Agra, 49. *D.*)

(37)—*Land producing water-nuts by sowing—Right of occupancy whether could be acquired in such land.*—A tenant got a lease of land in a holding comprising specific fields bearing distinct numbers. A tank in which water-nuts grew not spontaneously but as the result of sowing or planting was not included in the lease. *Held* that a right of occupancy could be acquired in such tank by the tenant in the holding. MOOL CHUND v. CHUTREE, **1 N.W.P. 254.**

(38)—Neem Howalas—*Rights of occupancy—Transferable tenures.*—Occupancy-tenures of the well-established and well-known character of *neem howalas* (even though they may not comprise the right of holding at fixed rent), and all other such rights of occupancy established by the ancient prescription and custom of the country, are transferable tenures. Purchasers from *neem howaladars* are consequently entitled to rights of occupancy. JUGGUT CHUNDER ROY v. RAMNARAIN BHUTTACHARJEE, **1 W.R. 125.**

(39)—*Uniform rent for half a century—Tenants contributing for the reclamation of the lands.*—Suit in ejectment. The suit lands originally formed part of a zemindari, and were forest lands. They were reclaimed, the defendants contributing the bulk of the expenditure. The lands were held by the defendants and their ancestors for about half a century at a uniform rent. *Held*, that the Judge, who found that the defendants, had acquired occupancy rights, cannot be said to be legally wrong in coming to that conclusion, in view of the fact that the tenants would have probably had notions about tenure similar to those of the (occupancy) tenants in the surrounding zemindaries. THE BAPTIST MISSIONARY SOCIETY OF INDIA v. HORIAH BEHARA, **7 M.L.T. 201=5 Ind. Cas. 972.** (23 M. 318, *R.*)

Right of Occupancy—continued.

——2.—Acquisition of Right—*continued.*

(40)—*Presumption of occupancy—Payment of uniform rent—Mokuraree lease, failure to prove in prior suit.*—The presumption of occupancy before Permanent Settlement arising from payment of uniform rent for 20 years, is not affected by failure to prove mokuraree lease in a former suit. ISHEN CHUNDER BUTTACHARJEE v. KALEE KOOMAR ROY, **1 W.R. 264.**

(41)—Adhlapi *custom—Sinking of well—Sinker's rights as cultivator.*—Where a person sinks a well under the *Adhlapi* custom, he becomes the owner of half the well and cultivator of the other half, the proprietary right in which belongs to the original owner of the land, who, however, bears no portion of the expense of sinking the well. As regards the rights of the sinker as cultivator of the other or proprietor's half, in the absence of all evidence of a special agreement, he is entitled to occupancy rights, since he cannot be ousted from the proprietor's half of the well unless the proprietor himself requires it for his own use. SHER BAKSH v. KHUDA BAKSH, **110 P.R. 1885.** [*R.*, 6 P.R. 1900, Rev.]

(42)—*Goozashta tenure—Bhowlee tenure—Rent in kind—Right of occupancy.*—A bhowlee tenure can be a goozashta tenure. A ryot, who has paid rent in kind but who has held or cultivated land for a period of twelve years, has a right of occupancy in the land so held or cultivated by him so long as he pays the rent (though it be in kind) for the same. JUTTO MOAR v. MUSSAMUT BASMUTTEE KOER, **15 W.R. 479.**

(43)—*Partnership holding a cultivating lease—Acquisition of occupancy rights—Firms—Ryotee lease, Test of.*—Where a cultivating lease of certain lands was taken by a firm owning an indigo concern in its collective name, the cultivation being carried on by its servants and subtenants continuously for more than twelve years, *held*, the lease must be taken to be one to the individuals, who were, at the time of the grant, members of the firm, and that they had secured an occupancy right under the circumstances of the case. (25 W.R. 117 and 4 C. 957, *D.*) [*D.*, 7 C.L.J. 475.] The test of a ryotee lease is, whether the lease has been originally granted for the purpose of cultivation, and if it has been so granted, it is none the less a ryotee lease, though the lessee may happen subsequently to sublet. *Quære.*—Whether, in the above case, an occupancy right could have been acquired, if all the original grantees had died before the statutory period of occupation or after acquisition of the right? Or whether the right, if acquired, could be transferred, according to the custom of the locality, to subsequently admitted members of the firm? LAIDLEY v. GOUR GOBIND SARKAR, **11 C. 501.** [*D.*, 7 C.L.J. 475.]

(44)—*Single family in joint possession—Similar tenancies—Wrong entry—Power of Court.*—Where tenancies of the same kind

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——2.—Acquisition of Right—*continued.*

are long held by a single family jointly, only some members of which are wrongly entered in the Settlement Records as occupancy tenants, the Court has power to correct such entries and award to all the members occupancy rights. MUHAMMAD v. YAR MUHAMMAD KHAN, **9 P.R. 1896, Rev.**

(45)—*Right of occupancy—Undivided share of estate.*—A right of occupancy may be acquired in respect of an undivided share of an estate. JARDINE SKINNER AND CO. v. RANI SURAT SOONDARI DEBI, **3 C.L.R 140, P.C. = 5 I.A. 164 = 3 Sar. 847.** [*F.*, 8 C.W.N. 751; *Rel. on*, 8 C.W.N. 192; *R.*, 16 C. 127; *D.*, 1 C.W.N. 521.]

(46)—*Suit for occupancy rights—Entry in Settlement of possession for two generations—Presumption of acquisition from father, onus of rebutting.*—In the settlement of 1859, the land in dispute was recorded as in the possession of one A as an occupancy tenant and the period of his occupation was stated to be 40 years. From the entries in the settlement papers, the land in suit appeared to have been in A's family for 60 years at the date of his death in 1878, and it had been admittedly occupied successively by A, his son, and lastly by his widow. A's father did not die till 1850 or thereabouts, and was consequently alive when the land was first acquired in 1819. Under these circumstances, as the facts connected with the acquisition of the land had passed beyond living memory, a fair presumption was held to arise that A who was recorded as in possession for 40 years in 1859 acquired it from his father. The *onus* was therefore rightly held to be on the defendant to rebut the presumption arising in plaintiff's favour from the facts above mentioned. HYAT KHAN v. KARM, **187 P.R. 1882.** (18 P.R. 1876, *R.*)

(47)—*Cultivation by tenant for more than 12 years—Several leases—Right of occupancy.*—A ryot who has held or cultivated continuously for more than 12 years, but under several original leases or pottahs, is entitled to claim a right of occupancy in that land although those leases or pottahs are for a specific term of years. Any solehnamah alleged to have been executed by the tenant, and purporting to give up his claim to the occupancy right, must be also considered in deciding the tenant's right of occupancy. NARAIN SINGH v. MUNSUR RAOOT, **25 W.R. 155.**

(48)—*Occupation for 12 years under lease—Suit for abatement of rent.*—A right of occupancy may be acquired by a raiyat holding lands for more than 12 years under a pottáh, and he is, therefore, entitled to sue for abatement of rent. SHAM LALL SAHOO v. HADY BUNJARA, **2 Hay 522.**

(49)—*Who is a middle-man—Rights of occupancy—Act X of 1859, s. 6.*—The fact that a person, without cultivating his holding himself, sub-lets it to others, does not make him a middle-man, and, as such not entitled to

Right of Occupancy--continued.

——2.—**Acquisition of Right**—*continued.*

the privileges of s. 6, Act X of 1859. The real question for determination is whether he was or was not a ryot, or one who held land under cultivation by himself or others who took for him under his supervision as a superior cultivator, or whether he was a middleman because he really did not cultivate in the sense of s. 6, but was a general lease-holder or a speculator in land rent. RAM MUNGAL GHOSE v. LUKHEE NARAIN SHAHA, **1 W.R. 71.** [*Appr.*, 7 W.R. 15.]

(50)—*Right of occupancy—Lease — Ryots—Middleman.*—Holding land as a ryot, if for a sufficient period, gives a right of occupancy whether the land has been held under renewed leases or on a continuous lease. A ryot does not become a middleman simply because, instead of cultivating the land, he erects shops on it and receives the profits from the shopkeepers. KHAJURANISSA BEGUM v. AHMED REZA, **8 B.L.R. 166, Note=11 W.R 88.** [*F.*, 8 B.L.R. 165=17 W.R. 62.]

(51)—*Act* X *of* 1859, *ss.* 6, 7—*Consecutive pattahs—Right of occupancy—Act* VIII (*B.C.*) *of* 1869, *ss.* 6, 7.—A ryot who has held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pattahs each for a specific term of years, is entitled to claim a right of occupancy in that land. Neither the mere fact of a ryot taking a lease for a term of years, nor the mere existence of the right of re-entry on the part of the landlord, amounts to an *express stipulation* within the meaning of s. 7, Act X of 1859, so as to prevent the right of occupancy being acquired under s. 6. PANDIT SHEO PROKASH MISSER v. RAM SAHOY SING, **8 B L R 165=17 W.R. 62.** [*App.*, 25 W.R. 155, 3 C. 560=1 C.L.R. 328, 6 C. 711=8 C.L.R. 189, 18 C. 349, P.C.=18 I.A. 27.]

(52)—*Act* X *of* 1859, *s.* 6—*Occupancy—Land "held"—Land "cultivated."*—A right of occupancy, if claimed under Act X, is acquired by a tenant who for twelve years cultivates or holds land, in the land which he has so cultivated or held. If a tenant does not *continuously* hold or cultivate the land, then the right of occupancy does not accrue to him. It is to be observed that the terms of s. 6 of the Act apply to land *held*, as well as to land *cultivated*. Therefore, although a tenant may not have personally cultivated, but may have made over the land to another to cultivate, assuming that by custom he has such power, he still may gain a right of occupancy if he continues to be recognized by the zemindar as the holder of the land. BUTABEE BEGUM v. KHOOSAL, **2 N.W.P. 24.**

(53)—*Act* X *of* 1859, *s.* 6, *right of occupancy under, on holding for* 12 *years under one of several proprietors—Court incompetent to treat defendant as plaintiff—Written statement—Admissibility in evidence.*—A holding for 12 years under one of several co-proprietors is sufficient to satisfy the requirements of s. 6 of Act X of 1859, provided the tenant has paid the rent, which payment he may, in the absence of fraud, make to any one of the co-proprietors whom he chooses. It is not competent to the Court to treat as a plaintiff and compel the other parties to accept, as a plaintiff, a party who remains, upon the face of the proceedings, as a defendant. A party making a written statement may, without incurring the penalties of perjury, insert in the written statement, in the form of direct allegations, any fact whatever which he hopes to be able to prove at the trial and which upon the merest rumour, he believes to be true. Statements made with so little security for their accuracy could not be received as evidence in any Court of justice. (*Per Bayley, J.*—It could not be said that, under all and every circumstance, the uncontradicted statement of a party verified on oath is positively no evidence.) MOOKTA KASHEE DOSSEE v. KOYLASH CHUNDER MITTER, **7 W.R. 493.**

(54)—*Act* X *of* 1859, *s.* 6—*Ryot's pottah declared invalid--Occupancy right not affected—Continuous holding for* 12 *years.*—Where the plaintiff can prove possession by having cultivated or held land continuously for 12 years, he becomes entitled to the occupancy right mentioned in s. 6 of Act X of 1859. Such right cannot be affected by the title of the grantor of the putta having been declared, by a Court, to be null and void. A declaration that an izaradar had no good title would not necessarily invalidate the holdings of all the ryots under the izaradar, and, according to s. 6, a ryot, *whether he holds under a pottah or not*, acquires a right of occupancy by simply holding or cultivating continuously for a period of 12 years. SHIBNATH ROY v. MESSRS. R. WATSON AND CO., **8 W.R. 374.** [*Expl.*, 12 W.R. 80.]

(55)—*Khamar land—Occupancy right—Act* VIII *of* 1869 (*B C.*), *s.* 6.—Possession by a tenant for more than 12 years gives him a right of occupancy in the land and he is not deprived of this right even though the land is khamar. It is only a tenure held on a lease for a term or year by year that could be brought within the exception to s. 6, Act VIII of 1869 (B.C.). SHAIKH ASHRAF v. RAM KISHORE GHOSE, **23 W.R. 288.** [*R.*, 1 C. L. J. 456]; (*but see* HURISH CHUNDER RAM v. GUNGA DHUR BHUDDRO, 25 W.R. 181, *infra*)

(56)—*Act* X *of* 1859, *s.* 6—*Right of occupancy in case of holding under Bhagdaree tenure.*—Ordinarily, a holding under a Bhagdaree tenure,—that is, upon a rent consisting of a portion of the produce,—would establish a right of occupancy under s. 6 of Act X of 1859, as much as if the holding had been upon payment of rent of any other description. HUREEHUR MOOKERJEE v. BIRESSUR BANERJEE, **6 W.R. Act X, Rul. 17.**

(57)—*Holding under leases—Act* X *of* 1859, *s.* 6—*Ben. Act* VIII *of* 1869, *s.* 6—*Cultivating raiyat.*—From 1824 to 1832 the defendant held

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—2.—**Acquisition of Right**—*continued.*

certain lands as cultivator; from that year to 1839 he obtained a lease from the zemindar of the village in which the lands were situate; from 1839 to 1843 he continued to hold these lands as cultivator; from that time to 1862 he again obtained a lease of the village, retaining these lands in his own cultivation; and after the expiry of the lease he continued to cultivate the lands. In a suit by the zemindar for possession on the ground that the defendant was holding over after the expiry of his lease, *held* that the defendant had acquired a right of occupancy under s. 6, Act X of 1859. MUKANDI LAL DUBEI v. L. G. CROWDY, **8 B.L.R. App. 95.** [*Appr.*, 25 W.R. 503.]

(58)—*Act* X *of* 1859, *s.* 6—*Possession for* 20 *years under* mourossee *lease, inherent right of occupancy on proof of.*—In a case in which possession for twenty years has been distinctly found as a fact under a previous *mourossee* lease, the right of occupancy is inherent under the lease and under the provisions of s. 6 of Act X of 1859, so that no special plea is requisite to entitle the plaintiff to it in a suit brought by him on his title by inheritance. GOUREE KANT BANERJEE v. GOLUCK CHUNDER PAKRASHEE, **4 W.R. Act X, Rul. 49.**

(59)—*Act* X *of* 1859, *s.* 6—*Rights of occupancy*—Nij-jote *and other lands.*—The fact of a land being *nij-jote* does not *per se* prevent a cultivator from acquiring rights of occupancy in it. S. 6, Act X of 1859, excludes *khamas nij-jote* and *seer* lands from the operation of such rights only when such lands have been let by the proprietor on a lease for a term of years, or year by year. GAURHARI SINGH v. BIHARI RAUT, **3 B.L.R. App. 138=12 W.R. 277.**

(60)—*Holdings commenced or continued under mortgagee in possession, not within exceptions to general rule in s. 6 of Act* X.—Among the exceptions to the general rule in s. 6 of Act X of 1859 that every ryot who has held or cultivated a holding for twelve years, is entitled to a right of occupancy therein, there is no exception in favour of holdings which have commenced or continued under a mortgagee in possession. It may be that a mortgagee cannot, without special power conferred on him by the mortgage agreement, demise any parcel of the mortgaged estate for a term which may exceed the duration of his own interest in the estate. The respondent, in the present case, however, did not rely on any such demise, but, having occupied his holding as a yearly tenant, he claimed a right of occupancy by operation of law and not by grant, and the High Court *held* that his claim was well-founded and should prevail against the zemindar. HEEROO v. DHOREE, **2 N.W.P. 129.** [*R.*, 7 A. 586=A.W.N. 1885, 134, F.B.]

(61)—*Occupancy, Right of*— Nij-jote—*Act* VIII (*B.C.*) *of* 1869, *s.* 6—*Act* X *of* 1859, *s.* 6.—The *nij-jote* land referred to in Act VIII (B.C.) of 1869, s. 6, as land in which a right of occupancy cannot be acquired, is land which is the *nij-jote* of the zamindar and not that which is merely the *nij jote* of a *sarbarakar* holding under the zamindar. OBHOY CHURN MOHAPATTUR v. KANYE RAWUT, **1 C.L.R. 394.**

(62)—*Act* VIII (*B.C.*) *of* 1869, *s.* 6—*Lease for term—Provision for re-entry—Occupancy rights.*—The mere fact of a lease being granted for a particular term does not preclude the accrual of the occupancy right given by s. 6 of Act VIII of 1869 to a ryot who continually occupies for more than 12 years. The fact that there is an express provision for re-entry by the lessor would not affect the accrual of the right. (16 W.R. 114, *F.*) A right of occupancy already acquired cannot be destroyed by the grant of such a lease. MUKHTAR BAHADUR v. BHOJRAJ SINGH CHOWDHRY, **9 C.L.R. 143.**

(63)—*Act* X *of* 1859, *s.* 23, *cl.* 6—*Waste lands brought under cultivation—Right of zemindar—Right of occupancy.*—If the land in suit was for the first time brought under cultivation by the ryot, it cannot be viewed as the zemindar's *seer* land, nor can the former be held to be a mere *shikmee* cultivator incapable of acquiring a right of occupancy in the land. JHUGRO v. LAUTOO PANDEY, **1 Agra, Rev., 32.**

(64)—*Ryotee lands — Cultivation and* ticca *lease—Occupancy right—Act* X *of* 1859, *s.* 6—*Merger.*—A person held ryottee lands alternately as cultivator and *ticca* lessee or farmer continuously for about 50 years. *Held* that his cultivation for broken periods cannot deprive him of his occupancy right under s. 6, Act X of 1859. *Held* also that, when the person took the lease, his possession as cultivator did not merge in that of the higher title. MOKOONDY LALL DOOBEY v. L.G. CROWDY, **17 W.R. 274.** [*R.*, 10 C. 45.]

(65)—*Acquisition of occupancy-right in a holding by a temporary lessee of the village-occupancy right--Merger.*--When the temporary lessee of a village purchases an occupancy-holding within the village, during the term of his lease, the occupancy, right is not extinguished, but inures to his benefit even on the expiry of his lease. RAMRUP MAHTO v. H. MANNERS, **4 C.L J. 209.** [*R.*, 13 C.W.N. 664=4 Ind. Cas. 531.]

(66)—*Act* VIII (*B.C.*) *of* 1865, *s.* 15—*Tenant's right of occupancy—Effect of Act.*—The right of occupancy of a tenant was not avoided by the operation of s. 16 of Act VIII of 1865 (B.C.). EMAM ALI MESTORY v. ATOR ALI KHAN, **22 W.R. 133.**

(67)—*Right of occupancy--Acquisition--Period of possession—Computation — Act* X *of* 1859, *s.* 6. — Under the provisions of s. 6 of Act X of 1859, a tenant acquires a right of occupancy when he remains in possession for 12 years. In computing the period of 12 years, the tenant is entitled to bring into account

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—2.—**Acquisition of Right**—*continued.*

the period during which he held the land under the lease or pottah. HOOBA KHAN v. MANSUB ALI, **3 N.W.P. 37.**

(68)—*Act* X *of* 1859, *s.* 4, *presumption under, applicability of*—*Reg.* VIII *of* 1793—*Suit for enhancement*—*Infirmity in defendant's title.*—It is probable that the words, "whenever in any suit under this Act," in s. 4 of Act X of 1859 are not intended to limit the presumption under the section to cases under that Act only. But even if the presumption does not, in fact, in terms apply to suits other than those under Act X, yet it would not be wrong on the part of a Court, in a suit under Reg. VIII when determining the question from what length of time the payment of a fixed rent should have been made so as to draw the inference that payment at such rate dated back to, or had its origin before, the Permanent Settlement, to follow the rule laid down in s. 4 of Act X of 1859. Assuming that a defendant in a suit for enhancement of rent has failed to prove anything except that he has held the land in question for more than 20 years at a fixed rent, and that he has been recognized in the receipts granted to him as a holder of a fixed tenure, yet, where there is no evidence on the part of the plaintiff, there would be nothing on which a decree in favour of the plaintiff could be based, though there may be some infirmity in the defendant's title. DUKHINA MOHUN ROY v. KUREEMOOLLAH MOOKTEAR, **12 W.R. 243.**

(69)—*Putnee talook*—*Sale under Reg.* VIII *of* 1819—*Ryotee jote*—*Ejectment*—*Fifteen years receipt of rent*—*Waiver.*—The defendant was the purchaser of a *putnee* talook brought to sale under the provisions of Reg. VIII of 1819, and the plaintiff was an inferior holder whose *jote* or tenure in its entire terms had been declared not to be valid as against the right of the auction purchaser. On the defendant's application to the Collector under s. 25, Act X of 1859, the plaintiff was ejected on the ground that he had not a right of occupancy against the *putnee* talookdar. In a suit by the tenant for possession of the *jote* or the tenure, it was *held* that, whether the plaintiff's holding was a ryotee *jote* or an intermediate tenure, he was not liable to eviction, but only to enhancement of rent. If it be a ryotee *jote*, as defendant's purchase took place 15 years before suit, he was protected by s. 6 of Act X of 1859, and had a clear right of occupancy as against the defendant. If it be an intermediate tenure, then, considering that the defendant for 15 years without objection received rents from the plaintiff at the old rate, he must be considered to have waived any rights which he might have had under cl. 2, s. 11 of Reg. VIII of 1819, to eject the plaintiff at the time of the purchase of the *putnee* talook. WOOMANATH ROY CHOWDHRY v. ROGHOONATH MITTER, **5 W.R. Act X, Rul. 63.**

(70)—*Act* XXV *of* 1857—*Confiscation of Zemindar's rights for rebellion*—*Effects on*

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—2.—**Acquisition of Right**—*continued.*

growth of right of occupancy by tenant.—Confiscation of a Zemindar's rights under Act XXV of 1857, will not operate to interrupt the growth of a right of occupancy claimed by a tenant. SHEO RAJ SINGH v. MR. W. F. LEGGE, **3 Agra 293.**

(71)—*Acquirement of occupancy rights.*—There is nothing to prevent a *saranjamdar* or *inamdar* from acquiring occupancy rights during the continuance of the *saranjam* or *inam.* GANPATRAV TRMIBAK PATWARDHAN v. GANESH BAJI BHAT, **10 B. 112.**

(72)—*Claim to status of occupancy tenancy*—*Predecessor not taking any steps*—*Effect*—*Punjab Tenancy Act,* 1887, *s.* 5.—The fact that the predecessor in title of a tenant took no steps to claim a higher *status* does not prevent such tenant from claiming the *status* of occupancy tenant under s. 5, provided he could make out the conditions and requirements of that section for the acquisition of such a status. BAHADUR v. DUL CHAND, **3 P.R. 1893, Rev.**

(73)—*Punjab Tenancy Act,* 1887, *ss.* 5 (1) (*a*), 11, 22 (2)—*Status of tenants under Act of* 1868—*Rights under the new Act.*—Where there are facts to show that the predecessors in interest of a tenant were occupancy tenants under s. 5 (1) of the Act of 1868 on the date of the passing of that Act and nothing happened in the meanwhile to deprive them of such status, he was considered to be a tenant under s. 5 (1) (*a*) of the Act of 1887. AHMAD YAR v. MUHAMMAD BAKSH, **12 P.R. 1896, Rev.**

(74)—*Punjab Tenancy Act,* 1887, *s.* 5 (1) (*c*)—*Status of tenant*—*Old and new Acts.*—The new Tenancy Act confers the status of an occupancy tenant as well upon the persons settled by the founder of the village as a cultivator therein as upon his representatives, while the old Act only conferred it upon his representatives. NUR-UL-LAH v. SHARIF MIAN, **7 P.R. 1890, Rev.** [*F.*, 2 P.R. 1891, Rev.]

(75)—*Punjab Tenancy Act,* 1887, *ss.* 5, 6—*Right of occupancy*—*Entry in Settlement record*—*No sanction of Government*—*Effect of such entry*—*Admission as tenant-at-will*—*No bar to claim.*—Where a person had not settled along with, or been settled by, the founder but was paying rent for the land, he or his successor in title could not claim occupancy rights under s. 5, Punjab Tenancy Act. Where an entry as to the status is not made in the record sanctioned by the Local Government, such status could not be claimed under s. 6 of the Punjab Tenancy Act. But the entry would operate as an agreement, to confer such rights under s. 111. The circumstance that a claimant had made an admission before 1887 that he was a tenant-at-will will not prohibit him from proving his claim to occupancy rights. CHIRAG v. MIRZA, **4 P.R. 1896, Rev.** [*Appr.*, 10 P.R. 1901=44 P.L.R. 1901.]

(76)—*Ejectment*—*Plea of occupancy right*—*Wrongful eviction*—Onus *of proof.*—In a suit

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——2.—**Acquisition of Right**—*continued.*

by the zamindar to eject a ryot where the ryot sets up a right of occupancy on the ground that his possession as a ryot extended to a continuous period of twelve years, and it was found that as the result of the litigation between the zamindar and the ryot, the ryot was evicted and then got possession, and thus there was a break of some months in the possession of the ryot during the period, *held* that, if the eviction by the landlord were wrongful, that would not be such an interruption of the ryot's possession as would prevent him from acquiring a right of occupancy, and that it was for the ryot to show that the eviction was wrongful. MAHOMED GAZEE CHOWDHRY v. NOOR MAHOMED, **24 W.R. 324.** [*R.*, 12 C. 82, 25 B. 115.]

(77)—*Landlord and tenant—Grant of permanent occupancy-rights to community—Express or implied surrender of the right—Burden of proof — Sub-division of lands by grantees—Variation in extent — Presumption.* — Where permanent occupancy-rights have been granted to certain individuals for the benefit of a community to which they belong, the *onus* of proving an express or implied surrender of such rights lies on the party affirming it. The sub-division of the lands and even the surrender of a portion thereof by the grantees will not be inconsistent with the latter continuing to hold the lands in their occupation on the terms of the original grant, *i.e.*, by right of permanent occupancy, although community of interest may have ceased as between themselves. If the same lands had been held by different persons in different years, this would be *prima facie* evidence of the tenure being inconsistent with the continuance of the rights under the original grant. Material variation in the extent of the lands held in each year might lead to the same inference, though it might also be explicable on the ground that the *pattas* for each year were only for the extent cultivated during the year. VELUSAMI TEVAR v. AROKYA UDAYAN, **15 Ind. Cas. 119.**

(78)—*Hereditary cultivators—Facts and circumstances establishing right and status—Long possession of re-claimed waste land—Payment at revenue rates.*—In this case, the question was whether the plaintiffs were entitled to the status of hereditary cultivators. The facts were that they had come to the village along with the proprietary body, that they had reclaimed the land from the waste and occupied it uninterruptedly from generation to generation ever since, that they had paid for a long time at only revenue rates, that afterwards, when the rents of the cultivators were raised, they were assessed at a rate considerably less than those paid by the non-hereditary cultivators of the village, and that one of the *lumbardars* had accepted a mortgage of a certain quantity of their land. The Chief Court held that these facts proved the hereditary status and rights of the plaintiffs. SOOKHEE RAM v. URJUN, **58 P.R. 1869.**

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

(79)—*Long continued possession—Hereditary occupancy—Setting up inconsistent or contradictory claims—On review from* 34 P.R. (1867). —Considering the uncertainty and imperfect character of proprietary right in the Punjab before annexation, it is perfectly possible for a person to claim the proprietary right of his land, on insufficient grounds, without any idea of fraud, but only with a wrong conception of his own position. Notwithstanding such a claim, he might still be a hereditary cultivator, and it would be wrong to hold that such a cultivator was precluded from establishing his right to hereditary occupancy on the ground of his being in the position of one *allegans contraria.* The observation in 34 P. R. (1867) about long possession may also be misunderstood. While it is perfectly true that long possession on the part of a cultivator *of itself* confers no right of hereditary occupation, still it is often annexed to circumstances which, combined with the long occupation, would afford good and sufficient ground for the right, and the Court accordingly must not be understood to express an opinion that such circumstances do not require notice, or may be disregarded. PURSOTUM DASS v. RYMULL, **81 P.R. 1867.**

(80)—*Hereditary cultivators—Entry in settlement record not conclusive.*—In this suit for ejectment by the proprietors, the defendants pleaded long occupancy. It appeared that they were recorded at settlement as tenants at will. But there was nothing to show that they were aware of such entry. The evidence showed that they were of the same caste or extraction as the plaintiffs and had held the land in suit for several generations without paying any rent *i.e.*, anything more than the bare revenue and cesses. *Held* that, on these facts, the defendants were entitled to a right of hereditary occupancy. LAB SINGH v. WUZEERA, **114 P.R. 1868.**

(81)—*Hereditary cultivator—Occupation for more than* 20 *years—Time cures defect in title.*—Suit to be declared the hereditary cultivator of certain land. The lower Court decreed against the plaintiff on the ground that though he had occupied it for more than 20 years, he was not the son of the original owner but was only related to him as a relation five generations removed. . *Held*, that the Court below was wrong ; the fact that twenty years had elapsed had cured any defect which may have originally existed in his title. NUTHA v. PREM SINGH, **40 P.R. 1868.**

(82)—*Lessee dispossessed of land—Suit for ejecting the dispossessor—Defendant's plea of being the original ryot of the land—Defendant's right of occupancy to be decided.*—Plaintiff sued to recover possession of certain lands alleged to have been leased to him by a *sezawal* acting under the orders of the zamindar. It was found that the lease was actually granted and the

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

plaintiff who had obtained possession thereunder had been ousted by the defendant. The defendant pleaded that he was the original ryot of the land, that the village was let in farm and that the zemindar had no right to oust him. The High Court *held* that the lower appellate Court was wrong in having rejected his plea on the mere ground that the defendant had not proved a hereditary tenure, because no such issue had properly arisen; the real question was whether the defendant had any right of occupancy, for, if he had, he could not be turned out by plaintiff. The case was therefore remanded for a distinct finding whether the defendant had any such right of occupancy. MOTEE ROY v. NADUR ALI KHAN, **6 W.R. 180.**

(83)—*Right of occupancy—Relinquishment—Lease.*—A right of occupancy can be acquired by a person in possession under a lease from another having a permanent transferable interest in the land, if the other requirements of law are fulfilled. In the absence of words in the pottah, under which the lessee holds the land leased, prohibiting the acquisition of such a right, the fact that the pottah reserves an annual rent year by year would not be sufficient to deprive him of that privilege. RUGOONATH SONAR v. MOKOOND DASS, **25 W.R. 213.**

(84)—*Holding for several years by ryot and his predecessor in title—Right of occupancy—Zemindar not competent to oust except by due course of law.*—This was a suit by a ryot against his zemindar, and another claiming an intermediate right in the land through him, to recover possession of his holding, from which he alleged himself to have been dispossessed by the third party, and for damages for the pulling down of his house. The lower appellate Court, finding that the plaintiff and his father before him had held this land as their *jote* for very many years, decided that the Zemindar could not dispossess him by giving his land to a third party and restored him to the possession he sought. It was contended on second appeal that, as the plaintiff had not proved the mourosee nature of his tenure, the zemindar was justified in bestowing the land on another. But it was held that, as the plaintiff and his father had together held the land for many years, a right of occupancy had been created which prevented the zemindar from ousting his tenant, except by due course of law. NIM CHAND BOROOAH v. MOORAREE MUNDAL, **8 W. R. 127.**

(85)—*Decree between Zamindars—Right of occupancy—Estoppel.*—A decree in a suit between Zemindars cannot shut the mouth of the ryot and prevent him from stating the facts as to the time when the formation of the land occurred and when his occupation commenced. The mere fact that the person to whom he for some years paid rent had no title cannot take away from him the character of a ryot or prevent him from counting those years in the

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

time necessary to give him a right of occupancy under Act X of 1859. SYUD AMEER HOSSEIN v. SHEO SUHAE, **19 W. R. 338.** [*F.*, 3 C. 560.]

(86)—*Suit for ejectment—Person succeeding ryot having right of occupancy—Right of such person to acquire right of occupancy.*—A ryot who had a right of occupancy to certain land having died, his nephew was allowed by the landlord to retain possession of the land for 11 years. *Held*, in a suit for ejectment by the landlord against the nephew and his son, that as the defendants were allowed as a matter of fact to succeed to the holding, and were not shown to have acquired it otherwise than as the heirs of their predecessor, they must be taken to have inherited it from him by the consent of the landlord, and to have acquired in it, if they did not inherit, a right of occupancy. MUSSAMAT HUKEEM-OON-NISSA v. BHOORIA, **5 N. W. P. 23.**

(87)—*Occupancy right—Possession by tenant of excess land—Nature of his right in such land.*—Where rent has been received by the zemindar, not the original rent which was fixed by the Jumabundee for the land then held, but for the whole land in the tenant's possession, the whole tenure, which was clearly one tenure and held as such, is subject to a right of occupancy as a whole, or else it is not subject to any right of occupancy as to any part of it. When the whole land is held by the tenant for more than twelve years, he acquires a right of occupancy in it. If, on the other hand, it appears that within twelve years the tenant has been allowed to take possession of fresh lands and the parties intended to create a new tenure by such addition, then, it must be held that, as regards the whole, a right of occupancy has not been acquired, although a portion thereof may have been held for more than twelve years. AMAR CHAND LAHATTA v. BUKSHEE PYEKAR, **22 W.R. 228.** [*R.*, 6 C. L.J. 149.]

(88)—*Lease for definite time—Possession after expiry of lease—Right of occupancy.*—Where, notwithstanding the conditions in a lease that the landlord was at liberty after the expiry of three years to put an end to the lease, and enter into a settlement with others regarding the property leased, the tenant continued in possession even after the expiry of three years by paying rent as before, *held*, that under the circumstances there was nothing in the stipulation itself which operated to negative or destroy the tenant's right of occupancy. SHAIKH EBADUTOOLAH v. SHAIKH MAHOMED ALI, **25 W.R. 114.**

(89)—*Cultivators—Right to crops—Right of occupancy.*—The lower appellate Court decreed that the defendants should pay the plaintiff the value of certain crops raised upon the lands in suit, merely because it was of opinion that the plaintiff had cultivated the land last year, and

Right of Occupancy—continued.

——2.—Acquisition of Right—*continued.*

by that cultivation, had produced the crops, and that such crops had been taken away by the defendant. *Held* that the plaintiff would have no right to recover the value of the crops from the defendant, unless he either had good right as against the defendant to occupy and cultivate the land or had been led by the conduct of the defendant to suppose that he had such right. The lower Court was wrong in having declined to enquire into the title by which the plaintiff cultivated the land in suit. If the plaintiff had been cultivating the land even for a year to the knowledge of the defendant, that would give him a right as against the defendant to the produce of the lands, even though he (the plaintiff) might not be able to make out a title to the occupation. OBHOY CHURN SEIN v. RAM HUREE ODHIKAREE, **10 W.R. 300.**

(90)—*Occupancy-right—Occupation of holding on death of holder by his legal heir—No new arrangement effected—Right to possession as against zemindar.*—Where, on the death of an occupancy-holder, his legal heir succeeded and was permitted by the zemindar to hold the land for about six years without any new arrangement, such heir was entitled to recover the land as against the zemindar, his occupation being presumed to have been regarded as a continuation of the right of occupancy already acquired. BRIJBHOOKUN v. BHYROW DUTT, **3 Agra 240.**

(91)—*Right of occupancy—Limitation—Absence in transportation.*—By adverse holding for more than twelve years, a tenant gains a right of occupancy as against his predecessor, even if the latter's absence has been involuntary in consequence of transportation, there being no exception in the Limitation Act with regard to plaintiff's absence from such cause. DOMUN v. SUDUNKOOLAT, **1 B.L.R. S.N. 25 A.**

(92)—*Pottah with term for fixed rent, whether amounts to evidence against right of occupancy.*—The finding in this case was that the tenants held a right of occupancy although their pottahs happened to contain a certain term for which the rate of rent was fixed. It was sought to be contended that the mention of the above term was of itself evidence that there was no right of occupancy, but the High Court held that though, under some circumstances, especially at the commencement of a new contract, a specification of a term may lead to the presumption that the landlord has a right of re-entry at the end of it, yet, in the present case, the tenants having been found to be ancient tenants, the term stated in their pottahs could evidently have reference only to the rate of rent fixed by those pottahs. BABOO NUND LAL SINGH v. RUMUN SINGH, **6 W.R. Act X, Rul. 38.**

(93)—*Right of occupancy—Long possession—Burden of proof—Landlord and tenant.*—Mere length of tenure for any period will not give a

Right of Occupancy—continued.

——2.—Acquisition of Right—*continued.*

right of permanent occupancy to a raiyat, who has been let in as a tenant from year to year. If the tenants rely on a right of occupancy, created after the instrument which let them in possession, then it lies on them to prove the grant, oral or written, of such right, or circumstances from which such grant could be legally presumed. THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI, **11 M. 77.** (6 M.H.C. 164, 5 M. 345, *Disc. & D.*) [*Appr.*, 8 C. W.N. 545, P.C.; *R.*, 27 M. 291, P.C. = 14 M.L. J. 200; *D.*, 16 M. 137, 16 M. 271.]

(94)—*Failure to acquire occupancy right—Conditions under which failure happens.*—A right of occupancy in certain land cannot be acquired by a person where he himself does not occupy the land for 12 years, nor was it the occupation by him for a like period of land which he had inherited from his father or any other person. KHERODE CHUNDER ROY v. GORDON, **23 W.R. 237.**

(95)—*Landlord and tenant—Occupancy right, proof of.*—When the right of possession, or the right to continue in possession, is proved to have arisen under a written instrument, which does not provide for right of permanent occupancy, then the right to possession must, *prima facie*, follow the terms of the instrument, in the absence of any subsequent agreement. Mere length of tenure for any period will not give a right of permanent occupancy to a raiyat, who has been let in as a tenant from year to year. THIAGARAJA v. GNANASAMBANTHA, SUBRAMANYA v. GNANASAMBANTHA, **7 M. 374.**

(96)—*Home-farm lands, Incidents of—Occupancy rights.*—If the lands held by the tenants are what are known as "home farm" lands of the zemindari, they are lands which, accordingly to a very general custom of the country, the zemindar reserves for his own cultivation when he thinks fit to resume them and on which a right of occupancy does not accrue. The zemindar, when he lets such lands, has ordinarily a right to resume them at the end of any agricultural year, on giving due notice. VENKATAGIRI ZEMINDAR v. RAGHAVA, **9M. 142.**

(97)—*Bengal Tenancy Act*, 1885, *s.* 181—*Ghatwali lands, whether occupancy rights can be acquired in.*—The question in this appeal was whether occupancy rights could be successfully acquired in Ghatwali lands. *Held*, that, upon principle, having regard to the nature of lands under Ghatwali tenure, and in view of s. 181 of the Bengal Tenancy Act, the acquisition of occupancy rights in such lands is inconsistent with the incidents of such a tenure. UPENDRA NATH HAZRA v. RAM NATH CHOWDHRY, **33 C. 630.** (1 C.L.J. 138, *R.*)

(98)—*Permissive possession—Act* VIII (*B.C.*) *of* 1869, *s.* 6—"*Land*".—Mere possession of a permissive character, and without any right whatever, cannot confer any occupancy-right. The words "cultivated or held" in s. 6, Act

***Right of Occupancy*—continued.**

——2.—Acquisition of Right—*continued.*

VIII of 1869, would have the effect of excluding lands occupied exclusively by buildings. The occupation intended under that section is occupation of land which is the subject of agricultural or horticultural cultivation, or used for purposes incidental thereto, and does not include land exclusively used for dwelling-houses, buildings, &c. MOHUR ALI KHAN PATHAN v. RAM RUTTUN SEN, **21 W.R. 400.**

(99)—*Right of occupancy, how acquired—Bengal Act* VIII *of* 1869, *s.* 6.—*Occupation by ryot as malik—Effect.*—It is only the holding of the father or other person, from whom a ryot, inherits, that can be deemed to be the holding of the ryot, within the meaning of s. 6 of Bengal Act VIII of 1869; the occupation by the predecessor in title is not such an occupation as will create in the holder of land any right of occupancy. [*R.*, 8 C.L.J. 533.] The period of occupation of land by a ryot as malik cannot count towards the acquisition of occupancy right; such a right must be acquired against somebody else and cannot be acquired against oneself. LAL BAHADUR SINGH v. SOLANO, **10 C. 45 = 12 C.L R. 539.** [*R.*, 8 C.L.J. 533.]

(100)—*Non-payment of rent—Act* VIII (*B.C.*) *of* 1869, *ss.* 6, 22—*Rent-free holding.*—A person who is in possession of land without paying any rent is not entitled to the protection of ss. 6 and 22 of Act VIII of 1869, even on the ground of a right to hold the land rent free. LALEE KRISHNA DEB v. SHASHONEE DASSEE, **25 W.R. 42.**

(101)—*Occupation or cultivation as trespasser —Act* X *of* 1859—*Occupation for twelve years.*—An occupation as a trespasser or a cultivation by a trespasser could not confer a right under Act X of 1859 and it could not be taken into account in considering whether such trespasser had occupied as a ryot for twelve years. SHEIKH PEER BUX v. SHEIKH MEAHJAN, **W.R. F.B. 146.**

(102)—*Who cannot acquire—Act* X *of* 1859, *s.* 6.—Those who had no possession of lands of which they had been dispossessed as ryots, or in any other sense than as middle-men receiving rents from the actual ryots of the land, not coming within the purview of s. 6, Act X of 1859, cannot acquire any rights of occupancy. GOPEE MOHUN ROY v. SIBCHUNDER SEN, **1 W.R. 68.**

(103)—*Cultivating ryot, sub-tenant of, right of occupancy cannot beacquired by.*—The defendant-appellant argued in this special appeal that, if the lower appellate Court had enquired and found that the plaintiff was holding under a higher and better title than a mere right of occupancy, the appellant, though a sub-tenant, would be entitled to plead that he had, by reason of 12 years' occupancy, acquired a right to continue to occupy. The High Court, however, *held*, that the lands in dispute having been found by the Courts below to be parts of a *jote* purchased by the plaintiff, and the

***Right of Occupancy*—continued.**

——2.—Acquisition of Right—*continued.*

defendant, being a sub-tenant of that *jote* holding at will, could not, as a sub-tenant of a cultivating ryot, acquire any right of occupancy. KETAL GAIN v. NADUR MISTREE, **6 W.R. 168.**

(104)—*S.* 6, *Act* X *of* 1859—*Right of occupancy by sub-lessee.*—Under s.6, Act X of 1859, a sub-lessee from a ryot having a right of occupancy acquires no right of occupancy for himself MR. D. N. GILMORE v. SURBESSUREE DASSEE, **W.R. 1864, Act X, Rul. 72.** (*James Hills* v. *Issur Ghose*, W.R. F.B. 148, *F.*)

(105)—*Occupancy right—Sub-letting of—Rights of lessee—Act* X *of* 1859, *s.* 6.—Where a person has a right of occupancy, another could not acquire the same right by any sub-letting from him, regard being had to the provisions of s. 6, Act X of 1859. *Quære* :—Under what circumstances will a person forfeit his occupancy right by setting up an adverse title. UNNOPOORNA DOSSEE v. RADHA MOHUN PATTRO, **19 W.R. 95.** [*Cons.*, 22 W.R. 520.]

(106)—*Act* X *of* 1859, *s.* 6—*Sub-lessee under occupancy ryot—Holding over for more than twelve years—Plea of acquisition of occupancy right.*—In the case of lands sub-let for a term by a ryot having a right of occupancy, the sub-lessee, who holds over for more than twelve years after the expiry of the term of his sub-lease, cannot plead that he has under the twelve years' rule acquired an occupancy right, under s. 6, Act X of 1859. JUMMEEUTTUNNISSA BEBEE v. NOOR MAHOMED, **W.R. 1864, Act X, Rul. 77.**

(107)—*Occupancy right—Creation by sub-lease from ryot.*—No right of occupancy is created by a sub-lease from a ryot having a right of occupancy. MOULVIE ABDOOL JUBBAR v. KALEE CHURN DUTT, **7 W.R. 81.**

(108)—*Holding for twelve years—Sub-lease—Right of occupancy.*—A ryot does not acquire a right of occupancy, if the land which he has been cultivating has been sub-let to him for a term, or year by year, by a ryot having a right of occupancy. NIL KOMUL SEIN v. DANESH SHAIKH, **15 W.R. 469.** [*F.*, 19 W.R. 95.]

(109)—*Under-raiyat and occupancy right.*—An under-raiyat is not a raiyat within the meaning of the Bengal Tenancy Act and therefore cannot acquire any right of occupancy. RABIRAM DAS v. UMA KANTA CHUCKERBUTTY, **2 C.W.N. 238.**

(110)—*Occupancy right—Ijara by tenant—Doctrine of merger—Adverse possession.*—The double character of a ryot and ijaradar is not inconsistent, for the doctrine of merger does not apply in this country. Where a tenant with a right of occupancy took an ijara of the estate from the landlord with a covenant that "on the expiration of the lease I shall not have

***Right of Occupancy*—continued.**

——2.—Acquisition of Right—*continued.*

anything to do with the lands without a settlement," *held*, that the covenant could be held to apply only to the rights created by the lease, and that there were no words in it importing an intention on either side to deal with pre-existing rights of the tenant as ryot, if there were any. *Held*, further, that where a ryotee interest co-exists with a farming lease, the co-existing ryoteo interest is the same in extent and quality at the end as at the beginning, and if the tenant has no right of occupancy at the commencement of the lease, he cannot acquire one during its currency. THOMAS SAVI v. PUNCHANUN ROY, **25 W.R 503.** [*F.*, 10 C. 45=12 C.L.R. 539.]

(111)—*S. 6, Act X of 1859—Right of occupancy if can be acquired, under a farming lease.*—Under s. 6, Act X of 1859, a person acquires no title to a right of occupancy by holding under a farming lease which has expired. MR. D.M. GILMORE v SREEMUNT BHOOMICK, **W. R. 1864, Act X, Rul. 77.**

(112)—*Suburban lands let for building—Occupancy rights.*—There is no authority for the proposition: "that there may be rights of occupancy in suburban lands left for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants." RAKHAL DAS ADDY v. DENOMOYI DEBI, **16 C. 652.** (8 C. 960, *Expl.*; 12 W.R. 404=9 B.L.R. 107 (N), *Rel. on.*) [*R.*, 25 C. 896, F.B., 9 C. W.N. 141.]

(113)—*Intruder into land of absconding ryot—Additions or alterations to the building—Effect of as against zemindar.*—Where defendants without any right whatsoever have intruded into a building held by a ryot who had since absconded, they cannot by making additions or alterations to the building acquire any right against the zamindar who is not shown to have assented to such additions or alterations. KUNDHYEE v. SAHEB ZUMAN KHAN, **1 Agra 9.**

(114)—*Act X of 1859, s 6, occupation for cultivation protected by—Occupation mainly as dwelling house not within section.*—The occupation intended to be protected by s. 6 of Act X of 1859, is occupation of land considered as the subject of agricultural or horticultural cultivation, and used for purposes incidental thereto, such as that for the site of the homestead, etc. It cannot therefore be deemed to include occupation, the main object of which is the dwelling house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that. KALEE KISHEN BISWAS v. SREEMUTTY JANKEE, **8 W.R. 250.** [*F.*, 12 W.R. 404, 9 B.L.R. App. 14=15 W.R. 464, Note; *Appr.*, 17 W.R. 151; *Cons.*, 24 W.R. 402; *R.*, 9 W R 552, 11 W.R. 231, 12 W.R. 140, 19 C. 489, 9 Ind. Cas. 804; *D.*, 10 W.R. 403=2 B.L.R.A.C. 92.]

***Right of Occupancy*—continued.**

——2.—Acquisition of Right—*continued.*

(115)—*S. 6—Right of occupancy — Occupation for over 12 years by erection of mud house.*—Holding either as a *Koorfordar* (sub-lessee) or as a trespasser gives no right of occupancy under s. 6 of Act X of 1859, and the erection of a mud-house by such a tenant and dwelling there for more than 12 years afford no presumption of acquiescence on the part of the proprietor. ESHAN CHUNDER GHOSE v. HURISH CHUNDER BANERJEE, **10 B.L.R App. 5=18 W.R. 19.** [*F.*, 9 B.L.R. 215=17 W.R. 550.]

(116)—*Act X of 1859, s. 6—Right of occupancy—Possession for 12 years—Proof of payment of rent—Servant's possession.*—Mere possession for 12 years in the capacity of a servant will not create a right of occupancy under the provisions of s. 6, Act X of 1859. The only way in which a person can take advantage of 12 years' possession will be by showing that he has paid rent during that period to his landlord. WOOMA MOYEE BURMONYA v. BOKOO BEHARA, **13 W.R. 333.**

(117)—*N.W.P. Revenue Board Circular No. 17 of 1856, construction and effect of—Cultivator with 12 year's possession—Protection from summary ejectment by Revenue Court—Acquisition of permanent right of occupancy*—The N.W.P. Revenue Board's Circular No. 17 of 1856, published in Appendix XXVI to directions to Collectors, cannot be taken to lay down as law that, in the N.W. Provinces, at that period, an uninterrupted occupancy of twelve years would carry with it a right of permanent occupancy. Under the Notification, a cultivator who had had possession for twelve years continuously was protected from summary ejectment by the order of a Revenue Court. But the question of his title to a permanent right of occupancy was a question for the determination of the ordinary Civil Courts in accordance with local custom, until the enactment of Act X of 1859. That Act gave fixity of tenure, for some classes of cases, to cultivators who had had twelve years' possession, but it was never in force in the Delhi district, being one enacted after the transfer of that district to the Punjab. JAIMAL v. KHUBI, **39 P.R. 1881.** (C.A. No. 290 of 1877, *R.*) [*F.*, 18 P.R. 1885; *R.*, 12 P.R. 1886.]

(118)—*Pottah granted for term—Holding after years—Right of occupancy.*—A ryot who has successively held under pottahs granted only for terms of years, cannot, by holding under them for more than 12 years, acquire a right of occupancy. KEBUL MUHTOON v. SHEIKH SUNNOO, **5 W.R. Act X, Rul. 80.** [*R.*, 11 W. R. 556; *D.*, 17 W.R. 62.]

(119)—*Lease—Prescriptive right of occupancy—Possession.*—Where the lower appellate Court found that after the defendant had held the land under a lease, it came into the immediate possession of the Zemindar who let it to the plaintiff, and gave him possession, **the plea raised by the defendant that he had a**

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

prescriptive right of occupancy will not avail him unless he be able to get over the fact found by the lower appellate Court, or can show that the Zemindar had illegal possession of the land. KUPRAM KARMOKAR v. JUMEER PORAMANICK, **1 W.R. 167.**

(120)—*Person holding land without rent as trespasser, no prescriptive right of occupancy can be acquired by.*—In this case, the question had to be decided whether the plaintiff's vendor had such right of occupancy as could be transferred by sale. Granting that he held possession of the land for more than 12 years, yet, it was evident that he held it without payment of any rent. The land in question was proved to have been part of the defendants' estate, and the plaintiff's vendor could not plead prescription unless he had paid rent, whereas he had been holding the lands as a trespasser, and, as such, had no rights whatever. SHEIKH GHOLAM HYDER v RAJAH POORNO CHUNDER ROY, **3 W.R. Act X, Rul. 147.** [*R.*, 8 W.R. 238.]

(121)—Khamut *lands let for a long term—Lease from year to year—Right of occupancy.*—A tenant does not acquire a right of occupancy, in *khamut* land which has been first let to him for a term of years, and upon the expiration of that term was tacitly let to him from year to year. BHUGWAN BHAGAT v. JUG MOHAN ROY, **20 W.R. 308.** [*F.*, 4 C.P.L.R. 55.]

(122)—*Rent Law—Kahmar land—Right of occupancy—Presumption.*—The word "khamar" mentioned in s. 6 of the Rent Law refers to any parcel of land whether cultivated or uncultivated, belonging to the zamindar, and which the zamindar chooses to keep in his own possession. Long possession in respect of khamar lands does not give a right of occupancy. There is no presumption in favour of a ryot from the fact of his having been more than 12 years in possession of such land. On the contrary, the presumption would be that he was in possession for a term or year by year as a tenant. If he wishes to get rid of the limitation, it will be for him to show that he had made some arrangement with the zemindar, which brought him within the category of ordinary ryots, and gave him a right of occupancy HURISH CHUNDER DAM v. GUNGA DHUR BHUDDRO, **25 W.R. 181**, *but see* SHAIKH ASHRAF v. RAM KISHORE GHOSE, 23 W.R. 288, *supra.*

(123)—*Land held under lease for fixed term—Right of occupancy—Tenant by sufferance—Yearly tenant—Illegal ousting without notice.*—No right of occupancy accrues while the land is held under a pottah defining and limiting the period for which the land is to be held. [*Not F.*, 17 W.R. 62] A tenant holding over for a number of years by sufferance without pottah is a yearly tenant and is entitled to recover possession if illegally ousted without notice. But if he held under a lease which has expired, he may be turned out early the following year without being entitled to relief, he being in fact a mere trespasser. SADHOO JHA v. BHUPWAN OOPADHYA, **5 W.R. Act X, Rul. 17=1 Ind. Jur. N.S. 75.**

(124)—*Acquisition of right—Occupation by virtue of lease for term of years—Beng. Act* X *of* 1859, *s.* 6.—A right of occupancy could not be acquired by occupation for 12 years under s. 6, Act X of 1859, when such occupation has been by virtue of a lease granting a term of years, and during the whole or part of such occupation the term had not expired. HURRISH CHUNDER KOONDOO v. ALEXANDER, **Marsh 479.**

(125)—*Act* X *of* 1859, *ss.* 6, 7—*Right of occupancy--Leases for fixed terms.*—There is nothing in the mere fact of a tenant having been in possession for over 12 years under a series of *pottas* each for a fixed term only, which gives him a right of occupancy under Act X of 1859. DAMANULLA SIRKAR v. MAMUDI NASHIO, **3 B.L.R. A.C. 178.**

(126)—*Ticca lease — Assignment—Occupancy right—Act* X *of* 1859, *s.* 6.—A ticcadar who is an assignee from the Zamindar and who cultivates land covered by the ticca lease, simply because of the opportunity afforded in his capacity of ticcadar, cannot under colour of that character alone, acquire rights adverse to the Zemindar. Such a person is excluded from the benefits of s. 6, Act X of 1859, which gives the right of occupancy to one who occupies as a ryot only. WOOMANATH TEWAREE v. KOONDUN TEWAREE, **19 W.R. 177.** [*R.*, 12 C. 82.]

(127)—*Right of occupancy—Tenure—Sale—Zamindar's consent.*—By the mere receipt of rent from a purchaser from a tenant having a right of occupancy, a zamindar does not sanction the sale to the purchaser, so as to give him a right of occupancy. GAUR LAL SIRKAR v. RAMESWAR BHUMICK, **6 B.L.R. App. 92.** [*Rel. on*, 7 C.W.N. 132.]

(128)—*Right of occupancy—Transfer of right—Tacking of possession—Act* X *of* 1859, *s.* 6—*Suit for contribution—Claim for interest—Act* XXXII *of* 1839 (*Interest*)—*Demand.*—The possession of the vendor could not be added to the possession of the purchaser so as to give the latter a right of occupancy under s. 6, Act X of 1859. It is immaterial that the Zamindar consented to the transfer. The Interest Act, XXXII of 1839, does not apply to contribution suits, and a demand, as contemplated by the said Act, is unnecessary to support a claim for interest. HYDERBUKSH v. BHUBINDRO DEB COWAR, **13 B.L.R. 276, Note=17 W.R. 179.** [*F.*, 22 W.R. 98 ; *Appl.*, 13 C.W.N. 118=4 Ind. Cas. 331.]

(129)—*Act* X *of* 1859, *s.* 6—*Possession obtained by fraud.*—Possession obtained and continued by fraud is not possession within the meaning of Act X of 1859. BHOOBUNJOY ACHARJEE v. RAM NARAIN CHOWDHRY, **9 W.R. 449.**

Right of Occupancy—continued.

——2.—**Acquisition of Right**—*continued.*

(130)—*Suit for declaration—Cause of action—No allegation of injury.*—The suit was for a declaration of the plaintiff's right to possession of certain land as an occupancy tenant, and to set aside certain alleged fraudulent talooki pottahs. There was no allegation that the plaintiff was disturbed by any act on the part of the defendant. *Held* that the suit would not lie. UDAI CHANDRA MUNDAL v. AHMEDULLA, **7 B.L R 616. Note=12 W.R. 467.** [*R.*, 7 B.L.R. 614=15 W.R. 421.]

(131)—*Act* X *of* 1859, *s.* 6—*Land not held under pottah nor paying rent—No right of occupancy claimable.*—Defendant claimed a right of occupancy in certain beegahs of land for which it had been found that he held no pottah and paid no rent, but of which he merely alleged he had secured and held possession. *Held* that defendant did not come within the provision of s. 6, Act X of 1859, which lays down that "every ryot who has held land for a period of twelve years has a right of occupancy in the land so held by him, so long as he pays the rent payable on account of the same." Defendant appeared to have secretly possessed himself of the land and continued without paying any rent for it. He was not, therefore, in a position to claim any right of occupancy in the land. GOREEB MUNDUL v. BHOOBUN MOHUN SEIN, **2 W.R. Act X, Rul. 85.**

(132)—*Act* X *of* 1859, *s.* 6—*Lease of trees in orchard—Suit by lessor for possession of orchard—Lessee's claim to right of occupancy whether maintainable.* — Where a lease entitled the lessee only to the produce of the trees in the orchard, and not to cultivate the land, the possession of the trees by the lessee, for more than 12 years, would not be a holding of the land within the meaning of s. 6 of Act X of 1859, so as to confer on him a right of occupancy in the land. ROOKMIN KOOER v. BUKSHEE, **5 N.W P. 155.**

(133)—*Act* X *of* 1859—*Land under customary grove tenure*—Kastkari *lands within scope of s.* 6.—In this case, the High Court held that the lower appellate Court was in error in having ruled that lands held as a grove upon terms long customary in the country would be subject to the provisions of s. 6 of Act X so that by a occupancy thereof for over 12 years a right of occupancy can accrue. The provisions of the said s. 6 were intended to apply and have always been construed as applying to *kastkari* land. PIRTUM KOORMY v. BHIKAREE, **2 N. W.P. 364.**

(134)—*Tank—Lease of land with tank thereon—Right of occupancy—Sale of lessee's tenure—Rights of purchaser.*—Where land is let for cultivation and there is a tank upon it, the tank would go with the land ; and if there is a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land. But where the tank is the principal subject of the lease, only so much land passes with the tank as is necessary for it, namely, for the banks. There cannot be a right of occupancy acquired in such a tank. A lease of such a tank is interminable on the sale of the lessee's tenure for arrears of rent, and then the operation of the law would be to give to the purchaser the property freed of the lease. NIDHI KRISHNA BOSE v. RAM DOSS SEN, **20 W.R. 341.** [*Expl.*, 8 C.W.N. 804=31 C. 937.]

(135)—*Tank used for rearing of fish—Tank no appurtenant to land—Act* X *of* 1859, *ss.* 6, 23, *cl.* 4.—Where a tank appears to be used only for the preservation and rearing of fish, and it does not appear to have formed part of any grant of land or that it can in any way be considered as appurtenant to any land, the provisions of Act X of 1859 with respect to acquiring a right of occupancy do not apply to such tank. SIBU JELYA v. GOPAL CHANDRA CHOWDHRY, **13 B.L R. 423, Note =19 W.R. 200.** [*R.*, 21 W.R. 386=13 B.L.R., 416, 8 C.W.N. 804=31 C. 937.]

(136)—*Right of tenant-at-will in occupancy of* julkur, *not preferential to that of lessee of landlord—Inapplicability of Act* X *of* 1859.—This was a suit to recover possession of a certain *julkur*, the plaintiff alleging that he had obtained a lease of the fishery from the zemindar on the death of the former tenant, and held it until the defendant illegally caught and appropriated the fish, and so ousted plaintiff from possession. The defence was possession from the time of the defendant's great-grandfather at a certain yearly rent. It was objected on second appeal that the question to be determined was, whether the defendant had any hereditary right to hold the *julkar*, and that not having been decided, the judgment of the lower appellate Court was incomplete, but the High Court *held* that the defendant was not holding under any lease from the zemindar, and his mere occupancy of the *julkur* for a series of years would give him no preferential right against his landlord's nominee. He was a mere tenant-at-will and could be ousted at any time by the proprietor of the *julkur* and the first Court should not have applied the provisions of Act X and decided that he was entitled to retain possession so long as he paid a fair rent. WOOMA KANT SIRCAR v. GOPAL SINGH, **2 W.R. Act X, Rul. 19.**

(137)—*Right of fishery—Exercise of—Occupancy right.*—The exercise of the right of fishery by a jotedar over two julkars for upwards of 12 years, not as the owner of the jote but as a tenant under a landlord (his rights therein being quite unconnected with his rights in the jote) does not confer on him a right of occupancy. SHAM NARAIN CHOWDHRY v. THE COURT OF WARDS, **23 W.R. 432.**

(138)—Jalker—*Fishery—Rights of occupancy.*—The right of occupancy which accrues to tenants, who have occupied or cultivated land for

Right of Occupancy—continued.

——**2.—Acquisition of Right**—*continued.*

twelve years or upwards, does not arise in respect of the right called *jalkar* or fishery. That is a right which may be let out by *ijaradars* under the landlord, and may be enjoyed under them so long as their *ijara* continues, but is liable to be determined at the expiration of the *ijara*. JUGGOBUNDHOO SHAHA v. PROMOTHONATH ROY, **4 C. 767**.

(139)—*Lease of right to cut spontaneous produce—Right of occupancy—Pre-emption—Act* X *of* 1859, *s.* 23.—This was a suit under cl.6, s. 23, Act X of 1859, to recover possession of certain plots of land on the ground of plaintiff's illegal ejectment by the defendants. Plaintiffs claimed under a lease from the original proprietor of the estate giving the right of cutting the reed, thatch grass and other spontaneous produce of the land in question. *Held* that the tenure under which the plaintiffs claimed to hold, was not a holding of a land within the meaning of s. 6 of Act X of 1859, in respect to which a right of occupancy could be acquired by the plaintiffs. Such right should be regarded as held year by year, and determinable each year, unless conveyed by the owner or other persons holding from him in occupation of the estate or tract for an express term of years. *Held*, further, that no prescriptive right of occupation could be created in such tenure merely by reason of the lengthened enjoyment by the tenant. GOOR DIAL v. RAMDUT, **Agra F.B. 15=Ed. 1874, 11.**

(140)—*Common land of puttee—Occupancy rights, Acquisition of.*—Occupancy rights cannot be acquired in the common land of a puttee cultivated by a tenant. MADDAN v. PIRA, **9 P.R. 1876.** (49 P.R. 1874, *F.*)

(141)—*Shamilat—Acquisition of occupancy rights in—Agreement of parties.*—The Tenancy Act prohibits the acquisition of occupancy rights in shamilat land; but a person may acquire such right by agreement entered into at the time of the settlement, which will, on his death, pass to his heirs. VIR SINGH v. HIRA SINGH, **155 P.R. 1889.**

(142)—*Tenancy Act* (XXVIII *of* 1868), *s.* 5, *cl.* 2—*Twelve years' continuous possession—Acquisition of occupancy rights—Custom.*—Under s. 5, cl. 2 of the Tenancy Act, if a proprietor who has involuntarily parted with his rights has died before the Tenancy Act of 1868 (without having himself acquired occupancy rights), his representative is not entitled to occupancy rights, because he and his father have been in possession ever since as tenants. *Held*, also that there was no well established custom in the Delhi Division, while it formed part of the North Western Provinces, whereby twelve years' continuous cultivation *ipso facto* created an occupancy right. NAHIR ALIKHAN v. KALU. **12 P.R 1886.** (39 P.R. 1881, *R.*) [*Appr.*, 148 P.R. 1888; *R.*, 6 P.R. 1900, Rev.]

(143)—*Punjab Tenancy Act*, 1868, *s.* 8—*Long possession—Mortgage by tenant—Ground not*

Right of Occupancy—continued.

——**2.—Acquisition of Right**—*continued.*

sufficient for occupancy rights.—Long occupation and mortgage of the holding by the tenant without any objection by the landlord are not sufficient to give the tenant occupancy rights. UDDAM SINGH v. NABIA, **96 P.R. 1889.**

(144)—*Punjab Tenancy Act*, 1887, *ss* 8, 5 (1)(c) *--Tenant living outside--Grant of rights—Conditions.*—A suit for occupancy rights under s. 5 (1) (c), Act XVI of 1887, will fail, if the tenant does not live within the limits of the village or estate where the land is situate. Scope of s. 8 discussed. KHAIRATI v. MANNU KHAN, **6 P.R. 1900, Rev.**

(145)—*Punjab Tenancy Act*, 1887, *s.* 5 (1) (*d*)—Muafi *partly resumed and partly unresumed—Interruption of possession—Claim to occupancy rights—O.* 2, *r.* 2, *Civ. Pro. Code*, 1908.—A certain land was originally *muafi*. Half of the *muafi* was resumed in 1887. Half was unresumed. In respect of the resumed portion, a suit for possession on the ground of proprietorship was brought by the defendants and decreed in their favour, while the plaintiff's possession was not interrupted. *Held*, a suit for claiming occupancy rights regarding the unresumed half is untenable and must be dismissed, but will not bar another suit, if the quasi-proprietary possession be disturbed and the plaintiff's title is challenged in course of law. In respect of the resumed half, the plaintiff was entitled to occupancy rights under s. 5 (1) (*d*), Punjab Tenancy Act. MAHANT SADHU RAM v. LAL KHAN, **13 P.R. 1896, Rev.**

(146)—*Acquisition of right under s.* 5 (2), *Punjab Tenancy Act*, 1887 — *One generation—Thirty years* --Where full 30 years have not elapsed on the date of suit since the origin of tenancy, or there was only one succession since then, as from father to son, a person cannot claim the benefit of the presumption laid down in s. 5 (2) Act XVI of 1887. PIRBHU v. MOHAR SINGH, **4 P.R. 1897, Rev.**

(147)—*Hereditary tenancy—Long possession—Settlement record contradicted by evidence.*—A Settlement record contradicted by indisputable facts appearing in a case may be held to be wrong. Mere length of occupancy cannot *per se* confer the *status* of hereditary cultivator on a party recorded at settlement as a tenant at will. But length of occupancy must certainly be taken into consideration as a matter of evidence affording a presumption of what the status of the cultivator has been from its commencement, and of what it was, in fact, at the time of settlement. HET RAM v. TOORTEE, **42 P.R. 1868.** [*F.*, 21 P.R. 1873.]

(148)—*Claim to occupancy right—Entry in settlement record—Sufficiency of proof—Material irregularity.*—If it is not shown that the Settlement Record, in which there is an entry regarding the *status* of the claimant, had not received the sanction of the Local Government, such entry would not be sufficient to confer that status

***Right of Occupancy*—continued.**

— 2.—Acquisition of Right—*continued.*

on the tenant under s. 6, Act XVI of 1887. The omission to consider the plaintiff's claim under s. 5 (1) (*a*) or (*c*) is a material irregularity, being a sufficient ground for revision. SANTA SINGH v. HAZARA SINGH, **8 P.R. 1895. Rev.**

(149)—*Settlement records, evidentiary value of —Long possession, effect of Claim to hereditary cultivation.*—Plaintiffs, the lumbardars of a village, sued to eject the defendants from their holdings of land occupied by them as cultivators of *shamilat* land belonging to the proprietary body of the village. The first Court dismissed the suit on the ground that the defendants had cultivated the land for a long series of years without paying anything but the land revenue, and that, beyond the settlement record of 1864, which was in plaintiff's favour, describing the defendants as tenants-at-will, there was no proof to rebut the presumption arising from long possession. The decree of the first Court dismissing the suit was reversed by the Commissioner on the ground that, as the defendants set up a claim opposed to the settlement records, the burden of proof was upon them. The Commissioner considered that the settlement records constituted a *prima facie* case for that party in whose favour they stood. *Held* that this view was wrong. The settlement entry could not have the effect of shifting the burden of proof form the quarter in which, but for that entry, it would have rested. The maxim being *melior est conditio possidentis*, although, by lapse of years, the cultivator, originally tenant at will, cannot grow into an hereditary cultivator, the fact of such lapse of years would be a weighty element of proof in his favour upon the question whether he or his ancestor was or was not a hereditary cultivator. BULDEO v. HAFIZ ALI, **15 P.R. 1869.** [*R.*, 21 P.R. 1873.]

(150)—*Non-hereditary cultivators — Long possession—Entry in settlement record—Effect.* —Suit by a land-holder to eject a tenant. The tenant pleaded that he had been in possession of the land for more than 27 years prior to settlement, and that the entry in the settlement record that he was only a non-hereditary tenant was erroneous. *Held*, that the tenant having been recorded as a non-hereditary tenant prior to the settlement, no length of occupancy even for 27 years, could confer upon him the status of a hereditary tenant. NUNDA v. FUTTAH, **91 P.R. 1867.** [*R.*, 21 P.R. 1873.]

(151)—*Settlement Record— Occupancy right —Tenancy-at-will — Long possession.*—Where certain tenants described in the Settlement Record as tenants-at-will, claimed rights of occupancy in the lands in their possession on the strength of their occupation for more than 21 years without payment of any proprietary dues or execution of any leases, *held* that this of itself was not enough to confer any right of occupancy on them and the landlord was entitled to eject them. HURRIA v. BIKHAREE, **23 P.R. 1868.** [*R.*, 21 P.R. 1873.]

***Right of Occupancy*—continued.**

——2.—Acquisition of Right—*continued.*

(152)—*Tenants in possession from before settlement — Payment at owner's rates—Such tenants whether entitled to be recorded as having rights of occupancy—Custom—Kukri Kalan, Ferozepur district.*—Plaintiffs were washermen by caste recorded as tenants without rights of occupancy at the settlement. On defendants proposing to eject them, they sued to have it declared that they were by mistake recorded as not having rights of occupancy and to have their rights of occupancy declared in the future; the Courts below found that they had been in possession for some years before the Settlement and had always paid at the same rate as the proprietors. *Held* that, under the rule acted upon at Settlement in the locality in question and its vicinity, a tenant paying at owner's rates, who was of 4 years' standing at the time of Settlement, could not claim to be entitled to be recorded as having a right of occupancy, and that no mistake had been made in recording the plaintiffs, like others in a similar position, as tenants at will. The fact of a tenant paying at owner's rates cannot entitle him to be recorded as an occupancy tenant, without any reference to the duration of his tenure or to other circumstances. LAL SINGH v. SOBHA SINGH, **92 P.R. 1882.**

(153)—*Right of occupancy—Pottah.*—A ryot has no right of occupancy in respect of jotes held by him less than 10 years, but is entitled to a pottah. KISSEN PROSAD v. SHEIKH KARBAREE, **1 W.R. 241.**

(154)—Nij-jote *lands—Zemindar's claim to rights of cocupancy.*—A zemindar cannot lay claim to his own *nij-jote* lands, on the ground that he is a ryot with rights of occupancy, when his zemindari has passed into the hands of another. A. REED v. SREEKISHEN SINGH, **15 W.R. 430.**

(155)—*Occupancy rights—Succession— Survivorship—Recognition by landlord of right as heir of deceased tenant.*—When a person acquires a right of tenancy and joins with him his wife's brother's son in cultivation, on the latter's death, his agnates do not succeed to the holding as his heirs, for it was not acquired by their and the deceased's common ancestor. They do not acquire the right by the landlord's recognising it against the surviving tenant who was joint with the deceased. SARDAR ALI v. MUHAMMED ALI, **23 P.L.R 1910=6 Ind. Cas. 499.** (159 P.R. 1879, 109 P.R. 1894, F.B., 4 P.R. 1880, *R.*; 76 P.R. 1907=32 P.L.R. 1908, *D.*)

(156)—*Occupancy right—Tenant at will—Inheritance—Civil Court—Jurisdiction—Claim not based on illegal ejectment—Possession—Claim to be maintained in possession—Plaintiff not in possession—Dismissal of suit.*—A person cannot claim a right of occupancy as heir of a tenant-at-will. The Civil Court has jurisdiction in the case when the claim is not based upon allegation that the plaintiff has been

Right of Occupancy—continued.

——**2.—Acquisition of Right**—*continued.*

illegally ejected by the person entitled to receive rent of the land. A claim to be maintained in possession is liable to be dismissed, if the plaintiff be found not to be in possession at the date of suit. BUSHEER-OOD-DEEN v. DAL CHUND, **3 Agra 236.**

(157)—*Acquisition of occupancy rights by firms.*—Occupancy rights in lands could be acquired only by particular individuals; a firm or partnership, whose members are changing, could not, by taking a lease of lands, acquire occupancy rights by any length of occupation. RAI KOMUL DOSSEE v. J.W. LAIDLEY, **4 C. 957.** (25 W.R. 117, *F.*) [*R.*, 7 C.L.J. 475.]

(158)—*Indigo concern—Corporate or legal existence--Right of occupancy.*—An indigo concern or firm has no corporate or legal existence so as to acquire a right of occupancy in lands which can be recognised only in particular individuals. H.H. CANNAN v. KYLASH CHUNDER ROY CHOWDHRY, **25 W.R. 117.** [*F.*, 4 C. 957; *R.*, 7 C.L.R. 475.]

(159)—*Fixed rates of rent—Right to hold land at such rates—Such right not a corollary from occupancy right.*—A right of occupancy is obtained simply by remaining in the land for twelve years. Any squatter, if he can succeed in fixing himself on an estate for that time, is entitled to retain his holding so long as he pays rent for it. But a right to hold at fixed rates of rent is a special privilege, which can only be obtained by a direct permission on the part of the landlord. The mere fact of a grandfather being allowed to hold at a fixed rent is no reason in favour of the grandson, unless there be some special mention in the lease conferring hereditary right. RAMNARAIN SINGH v. HURONATH ROY, **W.R. 1864, Act X, Rul. 92.**

See BEN. ACT VIII OF 1869, ss. 59, 60, 66, 9 C.L.R. 449.

See BEN. ACT VIII OF 1885, ss. 5, cl. 5, and 178, 24 C. 272, P.C.=23 I.A. 158=1 C.W.N. 83.

Acquisition of—*See* BEN. ACT VIII OF 1885, ss. 20, 21, 3 C.L.J. 285.

Acquisition of—Agreement between landlord and tenant, validity of—*See* BEN. ACT VIII OF 1885, s. 178 (1) cl. (*a*) and (3) cl. (*a*), 33 C. 136=10 C.W.N. 533.

See C.P. ACT IX OF 1883, 4 C.P.L.R. 53.

See PUN. ACT XXVIII OF 1868, ss. 2, 8, 112 P.R. 1880.

See PUN. ACT XXVIII OF 1868, s. 5, cl. (1), 65 P.R. 1877.

See PUN. ACT XXVIII OF 1868, s. 5 (3), 1 P.R. 1874, 49 P.R. 1874, 62 P.R. 1874, 94 P.R. 1880.

See PUN. ACT XXVIII OF 1868, s. 5 (4), 7 P.R. 1887, Rev. 7 P.R. 1887, Rev. Note.

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——**2.—Acquisition of Right**—*concluded.*

See PUN. ACT XXVIII OF 1868, s. 6, 10 P.R. 1880, 11 P.R. 1880, 17 P.R. 1880, Rev.

See U. P. ACT XII OF 1881, s. 8, A.W.N. 1882, 63.

See HINDU LAW—INHERITANCE, 2 N.W.P. 126.

Acquisition of — Resumption of *muafi* on *muafidar's* death- Subsequent settlement on his heirs—Their rights—Rights of tenants who are joint owners of the holding as against the heirs—*See* MUAFI, 3 P.R 1908, Rev.=5 P. W.R. 1908, Rev.=180 P.L R. 1908.

Whether—can be acquired by under-tenants in the case of a service tenure—*See* SERVICE TENURE, 11 C.W.N. 46=5 C.L.J. 53.

Origin and presumption as to occupancy. *See* WAZIB-UL-ARZ, cl. 11, 4 N.L.R. 149.

——**3.—Loss of Right.**

(1)—*Lease—Act* XI *of* 1859.—Where, under a howla-lease which provided for the digging of tanks and making homesteads and gardens, the defendant was in possession for 40 years, and had incurred expenses in excavating tanks, making gardens and erecting homesteads, he was held to be protected under s. 37 of Act XI of 1859. GIRISH CHUNDER BANERJEE v. SREEMUTTY GUNGA DOORGA, **25 W.R. 60.**

(2)—*Cultivating rights unexercised for a series of years—Lapse of rights.*—There was no provision for the preservation of cultivating rights when unclaimed and unexercised for a series of years even though the reason of this might be the death of the cultivator and the minority of his son. RUTTUN SINGH v. EASHER SINGH, **5 P.R. 1872.** [*R.*, 111 P.R. 1889, 2 P.R. 1901, Rev.=56 P.L.R. 1901, 3 P.R. 1910=157 P. L.R. 1910.]

(3)—*Continuous occupancy—Act* XXVIII *of* 1868, *s.* 36—*Cultivation without interruption.*—The rights of a hereditary cultivator are not lost by non-continuity of occupation, if the cultivation of the holding has been provided for by him without interruption. If once the proprietor has been let into possession and the cultivation is not provided for by the tenant, there ensues a breach in the continuous occupancy required by s. 36 of Act XXVIII of 1868. Whether of longer or shorter duration, the breach is the only point in question, and the usual law of limitation for 12 years is not at all applicable in such case. SHIAN SINGH v. KHUSHIA, **22 P.R. 1876.** [*D.*, 80 P.R. 1876.]

(4)—*Joint tenants—Plea of extinction by non-enjoyment not applicable* inter se.—The rule that an occupancy right will be extinguished, if the land is not continuously occupied, applies only to the case of landlord *versus* tenant, and not between tenants jointly cultivating the land. In the latter case, it is enough to show that the right is maintained as against the

***Right of Occupancy*—continued.**

—3.—Loss of Right—*continued.*

landlord, though not as between the tenants *inter se*. KARM DIN v. JIWA, **111 P.R. 1889.** (5 P.R. 1872, 12 P.R. 1879, 156 P.R. 1884, *D.*)

(5)—*Occupancy tenancy—Quitting of land by tenant—Right of landlord to re-enter.*—Where an occupancy tenant quitted the land in favour of a transferee from him and severed all connections between himself and the land, the landlord was entitled to re-enter the land, inasmuch as under the Rent Law an occupancy tenant had no transferable right in the land. RAM CHUNDER ROY CHOWDHRY v. BHOLONATH LUSHKUR, **22 W.R. 200.** [*F.*, 25 W.R. 104; *App.*, 9 C. 648.]

(6)—*Act X of 1859, s. 6—Right of occupancy, Abandonment of—Khodkast Ryot.*—The right of occupancy given by s. 6, Act X of 1859, is simply what it professes to be, a right to occupy and hold the land. If the ryot, of his own free will, quits and abandons the land, there is nothing in s. 6 to prevent the zemindar from re-letting the land and getting the rent to which he is entitled from a new tenant. HARO DAS v. GOBIND BUTTACHARJEE, **3 B.L.R. App 123=12 W.R. 304.** [*F.*, 24 W.R. 344.]

(7)—*Hereditary cultivator, Abandonment by—Effect.*—Any voluntary abandonment of cultivation by a hereditary cultivator, which entails on the proprietor the necessity of making new arrangements and lead thereby to the introduction of other cultivators, destroys the right of occupation possessed by the hereditary cultivator, and precludes him from afterwards claiming possession. ABDULLAH v. CHIRAG, **78 P.R. 1876.**

(8)—*Occupancy tenant—Voluntary abandonment of tenure—Absence of arrangement for cultivation—Forfeiture—Occupancy holding devolving on minor abandonment in case of.*—A and his brothers were the recorded occupancy-tenants of the land in dispute of which the defendant was the proprietor. It was found by the lower Courts that A went away 14 years ago taking his two brothers, who were then minors, with him, without providing for the cultivation and for the continuance of the occupancy right. *Held* that the rights of A were lost, since a tenure such as the present one cannot but absolutely determine, if the tenant voluntarily abandon it even for a single harvest without making proper arrangements for its cultivation. Also, when an occupancy holding devolves on a minor, the minor's rights will be absolutely destroyed even while he is still a minor, unless a *de jure* or *de facto* guardian comes forward and cultivates for him or arranges for the cultivation, and, consequently, when A went away with his brothers, he destroyed their rights as well as his own. JUMMA v. AHMAD ALI KHAN, **156 P.R. 1884.** [*R.*, 111 P.R. 1889.]

(9)—*Tenant with right of occupancy—Voluntary relinquishment for a year—Continuous occupation.*—The question in this case was whether the voluntary relinquishment of land by a tenant with rights of occupancy for the space of one year avoided the tenant's right in the land. *Held* that, according to the Punjab Tenancy Act, continuous occupation of the land occupied was one of the essential ingredients constituting a right of occupancy. A man who voluntarily relinquished his rights in the land did not retain the right to re-enter, in the absence of express or implied agreement. ALI MAHOMED v. GAMOO, **38 P.R. 1871.** [*R.*, 80 P.R. 1876.]

(10)—*Absolute—Occupancy holding to a minor—Surrender of, by a guardian when binding on minor—Absolute occupancy tenant right when might be lost—Absolute occupancy tenant and ordinary tenant—Difference between the rights—Applicability of Tenancy Act to absolute occupancy tenants.*—The validity of a surrender, by the guardian of an absolute occupancy holding belonging to a minor, as operating to put an end to the rights of the minor thereto, must be judged by the same considerations as apply to the acts of guardian with respect to ordinary property as laid down in *Hanooman Persaud's case.* (6 M.I.A. 393, *R.*) So if the surrender is not a prudent act, and is in excess of the guardian's qualified powers, it cannot so operate as to destroy the absolute occupancy tenant-right. An absolute occupancy tenant-right will not be lost, by reason of the tenant's connection with his land ceasing to exist by means of a transaction not binding on him, unless such severance of the tenant's connection amounts to a dispossession extending over the full statutory period of limitation for suits for land. Although the Tenancy Act incorporates an absolute-occupancy tenant within its sphere of operation and classes him as a tenant along with tenants properly so called, yet in its essence his right to something quite apart from the rights of tenants proper. Mere inclusion in the Act does not subject him to the disabilities of tenants, apart from what the Act specially provides for. RACHO v. SADOO, **6 N.L.R. 6.** [*R.*, 6 N.L.R. 69.]

(11)—*Abandonment of holding and non-payment of rent by occupancy ryot—Landlord's rights—Act* VIII *of* 1869 (*B.C.*), *s.* 22.—S. 22 of the Bengal Act VIII of 1869 could not have intended that, where an occupancy tenant, whatever his rights may be under the section, abandons his holding and ceases to pay rent for five years, his landlord should not be able to put another tenant in possession, without recourse to the formality of a suit. GOLAM ALI MUNDUL v. GOLAP SOONDARY DASSEE, **8 C. 612=10 C.L.R. 499.** [*Expl. & D.*, 14 C. 751.]

(12)—*Non-payment of rent, effect of.*—The mere non-payment of rent will not be sufficient to extinguish a right of occupancy. NILMONY DASSY v. SONATH DOSHAYI, **15 C. 17.** (12 C. 115, *Expl.*)

Right of Occupancy — continued.

— 3 — **Loss of Right**—*continued.*

(13)—*Non-payment of rent during submersion land—Forfeiture of occupancy rights on its re-formation.*—Tenants, with occupancy rights in land, who had not paid any rent at all during the period of the submersion of such land for a number of years, would forfeit their occupancy rights on the reformation of such land. The right of occupancy is one which is to be maintained by regular and punctual payment of the rent payable. HEMNATH DUTT v. ASHGUR SINDAR, **4 C. 894.** (13 M.I.A. 467 =5 B.L.R. 521, *R.*) [*Not F.*, 18 A. 290; *Expl.*, 14 C. 751; *F.*, 6 C.L.J. 149.]

(14)—*Suit to recover land by dispossessed occupancy ryot—Non-payment of rent, effect of.*—A suit by a dispossessed ryot, who had for some years previous to suit failed to pay rent, for recovery of possession, was *held* unsustainable, on the ground of his having had no subsisting title at the date of suit, in spite of his prior established occupancy right. HEM CHANDRA CHOWDHURI v. CHAND AKUND, **12 C. 115.** [*Expl.*, 15 C. 17; *D.*, 14 C. 751.]

(15)—*Landlord and tenant—Occupancy tenancy—Right of tenant to create intermediate tenure—Transfer of non-transferable tenure—Right of purchaser.*— An occupancy tenant has no right to create an intermediate tenure between himself and the landlord. If a ryot, not having a transferable tenure, quits possession, makes over his interests and gives over the land to a third person, he may be treated as having abandoned all rights formerly possessed by him in the land. His position is similar to that of a tenant-at-will, whose interest and tenancy at will are determined by his quitting the land. When a purchaser takes possession of a non-transferable tenure, and interposes himself between the Zemindar and the ryots on the land, he, by that act, commits a wrong and it is competent to the Zemindar to redress that wrong by bringing a suit to declare that no interest is vested in such purchaser, or to restrain him from interfering with the collection of rent. HUREEHUR MOOKERJEE v. JODOONATH GHOSE, **7 W.R. 114.** [*F.*, 11 W.R. 354; *R.*, 20 W.R. 139.]

(16)—*Right of occupancy—Alienation by deed—Possession by transferee*—A deed which purports to transfer a mere right of occupancy in land is invalid, or, at any rate, invalid unless possession is taken under it by the transferee. MAHOMED TUMEEZOODDEEN MUNDUL v. LUKHEE NARAIN DEY SIRCAR, **25 W.R. 104.**

(17)—*Alienation by tenant — Forfeiture — Power to enforce such condition—Delay—Effect.*—The terms of the *wajib ul-arz* provided that, if the tenants alienated their interests to third persons, they would be held to have forfeited their rights of occupancy. This condition was never enforced during a long course of years and was treated as obsolete by the parties. *Held* that, under these circumstances, a landlord cannot enforce this clause, as it was treated

Right of Occupancy—continued.

—— 3.—**Loss of Right**—*continued.*

as a dead letter especially when the plaintiff was guilty of laches in bringing the suit. SUKHDEO v. ABDUL RAHMAN, **6 P.R. 1889.**

(18)—*Occupancy ryot—Sub-lessee, rights of—Act X of 1859, s. 6.*—Under s. 6 of Act X of 1859, a ryot with a right of occupancy does not lose his right by sub-letting his land; but the lessee thereby gains no right. KALEE KISHORE CHATTERJEE v. RAM CHURN SHAH, **9 W.R. 344.**

(19)—*Occupancy ryot—Asserting right to transfer land—Remaining in possession—Effect.*—A tenant having a right of occupancy is not liable to ejectment by the landlord, merely because he has asserted a transferable right in the lands and has sold that right to a stranger, without abandoning the possession of the holding. SRISHTEEDHUR BISWAS v. MUDAN SIRDAR, **9 C. 648.** (13 B.L.R. 274=22 W.R. 22, 22 W.R. 200, *D.*; 4 C. 925, *R.*) [*F.*, 33 C. 531=3 C.L.J. 343; *Appr.*, 9 C.W.N. 379, 11 C.W.N. 811=34 C. 689=7 C.L.J. 78; *Expl.*, 30 B. 290=7 Bom. L.R. 941; *R.*, 7 C. P. L.R. 45, 9 C.P.L.R. 101, 2 C.W.N. 63, 13 C.P. L.R. 39, 15 C.P.L.R. 17, 9 C.W.N. 56; *D.*, 24 C. 212, 11 C.W.N. 873=9 C.L.J. 303.]

(20)—*Tenancy of ordinary puttahdar—Right of tenant, assignable — Verbal surrender by tenant to landlord with knowledge of assignment—Assignment not rendered void.*—The tenancy of an ordinary puttahdar in this Presidency, when properly created, entitles the tenant to the right of occupancy for the purpose of cultivation until default in the payment of the stipulated rent or surrender to the landlord in writing, and the right of the tenant is assignable as a mortgage security. [*Diss.*, 6 M.H.C. 164; *R.*, 1 M. 205, F.B., 210, 211, 4 M. 174, 7 M. 374, 11 M. 77, 13 M. 60, 23 M. 318.] A verbal surrender by the tenant to the landlord after the assignment was known to the landlord cannot be relied on as rendering the assignment void. VENKATARAMANIER v. ANANDA CHETTY, **5 M.H.C. 120.**

(21)—*Act X of 1859, s. 25—Eviction.*—A zemindar cannot eject a ryot having a right of occupancy by giving a patta to another party. In any case under s. 25 of Act X of 1859, the zemindar must have proceeded to the ejectment by due process of law, and not *proprio motu.* SHEIKH KHOSAL v. SHEIKH SHUKOWDEE, **1 W.R. 119.** [*R.*, 14 C.W.N. 297=3 Ind. Cas. 436.]

(22)—*Ejectment—Auction-purchaser of a jote—Right of occupancy—Transfer—Remand.*—A zamindar sued to eject the defendant on the ground that the Jote which he occupied was not transferable. The defendant asserted that the Jote was a transferable one and that he had purchased it at an auction sale in execution of a decree against one D to whom it had belonged and that the tenure so acquired by him was *mowrosee.* Both the lower Courts dismissed the suit on the ground that a mere right of

Right of Occupancy—continued.

—3.—Loss of Right—*continued.*

occupancy was transferable, the Full Bench decision in 22 W R. 22 not having been published when the case was decided by them. Under the circumstances the High Court remanded the case to the original Court to find whether the defendant was entitled to a higher right than a mere right of occupancy under Act VIII (B C.) of 1869, and to decide the case accordingly. MRS. M. R. HYES v. MOONSHEE MONEERUDDEEN AHUNG, **24 W.R. 6.** [*F.*, 15 C. 89.]

(23)—*Revenue sale of tenure—Suit by auction-purchaser against defaulting proprietor—Proceedings in prior suit at instance of latter, admissibility of.*—An auction-purchaser at a sale for arrears of Government revenue does not claim through the defaulting proprietor, so as to make proceedings between the defaulting proprietor and third parties, with respect to the title to the land, admissible in evidence in a subsequent suit by the auction-purchaser as against him. RADHA GOBIND KOER v. RAKHAL DAS MOOKHERJI, **12 C. 82** (14 W.R. 283 and 8 W.R. 22, *reviewed*) [*F.*, 34 C. 868; *R.*. 13 C.P.L.R. 1, 24 B. 591=2 Bom. L.R. 386, 9 C.W.N. 383.]

(24)—*Extinguishment of—On purchase of proprietary rights by occupancy tenant—Effect of the purchase on his sub-tenant's holding.*—If an occupancy tenant purchases the entire proprietary rights in a village, the occupancy rights are extinguished and therefore under ordinary circumstances any sub-tenancy which is grafted upon the tenancy is also determined and the sub-tenant can only become a tenant by virtue of a contract of tenancy entered into directly with the members of the proprietary body. (6 C. P. L.R. 74, *F.*) But, however, though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons, who, at the time of the surrender, had rights which such extinguishment would destroy and as to them, the surrender operates only as a grant, subject to their right, and the interest surrendered still has, for the preservation of their right, continuance. The sub-tenant, therefore, could only resist the claim for possession by pleading and proving the existence of some equity which would keep the occupancy rights alive, or by establishing a new contract or tenancy subsequent to extinguishment of such rights. SAKARAM SONAR v. MADHO RAO, **2 N.L.R. 29.**

(25)—*Putni lease—Right of occupancy—Ejectment—Change in proprietary title.*—Mere change in the proprietary title of an estate does not entitle a putnidar to eject a tenant if he can prove a right of occupancy in the land. RAM GHOSE v. RADHA CHURN GANGOOLY, **15 W.R. 417.**

(26)—*Suit in ejectment—Defendant in possession—Right of occupancy*—Onus *of proof.*—In a suit in ejectment, where the defendant in

Right of Occupancy—continued.

—3.—Loss of Right—*continued.*

possession derived his right from the zemindar, the plaintiff (a prior tenant) cannot succeed unless he shows that the zemindar was not in a position to give the defendant leave to occupy the land, and that he himself had such a right of occupancy or of some superior nature which controlled the zemindar's power to give the land to the defendant. ANUND CHUNDER MUDDUCK v. RASH BEHAREE DEY, **23 W.R. 59.**

(27)—*Tenant obtaining right of occupancy—Suit in ejectment—Act VIII of 1869 (B.C.), s. 6.*—A tenant who has obtained a right of occupancy under s. 6, Act VIII of 1869 (B.C.), could be ejected only by a suit brought under the Act. MOONSHEE JOWAD HOSSAIN v. MAHABIR SAHEE **23 W.R. 411.**

(28)—*Act X of 1859, s. 21—Ryot with right of occupancy, Ejectment of, in execution of decree under Rent Law.*—S. 21 of Act X of 1859 provides that a ryot with a right of occupancy can be ejected in execution of a decree or order under the Rent Law RAJ MOHUN NEOGEE v. ANUND CHUNDER CHOWDHRY, **10 W.R. 166.**

(29)—*Occupancy ryot in Assam—Patta—Right to—Government—Loss of right.*—The mere fact that an occupancy ryot in Assam does not apply to the Government for a *patta* so soon as another who is not in possession of the land, cannot constitute such want of diligence on his part as would make him liable to forfeit his right (*i e.*, the right to have a patta). MORA RABHA v. DHEW RABHA, **17 W.R. 158.**

(30)—*Succession to right of hereditary cultivation of land—Rights acquired under prior* wajib-ul-arz—*New* wajib-ul arz, *effect of.*—Nephews and nephews' sons of a deceased occupancy tenant have a right to succeed to his holding by virtue of a clause in a *wajib-ul-arz* giving the right of succession first to brothers, then to cousins and then to near relations respectively; and a new *wajib-ul arz* would not take away rights which accrued to the nephews under the old one. HARRI SINGH v. RANJIT SINGH, **56 P.R. 1874.** [*F.*, 61 P.R. 1875; *Cons.*, 121 P.R. 1883; *D.*, 8 P.R. 1884.]

(31)—*Right to hold at fixed rates or of occupancy—Written lease not essential.*—Ryots in this country seldom hold written leases, and such ryots cannot lose their right to hold, and to hold even at fixed rates, merely because they could not produce a written lease. DOORGA CHURN MULLICK v. BHOORMON MANJHEE, **6 W.R. 195.**

(32)—*Contract of tenancy—Personal residence, condition of contract—Breach of condition—Forfeiture of tenancy.*—The introductory clause in a contract of tenancy began as follows:—"We tenants *live* in Mouza M, and have been located there by S, who brought us from other liaquas, now by consent, &c." It was further stipulated that the proprietor was to receive certain fees from the tenants residing in that village on the

Right of Occupancy—continued.

——3.—**Loss of Right**—*concluded.*

occasion of marriage occurring either in the houses of the tenants or of the proprietor. R who had received certain land according to this contract omitted to reside in the village, the cultivation of the land having been carried on by his brother. *Held* that, under the terms of the contract, the personal residence in the village of each contracting tenant was contemplated in the contract; that as non-residence of such tenant would deprive the proprietor of those fees, forfeiture of his tenancy would necessarily follow his failure to reside in the village. SODHI MAN SINGH v. RURA, **78 P.R. 1874.**

(33)—*Suit for declaration of occupancy status of superior kind—Facts showing right to lower status—Court's duty—Decision of appeal without reward—Punjab Tenancy Act, ss.* 5, 6, 8.—If the facts in a case show that, though the plaintiff may not be entitled to the *status* claimed by him, he may be entitled to an inferior status, the Court is bound to have the plaint amended and decide the same. The fact that the Collector had to decide an appeal without being able to examine the record is *per se* a ground for remand. CHINGA v. MANGAT RAM, **3 P.R. 1898.**

See ABANDONMENT OF TENURE, 58 P.R. 1876.

See BEN. ACT VIII OF 1869, ss. 6, 52, 9 C. 304=11 C.L.R. 417.

Occupancy Ryot—Mere non-payment of rent, effect of—Abandonment of tenancy—*See* BEN. ACT VIII OF 1869, s. 52, 14 C. 751.

See BEN. ACT VIII OF 1885, s. 19, 21 C. 129.

See BEN. ACT VIII OF 1885, s. 22, sub-s. 3, 18 C. 121.

See PUN. ACT XXVIII OF 1868, s. 2, 22 P.R. 1879.

See PUN. ACT XVI OF 1887, s. 59 (4), 36 P.L.R. 1901.

See JOINT TENANCY, 2 P.R. 1867.

See LIMITATION — MISCELLANEOUS, 54 P.R. 1879.

See PRESUMPTION, 1 P.R. 1871, Rev.

See RES JUDICATA—ADJUDICATIONS, 77 P.R. 1877, 45 P.R. 1879.

See VALUATION OF SUITS, 28 P.R 1879.

——4.—**Transfer of Right.**

(1)—*Right of occupancy—Transfer.*—A right of occupancy cannot be transferred, and it is necessary for the defendant to have been in continuous occupation. CHANDRABATI KOERI v. HARRINGTON, **18 C. 349, P.C.=5 Sar. 481 =18 I.A. 27.**

Right of Occupancy—continued.

——4.—**Transfer of Right**—*continued.*

(2)—*Act* VIII *of* 1869, (*B C.*), *s.* 6—*Right of occupancy—Transfer—Abandonment—Suit by zemindar in ejectment.*—In 1838, a zemindar granted to one K a patta of *banjar* waste land at a yearly rent to hold the same by raising bunds and excavating tanks in, and by cultivating the said land himself or by means of tenants, from generation to generation as a *mukarrari* tenure, and there was a stipulation that the rate of rent should never be changed. K held under the patta until December 1859 when his right, title and interest were sold in execution of a decree and purchased by the defendant who obtained possession and was accepted by the zemindar as his tenant under the patta in the place of K. In May 1871, the zemindari was sold for arrears of Government revenue and purchased by the plaintiff; and in September 1871, the plaintiff delivered to the defendant a notice to quit, and on his refusal to do so, brought the present suit to eject him. *Held* that the right of occupancy which K had acquired under s. 6 of Ben. Act VIII of 1869 was not transferable, and on the facts of this case, it must be taken that K had either abandoned his right altogether so that it cannot be set up in answer to the suit by the landlord for possession, or that his right had ceased, had been put an end to, because it existed only so long as the ryot himself continued to hold or cultivate the land. If a ryot having such a right of occupancy endeavours to transfer it to another person, and in fact, quits his occupations and ceases himself to cultivate or hold the land, he may be rightly considered to have abandoned his right, and nothing is left in him which would prevent the zemindar from recovering possession from the person who claims under the transfer. And not only may he be considered to have abandoned it, but the right which is given by the law is one which exists only so long as he holds or cultivates the land; when he ceases to do that, by selling his supposed right and putting another in his place, his right is gone and cannot stand in the way of the landlord's recovering possession. NARENDRA NARAYAN ROY CHOWDHRY v. ISHAN CHANDRA SEN, **13 B.L.R. 274, F.B.= 22 W.R. 22.** [*F.*, 22 W.R. 169, 22 W.R. 200, 24 W.R. 6, 25 W.R. 104, 4 C. 925=4 C.L.R. 130, 15 C. 89, 24 C. 212=1 C.W.N. 163, 2 C.W.N. 63; *Cons.*, 4 C. 925=4 C.L.R. 130; *R.*, 4 C.L.J. 298, 24 W.R. 72, 9 C. 304, 8 A. 467= A.W.N. 1886, 192, 14 C. 382, 17 C. 826, 24 C. 355=1 C.W.N. 396, 7 C.W.N. 572, 2 C.L.J. 369, 12 C.W.N. 899=7 C.L.J. 72, 7 C.L.J. 78 =11 C.W.N. 811=34 C. 689, 8 Ind. Cas. 825; *D.*, 22 W.R. 493, 9 C. 648, 20 C. 590, 1 C.W.N. 160, 7 Bom. L.R. 941=30 B. 290, 3 C.L.J. 343=33 C. 531.]

(3) *Act* X *of* 1859, *s.* 6 (1)—*Right of occupancy—Transferable tenure.*—The gaining of a right of occupancy, in a non-transferable tenure under s. 6, Act X of 1859, does not make the tenure transferable. *Quære*:—*Per Peacock, C.J.*—Whether a right of occupancy gained

Right of Occupancy—continued.

—**4.—Transfer of Right**—*continued.*

under the same section is necessarily heritable? AJOODHIA PERSAD v. MUSSAMUT EMAMBANDEE BEGUM, **B.L R. Sup. Vol. 725=7 W.R. 528.** [*F.*, 11 W.R. 162, 11 W.R. 405; *R.*, 16 W.R. 111, 23 C. 179, 24 C. 207=1 C W.N. 89, 34 C. 516, F.B.=11 C.W.N. 626=5 C.L.J. 457; *D.*, 12 W.R. 110.]

(4)—*Occupancy right, a personal right—Transferability—Suit by transferee of a share for joint possession with co-sharers, if maintainable—Estoppel.*—The right of occupancy is a right personal to the particular raiyat and cannot be transferred (7 W.R. 28, 22 W.R. 22, 18 C. 353, 24 C. 355, 1 C.W.N. 396, 26 C. 727, 26 C. 937, *Rel.*; 15 W.R. 152, 17 W.R. 179, *R.*). The transferee of the share to one of several persons jointly owning an occupancy holding cannot claim joint possession of the holding as against his transferor's co-sharers, there being no room in such a case for the application of the doctrine of estoppel. SREEMATI AGARJAN BIBI v. PANAULLA, **14 C.W.N. 779=6 Ind. Cas. 452=37 C. 687.** (2 C.W.N. cclxxix, 13 C.W.N. 630, *Expl.*; 4 C.W.N. 679, 11 C.W.N. 76, 14 C.W.N. 71, *D.*)

(5)—*Act X of 1859, s. 6—Right of occupance—Transfer, Mode of—Transfer of jote—Zemindar's consent—Transferee's rights.*—The right of occupancy stated in s. 6 of Act X of 1859 is not a right which can be transferred except as laid down in the Act. It is a right which is attended with certain privileges which are stated in the Act; those privileges can only be acquired under the distinct circumstances stated in that Act [*F.*, 14 C.W.N. 779=6 Ind. Cas. 452=37 C. 687.] Where the zemindar consents to the transfer of a jote, the transferee thereby merely acquires a new jote on the same terms as the original tenure was held. He might in time acquire a right of occupancy, but he is not entitled, to make up his right of occupancy, to add the time during which his predecessor held it. TARA PERSHAD ROY v. SOORJOO KANT ACHARJEE CHOWDHRY, **15 W.R. 152.** [*F.*, 14 C.W.N. 779=6 Ind. Cas. 452=37 C. 687.]

(6)—*Right of occupancy—Transfer of right—Consent of zemindar.*—A bare right of occupancy is not transferable irrespective of the consent or otherwise of the zemindar. BUTI SINGH v. MURAT SINGH, **13 B.L.R. 284, Note =20 W.R. 478.** [*F.*, 22 W.R. 22.]

(7)—*Unauthorised alienation—Recovery of land by landlord—Right of tenant to get back possession.*—A tenant alienated his holding without the landlord's consent. The landlord sued for recovery and obtained possession of the land to obtain a re-entry on his holding. *Held*, that he was entitled to succeed without proving that he is no longer bound for some reason or other by the contract originally made by him. KHUDA BAKSH v. FAZIL DIN, **17 P.R. 1892, F.B.** [*F.*, 6 P.R. 1893, Rev.]

Right of Occupancy—continued.

—**4.—Transfer of Right**—*continued.*

(8)—*Sale of occupancy-rights by tenant with Zemindar's consent—Act XVIII of 1873 (N.W.P. Rent Act), s. 9.*—A sale of occupancy-rights when made by a tenant with the consent of the Zemindar is not void under s. 9 of the Rent Act, 1873. And when, after such a sale, the Zemindar receives from the vendee the arrears of rent due from the vendor, and recognises him as a tenant, he would be estopped from questioning the sale and claiming to eject the vendee (1 A. 547, *R.*)—*Olafield, J.* The transfer of occupancy-rights being prohibited by law (s. 9 of the Rent Act), such a sale is invalid with reference to the provisions of ss. 2 and 23 of the Contract Act. But when the Zemindar had accepted the vendee as a tenant and received rent from him, a tenancy under the Rent Act was created, and the vendee not being a trespasser, the question of his ejectment would not be cognisable by a Civil Court—*Mahmood J.* DURGA v. JHINGURI, **7 A. 511=A.W.N. 1885, 135.** (1 A. 547, *D.*) [*R.*, 10 C.P.L.R. 53, 6 O.C. 331.]

(9)—*Right of occupancy—Transfer - Tacking of possession—Act X of 1859, s. 6—Consent of zemindar.*—The right of occupancy stated in s. 6, Act X of 1859 is not a right which can be transferred except as laid down in the Act. Where a jote is transferred, even if the zemindar consented to the transfer, the transferee merely acquires a new jote on the same terms as the original tenure was held. He might in time acquire a right of occupancy, but he is not entitled to make up his right of occupancy, to add the time during which his predecessor held it. TARAPRASAD ROY v. SURJOKANTO ACHARJEE CHOWDHRY, **13 B.L.R. 281, Note =15 W.R. 152.**

(10)—*Non-transferable—Purchase by landlord in execution of money decree, whether subject to previous mortgage- Estoppel—Evidence Act (I of 1872), s. 115.*—Where in execution of a money decree, the landlords of a non-transferable occupancy holding purchased the holding after it had been mortgaged by the tenants in favour of a third party, *held*, that in a suit by the latter to enforce the mortgage, the landlords were not estopped from setting up the defence that the holding was not transferable without their consent. That the sale of the holding by the landlords did not amount to a representation that it was transferable without their consent, but only that it was transferable with their consent. That the landlords did not merely purchase the equity of redemption, the English law of mortgage not being applicable to the case. The law of estoppel in force in this country is contained in s. 115 of the Evidence Act. BIBI ASMATUNNESSA KATUN SAHEBA v. HARENDRA LAL BISWAS, **12 C.W.N. 721=8 C.L.J. 29=35 C. 904.** (11 C.W.N. 76, *D.*)

(11)—*Occupancy holding—Sale in execution of decree—Consent of fractional landlord—Sale if legal.*—Where a decree-holder's application for sale of an occupancy holding was granted

Right of Occupancy—continued.

— 4.—Transfer of Right—*continued.*

to the extent of 15¼ annas share, upon the finding that co-sharer-landlords to that extent had consented to the sale. *Held*, that, in the present state of authorities, the order should be maintained, the purchaser purchasing at his peril. SHAKARUDDIN CHOUDRY v. RANI HEMANGINI DASI, **16 C.W.N. 420=13 Ind. Cas. 188.**

(12)—*Occupancy right—Transfer by tenant—Recognition of transfer by zemindar—Equity.*—Though a right of occupancy is not transferable, the acts and conduct of the zemindar may take the case out of the purview of the Full Bench ruling in 22 W.R. 22. If it is proved that there has been a clear recognition of the transfer by the zemindar and that the latter has done everything in his power in accepting the transferees as his tenants, he cannot subsequently be permitted to impeach the transfer. SHAIKH AMEEN BUKSH v. BHYRO MUNDUL, **22 W.R. 493.** (22 W.R. 22, *R.*)

(13)—*Ryot having right of occupancy—Sub-lease—Mokurruree lease.*—A ryot having a right of occupancy can create a mokurruree lease in favour of a third party without the consent of his landlord. The term of the lease granted by him can only be binding as between them both. The landlord is not deprived of any legal right which he possesses, but if he chooses to dispossess the sub-lessee without the sanction of law, he is certainly guilty of trespass. DUMREE SHAIKH v. BISSESSUR LALL, **13 W.R. 291.**

(14)—*Ss.* 53 (10) *and* 60—*Punjab Tenancy Act*, 1887—"*Landlord*"—*Meaning of—Joint and general rights.*—The rights given by s. 53, Punjab Tenancy Act to land-holders are not merely joint rights belonging to all the landlords in a body but are also several by force of cl. (10), if the rights are not exercised jointly by the whole body. "Landlord" in s. 60 means all or some or only one of the owners according to circumstances and with due regard to equitable considerations. BUDH SINGH v MIHAN SINGH, **65 P.R. 1894.** (92 P.R. 1887, *D.*) [*R.*, 7 P.R. 1905, Rev.]

(15)—*Punjab Tenancy Act*, 1887, *ss.* 5, 6, 53, 55, 60—*Sale of occupancy rights without landlord's consent—Acquiescence—Rights of tenants.*—A deed of sale by occupancy tenants holding under s. 5, Punjab Tenancy Act, 1887, was registered on the 27th February, 1899, and mutation was effected in the April following. The alience then continued to pay the rents to the landlord who was accepting them. Hence, a suit filed by him in 1903 to cancel the sale was *held* to be unsustainable, as he was estopped by his conduct from disputing the sale. BHAGA v. KARISHAN, **8 P.R. 1904, Rev.=60 P.L.R. 1905.** (1 P.R. 1898, Rev., 2 P.R. 1898, Rev., *R.*) [*R.*, 3 P.R. 1907, Rev.=4 P.W.R. 1907, Rev.]

(16)—*Sale of occupancy in tenure in favour of landlord—Validity of such transfer.*—*Held* that the sale of an occupancy tenure by a tenant to his landlord is valid. BINDA PRASAD AND OTHERS v. RAJENDRA PRASAD, **10 O.C. 235.** (13 A. 396, *R.*) [*R.*, 11 O.C. 292; *Cited*, 12 O.C. 267.]

(17)—*Punjab Tenancy Act*, 1887, ss. 53 and 57—*Alienation of right to landlord—Effect.*—After the sale by an occupancy tenant of his rights to the landlords, the reversioners cannot then sue for a declaration that such sale will not bind their reversionary rights. Scope of ss. 53 and 57 of Act XVI of 1887 explained. DIDARU v. BANNA, **31 P.R. 1896, F.B.** [*R.*, 38 P.R. 1909=60 P.W.R. 1907, 115 P.R. 1901=115 P.L.R. 1901, 24 P.R. 1902, F.B., 3 P.R. 1910, Rev., *Rel. on*, 38 P.R. 1909=60 P.W.R. 1907.]

(18)—*Occupancy rights—Alienation of occupancy rights—Sale by tenant to landlord—Reversioners—Punjab Tenancy Act*, 1887, ss. 53, 56.—The reversioner of an occupancy tenant is incompetent to dispute the validity of a sale of occupancy rights made by a tenant to one of his landlords. NIHAL SINGH v. KHAZAN SINGH, **24 P.R. 1902, F.B.** (31 P.R. 1896, F.B., 89 P.R. 1898, F.B., 68 P.R. 1894, 68 P.R. 1900, *R.*) [*Obs.*, 38 P.R. 1909=60 P.W.R. 1909.]

(19)—*Mutation proceedings—Transfer of occupancy right—Landlord's consent not necessary.*—Mutation of names relating to transfer of occupancy rights must not be refused, simply because the landlord refuses his consent, or because the provisions of s. 53 or s. 56, Punjab Tenancy Act, have not been complied with, if the transfer has taken place as a matter of fact. HARNAM SINGH v. DHARM DAS, **44 P.L.R. 1903.**

(20)—*Right of occupancy—Sale—Custom.*—The determination of the question whether any particular tenure with right of occupancy is saleable or not, depends upon local custom. SREERAM BOSE v. BISSONATH GHOSE, **3 W.R. Act X, Rul. 2.**

(21)—*Right of occupancy—Transfer—Custom—Dowl silent re right to transfer—Presumption.*—In order to make a right of occupancy transferable it must be shown that it is so transferable according to the custom of that part of the country in which the tenure is situated. The power to transfer a right of occupancy cannot be presumed to exist, simply because the dowl makes no mention of the right to transfer. UNNOPOORNA DOSSIA v. OOMA CHURN DOSS, **13 W.R. 55.**

(22)—*Bengal Tenancy Act* (VIII of 1885), ss. 178, 183—*Occupancy rights, transferability of—Usage—Local usage—Custom.*—The usage to which ss. 178 and 183 of the Tenancy Act refer is not confined to a usage existing at the time of the passing of that Act. A long period of time must elapse before a custom in respect of the transferability of occupancy holdings can grow up; but this is not necessarily the case

Right of Occupancy—continued.

——4.—**Transfer of Right**—*continued.*

with regard to the growth of a 'usage' or 'local usage' in respect of this matter. There is a great difference between a custom and a usage and the latter may be established in a much less period of time than a custom. What is necessary to establish a local usage of the transferability of occupancy holdings is, evidence of purchases or transfers by persons other than the landlords, made with the knowledge, but without the consent, of the latter, and to which no objection was made by the latter. EDWARD DALGLEISH v. SHEIK GOZAFFAR, **3 C.W.N. 21.** [*F.*, 6 C.W.N. 861, 6 C.W.N. 181; *R.*, 8 C.W.N. 214, 8 C.W.N. 235, 3 C.L.J. 521.]

(23)—*Occupancy holding—Transferability—Local usage must be mature—Local usage, proof of, as to transferability.*—A transfer of an occupancy holding cannot be justified by local usage which is still "growing up." The usage should have fructuated into maturity. To establish a usage as to the transferability of occupancy holdings in a locality, it is not enough to prove that several cases of transfer of such holdings have actually taken place. It is necessary to prove that such transfers have been made with the knowledge and without the consent of the landlord, and that no successful objection to such transfer has been made by the landlord. RAMHURI SINGH v. JUBBAR ALI MEAH, **6 C.W.N. 861.** (3 C.W.N. 21, *F.*; 6 C.W.N. 181, *R.*) [*R.*, 8 C.W.N. 235.] *See also*, RAJENDRA KISHORE ADHIKARI v. CHANDRA NATH DUTT, 12 C.W.N. 878, *infra.*

(24)—*Occupancy holding — Local usage to transfer—Proof of local usage.*—Where the question was whether an occupancy holding was transferable and the lower appellate Court found as follows:—"There is abundant evidence on the record to show that such lands are actually sold in the locality, and the *Kobalas* filed in this case support this fact." *Held* that this did not amount to finding of local usage. DINO NATH GHOSH v. NOBIN CHUNDER GHOSE, **6 C.W.N. 181.** [*D.*, 2 Ind. Cas. 992.]

(25)—*Transferability of occupancy holding—Custom and usage, proof of.*—To prove a custom or usage that occupancy holdings are transferable in any locality it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages. The essence of a usage of transferability is that transfers made to the knowledge of, but without the consent of, the landlord are valid and must be recognised by him. (8 C.W.N. 172, *F.*) When occupancy holdings are not transferable by custom, the person who purchases them in execution of a money-decree purchase nothing. They are not transferable as between the judgment-debtor and the decree-holder. PEARY MOHAN MUKERJEE v. JOTE KUMAR MUKERJEE, **11 C.W.N. 83.** [*R.*, 2 Ind. Cas. 96.]

(26)—*Sale of holding by tenant—Right of purchaser to standing crops—Transfer without zemindar's consent—Whether allowable by custom.*—It is undoubtedly the general rule in the N.W.P., that a tenant's holding cannot be transferred without the zemindar's consent, but exceptions to this rule are by no means rare. The purchaser of a tenant's holding was entitled to have a distinct decision on the question as to whether or not tenants with a right of occupancy in the estate in which the holding in suit is situate, are competent by custom to transfer their holdings without the zemindar's consent. MEER HADAYAT ALEE v. BABOO LALL SINGH, **1 N.W.P. 96.**

(27)—*Non-transferable — Transfer, if may by questioned by transferor's heirs—Transfer by will—Void or voidable—Landlord's option.*—The transfer of an occupancy holding which is not transferable by local custom or usage, is not a void transaction. It is binding between the parties, namely, the transferor and the transferee, and all persons claiming through them, and is voidable only at the option of the landlord. The heirs of an occupancy raiyat would therefore be bound by a transfer of the holding made by will HARI DAS BAIRAGI v. UDOY CHANDRA DAS BAIRAGI, **12 C.W.N 1086=8 C.L.J. 261.** (4 C.W.N. 679, 2 C.W.N. cclxxix, 6 C.W.N. 624, 11 C.W.N. 76, *Rel. on.*)

(28)—*Absolute occupancy holding—Right of tenant to bequeath holding*—An absolute occupancy tenant cannot will away his holding. MT. ANANDI BAI v. HARLAL BRAHMAN, **15 C.P.L.R. 1.** (3 C.P.L.R. 167, *D.*)

(29)—*Custom of transferability on payment of fee—Fee not paid.*—Where it was found that there was a custom to the effect that the transfer of occupancy rights was not valid except on payment of ordinary fees to the landlord, the transferee who has not paid the same does not acquire the right. SRIMUTHY SIBO SUNDARI GHOSE v. RAJ MOHUN GUHO, **8 C.W.N 214.** [*F.*, 2 Ind. Cas. 992; *R.*, 12 C.W.N. 1086=8 C.L.J. 261.]

(30)—*Decree for arrears of rent—Fractional co-sharer—Sale in execution—Occupancy holding not transferable by custom.*—A fractional co-sharer who has obtained a decree for arrears of rent cannot bring to sale in execution of his decree an occupancy holding which is not transferable by custom or usage. SITA NATH CHATTERJEE v. ATMARAM KAR, **4 C.W.N. 571.** [*R.*, 1 C.L.J. 500. 10 C.W.N. 176=4 C.L.J. 68; *D.*, 13 C.W.N. 630.]

(31)—*Occupancy holding—Transfer contrary to local usage of portion of holding, if constitutes forfeiture of tenancy—Surrender of portion of holding—Landlord's right to re enter that portion—Encumbrance created prior to surrender, effect of—Act* VIII *of* 1885 (*Bengal Tenancy*).—Where the entire holding of an occupancy raiyat has not been transferred contrary to local usage and custom, it cannot be said that there has been a forfeiture of the tenancy.

***Right of Occupancy*—continued.**

——4—Transfer of Right—*continued.*

(2 C.L.J. 369, *F.*) Where a raiyat surrenders a portion of his holding to the landlord, the landlord is entitled to re-enter that portion, notwithstanding any subordinate rights which the raiyat may have created upon that particular portion, and the mere fact that the landlord was aware of the incumbrance created by the raiyat cannot take away his right of re-entry. GAGAN CHANDRA CHOWDRY v. ALAK CHAND SAHA, **17 C.W.N. 698=18 Ind. Cas. 996.** (2 C.L.J. 570, 12 C.W.N. 878, *R.*)

(32)—*Act* X, s. 6—Khoodkhasht *ryot—Right of occupancy—Custom as to transferability of tenure of.*—There is nothing unreasonable in the custom by which a *khoodhasht* ryot, who has built a pucca house upon the land, and has acquired a right of occupancy under s. 6 of Act X of 1859, should have power to put in a new tenant in his place. CHUNDER COOMER ROY v. KADERMONEE DOSSEE, **7 W.R. 247.** [*D.*, 11 W.R. 354.]

(33)—*Right of occupancy—Zemindar and ryot—Ryot's power to transfer—Trespass—Damages.*—A ryot's right of occupancy resting upon legislation and custom alone is not derived from the general proprietary right given to the zemindar by the Legislature, but derogates from and qualifies that right. Whatever the ryot has, the zemindar has all the rest which is necessary to complete ownership of the land; and amongst other rights, he must have such a right as will enable him to keep the possession of the soil in those persons who are entitled to it. The ryots have no power to transfer to a third party *their* right to have possession of and to use the soil for their own benefit. Where such a transfer has been made, and the transferee is in possession, the zemindar, as owner, has a right to evict him as a trespasser and to claim damages to the extent of so much of his rents and profits as the trespasser prevented him from receiving. BIBEE SOHODWA v. SMITH, **12 B.L.R. 82=20 W.R. 139.** [*F.*, 22 W.R. 22; *Appr.*, 15 C. 89; *R.*, 8 A. 467, 17 C. 826, 3 C.L.J. 521.]

(34)—*Transfer whether operates as forfeiture.*—The mere transfer of a right of occupancy does not work as a forfeiture of the rights and interests of occupancy ryots themselves in the land. GORACHAND MUSTAFI v. MADAN MOHAN SIKDAR, **13 B.L.R. 279, Note=11 W.R. 94.** [*F.*, 16 W.R. 111.]

(35)—*Transferable—Transfer—Transferor in possession as tenant of transferee—Ejectment.*—Where on a transfer of a non-transferable occupancy holding, the original tenant takes a sub-lease under the transferee, and, in a suit by the landlord for *khas* possession, pleads that the holding was transferable and that he is in occupation as a sub-tenant under the transferee, *held*, that the landlord is entitled to *khas* possession by ejecting both the original tenant and the transferee. KALI CHARAN GHOSH v. ARMAN BIBI, **13 C.W.N. 220=5 M.L.T. 276=4 Ind. Cas. 473.** (11 C.W.N. 811=34 C. 689, *Expl.*)

***Right of Occupancy*—continued.**

——4—Transfer of Right—*continued.*

(36)—*Transfer of part of occupancy holding—Ejectment—Suit by landlord.*—The transfer, by a raiyat with a right of occupancy, of a part of his holding does not entitle the landlord to recover possession of the land transferred by ejecting the transferee, in the absence of evidence to show that, by custom, such transfer is allowed. DURGA PROSAD SEN v. DOULA GAZEE, **1 C.W.N. 160.** (20 C. 590, 3 C. 744, *R.*; 4 C. 925, 22 W.R. 22, *D.*) [*R.*, 9 C.W.N. 134, 2 C.L.J. 369; *D.*, 10 C.W.N. 818.]

(37)—*Transferable occupancy right—Ejectment—Sale—Bengal Act* VIII *of* 1869, *ss.* 22 *and* 59.—A tenant, who has an occupancy right that is transferable by sale, is not liable to ejectment, and the landlord can only sell the holding under s. 59 of the Bengal Rent Act (*Mitter, J., doubting*) (8 C. 675=10 C.L.R. 399, *F.*) *Quaere.*—Whether a tenant, having a right of occupancy or not, and whether such right of occupancy be saleable or not, is not liable, under s. 22 of the Bengal Rent Act, to ejectment, on an arrear of rent remaining due at the end of the year?—*Per Mitter, J.* FAKIR CHAND v. FOUZDAR MISSER, **10 C. 547.**

(38)—*N.W.P. Rent Act*, XII *of* 1881, *s.* 9—*Transfer of occupancy holding—Lease.*—A lease of an occupancy holding for a period of fifteen years, the effect of which is to place the lessee in possession of the holding and of the right of occupancy is a transfer and is prohibited by s. 9, Act XII of 1881. WALI MUHAMMAD v. RAGHUBAR, **A.W.N. 1889, 145.** (7 A. 866, A.W.N. 1889, 145, *F.*; A.W.N. 1882, 80, *R.*) [*Diss.*, 15 A. 219, F.B., 13 A. 403.]

(39)—*Occupancy tenant—Lease in perpetuity of occupancy holding—Act* XII *of* 1881 (*N.W.P. Rent*), *s* 9—"*Transfer.*"—A lease in perpetuity of an occupancy holding is a "transfer" prohibited by s. 9 of the N.W.P. Rent Act (XII of 1881). JHARAN SINGH v. SHADI RAM, **A.W.N. 1889, 145.** (7 A. 866, *F.*; A.W.N. 1881, 11, A.W.N. 1882, 80, *R.*) [*Diss.*, 15 A. 219, F.B.]

(40)—*Landholder and tenant—Hypothecation of occupancy-right—Transfer—Act* XVIII *of* 1873 (*N.W.P. Rent Act*), *s.* 9.—(*By the Full Bench, Mahmood, J., dissenting*).—The hypothecation, by an occupancy tenant, of his right of occupancy, is not a "transfer" within the meaning of s. 9 of the N.W.P. Rent Act, 1873. GOPAL PANDEY v. PARSOTAM DAS, **5 A. 121 F.B.=A.W.N. 1882, 128.** [*Exp.*, 5 A. 103; *Cons.*, 13 A. 28; *R.*, 5 A. 495, F.B., 7 A. 258, F.B., 7 A. 553, F.B., 7 A. 691, 7 A. 511, 10 B. 519, 8 A. 467, 10 A. 130, 14 B. 377, 10 C.P.L.R. 53, 12 C.P.L.R. 26.]

(41)—*Act* X *of* 1859, *s.* 6—*Right of occupancy—Sub-letting does not transfer such right.*—A ryot, by merely sub-letting his land, does not transfer, nor does his sub-lessee thereby gain, any right of occupancy, the rules laid down in s. 6, Act X of 1859, not applying, as respects the actual cultivator, to land sub-let for a term of

Right of Occupancy—continued.

——4.—**Transfer of Right**—*continued.*

years by a ryot having a right of occupancy. HARAN CHANDRA PAL v. MUKTA SUNDARI CHOWDRAIN, **1 B.L.R. A.C. 81=10 W.R. 113.** [*Appr.*, 15 A. 219. F.B. ; *Expl.*, 11 W.R. 556.]

(42)—*Validity of mortgage by occupancy tenant.*—A temporary transfer, whether in the form of a mortgage or otherwise, by an occupancy tenant, in favour of his land holder, is valid. MITHAN KUNWAR v. MUSAMMAT BEHSA, **11 O.C. 345.** (2 O.C. 204, 6 O.C. 331, *R.*)

(43)—*Mortgage of occupancy rights—Death of occupancy tenant without heirs—Mortgagee's right against landlord.*—A mortgagee's interest is neither greater nor of longer duration than the mortgagor's interest in the occupancy tenure ; hence, where the latter's interest entirely ceases by his death without heirs, the interest of the mortgagee also determined even though the mortgage be made with the landlord's knowledge. NARINDAR SINGH v. LEHNA SINGH, **6 P.R. 1901, Rev.=36 P.L.R. 1901.**

(44)—*Occupancy Right—Transfer by tenants.*—In 1887 certain occupancy tenant of a certain land mortgaged a portion of it by unregistered deeds to Subu Ibrahim and Ismail, and, in 1888, their entire holding to Bhagwan Das. In 1891 the landlords sued for cancellation of the mortgage deeds executed in 1887 but the suit was dismissed on the ground of acquiescence ; the occupancy tenant executed several other mortgages subsequently to that in favour of Bhagwan Das On the 6th April, 1898, Bhagwan Das obtained a decree for possession of the land mortgaged to him, against the tenant and the mortgagees, and it was held that Bhagwan Das had priority over the unregistered mortgages of 1887, because his deed was registered, and over other mortgages, because they were of later dates. This was in pursuance of 115 P.R. 1890, which has been overruled by 56 P.R. 1900, F B. Bhagwan Das sold his rights under the decree of 6th April, 1898 On the landlord's suit for dispossession and cancellation of the sale, *held*, that the mortgages, which were nullities so far as Bhagwan Das is concerned, are not necessarily so as against others not holding any registered deeds entitling them to priority. *Held*, also, that the decree passed on the 6th April, 1898, though conclusive as between the parties, *viz.*, Bhagwan Das and the tenant and his mortgagees, did not confer on the landlords any rights over and above those which they would have had, if the decree had never been given. The landlords' suit for cancellation of the sale decreed but for dispossession of the mortgagees dismissed. IBRAHIM v. NATHU, **43 P.L.R. 1901=7 P.R. 1901, Rev.**

(45)—*Transferability — Usage — Growing usage not sufficient—Usufructuary mortgage by tenant—Subsequent relinquishment to landlord —Right of landlord to re-enter—Mortgage or*

Right of Occupancy—continued.

——4.—**Transfer of Right**—*continued.*

out-and-out sale.—In 1894 an occupancy ryot executed a usufructuary mortgage of the holding, put the mortgagee in possession, and though it was arranged that the tenant would continue to pay rent to the landlord, the tenant left the village and abandoned all connection with the land. In 1901, the tenant executed a deed of relinquishment in favour of the landlord and surrendered the land to him, and it did not appear that he paid any rent since. *Brett, J., held*, on second appeal, upon a consideration of the terms of the mortgage-bond and the circumstances connected with the transaction, that although the document purported to be a usufructuary mortgage for sixty years, the transaction was really an out-and-out sale and the deed was drawn up in that form in order to evade the provisions of law against the transfer of occupancy-holdings. *Held* by *Rampini, C. J.*, and *Mitra, J.*—That apart from such considerations, the moment the deed of relinquishment was executed by the tenant, the landlord became entitled to re-enter. A growing usage of transferability of occupancy holdings is of no effect against the landlord The usage, to be effective, must have already grown up. RAJENDRA KISHORE ADHIKARI v. CHANDRA NATH DUTT, **12 C.W.N. 878.** (10 C.W.N. 497, 10 C.W.N. 719, *Rel on.*)

(46)—*Mortgage by occupancy tenant— Subsequent surrender--Right of mortgagee.*—Where an occupancy tenant mortgages his land, which he is empowered by law to do (*vide* A.W.N. (1882) 126) he cannot defeat the rights of his mortgagee by subsequently relinquishing his occupancy rights. ALTAF HASAN v. DULA RAM, **A.W.N. 1882, 138.**

(47)—*Mortgagee by—Rights of mortgagee, effect of surrender of the mortgaged holding on.*—The predecessor in interest of some of the defendants had mortgaged his absolute-occupancy holding in favour of the plaintiff. After his death, his heirs surrendered a part of the holding in favour of their landlord and this suit was instituted by the plaintiff to foreclose the mortgage, making the landlord also a party. In modification of the decree of the first Court, the lower appellate Court substituted a foreclosure decree for the entire holding. On second appeal by the landlord, *held*, that, where an absolute-occupancy tenant has once validly mortgaged his holding, a subsequent voluntary surrender to the landlord cannot, in any way, operate so as to affect the rights of the mortgagee. BHURAY BRAHMIN v. LALA VISHWANATH, **2 N.L.R. 170.** (11 C.P L.R. 5, *F.*; 18 A. 354, 27 A. 82, 27 M. 401, *R.*) [*Cons.*, 4 N. L.R. 57.]

(48)—*Occupancy, right of—Mortgage of land part of which subsequently transferred by mortgagor to another*—Khud-kasht *land, Transfer of—Possession, Suit for—Tenant—Rent Act* (*Oudh*), 1886, *s.* 5.—In 1890, the proprietor of an eight annas share in a village mortgaged it

Right of Occupancy —continued.

—4.—Transfer of Right—*continued.*

to the plaintiff by a deed, which provided that, in a certain event, the mortgagees should be entitled to possession. The mortgagees sued, and obtained a decree, for possession of the mortgaged property. After the decree, but just before the possession of the share was made over to the plaintiffs by the Court, the mortgagor executed a deed of gift in favour of the defendant in respect of some *bighas* of land, which was admittedly the *khud kasht* land of the mortgagor. The plaintiffs sued the defendant for possession of that land. There was no evidence that the mortgagor either as proprietor or as tenant cultivated or held the land in question on August 24, 1866. *Held*, that s. 5 of the Rent Act, 1886, which was intended to apply only to ex proprietors, who had become mere tenants by August 24, 1866, did not apply to the case at all, and that the transfer of an entire share must be held to include every part of, and everything appurtenant to, that share. *Held*, therefore, that the plaintiffs were entitled to possession of the land in suit. AKBARI BEGAM v BADRI PARSHAD, **5 O.C. 176.** [*R.*, 7 O.C. 312; *F.*, 8 O.C. 353.]

(49)—*Redemption—Sub-mortgage by a mortgagee—Occupancy-holding—Transfer before the Agra Tenancy Act came into force—Right of mortgagee to redeem—General Clauses Act* (I *of* 1904, *local*), *s.* 6.—Rights which accrued before the Agra Tenancy Act came into force are not prejudiced by that enactment. A mortgage of an occupancy tenancy, executed prior to the coming into operation of the Agra Tenancy Act, is valid. Such a mortgagee has all the rights of a mortgagee, including a right to transfer his mortgage and also a right to a sub-mortgage. A mortgagee of an occupancy holding and a transferee from him have a power to redeem the mortgage. RAM PARGAS UPADHIA v. SOOBA UPADHIA, **7 A.L.J. 755=6 Ind. Cas. 837=32 A 623.** (26 A W.N. 302, *D.*)

(50)—*Occupancy holding, non transferable—Usufructuary mortgage by tenant — Tenant remaining on land as sub-lessee of portion of holding and paying rent—Abandonment—Ejectment.*—The execution by a tenant of a mortgage of his non-transferable occupancy holding does not by itself amount to an abandonment of the holding, because it is only on the assumption that the tenancy continues in operation that the mortgagee can have any subsisting interest in the land. (10 C.W.N. 499, 10 C.W.N. 719, 4 C.L.J. 306, *R.*) Where an occupancy raiyat executed a usufructuary mortgage of his holding, but continued to pay rent to the landlord and remained in possession of a portion of the holding as a sub-tenant under the mortgagor: *Held*, that the landlord was not entitled to treat the raiyat as a trespasser and sue him in ejectment. CHOWDHURY MOHADEO PERSHAD v. SHEIKH PACHKARI, **16 C.W.N. 322=13 Ind. Cas. 941.**

(51)—*Mortgage of occupancy-holding—Suit for recovery of money by mortgagee not maintainable — Contract Act, ss.* 23, 24—*Illegal contract.*—A usufructuary mortgage of an occupancy-holding being illegal, the mortgagee cannot recover even the money paid to the mortgagor. KANHAI v. TILAK, **16 Ind. Cas. 42.** (22 A. 205, 7 A.L.J. 330=32 A. 383=5 Ind. Cas. 557, *F.*)

(52)—*Occupancy holding—Mortgage—Subsequent sale of portion of holding with landlord's consent—Suit on mortgage—Purchaser if may question validity of mortgage — Estoppel — Evidence Act, s.* 115.—A raiyat mortgaged his occupancy holding to A; subsequently a portion of the holding was, with the landlord's consent, purchased by B, who later on took a fresh settlement from the landlord at an enhanced rent. *Held* (*Chitty* and *Chatterjee, JJ., Coxe, J., contra*)—That, in a suit by the mortgagee, B was estopped from questioning the validity of the mortgage. RADHA KANT CHUCKERBUTTY v. RAMANANDA SHAHA, **16 C.W.N. 475=15 C.L.J. 369=39 C. 513=13 Ind. Cas. 698.** (12 C.W.N. 720, *D.*; 14 C.W.N. 779, *R.*)

(53)—*Act* XVIII *of* 1873, *s.* 9—*Mortgage of cultivatory holding with right of occupancy by widow—Reversioner if entitled to question.*—Under Act XVIII of 1873, a usufructuary mortgage of a cultivatory holding with a right of occupancy effected by the widow of the last male holder cannot be questioned by the reversioners as they have no right of succession to it. MUSAMMAT BARANJA v. BASDEO MISSER, **7 N.W.P. 241.**

(54)—*Occupancy rights—Mortgage by widow in possession — Right of mortgagee to retain possession on her death — Necessity — Assent of landlord, whether binding on the reversionary heir—Punjab Tenancy Act* (XVI *of* 1887), *s.* 59 (3).—*Held*, that a mortgage of occupancy rights by a widow, whether or not for necessity, is void under s. 59 (3), Punjab Tenancy Act, even if it receives the assent of the landlord, and a reversionary heir is entitled to take possession of the land, without payment, on the death of the widow. ALLAH DITTA v. HASSAN, **50 P.L.R. 1913=18 Ind. Cas. 623=26 P.W.R. 1913.** (39 P.R. 1893, 69 P.R. 1900, *F.*)

(55)—*Occupancy tenants—Mortgage of holdings—Landlord's assent—Revenue decree obtained by proprietor ousting original tenants—Interest of tenants' mortgagees not affected.*—Where a zemindar has permitted his original tenants with a right of occupancy to spilt up their holding and make over portions of it to mortgagees charged with portions of the rent, and has accepted from the mortgagees in possession payment of such portions of rent, he cannot, by reason of his having assented to the substitution of the mortgagees for the original tenants, destroy the interest of the former by obtaining, from the Revenue Court, a decree ousting only the latter. GOBERDHUN v. GOKAL CHAND, **7 N.W.P. 31.**

(56)—*Right of occupancy—Restricted right—Out-and-out sale by heir.*—Although the heir

Right of Occupancy—continued.

——4.—**Transfer of Right**—*continued.*

of a person would not be competent to transfer out-and-out by sale a restricted right of occupancy which that person, and he as heir to that person, has enjoyed, there is no reason why he should not, during and for her life, make such arrangements for the cultivation of the jote and its management as she thinks fit. MOHANUND BANERJEE v. SHUSHEE SHEKHUR CHATTERJEE, **20 W.R. 132.**

(57)—*Occupancy right—Purchaser's right to claim to registry in Zemindar's sherishta.*—Where the purchaser of an occupancy right in certain land claimed the registry of his name in the Zemindar's sherishta, the purchaser should show that his purchase was of a transferable tenure and that the sale to him did not involve any re-distribution of the rent. MUSSAMUT SHUNKURPUTTEE THAKOORAIN v. MIRZA SAIFOOLLAH KHAN, **18 W.R. 507.**

(58)—*Agricultural land—Right of occupancy—Transfer—Conversion of land into dwelling-house.*—Ryots having rights of occupancy in land for agricultural purposes, may, by custom, have the right to transfer it to any person to hold for the same purpose, but that will not carry with it the proposition that a person who may be desirous of erecting a large house in the midst of an agricultural mehal, can buy up the tenures and rights of several cultivators, and convert the land into a dwelling-house and appurtenances. JUGUT CHUNDER ROY CHOWDHRY v. ESHAN CHUNDER BANERJEE, **24 W.R. 220.** [*Cons.*, 2 C.L.R. 294=3 C. 781.]

(59 *and* 60) — *Landholder and tenant — Occupancy holding—Part of occupancy holding converted into a* bagh—*Transfer of this portion—Act* XII *of* 1881 (*N.W.P. Rent*), *s.* 9.—*Held* that the fact that a piece of land, forming a portion of an occupancy holding, had, with the permission of the zemindars, been converted into a *bagh* or grove, by the tenants, did not exempt such piece of land from the usual incidents of occupancy tenure, amongst which were the restrictions upon alienation imposed by s. 9 of Act XII of 1881. NAWAL GOBIND RAI v. GANESH GOBIND RAI, **A.W.N. 1899, 25.** (5 A. 616, *R.*)

(61)—*Occupancy tenant, transfer by, set aside—Suit by landlord against transferee for damages.*—Plaintiff sued the defendant for damages in respect of a period during which plaintiff alleged that the defendant was in possession of the land which ought to have been in the possession of her (plaintiff's) occupancy tenant. The plaintiff had already succeeded in a suit against the defendant for his dispossession from the property, on the ground that the assignment under which he obtained possession from the occupancy tenant was illegal and he was therefore not entitled to retain possession, *Held* that plaintiff had no right to maintain a

Right of Occupancy—continued.

——4.—**Transfer of Right**—*continued.*

suit for damages against the defendant, that if she had any claim it must be in virtue of her right against her tenant, *i.e.*, her right to the rent which the tenant should have paid while he, and not the defendant, should have been in possession, and that, as no permanent injury to the plaintiff's rights had been caused by the defendant in the property, plaintiff had no right of suit against the defendant. BANNO BIBI v. MATHURA SINGH, **A.W.N. 1886, 72.**

(62)—*Right of occupancy—Transferable tenure—Suit to recover* khas *possession*—Onus.—A mere right of occupancy derived from a person who had only such a right, gives no title to the transferee against the Zemindar. (7 W.R. 528, *F.*) [*R.*, 16 W.R. 111.] In a suit to recover *khas* possession, where the defendant's plea is that his holding is a permanent holding, it is not sufficient for him to show that his vendor had some right; it is upon him to show that it was the exact permanent right at issue between the parties. RANI DURGA SUNDARI v. BRINDABEN CHANDRA SIRKAR CHOWDHRY, **2 B.L R. App. 37=11 W.R. 162.**

(63)—*Transfer of non-transferable occupancy holding—Sale by purchaser to under-tenant, effect of—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 22, 49—"*Other wise,*" *meaning of, in s.* 22.—A non-transferable occupancy holding under the plaintiff belonged to B, who sublet a portion of the same to defendants Nos. 1 and 2 and then sold the holding to a third party who again sold the same to defendant No. 1. The plaintiff sued for recovery of possession, and it was contended in defence that the effect of the transfer of the holding is that of abandonment which should be considered to be a transfer in favour of the landlord, who is bound to sue for evicting the defendants as the original tenant would have been bound to do, that is, after notice under s. 49 of the Bengal Tenancy Act: *Held*, that what had taken place in the present case was not tantamount to a sale by the tenant in favour of the landlord, and was not to be clothed with the same legal effect: Where the plaintiff is not the immediate landlord of the under-tenant, s. 49, Bengal Tenancy Act, has no application. S. 22 of the Act applies only to occupancy-holdings which are transferable. (27 C. 473, 4 C.W.N. 569, *R.*) The word "otherwise" in that section is used in respect of the transaction, which is *ejusdem generis* with the co-ordinate words, used in the section, by transfer or succession, and cannot be held to apply to the present case. RADHA NATH v. ADITYA PROSAD DASS, **5 Ind. Cas. 264.**

(64)—*Right of occupancy—Transfer of right—Tacking of possession—Act* X *of* 1859, *s.* 6.—The possession of the vendor could not be added to the possession of the purchaser so as to give the latter a right of occupancy under s. 6, Act X of 1859. It is immaterial that the Zemindar

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——4.—**Transfer of Right**—*continued.*

consented to the transfer. HYDERBUKSH v. BHUBINDRO DEB COWAR, **13 B.L.R. 276, Note=17 W.R. 179.**

(65)—*Estoppel—Occupancy holding sold as fixed rate tenancy—No objection by judgment-debtor in suit or in execution proceedings—Possessory title.*—Where an occupancy holding mortgaged as a fixed rate tenure was sold at auction, as such, and the decree-holder, having purchased it, remained in possession thereof for eleven years, but was subsequently dispossessed by the judgment-debtor, *held* that the defendant was estopped from setting up the plea that the holding was an occupancy tenure, and that the defendant having no title at all, the plaintiff was entitled to re-gain possession on the strength of his possessory title. ASGHAR HUSAIN v PAL AHIR, **10 A.L J. 66=34 A. 538 =15 Ind. Cas. 227.** (8 A.L J. 404, *Reversed.*)

(66)—*Transfer of occupancy holding—Suit by landlord to eject transferee.*—The zemindars of a village brought a suit for ejectment against their occupancy tenants on the ground that they had, by their illegal transfer of the occupancy holding, rendered themselves liable to ejectment, and against their transferees as trespassers. The suit was brought in the Court of the Assistant Collector. The occupancy tenants did not appear to defend the suit. The transferees contended, among other things, that the suit was barred by limitation and that the occupancy tenants were entitled to transfer the holding by the custom of the village. The Assistant Collector decreed the claim. On appeal, the District Judge confirmed the Assistant Collector's decree., On second appeal to the High Court, *held* that the suit was one properly cognizable in the Civil Court, being to eject the transferees as trespassers in fact, who had been put in possession under an illegal transfer by the real tenants, that the appeal however lay to the Judge and that the defect of jurisdiction was saved under s. 207 of the Rent Act, and that the suit, regarded as one to eject trespassers, was not barred by limitation, and that, as the act of the tenant in transferring his holding to the defendants was illegal under the Rent Act the transferees were mere trespassers, whom the plaintiff as proprietor of the land was entitled to eject. JOKHU RAM v. HAR SHANKAR PRASAD SINGH, **A.W.N. 1886, 75.**

(67)—*Suit to eject defendant treated as trespasser—Jurisdiction of Civil Court—Ryot's plea of purchase of mokuraree right—Question of transferability of vendor's title.*—The plaintiff in this case sued to eject the defendant, expressly denying that the relationship of landlord and tenant existed between them and treating the defendant as a mere trespasser having no right whatever to the lands in dispute. The allegations were such that, if the plaintiff failed to make out his own case proving the defendant a trespasser, he was to be out of Court. The contention was thus one of title and not one between landlord and tenant and the suit was therefore held by the High Court to have been properly brought in the Civil Court. *Held*, also, that when a mokururee right by purchase has been set up, it is the duty of the Court to give a substantive finding as to the title and tenure of the vendors, and also, to find distinctly whether from the nature of the tenure it was or was not transferable. RAM CHUNDER MITTER v. RAMZANEE BEBEE, **2 W.R. Act X, Rul. 4.** [*F.*, 4 W.R. Act X, 16.]

(68)—*Right of occupancy, if transferable—Act X of 1859, s. 27—Registration by zemindar—Transfer of occupancy holding—Suit for possession against transferee—Jurisdiction—Act X of 1859, s. 23, cl. 5.*—A right of occupancy is a perpetual lease, the holder of which cannot be ejected so long as he pays a fair and equitable rent. Such a right is a transferable tenure, the zemindar not being bound to register the transfer under s. 27 of Act X of 1859. [*Overruled*, 7 W.R 528; *R.*, 2 W.R. Act X, 4, 3 W. R. Act X, 147.] A Court of Revenue has no jurisdiction, under cl. 5, s. 23, Act X of 1859, to entertain a suit for possession against an occupant by transfer, who is not recognised by the landlord as his tenant, and from whom he has never received rent. The mere fact of the landlord suing for enhancement of rent shows that the tenants had at least the right of occupancy; for a tenant-at-will may be ejected at once on his refusal to pay such rent as the landlord deems proper. MUSSAMUT TARAMONEE DASSEE v. BIRRESUR MOZOOMDAR, **1 W.R. 86.**

(69)—*Non-transferable occupancy holding—Co-sharer landlord's decree for rent—Sale in execution—Purchase by decree-holder--Purchase at mortgage-sale—Rights of purchasers.*—In a suit for recovery of *khas* possession by the plaintiff who had purchased an occupancy holding in execution of a mortgage decree, the defendant claimed under a lease from a co-sharer landlord who also had purchased the holding in execution of a decree for his share of the rent. *Held*—that the question of transferability of the holding did not arise. AYENUDDIN NASYA v. SRISH CHANDRA BANERJI, **11 C.W.N. 76.** [*F.*, 11 C.L.J. 20=5 Ind. Cas. 39 =14 C.W.N. 71, 13 C.W.N. 630; *R.*, 11 C.W. N. 159 N, 12 C.W.N. 1086=8 C.L.J. 261, 2 Ind. Cas. 96; *D.*, 35 C. 904=12 C.W.N. 721= 8 C.L.J. 29, 8 C.L.J. 2, Note.]

(70)—*Jote—Sale in execution of decree—Right of purchaser.*—In the absence of any custom, a right of occupancy, which is merely a creature of the Rent Law and does not depend upon any custom, cannot be transferred. Consequently, the sale of a jote in execution of a decree does

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—4.—**Transfer of Right**—*continued.*

not confer on the purchaser any right of occupancy nor does such a sale prove the right to be transferable. KRIPA NATH CHAKEE v. DOYAL CHAND PAL, **22 W.R. 169.** [*Cons.*, 22 W.R. 493.]

(71)—*N.W.P. Rent Act*, XVIII *of* 1873, *s.* 9—*Transfer of occupancy right.*—In a suit by a decree-holder to bring the occupancy rights of the judgment-debtors to sale in execution of a decree, *held*, that, the present holders of the occupancy right being alive and standing alone, and there being no persons who had as yet become by inheritance co-sharers in such right, there was no person entitled to the occupancy right on whose death in due course such right would devolve as if it were land, and such right not being transferable to a stranger, the decree-holder was not entitled to bring such right to sale in execution of his decree. DURGA PRASAD v. GOKAL CHAND, **A.W.N. 1881, 31.** (1 A. 353, *R.*)

(72 & 73)—*Sale of occupancy right by landlord in execution of money-decree—Subsequent sale of same for rent.*—Where a zemindar, by his own act, had brought the *raiyati* right of his tenant to a termination by bringing it to sale in executing a money-decree against him and settling the lands with other persons after himself becoming the purchaser thereof, the person who subsequently purchased the same holding in execution of a decree for arrears of rent against the same tenant, could not acquire any title to the holding under his purchase and a suit by him for possession must fail; for there was no subsisting title in the tenant to be acquired by the purchaser. RAM SARAN PODDAR v. MAHOMED LATIF, **3 C.W.N. 62.**

(74)—*Occupancy holding, sale of, in execution of a money-decree—Holding not transferable by custom or usage—Sale if valid—Voluntary and involuntary sales.*—A sale in execution of a money-decree, of an occupancy holding which is not transferable by custom or usage, is effectual if it is held with the consent of the landlord. In principle, there is no difference between the case of a voluntary sale made by the raiyat, and an involuntary sale held by the Court, if such sale is consented to by the landlord. ANANDA DAS v. RUTNAKAR PANDA, **7 C.W.N. 572.** [*R.*, 6 O.C. 331, 9 C.W.N. 972.]

(75)—*Landlord and tenant—Sale of occupancy holding in execution of money-decree—Question of transferability of holding, who can raise—Co-sharer of raiyat whether competent to take the plea.*—The raiyat, whose occupancy holding has been sold in execution of a money-decree, can raise the question of transferability, as soon as he comes to know of the execution-proceedings taken against his holding. (24 C. 355, 1 C.W.N. 396, 26 C. 727, 3 C.W.N. 583, *R.*) But a third party cannot raise the plea, against

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—4.—**Transfer of Right**—*continued.*

a person who had purchased the holding in execution of a decree against the raiyat. (2 C.W.N. 279, 6 C.W.N. 624, *F.*) Therefore, the question cannot be raised by a co-sharer of the tenant, when the latter himself is silent, and the landlord is not a party to the suit. AMBIKA CHARAN MONDAL v. RAM CHARAN PRAMANIK, **5 Ind. Cas. 385.**

(76)—*Occupancy holding — Transferability, question of, if arises as between claimants not landlords or original tenants.*—In cases between rival claimants of holdings, neither of whom is either the landlord or the original tenant, the question of transferability does not arise, and the one who would have the best title, if the holding were transferable, is entitled to succeed. SAMIRUDDIN MUNSHI v. BENGA SHEIKH, **13 C.W.N. 630=1 Ind. Cas. 114.** (6 C.W.N. 624, 11 C.W.N. 76, *F.*; 24 C. 355, 3 C.W.N. 586, 4 C.W.N. 571, *D*).

(77)—*Zemindar and occupant ryot—Death of ryot—Lease of land to another tenant—Heir of former tenant not entitled to question.*—On the death of an occupant ryot, it is open to the Zemindar to let his land to whomsoever he pleased, and when the Zemindar has so let the land to some other person, giving him a pottah, it is not competent to a distant relation of the deceased ryot to claim to succeed by inheritance setting aside the arrangement by the Zemindar. JATEE RAM SURMAH v. MUNGLOO SURMAH, **8 W.R. 60.** [*F.*, 2 Agra 366; *R.*, 24 C. 207=1 C.W.N. 89, 34 C. 516, F.B.=11 C.W.N. 626=5 C.L.J. 457.]

(78)—*Hereditary cultivator — Succession—Transfer of holding.*—A hereditary cultivator adopted his nephew and conferred on him, by deed of gift registered, his hereditary occupancy along with other property. *Held* that, under the circumstances, the nephew had obtained a good title to the properties under Mahommedan law, and that the proprietor of the village could not, on the death of the cultivator, recover the holding from the nephew. *Held* further that the transfer by the uncle to the nephew was admissible, because the nephew was a member of the family of the deceased, and dependent on the land. MUTHOO KHAN v. SULTAN, **18 P.R. 1868.** (96 P.R. 1867 and 1 P.R. 1868, *F*) [*R.*, 45 P.R. 1883.]

(79)—*Hindu law—Succession to hereditary cultivators—Lineal heirs or collaterals.*—The law relating to succession to hereditary cultivators is that lineal male descendants succeed in the first instance, and in their absence, collaterals in the male line who can trace their descent to a common ancestor who held the land, and who reside in the village in which the land is situate. GOPAL SINGH v. JOWAHIR SINGH, **1 P.R. 1868.** [*Expl.*, 34 P.R. 1883.]

Right of Occupancy—continued.

——4.—Transfer of Right—*continued.*

(80)—*Hereditary cultivators—Inheritance—Direct line of heirs*—The next of kin of a hereditary cultivator will not be allowed to succeed, unless they are in the direct male line of the owner who originally obtained the cultivation. VEROO v. SAHIB SINGH, **43 P.R. 1866.**

(81)—*Succession—Agreement or custom—Entry in Settlement Record.*—A properly attested entry with regard to succession to occupancy rights in the settlement record will be deemed to be a valid agreement, though there may be no proper consent by either party. The rule as to succession laid down in the Tenancy Acts can be modified by agreement but not by custom. PHINA SINGH v. MAHTAB KHAN, **20 P.R. 1896.**

(82)—*Succession—Survivorship—S.* 59, *Punjab Tenancy Act*, 1887.—The principle of survivorship among joint tenants of a holding will not apply to the case of an heir claiming a share in an ancestral holding on the death of one of the tenants, even though the deceased was joint in cultivation with some of the family. MOHRU v. MUTSADDI, **109 P.R. 1894, F.B.** (56 P.R. 1887, *Overruled*; 2 P.R. 1867, 57 P.R. 1868, 36 P.R. 1870, 159 P.R. 1879, 4 P.R. 1880, 180 P.R. 1882, 9 P.R. 1891, Rev., *R*.) [*R.*, 100 P.R. 1908, 76 P.R. 1907.]

8 (83)—*Succession—Daughter's son—Adopted son—Rights of—S.* 59, *Punjab Tenancy Act*, 1887—*Punjab Tenancy Act*, 1868, *s.* 36.—Under s. 59 of the Punjab Tenancy Act, 1887, a Brahman's daughter's son is incompetent to succeed to the right of occupancy. *Quaere*:—Whether an adopted son can claim the benefit of the above section. WIR BHAN v. SUBA, **40 P.R. 1894.** (1 P.R. 1874, Rev., *D.*)

(84)—*Punjab Tenancy Act*, 1887, *ss.* 5, 59—*Succession to occupancy—Adopted son—Daughter's son—Objection in appeal.*—A daughter's son, who has been adopted, cannot claim to succeed to the occupancy rights of his adoptive father [*Vide* s. 5 (3), P.T. Act]. Such a plea can be taken even for the first time in an appellate Court. JOWALA SINGH v. KALA SINGH, **22 P.R. 1898.**

(85)—*Hereditary cultivator — Succession — Sister's son.*—As a general rule, no one can succeed to the right of an hereditary cultivator, unless he be a descendant in the direct male line of the person who originally obtained the cultivation. The exception is where relationship exists, and also family dependency is established on the part of the claimant. In this case, there were nearer relations than the plaintiff who was a sister's son of the deceased, but they did not object to the plaintiff's claim to succeed. But it was held that notwithstanding the waiver of their rights by these relations, it was open to the proprietors of the village to bject to the plaintiff's claim. Moreover, rights to hereditary cultivation cannot be transferred and therefore, as against the proprietors, such waiver can have no effect. MAYDA v. HURJUS, **96 P.R. 1867.** [*R.*, 18 P.R. 1868.]

(86)—Chela *of a deceased* fakir—*Right to succeed.*—A *chela* of a deceased *fakir* (*Bairagi*) has no right to succeed to the occupancy rights of the deceased against the wishes of the proprietary body, as the *chela* is not a male lineal descendant in the male line within the meaning of s. 59, Punjab Tenancy Act. PUNJAB SINGH v. SANT RAM, **22 P.R. 1896, F.B.** [*R.*, 97 P.R. 1909, 2 P.R. 1907, Rev.]

(87)—*Succession—Customary adoption, s.* 59, *Punjab Tenancy Act*, 1887.—No right of succession is acquired under s. 59, Punjab Tenancy Act, 1887, by a mere customary adoption by a Hindu or Mahomedan. FATTEH MUHAMMAD v. MUSST. JIWAN, **43 P.R. 1895, F.B.** [*R.*, 60 P.R. 1908, 97 P.R. 1909.]

(88)—*Widow—Sale of occupancy right—Remarriage—Extinguishment of right—Punjab Tenancy Act*, 1887, *s.* 59.—*Held*, that an occupancy tenant cannot alienate more than his own interest in a holding, and a widow tenant having rights of occupancy does not possess the power to sell her holding—s. 59 (3), Punjab Tenancy Act, 1887. *Held*, also, that a widow's right is extinguished by her re-marriage under s. 59 (*b*), Punjab Tenancy Act, 1887. HANWANTA v. CHOUTH MAL, **2 P.L.R. 1900, Rev. =3 P.R. 1901, Rev.**

(89)—*Suit for recovery of possession of occupancy holding acquired by defendant from plaintiff's guardian—Fact of defendant being a landlord not disclosed in plaint—Jurisdiction—Special jurisdiction of revenue officers when to be exercised—Notification under proviso to* s. 97, *Central Provinces Tenancy Act—Effect—Plaint presented to Civil Court subordinate to District Court—Return for presentation to judge who is also a Revenue officer—Return for presentation to Civil Court—Decision of District Court upholding Revenue officer's order—Effect—S.* 35 (4), *Central Provinces Tenancy Act*, 1898—*Meaning of words "leaves his holding uncultivated"—Tenants surrendering part of holding—Effect.*—The suit was by a tenant to recover possession of an occupancy holding sold to the defendant by plaintiff's guardians during his minority, alleging fraud, undue influence and absence of legal necessity. The defendant was the sole landlord of the village in which the property in question was, but there was no reference in the plaint to the fact of the defendant being the landlord, and the suit was tried by a Subordinate Judge who was not a Revenue officer. *Held*, that what decides the revenue in a case is the nature of the claim as brought, and that the trial of the suit by the Sub-Judge was not bad for want of jurisdiction. (15 B. 400, 4 N.L.

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—**4.—Transfer of Right**—*continued.*

R. 63, *F.*) It is doubtful whether, when a landlord is sued as alienee, the legislature intended his special position to affect the jurisdiction. An Act by which the jurisdiction of the ordinary Courts is taken away must be construed strictly. (8 W. R. 428, *R.*) Notification No. 586, dated 28-1-1904, which was issued by the Local Administration under the power conferred by proviso (*b*) to s. 97 of the C. P. Tenancy Act, is not in terms exhaustive in the enumeration of suits which the Administration considered to be suits between landlord and tenant as such. But the special jurisdiction conferred on Revenue officers by that Notification was not intended to be exercised when a landlord is not sued as such, but expressly as alienee by a person impeaching the alienation. The expression "leaves his holding uncultivated" in s. 35 (4) of the Tenancy Act means "omits to cultivate the holding himself or to arrange for its cultivation" (6 N.L.R. 6, *R.*). Notwithstanding the surrender, by contract, of part of the land demised, the former tenancy of the remainder continues (8 C.W.N. 375, *F.*; 14 C.P.L.R. 33, *D.*). A plaint was presented to an ordinary Civil Court subordinate to the District Court, but it was returned for being presented to a Judge who was a Revenue officer. It was accordingly presented to such a Judge who however returned it for presentation to an ordinary Civil Court. On appeal, the District Court upheld the order of the Revenue officer and held that the suit was not one between a landlord and tenant. *Held*, that this decision in appeal was binding on the Court to which the plaint was first presented, though there was no appeal from its order. GANPAT v. TRIMBAK, **9 N.L.R. 54=19 Ind. Cas. 759.** (9 C.P.L.R. 1, *D.*)

(90)—*Occupancy tenancy, Transfer of—Civ. Pro. Code* (1908), *ss.* 102, 115—*Small Cause Suit—Second appeal—Revision—Money-bond and lease of holding.*—P executed a bond in favour of J for Rs. 400, and on the same day gave him a lease of his occupancy holding in which it was provided that the rent was to be retained by J on account of interest payable under the bond. J having been ejected from the occupancy holding brought a suit for the recovery of Rs. 400 due under the bond. The Munsif dismissed the suit, but the District Judge on appeal decreed the suit. Defendant preferred a second appeal. *Held*, that the transaction carried out by means of the two documents, *viz.*, simple money-bond and the lease of the occupancy holding, was illegal, and the plaintiff could not sue for the recovery of the money due under the bond. (19 A. 35=A.W.N. 1896, 167, 22 A. 205, 7 A.L.J. 330=5 Ind. Cas. 557=32 A. 383, 8 A.L.J. 826=33 A. 695=11 Ind. Cas. 17, *F.*; 8 A.L.J. 931=33 A. 779=12 Ind. Cas. 112, *D.*) That, as the District Judge had decreed the plaintiff's suit in appeal, and as the suit was one of the nature cognizable by the Small Causes Court, no second appeal lay to the High Court; that, as the District Judge had not failed to exercise a jurisdiction vested in him nor exercised a jurisdiction not vested in him, nor acted in the exercise of his jurisdiction illegally or with material irregularity, the High Court could not interfere in revision. POORAN SINGH v. JAI SINGH, **17 Ind. Cas. 522.**

(91)—*Partition—Occupancy-holding—Suit for partition of occupancy-holding, if maintainable—Landlord, whether bound.*—Any property held for the time being jointly can be partitioned between joint holders. Therefore, a suit for the partition of an occupancy-holding is maintainable. But the division, unless made with the landlord's permission, would not be binding on him. RAJENDRA NARAIN SAHA v. SATISH CHANDRA PAL, **15 Ind. Cas. 331.**

(92)—*Party—Necessary party—Person not made party to proceeding, not bound by order—Purchase of occupancy holding in execution—Permanent lease granted to plaintiff by purchaser—Reversal of sale without making plaintiff party—Whether plaintiff bound by order of reversal—Bengal Tenancy Act* (VIII *of* 1885), *s.* 85, *cl.* (2)—*Lease in contravention of cl.* (2), *s.* 85—*Who is entitled to question validity of lease.*—An occupancy holding was sold in execution of a money-decree against the defendant and the purchaser obtained possession and subsequently granted a permanent lease to the plaintiff. The sale was afterwards set aside, but in the application for the reversal of the sale, the plaintiff was not made a party. The plaintiff brought this suit for recovery of possession, and the defendant pleaded that the sale, which was the basis of the plaintiff's claim, having been set aside, the plaintiff had no enforceable title as against the defendant. *Held*, that, as the plaintiff was not made a party to the proceedings for the reversal of the sale, he was not bound by the order. (15 Ind. Cas. 175, *F.*) The true object of s. 85 of the Bengal Tenancy Act is to entitle the landlord of a *raiyat* to question the validity of a sub-lease granted in contravention thereof. Therefore, an under-*raiyat*, who holds under a permanent lease granted by a *raiyat*, can successfully maintain a suit for possession or defend his possession against the *raiyat* or his representatives-in-interest. It is not open to the *raiyat* in such a suit to question the validity of the sub-lease on the ground that it was granted in contravention of cl. (2) of s. 85 of the Bengal Tenancy Act. SADHAN SARDAR v. LAKAN MANDAL, **15 Ind. Cas. 255.** (10 Ind. Cas. 469, 13 C.L.J. 649, 10 Ind. Cas. 562, 13 C.L.J. 656, *Rel. on.*)

(93)—*Specific Relief Act, s.* 27—*Evidence Act, s.* 115—*Estoppel—Rule of Equity—Occupancy holding—Landlord consenting to sale—Subsequent lease to third party—Title—Priority.*—The plaintiff was the mortgagee of an

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——4.—**Transfer of Right**—*continued.*

occupancy-holding and obtained a decree on his mortgage. He then took a *hukunnamah* from a co-sharer landlord, defendant No. 6. After purchasing the property at the sale in execution of his mortgage-decree, he settled the amount of *nazarana* and paid a part of it to the co-sharer landlord, defendant No. 6. He then took the settlement from the other co-sharer landlords, and went to defendant No. 6 to have the settlement from him on payment of the balance of the *nazarana*, but he was told that the land had already been leased out to the defendant No. 1. Thereupon he brought this suit for recovery of the holding. *Held*, that s. 27 of the Specific Relief Act did not embody the only rule of equity applicable to this case, and that the rule of estoppel contained in s. 115 of the Evidence Act was particularly applicable to the facts of the case; that the consent of the landlord to the purchase of the plaintiff gave the latter a complete title and he could not be ousted by the landlord by any subsequent action of his. HARI MOHAN DEY SARKAR v. RAM NARAIN DUTT, **14 Ind. Cas. 28.**

(94)—*Transfer to person in possession by the former owner of occupancy right in Berar—Nature of transfer—Burden of proof—Ss* 101, 102, *Evidence Act.*—When it is admitted that there was a transfer of some kind to the person in possession by the former admitted owner of the occupancy right in Berar, there is no presumption one way or the other whether that transfer was by way of sale or by way of lease, the possession being consistent with either alternative. We must fall back on the general provisions as to the burden of proof contained in ss. 101 and 102 of the Evidence Act. The burden of proving the nature of the transfer is on the person whose success depends upon the substantiation of the case set up by him. KASHIBAI v. LADURAM, **8 N.L.R. 185=17 Ind. Cas. 889.** (8 N.L.R. 76, 6 B.L.R. 144, *R.*)

See ACQUIESCENCE, 7 B.L.R. 159=15 W. R. 274.

Sub-letting does not transfer such right—*See* BEN. ACT X OF 1859, s. 6, 1 B.L.R.A.C. 81=10 W.R. 113.

See BEN. ACT VIII OF 1869, s. 6, 4 C. 925 =4 C.L.R. 130.

Portion of occupancy-holding, whether transferable—Custom purchaser, position of —*See* BEN. ACT VIII OF 1885, s. 88, 26 C. 615 =4 C.W.N. 738.

See BOM. ACT I OF 1880, 20 B. 78.

Transfer of absolute occupancy holding—*See* C.P. ACT XI OF 1898, s. 41, 15 C.P.L.R. 173.

See PUN. ACT XXVIII OF 1868, s. 34, 92 P.R. 1887.

See PUN. ACT XVI OF 1887, s. 56, 104 P.L. R. 1901.

Right of Occupancy—continued.

——4.—**Transfer of Right**—*concluded.*

See U.P. ACT XVIII OF 1873, s. 7, A.W.N. 1882, 20.

See U.P. ACT XVIII OF 1873, s. 9, A.W.N. 1881, 2, A.W.N. 1881, 11, A.W.N. 1881, 129, A.W N. 1884, 160.

See U.P. ACT XII OF 1881, ss. 7, 9, 6 A. 54, F.B.=A.W.N. 1883, 207.

See U.P. ACT XII OF 1881, s. 9, A.W.N. 1883, 7, A.W.N. 1886, 148, A.W.N. 1887, 130, A.W.N. 1890, 3, A.W.N. 1892, 59, A.W.N. 1894, 37.

Landholder and tenant — Usufructuary mortgage by occupancy tenant—Transfer—*See* U.P. ACT XII OF 1881, s. 9, 5 A. 495, F.B.= A.W.N. 1883, 89.

See U.P. ACT XII OF 1881, ss. 93, 149, A. W.N. 1886, 145.

See BURDEN OF PROOF—LANDLORD AND TENANT, 83 P.R. 1879.

Suit by a reversioner to restrain alienation of occupancy rights by occupancy tenant—Custom —*See* BURDEN OF PROOF—MISCELLANEOUS, 98 P R. 1907, F.B.=62 P.W.R. 1907=18 P.L. R. 1908.

See CIV. PRO. CODE, 1908, ss. 47, 60, O.XXI, rr. 90, 92, 26 C. 727=3 C.W.N. 586.

See CUSTOM—PUNJAB—A LIENATION, 68 P. R. 1894, 12 P.R. 1904.

Transfer of holding by occupancy-tenant—Suit for cancelling transfer—Possession—Ejectment—Jurisdiction of Civil and Revenue Courts —*See* JURISDICTION OF REVENUE COURTS, A.W.N. 1885, 271.

Mortgage of—Mortgagor denying validity of mortgage of his occupancy-holding against mortgagor—*See* MORTGAGE—MISCELLANEOUS, 6 O.C. 331.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 196 P.R. 1882, 43 P.R. 1892, 146 P.L.R. 1901 =87 P.R. 1901.

See PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 179 P.R. 1888.

See SALE—SALE IN EXECUTION OF DECREE —SETTING ASIDE SALE, A.W.N. 1881, 40, A. W.N. 1881, 60.

Question of transferability of, when can be raised—*See* TRESPASSER, 2 Ind. Cas. 96.

——5.—**Miscellaneous.**

(1)—*Right of occupancy—Kubooleut at fair rate — Landlord's permission.*—A kubooleut is a matter of agreement. If a ryot has a right of occupancy and insists on that right, he impliedly undertakes to give a kubooleut at fair and equitable rates, if his landlord requires him to do so. But if the right of occupancy is absent, the ryot can only remain on the land by the permission of the landlord, *viz.*, on such terms

***Right of Occupancy*—continued.**

——5.—Miscellaneous—*continued.*

as may be agreed upon between the landlord and himself. RAJAH SUTTO CHURN GHOSSAL v. GOUREE PERSHAD ROY, **13 W.R. 117.**

(2)—*Permanent settlement, presumption of occupancy before—Rates.*—A defendant pleading a mokururee pottah which is found to be a forgery is not entitled to the benefit of the presumption arising from 20 years' occupancy under s. 16, Act X of 1859—part of the finding of fact of the first Court being that the defendant has not such a jote as that on account of which he claims the benefit of the presumption. Notwithstanding the first Court's finding that the rates claimed by the plaintiff were less than those paid by other ryots who settled with the plaintiff amicably, the lower appellate Court should have found distinctly what were in its opinion the proper rates, and whether the principle adopted by the first Court was a correct one. NOBIN CHUNDER SIRCAR v. SHAMASOONDEREE DABEE, **1 W.R. 106.**

(3)—*Act* X *of* 1859, *s.* 4, *presumption of occupancy under, not claimable by defendant with fictitious pottah*—In this suit for rent at an enhanced rate, it was objected on second appeal that the Judge ought to have taken into consideration the fact that the defendant had held for 20 years at a fixed jumma and that the presumption should have been made that he had so held at that rate since the time of the permanent settlement, under s. 4 of Act X of 1859. The High Court decided that the defendant, having set up an alleged *mouroosee* pottah, which was found, apparently on good grounds, to be fictitious, could not fall back upon the rights which he might have had under that section. PETUMBER SHAHA v. JEBUN SINGH BURMONEE, **2 W.R. Act X, Rul. 6.**

(4)—*Non-occupancy ryot—Suit for kubooleut—Rates of rent to be just and equitable.*—Where, instead of giving notice to quit to a tenant having no rights of occupancy, a landlord chooses to retain him as tenant, and sues to compel him to enter into an engagement to pay rent, the Court is bound to see that it does not enforce the payment of any rates but such as are just and equitable. Where the rates claimed are not admitted by the defendant to be just, the Court should not give a decree for rent at those rates without inquiring whether they are just or not, merely because the defendant has not questioned them. RAM MOHUN GHOSE v. MODHOO SOODUN CHOWDRY, **11 W.R. 304.**

(5)—*Suit for enhancement of rent—Right of occupancy* — Khas *possession.* — A right of occupancy by 12 years' possession, even though the defendant had failed to prove his *patta*, is a sufficient answer to a suit for *khas* possession. The Court cannot, in such a suit, declare the plaintiff's right to enhancement of rent. MUNSOOB BIBEE v. ALI MEAH, **17 W.R. 357.**

(6)—*Punjab Tenancy Act* (XXVIII *of* 1868), s. 5, *cls.* 1, 3—*Notice of ejectment by proprietor—*

***Right of Occupancy*—continued.**

——5.—Miscellaneous—*continued.*

*Tenant's allegation of fulfilment of conditions required—Non-proof—Effect—*12 *years' occupancy, custom of—Allegation in second appeal.—Cir. No.* 17 *of* 1856. *N.W.P. Board of Revenue—Whether applicable to land situate in Delhi District.*—Where a tenant to whom the proprietors had issued a notice of ejectment, claimed to have fulfilled every one of the conditions required in cls. 1 and 3 of s. 5 of the Punjab Tenancy Act (XXVIII of 1868), by alleging firstly, that his father, grandfather, and great grandfather had occupied the same land; that he had paid nothing to the proprietors beyond the revenue fixed, and that he had rendered no service; and secondly, that he was the representative of people who, at the time the village was founded, had broken up the land and had made it fit for cultivation: and both the lower Courts concurred in finding that he had not proved that he could fulfil the conditions of those clauses, it was held that he could not for the first time, in his appeal to the Chief Court, be allowed to urge that his case should be sent back in order that he might have a chance of proving that he was entitled to occupancy rights under a custom of 12 years' occupancy as he had mistaken his ground all along. The effect of Notification No. 1678 of September 1856, as explained in Circular No. 17 of 1856, was merely to protect a cultivator who has had possession for 12 years continuously from summary ejectment by order of the Revenue Court. After Delhi became part of the Punjab in 1857, it was no longer necessary to discuss the effect of Act X of 1859 which only affected the N.W. Provinces. As no special exception was made in the Punjab Tenancy Act (XXVIII of 1868), in favour of the territory annexed from the N.W. Provinces, it could not in any way be said that 12 years' occupancy was by law a sufficient qualification to invest a tenant holding land in the Delhi District with occupancy rights. HANS RAIN v. HAR CHAND, **18 P.R. 1885.** (39 P.R. 1881, *F.*)

(7)—*Act* VIII (*B C.*) *of* 1869, *s.* 16—*Resident cultivator.*—Merely because it appears on the pleadings that a ryot resides in one mouzah, and the land is situate in another, he cannot as a matter of law be treated as a resident cultivator, within the meaning of s. 16, Act VIII (B.C.) of 1869. NUBOKISHORE BISWAS v. JADUB CHUNDER SIRCAR, **20 W.R. 426.**

(8)—*Permanent occupancy right—Proof—"Ulavadai."*—The term "ulavadai" as used in the *pymash* accounts means only the right to cultivate the lands, and it cannot be assumed that the use of the word indicates the existence in the tenant of a permanent right of occupancy. RANGASAMI REDDI v. GNANA SAMBANDA PANDARA SANNADI, **22 M. 264.** [*R.*, 25 M. 507.]

(9)—*Landlord and tenant*—Bastoo *land—Ryotwari tenure—Distinction in payment of*

Right of Occupancy—continued.

——5.—**Miscellaneous**—*continued.*

rent—Operation of Acts X *of* 1859 *and* VIII (*B.C.*) *of* 1869.—*Bastoo* lands are those upon which houses stand, inhabited by persons engaged in agriculture; and they are adjacent to the lands which the ryots who inhabit those houses cultivate. Where rent for *bastoo* lands, attached to a ryotwari tenure, was paid by the ryots to their landlord separately from the rent which was paid for the cultivated lands, as a matter of law, the distinction in the mode of paying the rent did not exclude the *bastoo* lands from the operation of Act X of 1859 or Act VIII (B.C.) of 1869. POGOSE v. RAJOO DHOPEE, **22 W.R. 511.**

(10)—*Evidence—Burden of proof*—Taraf *village—Assertion of occupancy right by* purakkudi *tenant—Length of enjoyment—Effect.*—In a *taraf* village, a registered proprietor is entitled to both the *melvaram* and the *mirasvaram.* In such a case, a claim to an occupancy right set up by a *purakkudi* tenant as overriding the proprietor's right to cultivate his own land is of a special character and as such it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish. Mere length of enjoyment in the capacity of tenants or *purakkudies*, irrespective of other circumstances, is not *prima facie* proof of occupancy right. CHIDAMBARA PILLAI v. TIRUVENGADATHIENGAR, **7 M.L.J. 1.**

(11)—*Customary right—Farmer of revenue, Occupancy for a long time—Burden of proof.*—The principle laid down in Chockalinga Pillai's case (6 M H.C.R 164) is that when a tenancy rests on a contract only, the duration of the tenancy is regulated by the terms of the contract express or implied, and neither the Rent Act nor the Regulations operate to extend its duration. This ruling does not derogate from any customary right. A mere farmer of revenue or proprietary right cannot acquire a right of occupancy. [*R.*, 7 M.L.J. 1, 19 M. 485, 27 M. 291=14 M.L.J. 200=8 C.W.N. 545, P.C.] An occupancy of upwards of seventy years is sufficient to throw upon those who seek to disturb it the burden of showing that the tenancy was not accompanied with a right of occupancy. KRISHNASAMI v. VARADARAJA; VARADARAJA v. VENKATACHALA, **5 M. 345, F.B.** [*R.*, 7 M. 374, 13 M. 60; *D.*, 11 M. 77, 16 M. 131, 16 M. 271.]

(12)—*Surrender of right for consideration—Revival of right.*—Where, in a case in a Civil Court, the occupancy right had been surrendered for a consideration, *held* that it could not be revived subsequently. SAID MUHAMMAD v. SAHIBZADA, **5 P.R. 1872, Rev.** [*F.*, 12 P.R. 1879.]

(13)—*Ejectment of tenant—Possession, Confirmation of—S.* 23, *Act* X *of* 1859—*Applicability.*—The provisions of s. 23, cl. 6, Act X of 1859, which restricts to the Collector's Court all suits to recover the occupancy of land from which a ryot has been dispossessed by the person entitled to receive rent for the same, must be considered to apply equally to cases in which the tenant words his suit, as for confirmation of possession, and brings the suit against the persons entitled to receive rents, in order to settle the question of right to possession. GOOROO CHURN COOMAR v. KHETTER MOHHUN ROY, **W.R. 1864, Act X, Rul. 79.**

(14)—*Occupancy rights in jalkar—Termination or variation of lease by joint proprietors of jalkar.*—A lessee of a jalkar cannot acquire occupancy rights. The lessee of a jalkar could not be ejected by a suit brought by some only of the joint proprietors, with respect to their share in the jalkar. A lease granted by all the proprietors could not be varied or terminated at the suit of one. BOLLYE SATEE v. AKRAM ALLY, **4 C. 961.**

(15)—*Landlord and tenant—Occupancy holding—Pacca mosque built on the holding—Act inconsistent with the purpose of letting—Ejectment.*—At one of the corners of an occupancy holding, there stood some huts which the defendant used for his living and for his cattle and *kolhu.* In one of these huts, the Mussulmans used to meet for prayers. Subsequently the defendant began to build a pacca mosque on the site of the house in which they used to pray. *Held*, that the building of pacca mosque was an act inconsistent with the purpose for which the holding had been let, and the defendant was liable to be ejected for so doing. *Held*, further, that the defendant was liable to be ejected from the entire holding, and not only from the part on which the mosque was built. ALLAH DIA v. SADA NAND, **8 Ind. Cas. 732.**

(16)—*Arable land—Right of tenant to build on—No landlord's consent—Injury to landlord.*—A suit by a landlord for removal of an enclosure and cattle shed erected by a tenant on arable land will be dismissed if the landlord suffers no appreciable injury by the act of the tenant as such erection could not be said to have altered the nature of the holding from arable to building land but was connected with purposes of agriculture. DASWANDHI v. GHULAM, **122 P.R. 1888.** [*R.*, 3 P.R. 1904, Rev.]

(17)—*Occupancy ryots, power of, to build houses on lands.*—Plaintiff sued to compel the defendant who was a ryot with a right of occupancy to pull down a house, on the ground that he had no right to build on it; and the lower appellate Court decreed accordingly. But the High Court held that every man possessed of a right to hold land permanently,—that is, of a right of occupancy,—can do what he likes with the land so long as he does not injure it to the detriment of the landlord. NYAMUTOOLLAH OSTAGUR v. GOBIND CHURN DUTT, **6 W.R. Act X, Rul. 40.** [*Not F.*, 16 M. 407=3 M.L.J. 185; *R.*, 10 C.L.R. 25, 8 C.W.N. 754=31 C. 1014.]

***Right of Occupancy*—continued.**

——5.—Miscellaneous—*continued.*

(18)—*Alienation of portion of jote—Diminution in jumma—Ryot if deprived of presumption of occupancy under s. 4 of Act X of* 1859.—The defence in this suit for enhanced rent was that the land had been held for generations at a uniform rent and that the ryot was therefore entitled to the benefit of the presumption given by s. 4 of Act X of 1859. On second appeal, the High Court *held* that the lower appellate Court had wrongly ignored the statement of the ryot, which was not that the jumma was fixed in a particular year, but that, in that particular year, he had parted with a portion of his jote so that a diminished rent was payable. He stated that, in that year, he paid lesser rent than during the former years, the diminution being caused by his having alienated a portion of the jote, and the diminution caused by such alienation could not deprive the ryot of the benefit of the presumption under s. 4 of Act X of 1859. KENARAM MULLICK v. RAM COOMAR MOOKERJEE, **2 W.R. Act X, Rul. 17.**

(19)—*Mortgage—Occupancy-holding — Relinquishment of holding by mortgagor in favour of Zamindar—Mortgage not affected.*—A mortgagor of an occupancy-holding is not competent to relinquish the holding, so as to impair the security given by him to the mortgagee and in fact to destroy it. JAIGOPAL SINGH v. RAM TAHAL, **6 Ind. Cas. 705.** (24 A. 538, A.W.N. 1902, 151, 18 A. 354, *R.*)

(20)—*Plaintiff when entitled to decree—Suit by zemindar to recover possession of occupancy holding against tenant and his alleged transferee —Death of tenant after filing suit but before issue of notice.*—A plaintiff is not entitled to a decree in his suit unless, by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to a decree. A zamindar brought a suit for recovery of possession of an occupancy holding against the occupancy tenant and an alleged transferee of his. Subsequent to the filing of the plaint, but before the time of notice thereof to the defendants, the occupancy tenant died, and his alleged transferee was, in addition to his personal capacity, made a defendant as representing the deceased occupancy tenant. The transfer by the occupancy tenant in this case was inoperative under s. 9 of the N.W.P. Rent Act XII of 1881; and the plaintiff, therefore, at the time of filing of the suit, could not have been entitled to the immediate possession of the holding. *Held* that under the circumstances the suit must be dismissed, although the zemindar, if he had filed his suit after the death of the tenant against the alleged transferee as trespasser, might have been entitled to a decree; and also that this dismissal should not bar any suit that the zemindar may bring against the transferee as trespasser. GULZAR SINGH v. KALYAN CHAND, **15 A. 399=A.W.N. 1893, 170.** [*D.*, 16 A. 325.]

(21)—*Suit by landlord to resume occupancy right after the death of widow of late tenant—*

***Right of Occupancy*—continued.**

——5.—Miscellaneous—*continued.*

Plea of adverse possession by one holding under widow, validity of.—In a suit by proprietors to eject a person who set up title as occupancy tenant, immediately after the death of the widow of the previous tenant, the defendant set up adverse possession, based on mutation of names in his favour during the widow's lifetime, on a subsequent possession as occupancy tenant and on an unsuccessful application by the father of some of the plaintiffs, and failure by them to sue in a Civil Court as directed by the Revenue authorities. *Held*, that the plaintiff was not bound to sue till after the death of the widow and that s. 9 of the Tenancy Act would preclude the acquisition by mere lapse of time of a right of occupancy. The suit was, therefore, not barred by limitation and the defendant could not set up a claim by adverse possession. *Held* also, that the plea that the defendant's possession was adverse to his adoptive mother, and through her to the plaintiffs, was not valid. GANDA SINGH v. KAIM KHAN, **60 P.R. 1908=109 P W.R. 1908.** (43 P.R. 1895, *R.*; 73 P.R. 1900, 12 C. 484, P.C., *D.*)

(22)—*Succession to—Presumption from long possession.*—In a case of succession to occupancy rights by the collaterals of the last tenant, *held* that, where the father of the deceased tenant, who was entered in the annual papers as a hereditary cultivator, is shown to have been in possession of the holding for 50 years, it may be presumed that it descended to the father, from the grandfather. SIPADAR KHAN v. KADHERU, **101 P.R. 1908=11 P.L.R. 1909=166 P.W.R. 1908=4 Ind. Cas. 691.**

(23)—*Tenant dying issueless—Provision in* wajib-ul-arz. — The provision in *wajib-ul-arz* that, on the death of an occupancy tenant sonless, the holding should revert to the owners, does not, in the absence of clear express exclusion, exclude male collaterals of the same ancestor, who was himself in possession of the land. CHANGA v. NABI BAKSH, **145 P.R. 1890.**

(24)—*Landlord and tenant—Occupancy right —Successor to an occupancy tenant—Presumption of occupancy.*—Where a *Zamindar* granted a *Rajabhogam* right to one B and, at the time of the grant, a tenant cultivated the land under occupancy rights: *Held*, that the successor of the occupancy tenant should be deemed to be a tenant with occupancy rights. SAPPA KRISHNA PATRUDU v. THELLI MUKUNDA SAHU, **6 Ind. Cas. 586=8 M.L.T. 96.** (30 M. 502, 2 M.L.T. 470, *D.*)

(25)—*Occupancy holding—Recorded tenant, whether represents holding—Question of fact —Decree for rent against recorded tenant — Sale—Interest of unrecorded tenant how affected.*—The decision in 9 C.W.N. 843 lays down no more than this, that a landlord is not justified in treating the registered tenant, of raiyati holding as the sole tenant, merely because his co-sharers in the holding are not registered. There is nothing in that case to prevent the whole body of tenants of a raiyati

***Right of Occupancy*—continued.**

——5.—Miscellaneous—*continued.*

holding electing to treat one of their number as their representative in their dealings with the landlord. The fact that only one tenant is registered is merely an item in the evidence, on the question whether he is or is not the representative tenant *qua* the landlord. (26 C. 677, 2 C.W.N. 172, 27 C. 546, 6 C.W.N. 302, 7 C.W.N. 170, 10 C.W.N. 176, 24 C. 642, 3 C. W.N. 19, 9 C.W.N. 843, *R.*) The question whether the recorded tenant represents the holding or not is, under the present law, always a question of fact. JAGAT TARA DASSYA v. DAULATI BEWA, **13 C.W.N. 1110 = 2 Ind. Cas. 695 = 37 C 75.**

(26)—*Act* VIII (*B C.*) *of* 1869, *s.* 6—*Occupation of land under some person representing landlord — Ejectment before termination of tenancy.*—Where a person is occupying land rightfully as a tenant under some one representing the landlord, he could not be ejected before the termination of the tenancy, though he might have failed to prove that he had a right of occupancy under s. 6, Act VIII (B.C.) of 1869. RAMGUT PANDEY v. RADHA PERSHAD SINGH, **22 W.R. 195.**

(27)—*Landlord and Tenant—Trees, Right to —Jurisdiction of Civil and Revenue Courts - Punjab Tenancy Act* (XVI *of* 1887), *s.* 77 (3) (i)—*Suit by occupancy tenant for share of price of trees against landlord.*—The plaintiff, occupancy tenant, sued the defendant, landlord, for a share in the price of trees cut down and sold by the defendant from the land of the plaintiff's tenancy. *Held*, that the claim was cognizable by a Revenue Court under s. 77 (3) (*i*) of the Punjab Tenancy Act. *Held*, also, that although the trees are the property of the landlord, the occupancy tenant has certain rights in the trees growing on his land, and a landlord cannot be allowed to wantonly cut down and sell any trees he likes contrary to the interest of his tenant. GANGA RAM v. MAHNI, **45 P.L.R. 1905 = 9 P.R 1904, Rev.** (95 P R 1867, 61 P R. 1873, 4 P.R. 1875, 61 P.R 1881, *R.*) [*R.*, 52 P.R. 1906.]

(28)—Khodkasht *and* Khodkasht Kudeemee *ryot—Suit for eviction by auction-purchaser—Act* I *of* 1845, *s.* 26 (3).—A *khodkasht kudeemee* ryot having a right of occupancy at a fixed rent (but not a mere *khodkasht* for 12 years) cannot be evicted under cl. 3, s. 26, of Act I of 1845, by the auction-purchaser. SYUD LOTF ALI KHAN v. KASHEE DYAL, **1 W. R. 6.**

(29)—*Act* VIII *of* 1865, *s.* 16 — *Mokurruree tenure—Auction purchaser, rights of—Rights of occupancy, how affected.*—Under s. 16 of Act VIII of 1865, an auction-purchaser of a mokurruree tenure could set aside incumbrances created only subsequently to the creation of the tenure. Consequently, rights of occupancy existing prior to the mokurruree tenure remain unaffected by the purchase. BHOLANATH GHOSSAL v. KEDARNATH BANERJEE, **19 W. R. 106.** [*R.*, 22 W.R. 478.]

***Right of Occupancy*—continued.**

——5.—Miscellaneous—*continued.*

(30)—*Tenancy Act* (XXVIII *of* 1868), *ss.* 5, 6 —*Suit to be declared occupancy tenant under s.* 5—*Judgment on admission by some of the defendants — Plaintiff whether entitled to a decree as against confessing defendants only.*—Six out of the fifty-three defendants in this case admitted the truth of the facts upon which the plaintiff relied, as establishing his title to be declared a tenant with rights of occupancy under s. 5, cl. 3 of the Punjab Tenancy Act, in place of being recorded under s. 6. The Lower Courts dismissed the plaintiff's claim against all the defendants, upon the ground that he had failed to establish that his predecessors-in-title had settled in the village with the founders. Plaintiff on appeal contended that he was entitled to the declaration sought by him at least as against the defendants proprietors who confessed judgment. *Held* that the right of the plaintiff in his holding should be treated as one and indivisible, and he cannot be an occupancy tenant under s. 5 *qua* some of the proprietors, and a tenant under s. 6 *qua* the others. BHAGWAN SINGH v. ALLADAD KHAN, **84 P.R 1881.** [*Appr.*, 16 P.R. 1887; *R.*, 15 P R. 1884.]

(31)—*Suit for occupancy rights—Act* XXVIII *of* 1868 (*Punjab Tenancy Act*), *s.* 8.—This was a claim to occupancy rights instituted to contest a notice of ejectment, and the decree under s. 8 of the Punjab Tenancy Act passed by the Court of first instance was set aside by the Lower Courts. The plaintiff had previously sued for proprietary rights in the holding and that claim was dismissed by the Appellate Courts as premature; but this was not a claim to proprietary rights and could not be supported by evidence that the original status of the plaintiff was equal to that of the defendants. In a suit for occupancy rights, the plaintiff must be taken to admit that he is a tenant of the defendant, and has to show that he has acquired a right of occupancy. No facts were found to prove the above, and it was held that rights of occupancy could not be decreed merely because the Court thought that the plaintiff's true position was that of the proprietor. MANSUKH v. HAR PERSHAD, **56 P. R. 1884.**

(32)—*S.* 5 (1) (*a*), *Punjab Tenancy Act*, 1887 —*Condition fulfilled with regard to part of holding—Suit to contest notice of ejectment.*—A suit by a tenant to contest a notice of ejectment will be decreed, if it is shown that the landlord had permitted the tenant to fulfil the conditions of s. 5 (1) (*a*) of the Punjab Tenancy Act, 1887, in respect of even a part of the land, though not of the whole. HIRDE v. DARBARI, **5 P.R. 1891, Rev.**

(33)—*Punjab Tenancy Act*, 1887, *s.* 5 (1) (*a*) —*Suit for enhancement of rent—Question of status not raised—Subsequent suit to establish a right of occupancy*—Res judicata.—In a suit for enhancement of rent before the Collector, the question of *status* of the tenants was not

***Right of Occupancy*—continued.**

——5.—Miscellaneous—*continued.*

raised. *Held*, that in a subsequent suit to establish an occupancy right under s. 5 (1) (*a*) of the Act, the question of status was held to be *res judicata*, as it ought to have been raised in the former suit. NIHAL SINGH v. HIRA SINGH, **5 P.R. 1892, Rev.**

(34)—*Punjab Tenancy Act*, 1887, *s.* 5 (1) (*c*) —*Administrative proceeding*— Res judicata— *Right to occupancy rights.*—A tenant found to possess the qualifications required by s. 5 (1) (*c*) of the Tenancy Act, 1887, would have a right to occupancy rights. The fact that such a tenant was found to be a tenant-at-will in settlement proceeding in 1863 will neither constitute *res judicata*, nor will in any way affect his rights to occupancy tenure. SARTA v. IMAMUDDIN, **2 P.R.1891, Rev.** (7 P R. 1890, Rev. *F.*) [*R.*, 1 P.R. 1904, Rev.=3 P.L.R. 1904.]

(35)—*Punjab Tenancy Act*, 1887, *ss.* 45, 77 (3) (*a*)—*Notice — Suit to establish occupancy rights - Question of compensation.*—In a suit to establish occupancy rights under s. 77 (3) (*a*), Punjab Tenancy Act, 1887, a question of compensation cannot be determined, without reference to s. 45 of the Act where no previous notice of ejectment had been given. FATTU v. MAHANT SHANKAR GIR, **9 P. R. 1890, Rev.**

(36)—*Provision for succession in old* Wajib-ul-arz—*No provision in later one—Rule to follow—Punjab Tenancy Act*, 1887, *s.* 50 - *Civil Courts, Jurisdiction of.*—Where the provision in the *Wajib-ul-arz* of the old settlement on a matter of succession to an occupancy tenant, did not find a place in that for the new settlement, a suit brought subsequent to the new settlement must be decided according to the new one and not according to the old and superseded one. A suit by a collateral for possession of a holding from the landlord on the ground of inheritance is cognizable by a Civil Court and is not governed by s. 50 of the Tenancy Act. WAJIRA v HARJALU, **160 P.R. 1890.** [*R.*, 43 P.R. 1904.]

(37)—*Punjab Land Revenue Act*, 1887, *s.* 112 (3)—*Application to partition by majority of tenants—Objection by others—Power of Revenue officer.*—If, in an application for partition by the majority of occupancy tenants, the others object to the partition, the Revenue officer has, under s. 112, cl. (3), Punjab Land Revenue Act, 1887, full discretion to allow or disallow partition. SUBE KHAN v. RAHMAT ALI, **1 P.R. 1895, Rev.** (77 P.R. 1883, *F.*) [*R.*, 3 P.R. 1905, Rev.]

(38)—*Grass preserve kept up by proprietors—Hereditary tenants whether entitled to cut and remove grass from*—Wajib-ul-arz—*Right of tenants to pasture cattle and remove grass in* ban banjar. - A plot of land had been formed into a grass preserve, and the grass produced in the preserve having been cut by certain hereditary cultivators, the present suit was brought by a portion of the proprietary body disputing the right of such cultivators to cut the grass, and

***Right of Occupancy*—continued.**

——5—Miscellaneous—*continued.*

for damages for loss of profits they would otherwise have made from it. The Administration-paper of the village contained provisions as to the usage of the cattle of the village grazing without distinction of proprietor or non-proprietor in the *ban banjar* without payment. The question raised in the present suit was whether the hereditary tenants were entitled to share with the proprietors in the produce of a portion of the *ban banjar* set apart as a grass preserve and not used for grazing. *Held*, that the plaintiffs, the proprietors, were entitled to a decree, having regard to the provisions of the *wajib ul-arz* and to the fact found that there was a sufficient grazing for both proprietors and non-proprietary tenants in the portion of the *ban banjar* which was not enclosed and preserved. There was nothing in the village Administration-paper which gave non-proprietary tenants an absolute right to graze on the whole uncultivated area or which forbade the proprietors from setting aside as a grass preserve a portion of that whole area, provided the portion left formed sufficient grazing ground for all the village cattle. As long as the tenants had sufficient grazing land left, the owners had the right to enclose the rest and use it for building purposes or for growing profitable crops. The defendants, the tenants, had no right to remove or cut the grass of the preserve. NAGINA v. BAGGU, **100 P.R. 1881.** [*F.*, 119 P.R. 1889.]

(39)—*Suit to disprove right of occupancy in a portion of land—Difference in the old and new settlement—Procedure.*—The entry in the record of the Regular Settlement in favour of any person is *prima facie* evidence of his right to hold the land. Where a previous measurement record is perfect and accurate, the fact that a person entitled under it is found to hold a larger area than that shown therein would be evidence of his encroachment on adjacent land. But, if the measurement made long ago is found to be inaccurate, the fact of discrepancy in the old and new measurements would be an unsafe guide in deciding a claim. BAHADUR v. SHER, **5 P.R. 1887, Rev.** [*R.*, 5 P.R. 1888, Rev.]

(40)—*Actual possession — Wrong entry in settlement record—Effect on one's rights.*—A person will be entitled to the fields or land which he actually possessed at the time when the settlement entry is made. The fact that the extent of such land was wrongly entered in the record would in no way affect his rights to the land. DULLA v. MUSST. GHULAM BIBI, **5 P.R. 1888, Rev.** (5 P.R. 1887, Rev. *F.*)

Whether a *raiyat* taking a *zuripeshgi* lease construed as a cultivating lease divests himself of his rights to acquire—in the land—*See* BEN. ACT VIII OF 1885, *s.* 28, 10 C.W.N. 351.

Presumption of fixity of rent—When arises —*See* BEN. ACT VIII OF 1885, ss. 50, 106, 6 Ind. Cas. 217=14 C.W.N. 884.

Right of Occupancy—continued.

— 5.—**Miscellaneous**—*continued.*

Sale of, by tenant—Right of landlord to eject—*See* BEN. ACT VIII OF 1885, s. 87, 3 C. L.J. 343=33 C. 531.

Homestead land of raiyat—*See* BEN. ACT VIII OF 1885, s. 182, 10 C.W.N. 944=4 C.L.J. 332.

See PUN. ACT XXVIII OF 1868, ss. 2 and 8, 3 P.R. 1877.

See PUN ACT XXVIII OF 1868, s. 36, 47 P. R. 1889.

Mortgage of, by tenant—Holding by mortgagee after death of the mortgagor—only of a tenant-at-will not of an occupancy tenant —*See* PUN. ACT XVI OF 1887, ss. 9, 57, 8 P.R. 1905, Rev.=67 P.L.R. 1906.

Whether extinguished by non-cultivation by a minor tenant—*See* PUN. ACT XVI OF 1887, s. 38, 3 P.R. 1910=9 P.W.R. 1910=5 Ind. Cas. 235=157 P.L.R. 1910.

Succession to occupancy—Punjab Tenancy Act, ss. 111 and 112—Right of person to settle, by written agreement, a course of succession different from that prescribed in the Act—*See* PUN. ACT XVI OF 1887, ss. 111 and 112, 130 P.R. 1907=76 P.L.R. 1908.

See U.P. ACT XVIII OF 1873, ss. 8, 34 (*b*), 35, 4 A. 157=A.W.N. 1881, 170.

See U.P. ACT XII OF 1881, s. 8, 7 A. 586, F.B.=A.W.N. 1885, 134.

Mortgage of—*See* U.P. ACT II OF 1901, s. 20, 3 A.L.J. 691=A.W.N. 1906 302.

Right of succession to—Poor and rich daughters—Preference—*See* U.P. ACT II OF 1901, s. 22, 7 A.L.J. 293=5 Ind. Cas. 584=32 A. 314.

Sale of—Possession of tenant of portion of holding—Rent decree against purchaser—Sale of holding—Right of old tenant to save by deposit of decretal amount—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, 5 Ind. Cas. 561.

Custom as to existence of—Nature and proof of usage—*See* CUSTOM, 6 Ind. Cas. 291.

Succession to—*Onus*—*See* CUSTOM—PUNJAB—INHERITANCE, 60 P.W.R. 1910=38 P.R. 1910=6 Ind. Cas. 774=182 P.L.R. 1910.

Succession to, not to be restricted to relations within the village of the deceased tenant —*See* CUSTOMS, PUNJAB—INHERITANCE, 128 P.L.R. 1906.

See DECREE—DECREE, FORM OF, 6 P.R. 1891, Rev.

See FISHERY, 11 C.L.R. 9.

Right of Occupancy—concluded.

—5.—**Miscellaneous**—*concluded.*

See HINDU LAW—PARTITION, A.W.N. 1895, 143.

See KHOTI TENURE, 17 B. 677.

Mortgage of—Void-mortgage—Rights of mortgagor and mortgagee—*See* MORTGAGE —GENERAL, 7 Ind. Cas. 738.

Mortgage of—Relinquishment by mortgagor's representative—Right of mortgagee—Declaratory suit—*See* MORTGAGE—GENERAL, 7 A.L.J. 291=6 Ind. Cas. 284.

Registered occupant of holding in Berar —Relinquishment of holding—Surrender—Co-sharer's right of pre-emption—Failure to exercise the right, effect of—*See* PRE-EMPTION, MISCELLANEOUS, 6 N.L R. 78=6 Ind. Cas. 824.

Temple lands—Use of terms such as "permanent," "you and your heirs" in documents — Effect — *See* RELIGIOUS ENDOWMENTS, 7 M.L.T 386=6 Ind. Cas. 7.

See RES JUDICATA—ADJUDICATIONS, 118 P.R. 1876

See RES JUDICATA—MISCELLANEOUS, 54 P.R. 1884.

See REVIEW—PRACTICE AND PROCEDURE, 10 C.L.R. 106.

See REVISION—GENERAL, 16 P.R. 1892, Rev., 17 P.R. 1892, Rev.

Suit to contest—Ejectment — Tenant-at-will—*See* VALUATION OF SUITS, 11 C L.R. 91.

Suit to establish right to grant of puttah of waste lands—Preferential right to occupancy—*See* WASTE LANDS, 4 M.H.C. 429.

Right of Reply.

(1)—*Giving no opportunity for reply—Ground for special appeal.*—When an appeal was dismissed by the lower appellate Court, after hearing the respondent's pleader, without giving the appellant's pleader an opportunity to reply, the High Court on that objection being made a ground of special appeal from an order of the Judge refusing to grant a review on that ground, set aside the order and sent the case back for re-trial. JARDINE v. TARNI MOHAN SEN, **8 B.L.R. App. 44.** [*D.*, 8 C. L.R. 23.]

(2)—*Rule* nisi—*Right of reply* —When a rule *nisi* has been obtained and cause has been shown against it, the party obtaining it has a right to be heard in reply, even though the side showing cause has made use of no affidavit. BAMASUNDARI DASI v. RAMNARAYAN MITTER, **7 B.L.R. Ap. 59.**

(3)—*Appeal—Practice—Appellant's right of reply.*—When no new matter of any kind is brought forward by a respondent in his answer to the appellant, the latter has no right of reply ; as such reply ought not to be a reiteration

Right of Reply—*concluded.*

of the arguments in support of the appeal, but should be a refutation of the new matter brought forward by the respondent in his answer. M. S. ROUSSEAU v. NUBOO KISHORE BHUDRO, **12 W.R. 302.**

Right of Suit.

1.—GENERAL.
2.—ACCOUNTS.
3.—ACTS DONE IN EXERCISE OF SOVEREIGN POWERS.
4.—ATTACHMENT PROCEEDINGS, SUITS CONCERNING.
5.—AWARDS, SUITS CONCERNING.
6.—BOUNDARY QUESTIONS, SUITS CONCERNING.
7.—BUILDING, SUIT TO RESTRAIN.
8.—CASTE QUESTIONS, SUITS CONCERNING.
9.—CONTRACTS, SUITS ON.
10.—CO-SHARERS, SUITS BY.
11.—COSTS.
12.—CUSTOMARY RIGHTS.
13.—DEBTOR AND CREDITOR.
14.—DECREES.
15.—DIGNITIES.
16.—ENDOWMENTS, SUITS RELATING TO.
17.—ENHANCEMENT OF RENT.
18.—EXECUTION OF DECREE.
19.—FRESH SUITS.
20.—INJURIES BY REPRESENTATIVES OF DECEASED.
21.—INJURIES TO ENJOYMENT OF PROPERTY.
22.—JUDICIAL OFFICERS, SUITS AGAINST.
23.—LANDLORD AND TENANT, SUITS CONCERNING.
24.—MESNE PROFITS.
25.—MUNICIPAL OFFICERS, SUITS AGAINST.
26.—OBSTRUCTION TO PUBLIC HIGHWAYS, SUITS CONCERNING.
27.—OFFICE OR EMOLUMENT, SUITS RELATING TO.
28.—ORDERS, SUITS TO SET ASIDE.
29.—POSSESSION, SUIT FOR.
30.—PRIVACY, INVASION OF.
31.—PUBLIC WORSHIP, SUITS CONCERNING RIGHTS TO.
32.—REGISTRATION OF NAME.
33.—REVENUE, SALE FOR ARREARS OF.
34.—SALE IN EXECUTION OF DECREE.
35.—SUBSCRIPTION.
36.—TORTS.
37.—TRUSTS, SUITS RELATING TO.
38.—WITNESS.
39.—MISCELLANEOUS.

See CIV. PRO. CODE, 1908, s. 9.

Right of Suit—continued.

—1.—General.

(1)—*"Right to sue"—"Cause of action."*—"The right to sue" is based upon facts which go to make up what is called the "cause of action." SHAM CHAND GIRI v. BHAYARAM PANDAY, **22 C. 92.**

(2)—*Plaint—Presentation—Right of suit.*—The mere non-acceptance by the Court of a plaint on the date on which it is actually presented does not deprive plaintiff of his right of suit E. YOUNG v. D. MACCORKINDALE, **19 W.R. 159.**

(3)—*Right of suit — Execution of decree barred — Suit on decree—Maintainability.*—Where a decree is barred by limitation, the decree-holder loses his rights under it, and cannot proceed by a fresh suit on the decree to enforce its execution. YAKOOB ALI v. KHAJEH UBDOOL RAHMAN, **3 Agra 383.** [*D.*, 13 A. 309=A.W.N. 1891, 117.]

(4)—*Judgment of Court, no new cause of action given by—Suit upon decree not maintainable.*—The judgment of the Commissioner, in this case, proceeded upon the ground that the plaintiff, having omitted to sue out execution of his decree, could not bring a fresh suit upon that decree without having to establish his claim on the merits. The appeal brought against the judgment was accepted by the Chief Court which reversed the judgment and remanded the case. Since the above judgment was recorded on the appeal by the Chief Court, certain decisions upon which the Chief Court had based that judgment, happened to be overruled by the High Court of Bengal in 9 W.R. 399, wherein it was ruled that a suit cannot be entertained in a mofussil Small Cause Court to recover the unsatisfied balance of a decree. Accordingly, the Chief Court, in review, reversed its previous order in the case. SHEO SING v. ROORA, **14 P.R. 1869.**

(5)—*Mistake in decree—Separate suit to set aside—Maintainability.*—It cannot be broadly laid down that any error in a decree made by a Court may be challenged by a separate suit. CHAND MEA v. SRIMATI ASIMA BANU, **10 C.W.N. 1024.** (3 C.W.N. 375, 8 C.W.N. 473, *R.*)

(6)—*Erroneous dismissal of suit by Small Cause Court—Suit cannot be instituted in Munsif's Court.*—The erroneous dismissal of a suit for the same cause of action by a Small Cause Court does not warrant the institution of the suit in the District Munsif's Court. PONNAPPA MUDALI v. SRINIVASA MUDALI, **3 M.H.C. 86.**

(7)—*Suit to enforce liability specifically imposed by decree of Civil Court in the mofussil, not sustainable—Act* XXIII *of* 1861, *s.* 11.—A suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the mofussil, the right of suit in such a case being taken away by s. 11 of Act XXIII of 1861. K. SANJEEVIYAH v. NANJIYAH, **4 M.H.C. 453.** [*Appr.*, 2 N.W.P. 382 ; *R.*, 5 M.H.C. 185, 5 M.H.C, 375, 6 B. 7; *F.*, 10 B.H.C. 433.]

Right of Suit -continued.

——1.- **General**—*continued.*

(8)—*Suit in British India on cause of action arising in foreign territory—When maintainable—Civ. Pro. Code, Act* XIV *of* 1882, *ss.* 11, 17.—There is no reason for refusing to hear a claim for the price of goods supplied against a defendant residing within the jurisdiction of the Court, when the claim is brought on a cause of action arising in a foreign country, if the cause of action be such that it can be proved that a Court in foreign territory would have taken cognizance: and s. 17 of the Civ. Pro. Code (Act XIV of 1882), which gives the Courts jurisdiction to try cases against the defendants residing within their jurisdiction, must be read with s. 11 which gives Courts jurisdiction to try all civil suits unless specially barred. HARI SINGH v. MAJOR H. TUCKER, **4 P.R. 1885.** [*R.*, 35 P.R. 1903=101 P.L.R. 1903.]

(9)—*Right of suit—Delegated powers.*—A person whose right to represent the nominal plaintiff is challenged by the defendant, must prove that he is authorised to sue as he does and must bring into Court the primary evidence in his possession. GOBIN CHUNDER DUTT v. OODY CHUNDER SEN, **21 W.R. 30.**

(10)—*Suit to recover debt, nature of right.*—The right to sue to recover a debt is in the nature of a common law right, and, unless it is taken away either expressly or by necessary implication, it must be treated as subsisting. KOTHANDAPANI v. SOMASUNDARAM, **15 M. 97.**

(11)—*Written promise to pay when able, how construed—Limitation.*—It seems to have been settled in English Cases that, however vague a condition to pay "when I am able" may be, those words are not to be treated as mere surplusage without meaning, but do in fact form a binding contract, so that the promisee cannot sue till the time when the condition is fulfilled. The promisee's cause of action does not accrue until the promisor is in circumstances to pay. WATSON & CO. v. BLECHYNDEN, **1 W.R. 368.**

(12)—*Trust—Suit for payment of trust fund into Court—Plaintiff not having actual title to any part of fund*—Bill quia timet—*Assent of trustee of fund to decree in plaintiff's favour—Maintainability of suit.*—Plaintiff, a member of the Armenian community at Madras sued for a decree for payment into the Bank of Madras, with the privity of the Accountant-General of the High Courts, the Government promissory notes mentioned in the plaint, and for a direction that the Accountant-General might pay the interest accruing due on the notes to the Governors of the Madras Armenian Orphan's fund. The trustees of the fund concerned consented to a decree in favour of the plaintiff. *Held* that the plaintiff had not such interest in the fund as was sufficient to entitle him to require it to be brought into Court. The only interest which he appeared to possess was that he was a member of the Armenian community to which the fund has been endowed. He had no title to any part of the fund in question. As the plaint was in the nature of a *Bill quia timet*, the plaintiff was bound, in order to support it, to prove a title in possession or expectancy in him and a danger to the fund. The fact that the trustees of the fund did not make any opposition and consented to a decree in plaintiff's favour did not give the Court liberty to pass such a decree. SATOOR v. SATOOR, **2 M.H.C. 8.**

Right of Suit—continued.

——1.—**General**—*continued.*

(13)—*Suit for declaration of title—Plaintiff in possession of all alleged rights—Maintainability of suit.*—Where the plaintiff in a suit for declaration of title has all his rights uninvaded and intact and there has been no foundation for an action, the suit for declaration of title cannot be maintained. PADAGALINGAM PILLAY v. SHUNMUGHAM PILLAY, **2 M.H.C. 333.** [*F.*, 6 M.H.C. 117; *R.*, 9 W.R. 580, 3 C. 612; *D.*, 6 M.H.C. 307.]

(14)—*Wife representing absent and divided husband - Suit by her for his share.*—In a suit brought by a woman to procure the delivery to her of a share of land alleged to have been purchased with money subject to the provisions of a partition deed executed by her husband and the undivided members of his family, where it appeared that her husband had been, for six years prior to suit, absent in a foreign country, *held* that the wife sufficiently represented her absent and divided husband to enable her to sue for his share. PAPAMMAL v. RAMASWAMI CHETTI, **2 M.H.C. 365.**

(15)—*Accrual of right—Redemption—Constructive payment.*—Where an assignee of land covenants with his assignors to repay all the moneys which they have at any time actually or constructively paid to Government for redemption, a suit against him, where money has not been actually paid, is premature, unless there is some definite agreement with Government as to the amount which Government can enforce. WOODROW v. SCHILLER, **1 Ind. Jur. N.S. 90.**

(16)—*Vendor and vendee—Decree against purchaser on a mortgage previous to the sale, vendor cannot maintain suit to set aside.*—Plaintiff, who had sold a shop to certain persons, sued to set aside a mortgage, on which the defendant had previously brought an action and obtained a decree against those persons, and to have the shop exempted from the effect of the decree. It was before the said previous suit brought by the present defendant, on his mortgage, that the plaintiff had made his sale to his vendees and had covenanted with them that he had a good title. In the present action, to which the plaintiff's vendees were not parties, he claimed to set aside the mortgage and decree, on the ground that the mortgage was fraudulent and that, as he was liable on his covenant, he was entitled to maintain this action. It was held that the instrument of mortgage had merged

Right of Suit—continued.

——**1.—General**—*continued.*

in the decree and this action was not maintainable, unless the plaintiff was entitled to have the decree in the prior suit set aside. By the sale, he had parted with all his interest in the property before the institution of the prior suit, and had no manner of right to the property enabling him to maintain the present action questioning the above decree that had been passed in a properly instituted suit, in a previous litigation and against parties interested at the time. THUNA v. BENI RAM, **9 A. 439 = = A.W.N. 1887, 75.**

(17)—*Will—Creation of trust—Breach of trust—Parties entitled to sue—Pleadings — Necessary allegations absent — Effect.*—The representatives of a testator are entitled to sue for the enforcement of trusts created by him for religious or charitable purposes, even though they may not be personally interested in them. It is necessary for the maintainability of a suit for breach of trust that the plaintiff should substantially allege, in his plaint, a state of circumstances which, if proved, will constitute a distinct breach of trust. BROJO MOHUN DOSS v. HURROLOLL DOSS, **6 C.L. R. 58.**

(18)—*Right of suit —Interest in subject-matter —Court-fee on plaint.*—Plaintiffs as owners of or as persons having an interest in certain land sued to close a door opened by the defendants adjoining such land with a view to assert rights injurious to the plaintiffs' interests. *Held*, that in order to maintain the suit, the plaintiffs must show some right or interest in themselves which entitled them to complain of the defendants' act, for as mere strangers without any interest, they could not maintain any suit. For the purposes of such a suit, they may prove their *locus standi* without paying the stamp necessary in case the suit was directly for the land itself. CHUNDUN v. TALIB ALI, **2 N.W. P. 41.**

(19)—*Lease granted by co-sharer—Pendency of* butwara *proceedings—Suit to set aside lease —Right of suit.*—A suit to set aside a *mokurruree* lease granted by a co-sharer, is premature if brought before the completion of a *butwara* which was in course of being effected, as the plaintiff has no *locus standi* to bring the suit in respect of a *mokurruree* by which he might never be injuriously affected at all. BHEKDHAREE SINGH v. KISHEN PERSHAD SINGH, **15 W.R. 106.**

(20)—*Suit by co-sharer for joint possession of one of several properties, maintainability of.*—It is competent for a co-sharer, who is debarred from enjoyment in one of several properties owned by him in common with the rest of his co-sharers to sue for joint possession in respect of that property alone without claiming a similar relief in respect of the other joint properties. SURA SINGH v. SANT SINGH, **43 P.R. 1906 = 122 P.L.R. 1906.** (77 P.R. 1887, 7 B. 182, 7 B. 272, 11 C. 566, 162 P.R. 1884, *D.*)

Right of Suit—continued.

——**1.—General**—*continued.*

(21)—*Fraud by minor's guardian evading Court's order to render accounts—Person exposing fraud entitled to be heard.*—In a case where a gross fraud is being practised upon the Court relating to the matter of a minor, and the object of the fraud is for evading an order which the Court has made directing the guardian of the minor to render certain accounts, any person that appears before the Court, exposes the fraud and undertakes to prove it, has a *locus standi* in the Court and is entitled to be heard. HOSSEIN ALI KHAN v. SYUD BURKUT ALI, **10 W.R. 372.**

(22)—*Hindu widow, not representative of husband for purposes of suit, sons being alive—Disclaimer in petition filed by sons, widow's defect in title not cured by—Limitation.*—Plaintiff sued to have an order in an Act IV case set aside, and to obtain possession of certain lands. In her plaint, she described herself as widow of one N M, deceased, and she showed no title to the property in question save as being the heiress of N M and his representative according to Hindu law. The defendant pleaded that she had no right to sue, because she was not the representative of her husband, who had left two sons who were still alive, and who were his heirs. Upon this, the sons, more than six months after the suit was instituted, filed a petition in which they declared that the plaintiff was in possession of all their father's property and had, therefore, full right to sue. Before this petition was put in, the claim had become barred by lapse of time, the original plaint having been filed the very last day on which it was not barred. The lower appellate Court held that the declaration of the sons of the 17th December 1862 showed that the plaintiff had the right to sue on the 31st December 1861, the date of her plaint, and that thus plaintiff was not barred by limitation or by absence of right to sue and, finding that plaintiff's husband's alleged purchase was proved, reversed the first Court's decree and allowed the plaintiff's claim. *Held* that a Hindu widow, whose husband's sons, him surviving, are alive, possesses no legal rights to confer on her the *locus standi* to sue as the representative of her husband. So, the plaintiff, in this case having had, when she instituted the suit, no title in her on which she could maintain her suit, the High Court was of opinion that the petition subsequently filed by the sons could not be deemed to have removed that defect. RAM KANNYE GOSSAMEE v. MEERNOMOYEE DOSSEE, **2 W.R. 49.** [*R.*, 7 W.R. 455; *D.*, 18 W. R. 271.]

(23)—*Hindu law—Legal necessity where presumable in connection with alienation of ancestral property—Right of unborn son to sue.*—Limitation can be pleaded as a bar to a suit to set aside an alienation by a grandfather, the cause of action in such a case arising not from the date of the grandfather's death, but from the date of alienation. The right of an unborn

Right of Suit—continued.

—— **1.—General**—*continued.*

son to sue does not give a perpetual right of action. Where neither want of enquiry nor *mala fides* is shown, the existence of legal necessity must be presumed, and the acts of the guardian must be considered to be the acts of the minor. *Quære*:—Whether the same rule strictly applies to the relation of the head of a family and his descendants' holding, vested rights in his state, in regard to alienations by the head of the family, to which the descendants did not expressly consent. BABOO SEETAL PERSHAD SINGH v. BABOO GOUR DYAL SINGH, **1 W.R. 283.**

(24)—*Custom—Alienation—Gift by widow—Collaterals' right of suit to object in the presence of daughter's son—Hindu Law—Right of suit—Khatris of Multan City.—Held*, that no custom to the contrary having been proved, the parties to the suit, *Mahrotra Khatris* of Multan City were governed by the Hindu Law in the matters relating to succession. Where the widow of a *Mahrotra Khatri*, of Multan City, made a gift of a house, which was the self-acquired property of her deceased husband, to the Sanatan Dharm Sabha, and a brother and nephews of the husband sued for a declaration that the gift shall not affect their rights after the widow's death, *held*, that in the presence of daughters and daughters' sons of the deceased, the plaintiffs, who were not joint with the deceased, had no right to sue, unless they could prove that the daughters and daughters' sons, who were heirs, were in collusion with the widow, or did not sue for some improper and insufficient reasons. *Held*, also, that the daughters being heirs to the whole property, their agreement to the gift was an act of filial piety against their own interest, and was not collusive in the sense in which collusion would give the plaintiffs a right to sue. M. WISHAN DASS v. PANDIT THAKAR DAS, **6 P.L.R. 1902 =119 P.R. 1901.** (23 P.R. 1876, 144 P.R. 1882, 4 P.R. 1890, 6 A. 428, 84 P.R. 1898, F.B., 6 C. 764, 143 P.R. 1882, 67 P.R. 1888, 9 P.R. 1884, 108 P.R. 1888, 60 P.R. 1895, 73 P.R. 1896, 4 P.R. 1888, *R.*) [*R.*, 3 P.R. 1908, 48 P.R. 1908, 51 P.R. 1903=174 P.L.R. 1903, 68 P.R. 1909=1 P.L.R. 1909; *F.*, 54 P.R. 1903, 110 P.R. 1906.]

(25)—*Hindu Law—Sale of judgment-debtor's right as reversioner—Suit to set aside sale.*—The right and interest of a judgment-debtor as a reversioner, being a mere contingent right depending on his being alive at the widow's death, a suit by the widow to set aside a sale of such right is not maintainable. MUSSUMAT SHIB KOONWER v. SADHO SINGH, **2 Agra 255.**

(26)—*Debt — Inheritance — Hindu Law—Right of one of several co-heirs to sue for his share of debt.—By the Full Bench Mahmood, J., dissenting.*—When, upon the death of the obligee of a money-bond, the right to realize the money has devolved by inheritance in

Right of Suit—continued.

—— **1.—General**—*continued.*

specific shares upon his heirs, each of such heirs cannot maintain a separate suit for the recovery of his share of the money due on the bond. KANDHIYA LAL v. CHANDAR, **7 A. 313, F.B.=A.W.N. 1885, 34.** [*Appr.*, **25 M.** 26; *R.*, 9 A. 486, 51 P.R. 1894, 21 B. **154, 6** C L.J. 383, 12 C.W.N. 84=6 C.L.J. **558**; *D.*, 70 P.R. 1904.]

(27)—*Hindu widow, if competent to maintain suit for possession, during lifetime of her adopted son.*—This was a suit brought by a widow for possession of a share in a fishery, alleging it to belong to her talook of which she was in possession, and that her co-sharers in the julkur had wrongly ousted her. She had an adopted son who was a major, and he first objected to the suit being brought but subsequently withdrew his objection. But it was held that his petition so withdrawing his objection could not cure the defect in the plaint owing to want of title in the plaintiff to bring the suit in the lifetime of her son. JANNOBEE CHOWDHRAIN v. DWARKANATH ROY CHOWDHRY, **7 W. R. 455.**

(28)—*Insult to female members—Action by male relations.*—Male member of a family (whose relationship even was not clearly defined) cannot sue for the injury or insult which they have sustained indirectly in consequence of ill-treatment of certain female members of their family. OODAI v. BHOWANEE PERSHAD, **1 Agra 264.** [*Appr.*, 11 A. 104=8 A.W.N. 287; *R.*, 10 A. 425=A.W.N. 1888, 157, 32 C. 1060 =9 C.W.N. 847=2 C.L.J. 396.]

(29)—*Judgment—Alteration of legal misapprehension—Effect—Cause of action—Parties to judgment.*—The plaintiff and other share-holders in the same family lent to the Rajah of Durbangha a large sum of money on a bond. The Rajah made a payment of two lakhs of rupees which was received by the defendants and appropriated as their share of payments, with the knowledge and acquiescence of the plaintiff. Subsequently, all the share-holders instituted separate suits against the Rajah for the recovery of their separate shares of the money lent. In the separate suits the defendants deducted the sum of two lacs as received to their several receipt; while the plaintiff in his suit, made no such deduction, thereby showing that up to that time he had considered the two lacs as paid to the sole credit and receipt of the other share-holders. The Court ruled in the plaintiff's suit that the sum of two lacs was paid in liquidation of the whole sum due on the bond, not with reference to any particular share or interest in it. Consequently the plaintiff's claim to his share of the two lacs paid was disallowed. Then the plaintiff brought this suit to recover his share of the sum paid by the Rajah to the credit of the defendants. *Held* that the plaintiff was not entitled to recover. The plaintiff's error was a pure error of law and the judgment of the

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——1.—General—*continued.*

Court ruling that the two lacs as between the parties were paid as interest and were to be credited to the joint and not to the separate payments, cannot alter the status of the parties in this suit and cannot give a new right of action. That judgment was, of course, binding on the plaintiff and the Rajah who were the only parties there. It would not bind the defendants, nor would it give the plaintiff a right to start a fresh suit, nor put him in the position in which he would have been, had he never misconceived his correct legal claim. There is no warrant in law for this doctrine that judgments of Courts, altering a pure legal misapprehension as to rights and status, and passed in a suit to which the defendant was not a party, can confer any such right on a plaintiff against a defendant so circumstanced; it is far better to allow parties to abide by the consequences of their own misconception or ignorance where no fraud or deception is even alleged. SYED LOTF ALI KHAN v. AFZUL OONISSA BEGUM, **3 W.R. 113.** [*Reversed on appeal,* 16 W.R. P.C. 20=9 B.L.R. 348.]

(30)—*Suit by pre-emptor—Right of mortgagee—Limitation.*—Though the law allows a pre-emptor to sue at any time within one year of the transfer of possession, there is nothing to prevent his doing so earlier. The absolute rights of a mortgagee, and the consequent right to claim pre-emption, arise from the time when the sale becomes absolute. MUSSAMUT JANKEE KOER v. MUSSAMUT LEKRANEE KOER, **W.R. 1864, 285.**

(31)—*Suit by trustee—Decree— Benefit of decree.*—If a truseee obtains a decree on a bond, the money due on which belongs to another party, he (the trustee) is liable to be sued by the party's son to obtain the benefit of the decree. JUGGOBUNDOO COONDOO v. NIL COMUL SURMAH, **W.R. 1864, 190.**

(32)—*Suit on joint claim—Evidence—Limitation.*—Where a joint claim has been put forward in a suit, it will be liable to dismissal unless the joint claim is established as such. It is not enough that one of the several plaintiffs should have made out a title to the property. Also on euquiring into the issue of limitation, the Court should satisfy itself whether or not there has been joint enjoyment by the plaintiffs or their respective predecessors within the period of limitation. RAM COMAL CHUCKERBUTTY v. NUND RAM COOLAL, **10 W.R. 261.**

(33)—*Landlord and tenant—Repudiation of title—Cause of action.*—Where a tenant claims to hold lands on one species of tenure and the landlord under whom he holds repudiates his tenure, and sets up another which is inconsistent with it, this is a dispossession of the tenant by the landlord from the tenure claimed, and may be thus treated as giving a cause of action. Though the repudiation of the tenant's title by the landlord might form a cause of action against him, it can only form one cause of action, however often that repudiation is repeated. NUND KISHORE SINGH v. HUREE PERSHAD MUNDUL, **13 W.R. 64.**

(34)—*Suit instituted by agent in his own name—Dismissal of—Act X of* 1877, *ss.* 27, 582—*Appellate Court whether competent to substitute principal as plaintiff in place of agent.*—The practice of a gomashta instituting a suit in his own name describing himself as "gomashtah of a specified firm" is not an uncommon one, but is not a correct practice, as the suit brought should be brought by the person or persons in whom the legal right of suit is vested and not by agents in their own names. The error is an important one as it renders the suit liable to dismissal, even after judgment in the plaintiff's favour in the first Court, unless it be held that the combined effect of ss. 27 and 582 of the Civ. Pro. Code, is to empower an Appellate Court to substitute the principal as plaintiff, on sufficient grounds being shown for such a course. THAKURDAS v. GOLAM MOHYUDDIN, **20 P.R. 1882.** [*R.*, 8 P.R. 1886, 156 P.R. 1889.]

(35)—*Decree for possession barred by limitation—Effect of such bar by neglect to execute—Fresh suit for possession not maintainable.*—Where plaintiffs obtained a decree for possession of immoveable property, but did not apply for execution of the same within the period of limitation and brought the present suit again, for recovery of possession of the same property, *held*, the plaintiffs having allowed the period distinctly prescribed for execution of their decree to expire, the decree had become a nullity and they had no right to subsequently rely upon that decree and sue again to recover possession of the same land upon the footing thereof, since the mere fact, that there was once in existence an executable decree made in their favour, could not entitle them to institute a fresh suit, upon the same cause of action, upon which the former suit had been founded. OMAN SHEIKH v. HALAKURI SHEIK, **33 C. 679.**

(36)—*Suit for possession against trespasser—Plaintiff's title, proof of—Possession good title against all but rightful owner.*—In a suit by a mortgagee (plaintiff) for possession of the mortgaged property from which the defendant had dispossessed him, the defence was that the original mortgagor had no title to the property and, therefore, could not mortgage it to the plaintiff and, consequently, the plaintiff's suit was not maintainable. *Held*, that the plaintiff was entitled to a decree, unless the defendant was the true owner. Possession is good title against all persons except the rightful owner and entitles the possessor to maintain an action in ejectment against any person other than such owner, who dispossesses him. RAMPAL SINGH v. RAJA MUSTAFA ALI KHAN, **9 O.C. 273.** (2 O.C. 3, *R.*) [*R.*, 11 O.C. 337.]

(37)—*Suit for money paid for the use of the defendant, maintainability of—Absence of obligation to pay, express or implied—Payment against the will of the defendant.*—Upon a

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—**1.—General**—*continued.*

putni sale under Regulation VIII of 1819, a portion of the surplus sale proceeds, standing to the credit of the defaulter, was withdrawn by an execution creditor of one of them. On a suit by the defaulter, the sale was set aside and the landlord had to refund the purchase money to the auction purchaser. The landlord having sued for the recovery of the amount withdrawn by the execution creditor: *Held*, that the defaulter whose creditor had withdrawn the money was not liable to pay. It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. To support such a suit there must be an obligation, express or implied, to repay. There is no such obligation in the case of a voluntary payment and still less when money has been paid against the will of the party for whose use it is supposed to have been paid. ROOP CHANNESSA BIBI v. BEJOYCHAND MAHATAP, **3 C.L.J. 288.** (15 B.L.R. 208=2 I.A. 143, *F.*)

(38)—*Suit by judgment-debtor to recover money paid to decree-holder under an agreement —Suit before actual execution taken out in spite of the agreement—Maintainability.*—A judgment-debtor paid a certain amount to the decree-holder under an arrangement that the latter should certify to the Court that the decree was fully satisfied. Without, however, entering such satisfaction, the decree-holder applied for execution and the judgment debtor immediately on receipt of a notice under s. 248, Civ. Pro. Code, sought, by the present suit, to recover from the decree-holder the sum the latter had received under the above arrangement. Defendant, the decree-holder, pleaded, *inter alia*, that the suit was not maintainable before actual execution of the decree and realization of money thereunder from the plaintiff and the question was referred to the High Court, whether the plaintiff had a cause of action for the suit and could recover back the sum paid in discharge of the decree-debt due by him to the defendant, although the latter had not executed the decree and recovered the sum again from the plaintiff. *Held*, that the suit was not maintainable. SRIRAMULU v. DALAYYA, **16 M.L.J. 54.**

(39)—*Fraud—Judgment, impeachment of, on account of fraud.*—A party to an action can impeach the judgment in it for fraud, by means of a fresh suit for the purpose, where the judgment is that of a British Court or of a Foreign Court and that not only where there has been a fraud on the Court by what are called extrinsic circumstances but also where the judgment, which the party seeks to set aside has been obtained by the other party by fraud on the Court by committing deliberate perjury and suppressing evidence. VENKATAPPA NAICK v. SUBBA NAIK, **16 M.L.J. 59=29 M. 179.**

(40)—*Money due under promissory note, agreement to pay, contained in a subsequent deed of assignment—Right of fresh suit, whether given by such deed.*—A promissory note was executed by the defendant to the plaintiff. Subsequently, the defendant executed, in favour of plaintiff, a deed of assignment of certain decrees and it was agreed therein, that the amount which plaintiff might recover from those decrees must be credited towards the amount due to him under the promissory note, and that any balance which might be left due under it, after such deduction, must be paid separately by the defendant. The original promissory note, however, had not been cancelled. The present suit was instituted for the recovery of such balance, as under the agreement to pay the same, contained in the assignment deed. *Held*, the obligation under the promissory note was the only one on which the plaintiff was entitled to sue and that the provisions in the subsequent deed as to the adjustment of the debt and the payment of the balance, if any, did not operate to extinguish the obligation under the promissory note, or create an independent right of suit in favour of plaintiff. The present suit, therefore, having been brought after expiry of the period of limitation, which would have governed the suit if brought upon the note, the lower Court was right in having dismissed the suit as barred. VENKATARAMIAH PANTULU v. RAMAKRISHNA PANTULU, **29 M. 205.**

(41)—*Right of suit—Promise in favour of vendor—Right of vendee to enforce promise.*—A vendee has no right to sue for the enforcement of a promise made by a third person in favour of the vendor, if the right to sue on it has not been conveyed to her by the sale. MUSSUMAT KISHOREE v. JEY KISHORE DASS, **3 Agra 46.**

(42)—*Legal Practitioner's Act, ss. 28, 30—Suit by pleader to recover fee—Indian Contract Act, s. 70.*—A suit may be brought by a pleader against a client to recover the fees agreed to be paid, though the agreement is not in writing, nor filed in Court, when it is under s. 70 of the Contract Act for work and labour done. Ss. 28 and 30 of the Legal Practitioner's Act, which appear to refer to agreements to pay more than the regular fees prescribed by the High Court under s. 27 of the Act, are no bar to such a suit. RAMA v. KUNJI, **9 M. 375.** [*Diss.*, 136 P.R. 1893; *F.*, 12 A. 169, 25 C. 805, 27 M. 512=14 M.L.J. 274; *R.*, 11 M. 220, 14 M. 63, 28 A. 764=3 A.L.J. 579=A.W.N. 1906, 235=1 M.L.T. 242, 3 N.L.R. 47, 1 P.R. 1909.]

(43)—Mooktearnamah *impugned as forgery, onus of proving genuineness of Act* VIII *of* 1859, *s.* 132—*Endorsement on exhibits produced in Court.*—The question, whether the present suit was validly instituted or not, depended on the question whether the *mooktearnamah* under which the parties that signed the vakalut claimed the right to do so was genuine or not. It was set forth in answer that it was a forged document brought about by fraud. The Judge, however, proceeded on the ground that there

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——1.—General—*continued.*

was no question as to the legality of admitting the *mooktearnamah* because it happened to be attested by two witnesses in the presence of the Munsiff in accordance with the custom and usage of the Court. But the High Court *held* that, in such a case, when it has been set up that the document is a forgery and that it has been brought about by fraud, it is not sufficient to rely on an attestation in another Court without bringing forward the attesting witnesses and subjecting them to cross-examination. The institution of the proceedings in the Court was by virtue of *Vakalatnamah* purporting to have been signed under an authority given by means of a *mooktearnamah* which was impeached as a forged one and the party was therefore bound to come forward to prove the genuineness of the *mooktearnamah*, which he entirely failed to do. On inferences adverse to the party which it was possible to make, under the circumstances of the case, the High Court sent the case to the Magistrate for investigation directing him to proceed according to law in respect of offences which might have been committed under s. 471 or any other section or sections of the Penal Code. Under s. 132 of the Procedure Act, when a document is received by the Court and admitted in evidence, it should be endorsed, among other things, with the name of the party producing it. Whether the exhibit was filed originally or was only produced at the trial, the above rule ought to be acted upon so that any document produced at the trial, though it may not have been filed as an exhibit in the first instance, ought to be endorsed as directed in s. 132. When a Judge, on a trial, thinks it proper to admit a document which has not been filed as an exhibit, he ought to take care that it is produced by a proper person, and that the endorsement pursuant to s. 132 is made upon it in order that hereafter it may be known who the person is who produced it. BABOO BISRAM SINGH v. MAHARANEE INDURJEET KOONWAR, **6 W.R. 2.**

(44)—*Contract—Wagering transaction—Delivery of goods not contemplated*—Budnee—*Payment of differences.*—Where the plaintiff agrees to deliver and the defendant agrees to accept certain *til* on a certain day, but no interchange of commodities and their prices passes between the parties, but mere entries are made in the account books of each, the transaction partakes more of the nature of what is called "budnee," *i.e.*, the intention of the parties was that no effect should be given to the transaction and that each party should recover from the other the difference in the prices of goods according as it fluctuates. Such a transaction is more of the nature of a wagering contract, and as such should not be enforced, being opposed to public policy. KISHNA v. HUSHNAK, **11 P.R. 1866.**

(45)—*Suit against Secretary of society for rent of premises let--Secretary when and how far liable as agent—Indian Contract Act* (IX *of* 1872), *s.* 230—*Transfer of Property Act*, 1882, *s.* 106—*Notice to quit prior to ejectment—Sufficiency of the service.*—In this suit to recover a house with arrears of rent, defendant pleaded that he was merely the honorary Secretary of an Association which held its school in the premises and that he had hired the premises as such Secretary and not in his personal capacity. *Held*, even assuming that the owner, when he let the premises to the defendant, knew that the latter was the honorary Secretary of the school committee, still, there was nothing to show that the contract was made on the personal credit of any one except the defendant. Looking at the forms of receipt accepted by the defendant, it appeared that he contracted in his own name, but whether he did so or not, the case would fall under s. 239 of the Contract Act, no principal being disclosed. Plaintiff therefore had a cause of action personally against the defendant who was liable to him for the rent. Question also arose as to whether defendant had received a legally valid notice to quit. The notice had been sent to his solicitors, who handed it over to his brother, who in turn passed it on to him within a few days, so that the notice was in the defendant's hands within the requisite time for compliance with s. 106 of the Transfer of Property Act. The notice was not held bad merely because it had not been placed in his hands by the plaintiff or his agent directly. It could not make any difference whether the notice was given in the first instance to the solicitors and by them conveyed, through a relative or servant, to the tenant, or was given direct to the tenant by the lessor in the first instance. In both cases it was delivered to the defendant personally, either eventually or directly, and that was all that the section required. BHOJOBHAI v. HAYEN SAMUEL, **22 B. 754.**

(46)—*Land granted by Government to several persons—Defendant in possession of portion granted to a neighbour—Right of Government to sue for that portion.*—Where a certain quantity of land was granted by Government to several grantees subject to the condition of resumption if the land were allowed to remain uncultivated for certain years, and it was subsequently found that several grantees were not in possession of the land corresponding in quantity with that originally granted to them, and defendants held more than that included in their original grant, *held*, in a suit by Government for the recovery of land not included in the defendants' grant, that if the defendants held lands belonging to the neighbouring grantees, the right of suit to recover possession of such land vested in the grantees, not in Government, who, having parcelled out the whole land among several grantees, had no remaining right or interest therein, save that of resumption on the aforesaid condition. GOVERNMENT v. RAM CHARUN MISSER, **2 Agra 74.**

Right of Suit—continued.

——**1.—General**—*continued.*

(47)—Maafee *grant*—Nuzzerana *to Government through* lambardar—*Resumption of* maafee—*Confiscation for rebellion—Auction sale—Payment of* Nuzzerana *to* lambardar—*Suit to enforce payment--Jurisdiction—Act* XIV *of* 1863, s. 1, *cl.* 4.—A certain sum was during the existence of the *maafee* grant paid as *Nusserana* to Government through the *lambardar*. After the *maafee* was resumed and a Government *jumma* assessed upon it this sum as *Nuzzerana* continued to be paid until the interests of the holder of the resumed *maafee* were confiscated for rebellion and sold at auction. After confiscation and before the auction-sale the Government allowed the amount to the *lambardar* by deducting it from the amount of Government revenue paid by him. *Held* (*a*) that the Government, in arranging that the payment should be made of this *Nuzzerana* through the *lambardar* did, in effect, convey to him (the *lambardar*), as trustee on behalf of Government, such an interest in the estate as would enable him to sue for and enforce its payment: (*b*) That under the circumstances, the payment of *Nuzzerana* appeared to be present in acknowledgment of proprietary title in the nature of a rent charge, and, (*c*) That a suit to enforce such payment might be brought in the Revenue Court under cl 4, s. 1, Act XIV of 1863. SYUD ZAHOOR HOSSEIN v. ASSUD ALI, **2 Agra 378**.

(48)—*Reg.* XI *of* 1825, s. 4, *cl.* 1 (3)—*Formation of chur by gradual accretion — Suit by Government—Cause of action—Setting up case different from plaint, effect of—Right of Government confined to assessment of revenue.*—A chur which had been formed by gradual accretion was first settled with the putneedar of mouzah B, and then with its zemindar. During the second settlement, another chur formed which, after having been the cause of disputes between the putneedar of B and the putneedar of the adjoining mouza D, was taken possession of by the latter, after it was declared to be an accretion to his mouza in all the three suits brought by him to establish his right, in one of which the Government also was made a party. Subsequently, the Government brought a suit for possession of the second chur to which those suits related, and for setting aside the decrees in the two suits in which it was not made a party, stating the result of those suits to be the cause of action. A suggestion which was not made in the plaint and did not appear in the issues, was made in the lower Courts, that the first chur which had been settled with the Zemindar of mouzah B, and which had been over and over again described in documents to which Government was a party as "contiguous to the bank of the river H," as "adjoining" and as "contiguous" to mouzah B, originally came into existence as an island, and that the Government were entitled, under cl. 3 of s. 4 of Reg. XI of 1825, to take exclusive possession of it with all its accretions. *Held* that Government was not at liberty to depart from the

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——**1.—General**—*continued.*

allegations with which it had come into Court, that, as the right of Government in case of such accretion was limited to its revenue only and not to its actual possession, they were bound to accept the result of the litigation between the owners of the respective mouzahs, and to settle the revenue with that person who had been declared to be the owner. MOOKTAKESHEE DEBIA v. THE COLLECTOR OF BURDWAN, **12 W.R 204**.

Suit for damages for breach of contract to sell by the guardian of a lunatic without Court's permission, maintainability of—*See* ACT XXXV OF 1858, s. 14, 3 A.L.J. 686=A.W.N. 1906, 298.

See ACT XX OF 1863, s. 7, 13 M. 277.

See ACT XX OF 1863, s. 12, 17 M. 143.

Suit by member of an unregistered *chit* fund, consisting of more than twenty members, for recovery of subscription paid, maintainability of—*See* ACT VI OF 1882, s. 4, 1 M.L.T. 106.

Separate suit maintainable by owner for damage by the Public Works Department before publication of notice under s. 6, of Act I of 1894—*See* ACT I OF 1894, ss. 6, 23, 3 L.B.R. 117.

Settlement by revenue authorities—Right of suit—*See* BEN. ACT IX OF 1847, 4 C. 103=3 C.L.R. 151.

Assignee of purchaser of estate sold under Revenue Sale Law can sue to avoid encumbrances—*See* BEN. ACT XI OF 1859, s. 37, Exc. 4, 12 C.W.N. 1029.

Suit for, by assignee from an unregistered prorprietor whether maintainable—*See* BEN. ACT VII OF 1876, s. 78, 11 C.W.N. 141.

See BEN. ACT VII OF 1880, 29 C. 73, F.B. =5 C.W.N. 521.

Suit to cancel an assessment by a municipality—*See* BEN. ACT III OF 1884, ss. 113, 116, 21 C. 319.

Act VIII of 1885 (Bengal Tenancy), ss. 69, 70 (5)—Order of Collector, finality of—*See* BEN. ACT VIII OF 1885, s. 70, cl. (5), 32 C. 422.

Suit to correct or alter entries in record-of-rights, published under Ch. X, Bengal Tenancy Act, not maintainable—Recourse to be had to special remedy provided in chapter—*See* BEN. ACT VIII OF 1885, ss. 103 (B), 105, 106, 108, 12 C.W.N. 1032=8 C.L.J. 322=35 C. 1013.

Suit for rent—Deposit in Court under s. 149, Bengal Tenancy Act—Notice to third person interested—Omission of such third person to sue—Suit for rent by such third person, maintainability of—*See* BEN. ACT VIII OF 1885, ss. 149, 153, 9 C.W.N. 492.

See BOM. ACT XVII OF 1879, s. 16, 5 B. 614.

Right of Suit—continued.

—**1.—General**—*continued.*

Maufi Khiarati — Record by Settlement officer - Suit for declaration that record had been wrongfully made—Maintainability of—*See* C.P. ACT XVI OF 1889, ss. 72, 74 and 152 (9), 11 C.P.L.R. 129.

Person injured by a felonious act—Right of civil suit without bringing or endeavouring to bring the felon to justice—*See* MAD. ACT V OF 1884 (LOCAL BOARDS), ss. 162 and 165, 17 M.L.J. 537=2 M.L.T. 461=31 M. 54.

Contract to transport Government salt—S. 87, Madras Salt Act—Suit to recover sums deducted under the terms of the contract—Maintainability—*See* MAD. ACT IV OF 1889, s. 87, 4 M.L.T. 224.

Plaintiff having no right to sue—Defendant's case weak—Suit must fail—*See* PUN. ACT XVI OF 1887, s. 59 (3), 9 Ind. Cas. 339=54 P.L.R. 1911.

Maintainability of suit for a declaration that the land in dispute is joint property liable to be partitioned according to revenue holdings and not according to ancestral shares—*See* PUN. ACT XVII OF 1887, ss. 116, 117, 46 P.L.R. 1906.

Mortgage by disqualified proprietor — Suit brought after cessation of disqualification—Not maintainable—*See* U.P. ACT XVI OF 1882, s. 8, cl. (1), 4 A.L.J. 696=A.W.N. 1907, 276=30 A. 38.

Powers of Civil Courts to question acts of Municipal Boards within their statutory powers —Ss. 90 and 91 of Act I of 1900—Suit in Civil Court—*See* U.P. ACT I OF 1900, ss. 90 and 91, 2 A.L.J. 222=A.W.N. 1905, 79.

Decision of Revenue Court on a question of title, adverse to plaintiff—Suit by plaintiff in a Civil Court for declaration of title—*See* U.P. ACT II OF 1901, ss. 199 and 200, 4 A.L.J. 53=A.W.N. 1907, 6=29 A. 160.

Suit relating to partition - Dispute relating to mode of partition by Revenue Court —Jurisdiction of Civil Court to entertain suit —*See* U.P. ACT III OF 1901, s. 233 (K), 6 A.L.J. 744=2 Ind. Cas. 982=31 A. 541.

See BENAMIDAR, 3 C.W.N. 12=25 C. 874, 3 C.W.N. 20=25 C. 98.

Maintainability of suit by real purchaser against *benamidar*—Sale in execution of decree —*See* BENAMI TRANSACTION—MISCELLANEOUS, 3 P.R. 1906=109 P.L.R. 1906.

Contract—Execution of bond under misapprehension—Failure of consideration—Suit on bond—Maintainability—*See* BOND, 7 M.H.C. 85.

Bill or note given by debtor for payment of money on cause of action already arisen—Creditor's right to sue on the original consideration independently of the bill or note—*See* CAUSE OF ACTION, 15 M.L.J. 484=29 M. 111.

Right of Suit—continued.

—**1.—General**—*continued.*

Based on an agreement by judgment-debtor promising to pay interest at a rate higher than that provided in the decree—Sanction of Court not obtained—Agreement void—Non-maintainability of suit—*See* CIV. PRO. CODE, 1882, ss. 244, 257-A, 9 C.W.N. 1004=32 C. 917.

Suit of a civil nature—Religious rites and ceremonies—*See* CIV. PRO. CODE, 1908, s. 9, 2 C.L.J. 590=32 C. 1072=10 C.W.N. 505.

First suit for partition—Execution-proceedings struck off for default of parties after appointment of Amin to effect partition—Second suit for partition, whether maintainable—*See* CIV. PRO. CODE, 1908, s. 11, O. IX, r. 9, O. XVI, rr. 13, 14, 10 C.W.N. 839.

Delivery of formal possession in execution proceedings - Maintainability of suit for actual possession—*See* CIV. PRO. CODE, 1908, s. 47, 3 A.L.J. 504=A.W.N. 1906, 213=28 A. 722.

One of two joint decree-holders recovering whole amount—Right of the other to sue for his share—*See* CIV. PRO. CODE, 1908, s. 47, 29 M. 183.

Mortgage decree against member of undivided family—Surviving member brought on record on death of judgment-debtor—Objection by surviving member to sale in execution—Determination of objection by separate suit—*See* CIV. PRO. CODE, 1908, s. 47, 12 C.P.L.R. 73.

Surety's right to sue for declaration of non-liability as to portion of decree-amount—*See* CIV. PRO. CODE, 1908, s. 47, 28 M. 117=14 M.L.J. 430.

Right of decree-holder-purchaser to sue for possession of property purchased in execution—*See* CIV. PRO. CODE, 1908, s. 47, 28 M. 87=14 M.L.J. 474.

Decree-holder's taking possession of greater area than what was decreed—Suit by judgment-debtor for possession, maintainability of—*See* CIV. PRO. CODE, 1908, s. 47, 3 A.L.J. 601=A.W.N. 1906, 233.

Decree for sale against Hindu father—Suit by son—Sale of property during pendency of such suit and notwithstanding an injunction therein—Right of father to question the validity of the sale in a separate suit by him—Maintainability of suit—*See* CIV. PRO. CODE, 1908, s. 47, 2 A.L.J. 694.

Maintainability of suit, by *shebait*, of idol, for declaration that property sought to be sold in execution of personal decree against him is endowed property — *See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 58, 12 C.W.N. 308.

Objections by legal representative of judgment-debtor that attached property was trust-property in his possession disallowed—Suit contesting such order, maintainability of—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, rr. 58, 60, 63, 3 A.L.J. 370=A.W.N. 1906, 157.

Right of Suit—continued.

——1.—**General**—*continued.*

Suit for refund of purchase-money on sale being set aside, maintainability of—*See* CIV. PRO. CODE, 1908, s. 47, O XXI, r. 90, 32 C. 332.

Surety guaranteeing payment of judgment-debt when judgment-debtor arrested and brought before Court under s. 386, Civ. Pro. Code—Suit by decree-holder on surety's default—*See* CIV. PRO. CODE, 1908, s. 55, 10 C. W.N. 830=4 C.L.J. 311.

Maintainability of suit by one decree-holder receiving rateable distribution against a rival decree-holder similarly circumstanced for a declaration that the latter's decree is fraudulent—*See* CIV. PRO CODE, 1908, s. 73, 3 C.L. J. 385.

Suit by person having no right to sue—Person having right whether can be joined as plaintiff—*See* CIV. PRO. CODE, 1908, O. I, rr. 1, 10, 11 Ind. Cas. 223.

Suit by one individual to establish a common right to a public religious trust—*See* CIV. PRO. CODE, 1908, O. I, r. 8 (1), ss. 92 and 93, 9 C.W.N. 594.

Infringement of right of worship—Suit by some members of a community on behalf of themselves and other members of the community, not on behalf of the public in general—Maintainability of suit—*See* CIV. PRO. CODE, 1908, O. I, r. 8 (1), ss. 92, 93, 10 C.W. N. 867=33 C. 905.

Application for adjournment by pleader—Rejection of application — Withdrawal of pleader from suit—Dismissal of suit for plaintiff's default—Whether fresh suit maintainable—*See* CIV. PRO. CODE, 1908, O. IX, rr. 3, 4, O. XVII, rr. 2, 3, 9 Ind. Cas. 842.

First suit for partition dismissed for default—Maintainability of second suit for the same purpose—*See* CIV. PRO. CODE, 1908, O. IX, r. 9, 3 A.L.J. 379=A.W.N. 1906, 142=28 A. 627.

Suit to set aside *ex parte* decree on the ground of fraud, such fraud being non-service of summons, maintainability of—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, 4 A.L.J. 51=A.W.N. 1907, 31=29 A. 212.

Dismissal of application under s. 232, Civ. Pro. Code—Maintainability of suit to establish right to execute decree—*See* CIV. PRO. CODE, 1908, O XXI, r. 16, A.W.N. 1906, 133=3 A. L.J. 428=28 A. 613.

For declaration on failure to appeal from an order dismissing without enquiry an application under s. 232—*See* CIV. PRO. CODE, 1908, O. XXI, r. 16, s. 47, 16 M L.J. 27.

Money paid by a person to raise an attachment to clear his own title—Suit to recover such money from the true owner, maintainability of—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 61, 63, 16 M.L.J. 136=29 M. 225.

Right of Suit—continued.

——1.—**General**—*continued.*

Of an auction-purchaser for the recovery of purchase-money from the decree-holder on the ground of judgment-debtor's want of title to the property sold—*See* CIV. PRO. CODE, 1908, O. XXI, r. 93, 10 C.W.N. 274.

Survival of right—Where in an action of libel, the appellant dies, the right to continue the appeal survives to his legal representative—*See* CIV. PRO. CODE, 1908, O. XXII, r. 1, 4 Bom. L.R. 325=26 B. 597.

Meaning of, in O. 22—Right to obtain probate different from right to be appointed to administer deceased's estate—*See* CIV. PRO. CODE, 1908, O. XXII, r. 1, 36 C. 799=3 Ind. Cas. 995.

Where the plaintiff dies pending a suit to recover possession his legal representative can continue proceedings—*See* CIV. PRO. CODE, 1908, O. XXII, r. 5, 4 Bom. L.R. 980=27 B. 162.

Suit on compromise in respect of matters other than subject-matter of suit—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 3, 10 C.P.L.R. 56.

Alienation by male proprietor—Next reversioner's right to sue for setting it aside in the presence of minor adopted son—*See* CIV. PRO. CODE, 1908, O. XLI, r. 23, 56 P.R. 1908.

Competency of son to maintain action for damages for death caused to deceased father by defendant's actionable wrong—*See* COMPENSATION, 56 P.R. 1905=94 P.L.R. 1905.

Suit to recover money paid to release property from unlawful revenue attachment in a Civil Court, maintainability of—*See* CONTRACT ACT, 1872, s. 69, A.W.N. 1906, 114=3 A.L.J. 372=28 A. 563.

Interest to pay Government revenue—Subsequent suit to recover money paid from person benefited by payment—*See* CONTRACT ACT, 1872, s. 69, 3 A.L.J. 665=A.W.N. 1906, 282.

Collection by some of several co-sharers of portions of rent from tenants—Suit by all co-sharers jointly for the whole rent, maintainability of — *See* CO SHARERS, SUIT BY CO-SHARERS, 10 C.W.N. 787=3 C.L.J. 627.

One sharer suing for whole rent—Other sharers parties to suit—*See* CO-SHARERS—SUIT BY CO-SHARERS, 3 C.W.N. 225.

Of sharer to sue alone for his share of rent—*See* CO-SHARER— SUIT BY CO-SHARERS, 3 C.W.N. 214.

Maintenance of suit in Civil Court not withstanding order of Magistrate refusing maintenance—*See* CRIM. PRO. CODE, s. 488, 32 C. 479=13 C.W.N. 150.

Male proprietor making a gift to his daughter with the consent of a childless son—Right of reversioners to contest the alienation—*See* CUSTOMS—PUNJAB— ALIENATION, 58 P.R. 1908=117 P.W.R. 1908=162 P.L.R. 1908.

Right of Suit—continued.

——1.—**General**—*continued.*

Brahmin of Gopalpur in the Amritsar District—Son's right to question the validity of alienation by father—*See* CUSTOM—PUNJAB—ALIENATION, 58 P.R. 1908=117 P.W.R. 108=162 P.L.R. 1908.

Right of sons born before the adoption of their father to contest alienation by father of his adoptive father's property—*See* CUSTOMS—PUNJAB—ALIENATION, 66 P.R. 1908=110 P.W.R. 1908.

See CUSTOMS—PUNJAB—ALIENATION, 66 P.R. 1878, 4 P.R. 1890, 68 P.R. 1892, 14 P.R. 1895.

See DAMAGES—DAMAGES, SUITS FOR, 8 M. 175.

Decree incapable of being executed for future mesne profits—Maintainability of separate suit to recover such profits—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 1 M.L.T. 69.

Claim for declaring that defendant was not pregnant at her husband's death—Declaratory suit—Not maintainable—*See* DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 124 P.W.R. 1908.

Transfer of *ex parte* decree—Decree set aside subsequent to transfer—Right of transferee to maintain suit on original cause of action—*See* DECREE — MISCELLANEOUS, 135 P.L.R. 1905=78 P.R. 1905.

Suit to challenge validity of decree—Review—Alternative remedies—*See* DECREE—MISCELLANEOUS, 2 C.L.J. 508.

Defamation—Imputation of unchastity to wife—Husband's right to sue—*See* DEFAMATION, 18 M. 250=5 M.L.J. 89.

Defamation of daughter, suit by father in his own right for—Maintainability of suit—*See* DEFAMATION, 11 A. 104=A.W.N. 1888, 287.

Demarcation of village boundaries accepted by Settlement authorities and agreed to by defendants—Conduct of parties with reference to and long possession of such land—Suit by Government to impugn correctness of demarcation proceedings, maintainability of—*See* DEMARCATION, 11 O.C. 30.

Agreement executed under pressure of criminal prosecution—Suit to set aside agreement maintainable—*See* DURESS, 7 M.H.C. 378.

Of a lessee or a person in lawful possession of a house—Interference with right of privacy—*See* EASEMENTS ACT, 1882, s. 4, 3 A.L.J. 670=A.W.N. 1906, 283=29 A. 64.

Succession suits for instalments—*See* EVIDENCE—SECONDARY EVIDENCE, 3 A. 717.

S. 11—Civ. Pro. Code, 1882—Fact that criminal trial did not result in conviction of the accused is no bar to a civil suit against him—

Right of Suit—continued.

——1.—**General**—*continued.*

Suit against approver—Evidence at criminal trial if admissible—Sessions Court's finding if binds Civil Court—*See* EVIDENCE—MISCELLANEOUS, 13 C.W.N. 501=4 Ind. Cas. 523.

Declared by decree—Execution of decree barred—Right remains though remedy gone—*See* EVIDENCE ACT, 1872, s. 116, 11 Bom. L.R. 1093.

Suit for damages for false imprisonment—Prosecution after investigation—Acquittal of accused—Maintainability of suit against accused—*See* FALSE IMPRISONMENT, 3 A.L.J. 650=29 A. 44=A.W.N. 1906, 263.

Right of fishing in navigable river—Property—Grant from Government—*See* FISHERY, 2 B. 19.

Heirship Certificate Act XXVIII of 1860—Certificate issued by Resident at Cochin—Suit maintainable only in Court of Native Cochin for setting aside — *See* FOREIGN COURT, JURISDICTION OF, 16 M. 405.

Agreement restricting right to sue—Validity—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 11 Bom. L.R. 273=34 B. 13=3 Ind. Cas. 837.

One or other of the plaintiffs entitled to succeed—Failure of first plaintiff to make out title—Right of the other plaintiffs—Dismissal of suit—Appellate Court's power to make any orders to meet the ends of justice—*See* HINDU LAW—ALIENATION, 38 C. 721.

Suit by step-mother against step-son for maintenance based upon a contract between the uterine sons and the step-son—Step-mother not a party to, but acted upon, the contract—*See* HINDU LAW—MAINTENANCE, 1 C.L.J. 142.

Right of stranger to sue for rights under a contract — Exceptions—*See* HINDU LAW—MAINTENANCE, 10 M.L.T. 214.

Legal presumption of death—Suit on bond against legal representatives of obligor, supposed to be dead—*See* HINDU LAW—PRESUMPTION OF DEATH, 4 M H.C. 1.

Alienation of ancestral *debutter* property by father and uncle in a joint Hindu family—Right of a member to sue to set aside the alienation and for recovery of the property—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 33 C. 507.

Suit by a presumptive reversioner against a Hindu widow for declaration of title and injunction against waste and alienation—*See* HINDU LAW—REVERSIONERS, 2 A.L.J. 84=A.W.N. 1905, 6=27 A. 406.

Suit in High Court based on order of the Insolvency Court (in this case the High Court itself)—Order of Insolvency Court is judgment of High Court—*See* INSOLVENCY—GENERAL, 9 C.W.N. 952=33 C. 560.

Right of Suit—continued.

——**1.—General**—*continued.*

Condition limiting time of suit—Validity—*See* INSURANCE, 11 Ind. Cas. 756.

Suit by *Malis* attached to a temple to sue the Brahmans for a declaration of their right to receive offerings made by votaries at the temple and for an injunction—*See* JURISDICTION OF CIVIL COURTS, 8 O.C. 339.

Landlord, suing in ejectment, not showing intention to avail himself of tenant's forfeiture and to determine the lease before bringing suit —Suit does not lie before such act showing intention is done—*See* LANDLORD AND TENANT—FORFEITURE, 4 M.L.T. 221=31 M. 403.

Suit by co-sharer landlord—Co-sharers refusing to join as plaintiffs—Co-sharers consequently made defendants in suit—Whether co-sharer landlord entitled to maintain suit for entire rent—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 7 C.L.J. 425 =35 C. 744.

For damages — Defamation of class—Cause of action of individual—*See* LIBEL, 12 C.W.N. 490=35 C. 495.

See LIMITATION ACT, 1908, arts. 62, 120, 89, 115, 96 P.R. 1886.

Mahomedan mosque founded by various classes of Mahomedans—Charter of incorporation obtained by a portion of the congregation disregarding the right of the rest—Remedy of the latter—Court will grant relief to aggrieved members of unauthorized religious communities —*See* MAHOMEDAN LAW—WAKF, 13 C.W.N. 26, P.C.=4 M.L.T. Special, p. 25=1 Ind. Cas. 314.

See MAHOMEDAN LAW—WAKF, 2 N.W.P. 420.

Suit for damages for malicious arrest, whether maintainable when arrest ordered by officer having discretionary power to order arrest on facts placed before him by defendant—*See* MALICIOUS ARREST, 29 M. 208.

Suit by wife for declaration that neither her husband nor another, to whom husband transferred her by deed of repudiation, have conjugal rights against her, maintainability of—*See* MARRIAGE, 31 P.R. 1908=76 P.W.R. 1908 =152 P.L.R. 1908.

Suit to set aside compromise entered into by pleader engaged by the guardian of the minors against the express wishes of the guardian—*See* MINORS—SUITS BY AND AGAINST MINORS, 34 C. 83.

Covenant in a usufructuary mortgage—Enhancement of kist—Right of mortgagor to sue for the excess *kist* paid by him—*See* MORTGAGE—GENERAL, 16 M.L.J. 28.

Prior and subsequent mortgagees—Purchase by each at sale on his mortgage—Right *inter se* —Suit for possession by prior mortgagee, maintainability of—*See* MORTGAGE—GENERAL, 11 C.W.N. 403=5 C.L.J. 315.

Right of Suit—continued.

——**1.—General**—*continued.*

Mortgage of tenant's holding — Decree for rent on suit of landlord—Decree and sale thereunder fraudulent and collusive—Purchase of the holding by the landlord—Suit by mortgagee —*See* MORTGAGE, SALE OF MORTGAGED PROPERTY, 32 C. 283.

Hundi payable after sight—Presentation for acceptance within reasonable time, when condition precedent to suit — *See* NEGOTIABLE INSTRUMENTS — HUNDIS — PRESENTATION OF HUNDIS, 10 B. 346.

On a pro-note neither barred nor suspended by reason of a collateral covenant not to sue for a specified time—*See* NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—GENERAL, 16 M.L.J. 103=29 M. 212.

Suit for money lent independent of pro-note—Liability of other partners on a pro-note signed by one of the partners—*See* NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—GENERAL, 17 M.L.J. 126.

See PARTIES TO SUIT—GENERAL, 5 C. 445=5 C.L.R. 172, A.W.N. 1881, 23.

Co-owner of estate suing other co-owner for partition of chowkidari chakran lands of portion of estate—Maintainability of suit. *See* PARTITION—GENERAL, 12 C.W.N. 640.

Right of person, holding permanent interest of inferior grade, to sue for partition persons holding interest of superior grade—*See* PARTITION—GENERAL, 7 C.L.J. 449=12 C.W.N. 670.

Partners—Promise by one partner to another to pay balance struck, suit maintainable on—*See* PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 21 M. 366.

Suit for money paid out of Court—Adjustment of decree — *See* PAYMENT OUT OF COURT, 1 M. 203.

Suit for money—Objection to maintainability —Defendant's consent while giving evidence to plaintiff's recovering the amount, whether validates suit—*See* PLEADINGS, 10 Ind. Cas. 351.

Tenant dispossessed by a trespasser—Right of landlord to sue the trespasser—*See* POSSESSION — ADVERSE POSSESSION, 10 C.W.N. 343.

Suit for possession on possessory title of plaintiff's predecessor, plaintiffs never themselves being in possession—*See* POSSESSION—SUITS FOR POSSESSION, A.W.N. 1906, 264= 3 A.L.J. 775=29 A. 52.

Sale to stranger with concurrence of co-sharer—Purchase by such co-sharer—Maintainability of suit for pre-emption—*See* PRE-EMPTION—GENERAL, 3 A.L.J. 794=A.W.N. 1906, 313=29 A. 125.

Suit for pre-emption—Sale not real but sham —Right to enforce pre-emption—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 9 C.W.N. 874=32 C. 988.

Right of Suit—continued.

——**1.—General**—*continued.*

Mere proposal to sell does not entitle a person to claim pre-emption—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 9 O.C. 169 (B).

See PRE-EMPTION—RIGHT TO PRE-EMPT, 2 A. 884, 3 A. 610, F.B.

Co-occupant in Berar in survey number, whose interest is sold by auction to satisfy mortgage decree, not entitled to sue for pre-emption *re* shares so sold—*See* PRE-EMPTION—MISCELLANEOUS, 4 N.L.R. 138.

Authority of agent to sue on behalf of principal—Right of defendant—Right of Court to enquire as to agent's authority—*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 19 C. 678=19 I.A. 135.

Suit by surety against administratrix to be discharged from obligation under administration-bond—Suit not maintainable—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 78, 28 M. 161=14 M.L.J. 482.

Suit against a Receiver—Maintainability of suit without sanction of Court previously obtained—Application for leave to continue suit already brought—*See* RECEIVER, 9 C.W.N. 247=32 C. 270.

See REGISTRATION ACT, 1908, s. 32, 9 B. 63.

S. 12, Civ. Pro. Code, 1882—Decision by Council of Elders under the Sind Frontier Regulation, III of 1892, bar to a fresh suit—*See* BOM. REG. III OF 1892, ss. 4, 5 (3), (*a*), (*c*), (*e*), 6 and 7, 3 S.L.R. 100=3 Ind. Cas. 902.

Suit by *Vadagalai Dharmakartas* (Trustees) for declaration of right of management and for injunction restraining *Tengalai Archakars* (worshippers) from interfering with former's management of a *Tengalai* shrine, maintainability of—*See* RELIGIOUS ENDOWMENT, 16 M.L.J. 150.

See RENT, SUIT FOR, 2 W.R. Act X, Rul. 91.

Suit compromised by pleader—Application for review on ground of pleader's authority to compromise rejected—Fresh suit to set aside decree, maintainability of—*See* RES JUDICATA—MISCELLANEOUS, 10 C.W.N. 529=2 C.L.J. 508.

See SERVICE TENURE, 9 B.H.C. 282.

Imputation of unchastity to plaintiff's sister—Suit by plaintiff for damages for slander, maintainability of—*See* SLANDER, 9 C.W.N. 847=2 C.L.J. 396=32 C. 1060.

Auction-purchaser on obtaining delivery of possession under s. 318, Civ. Pro. Code, dispossessing judgment-debtor's tenant—S. 319, Civ. Pro. Code, not proceeded under—Dispossession of judgment-debtor's tenant not in due course of law—Suit by tenant of judgment-debtor against auction-purchaser, maintainability of—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 12 C.W.N. 694.

Right of Suit—continued.

——**1.—General**—*concluded.*

Rectification of sale-deed upon which plaintiff's title rested not made as required by s. 31, Specific Relief Act—Maintainability of plaintiff's suit—*See* SPECIFIC RELIEF ACT, 1877, s. 31, 11 O. C. 93.

Duty and penalty of insufficiently stamped documents recovered from person filing document by Collector—Proper authority to review Collector's order—Suit by such person against Secretary of State for collecting duty due from third person, maintainability of—*See* STAMP ACT, 1899, ss. 40, 44, 5 A.L.J. 262=A.W.N. 1908, 130=30 A. 271.

Letters of administration, with copy of will annexed, granted to a legatee in respect of his legacy alone—Right of another legatee to sue for recovery of his legacy—*See* SUCCESSION ACT, 1865, s. 187, 10 C.W.N. 864=4 C.L.J. 523.

See SUCCESSION ACT, 1865, s. 190, 18 B. 337.

Letters of administration to estate of deceased Parsi—*See* SUCCESSION ACT, 1865, s. 190, 19 B. 823.

Right of manufacturer to sue for breach of trade mark, when different firm does the business—*See* TRADE MARK, 13 C.W.N. 82=4 Ind. Cas. 318.

Contract to make testamentary dispositions—Right of assignee from a person in whose favour such a contract exists to sue for declaration of his rights—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6, 9 O.C. 55, B.

Right to sue for damages for breach of contract is not transferable—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6 (*e*), 7 M.L.T. 228=6 Ind. Cas. 290.

Suit not maintainable by usufructuary mortgagee for money, when the mortgaged property is lost by his own default—*See* TRANSFER OF PROPERTY ACT, ss. 68, cls. *a*, *b* and *c* and 73, 3 C.L.J. 220.

Statute creating a special right—Conditions necessary to acquire the right—*See* TRESPASS, 13 C.W.N. 458=9 C.L.J. 298=36 C. 433=5 M.L.T. 367=2 Ind. Cas 436.

Suit for cancellation of a will does not lie during life of testator—*See* WILL—GENERAL, 27 A. 14=1 A.L.J. 468.

——**2.—Accounts.**

See ACCOUNTS.

(1)—Ruzukhata (*account adjusted*), *evidence of existing debt—Suit not maintainable on such account as fresh contract.*—By English law, an account stated even though it amounts to nothing more than the totalling up of the items of an account and adding interest and acknowledging their correctness (which a simple *ruzukhata* usually consists in) could have been directly sued upon. Formerly this was the law adopted by the Courts in Bombay. Where,

Right of Suit—continued.

——2.—**Accounts**—*concluded.*

however, an acknowledgment was oral or unsigned, the provisions of the Limitation Act rendered it inoperative as an exception to the plea of limitation, so that, when the Act intervened, such acknowledgment could not be directly sued upon as a new contract. An admission or acknowledgment of a debt ordinarily implies a consent to pay it, but when the admission has not been made in the manner which the law has prescribed for the purpose of its preventing a debt from becoming barred by time, such admission would not at all imply in law a promise to pay such debt if it should become barred by time. The later authorities are clearly to the effect that a *ruzukhata* cannot by itself be made the basis of a suit. The original transactions form the basis of the suit and the subsequent *ruzukhata* is only an evidence of the debt due and may serve to prevent the operation of the statute of limitation. SHANKAR v MUKTA, **22 B. 513.** [*F.*, 23 A. 502=21 A.W.N. 150; *Cons.*, 26 M. 186=12 M.L.J. 444; *R.*, 14 C.P.L.R. 151, 84 P.R. 1904. 1 L.B R 190, 68 P.R. 1904=123 P.L.R 1904, 32 M. 284=19 M.L.J. 372=3 M. L.T. 351; *D.*, 24 B. 394, 25 B. 397.]

——**3.—Acts done in exercise of Sovereign Powers.**

See ACT OF STATE.

(1)—*Sovereign powers of Government--Government, liability of, for its acts.*—Government is not civilly liable for its acts in exercise of sovereign powers. The subject has no right of suit in such cases. NOBIN CHUNDER DEY v. THE SECRETARY OF STATE FOR INDIA, **1 C. 11=24 W.R. 309** [*F.*, 3 A. 829; *Diss.*, 4 M. 344. 3 A. 829, 5 M. 273, 7 M. 466, 6 Bom. L.R. 131; *R.*, 27 B. 189=5 Bom. L.R. 30, 1 C.L.J. 355=9 C.W.N. 495.]

(2)—*Acts of State—Cognizance by Municipal Courts.*—The Acts of State of which Municipal Courts are not authorized to take cognizance are those done in the exercise of sovereign powers, but which do not profess to be justified by Municipal law. Where the act which is the ground of complaint is an act which professes to be done under the sanction of Municipal law and in the exercise of powers conferred by that law, the circumstance that it is an act done by the sovereign power or by the deputy of that power, does not oust the jurisdiction of the Civil Courts. THE SECRETARY OF STATE FOR INDIA v. HARI BHANJI, **5 M. 273.** (7 M. I.A. 476, *Diss.*) [*F.*, 21 P.R. 1894; *R.*, 7 M. 466, 27 B. 189, 6 Bom. L R. 131.]

(3)—*Contract by Government to grant proprietary rights in land—Contract entered into or acts done in the exercise of Sovereign power.*—Suit against the Secretary of State and another person for possession of certain land, on the allegation that Government had promissed to confer on the plaintiff the proprietary rights in such land on the condition that he should do certain things, which he had done,

Right of Suit—continued.

——**3.—Acts done in exercise of Sovereign Powers**—*concluded.*

and that the Government had refused to perform such promise and had conferred proprietary rights in such land on such other person. *Held per Spankie, J.*, that the suit would not lie, as the contract, if any, was made in the exercise of Sovereign power, and the other acts complained of were also acts done in the exercise of such power. *Held per Stuart, C.J.*, (on the facts) that the Government had entered into the contract alleged by the plaintiff and that the suit would lie, as the contract was not entered into in the exercise of Sovereign power, but in the capacity of a private owner; but that the plaintiff could not succeed as he had not performed his part of the contract. KISHEN CHAND v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **3 A. 829=A.W N. 1881, 87.** (1 C. 11, *R.*)

(4)—*Suit against Secretary of State—Illegal levy of import duties by a Collector—Jurisdiction—Excise duty—Import duty—Fluctuation—Liability to pay difference.*—A suit lies against the Secretary of State for India, to recover import duties illegally levied by the Collector. [*R.*, 6 Bom L.R. 131. 9 C.W.N. 495=1 C.L.J. 355, 7 M. 466, 27 B. 189.] Persons who export salt at one port and import it in another, are liable to the contingency of the tariff rates being raised between the interval of their paying the excise duty and the levy of the import duty at the port of import. If the contingency happen, they are liable to pay the extra duty. HARI BHANJI v. THE SECRETARY OF STATE FOR INDIA, **4 M. 344.**

——**4. — Attachment Proceedings, Suits concerning.**

See ATTACHMENT.

See EXECUTION OF DECREE.

(1)—*Mortgage — Attachment — Mortgagee's suit to raise attachment.*—A mortgagee claiming title otherwise than from the execution creditor, can sue on behalf of himself and his mortgagor, to raise an attachment on the mortgaged property in his possession. WAIGANKAR v. WADEKAR, **5 B.H.C A.C. 194.**

(2)—*Attachment—Suit to raise—Mortgagee.*—Two persons borrowed money from a third person with the plaintiff as surety, agreeing that their house should be held by the plaintiff in mortgage, to be his absolutely, if he had to pay the money he was thus surety for, and was not paid other money they owed him personally. The plaintiff had to pay the debt himself. The defendant had, in the meanwhile, attached the same house in execution of his decree against the two debtors. The plaintiff sued to raise the attachment on the ground that the bond passed to him was a sale and not a mortgage. *Held* that the plaintiff who was but a mortgagee could not institute a suit to raise the attachment. SHIVLAL *bin* KHUBCHAND v. BULVANTRAV VINAYAK, **2 B.H.C. 70.**

Right of Suit—continued.

—4. — Attachment Proceedings, Suits concerning—*concluded.*

(3)—*Cause of action—Attachment of property in execution—Suit for declaration of right.*—Where property belonging to a person was attached in execution of a decree obtained in a suit between some others, a good cause of action accrued to that person to institute a suit to declare his claim to the property. MAHOMED GAZEE CHOWDHRY v. SHUMBHOONATH MISSER, **22 W.R. 389.** [*R.*, 6 B. 168, F.B.]

(4)—*Civ. Pro. Code*, 1882, *s.* 283 (=*O.* XXI, *r.* 63, *new Code*), *essential conditions for suits under.*—An essential condition precedent to the institution of a suit under the section is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection in the manner provided by the Code, and lastly of his being allowed or disallowed. ANGAN LAL v. GUDAR MAL, **10 A. 479=A.W.N. 1888, 189.**

(5)—*Claim to property attached — Claim allowed — Suit to declare right to proceed against property—Jurisdiction—Small Cause Court—Civ. Pro. Code*, 1859, *s.* 246.—Where a claim to property attached in execution of a decree has been allowed by a Small Cause Court, an original suit does not lie in the Small Cause Court against the successful claimant, provided, of course, that the plaintiff has no property general or special in the goods attached by him except such as he claims in virtue of his attachment. NUTHOO MULL v. RADHAKISHEN, **72 P.R. 1868.** [*Expl.*, 84 P.R. 1870.]

(6)—*Suit to establish judgment-debtor's title to property attached not cognisable by any Court.*—A suit by a decree-holder to establish his judgment-debtor's title to the property attached does not lie in any Court. NUTHOO MULL v. RADHAKISHEN, **72 P.R. 1868.** [*Expl.*, 84 P.R. 1870.]

See CLAIM TO PROPERTY ATTACHED, 18 A. 410=A.W.N. 1896, 126.

—5.—Awards, Suits concerning.

See ARBITRATION.

See AWARD.

(1)—*Civ. Pro. Code, s.* 525—*Suit upon an award—Secondary evidence.*—A suit upon an award is not barred by s. 525, Code of Civil Procedure, and secondary evidence of its contents will be admissible on proof of its loss. GOPI REDDI v. MAHANANDI REDDI, **15 M. 99=1 M L.J. 591.** [*F.*, 20 M. 490; *R.*, U.B R., 1906, 1st Qr., Specific Relief 30, 19 P.R. 1907=46 P.L.R. 1907=134 P.W.R. 1907.]

(2)—*Suit to enforce award or for partition—Alternative relief.*—Where disputes as to partition of family properties had been submitted to arbitrators and an award had been made and some properties divided in pursuance thereof but the partition was not completed on account

Right of Suit—continued.

—5.—Awards, Suits concerning—*continued.*

of disputes, *held*, in a suit to enforce the award, that an alternative claim for partition cannot succeed, since there has been already a valid award. SUBBARAYA CHETTI v. SADASIVA CHETTI, **20 M. 490.**

(3)—*Award—Religious quarrel—Submission to the award by some persons—No representation of the community—Consent—Enforcement—Interference by Court.*—In this case an award was sought to be enforced by a few persons of a community. The award was in respect of a religious quarrel relating to a state of things which had been in force at a mosque for fifty years by the common consent of all the worshippers having an interest therein. The award was made under a submission to arbitration entered into by a few persons without the consent of the entire community. *Held* that the award could not be enforced and the suit was not maintainable. ZAHID v. PEEREE, **3 N.W.P. 92.**

(4)—*Reg.* VII *of* 1822—*Reg.* IX *of* 1833, *s.* 9—*Award on arbitration—Suit to set aside award—Suit for possession.*—A suit for a partition of a moiety of certain joint and undivided property by the purchasers of that moiety under Reg. VII of 1822, and for the setting aside of an award by which the purchasers and their vendors were found to have never been in possession, is not barred by s. 9 of Reg. IX of 1833, as the arbitration in course of which the above award was given was not brought about under the provisions of that Regulation. It is unnecessary that the award should be set aside before Courts could adjudicate on the purchasers' claim to obtain possession of the share of the parcel which they purchased by establishing their title thereto. It does not follow that because their vendors were not in possession of their share at the time of the purchase, their claim is barred by limitation. On the contrary if the vendors' dispossession did not take place at a period more remote than twelve years before the commencement of the suit, the purchasers may be entitled to a decree for possession by establishment of their right, even though there may be no sufficient reason for setting aside the award. GANGA BAKSH v. WALI BAKSH, **7 N.W.P. 169.**

(5)—*Reg.* IX *of* 1833, *ss.* 6, 7, 9—*Suit for cancelment of award—Objection that plaintiff did not consent to it—Proceedings contrary to law.*—A suit for the cancelment of an award of arbitrators made under ss. 6 and 7, Reg. IX of 1833, not on the ground that the proceedings had been contrary to law but on the ground that the plaintiff had not consented to the arbitration, is liable to be dismissed under the provisions of s. 9 of that Regulation, as his consent was not necessary. IKRAM OOL-LAH v. SHEO PERSHAD, **2 Agra 340.**

(6)—*Act* XI *of* 1865, *s.* 6—*Maintenance fixed by award—Suit for arrears not a suit of Small Cause nature—Award passed* ultra vires, *suit not maintainable on.*—This was a suit to recover arrears of

Right of Suit—continued.

——5.—**Awards, Suits concerning**—*concluded.*

maintenance payable under an award of arbitrators at the rate ascertained by award. Preliminary objection was taken on special appeal that this suit was of a nature cognizable by a Court of Small Causes and that, consequently, no special appeal lay. The High Court overruled the objection and proceeded to dispose of the appeal. The suit was, however, held to be bad on the ground that the determination by the arbitrators of a specific sum as maintenance was *ultra vires* as the question as to the amount of maintenance to which the respondent would be entitled, was not a question which could have judicially come before the Settlement Officer who appointed the arbitrators, who, therefore, exceeded their powers in having fixed the amount of maintenance. DURJAN SINGH v. MUSSAMAT SIBIA, **7 N.W.P. 329.**

——6.—**Boundary questions, Suits concerning.**

See BOUNDARY.

(1)—*Right of suit—Question of boundary—No allegation of transgression.*—The owner of a land has no r ght to bring a suit to compel all his neighbours to agree to a particular line of boundary being marked out between his land and theirs, when he does not venture to say that they have by any overt act transgressed that boundary. AMEEROONNISSA BEGUM v. GOPAL SAHOO, **22 W.R. 134.**

——7.—**Building, Suit to restrain.**

(1)—*Right of privacy—Construction of upper part of house.*—A house-owner in a street changed the arrangement or the construction of the upper part of his house in such a manner that the alteration gave him a wider range of vision than before, but otherwise consistent with his just rights of enjoyment. A neighbour living on the other side of the road and not adjacent owner complained of loss of privacy. No improper obstruction of light or air was stated to be occasioned. *Held* that the mere fact that the alteration gives to the defendant a wider range of vision than before does not constitute any legal right of suit in the plaintiff. JOOGUL LAL v. MUSSUMAT JASODA BEBEE, **3 N.W. P. 311.** [*Cons.*, 10 A. 358.]

(2)—*Right of way—Long silence as to obstruction—Acquiescence.*—Where a plaintiff sued to have a dwelling house pulled down, which defendant had erected seven years previously upon a path, whereby plaintiff and others had been accustomed to go across defendant's land to a tank (the path being not the only, but the shortest, way to the tank), it was *held* that the plaintiff's conduct in allowing the building to be erected, and in keeping silence for so many years, warranted the inference that he acquiesced in what defendant did, and that plaintiff's claim was unreasonable under the circumstances, and such a Court of equity and good conscience ought not to enforce. BENI MADHAB DAS v. RAMJOY ROKH, **1 B.L.R. A.C. 213 = 10 W.R. 316.** [*R.*, 12 W.R. 519, 3 C.L.R. 194.]

Right of Suit—continued.

——7.—**Building, Suit to restrain**—*continued.*

(3)—*Encroachment—No immediate prospect of damage—Pleas—Raising of plea in special appeal—Facts to be set out in plaint.*—In a suit for the removal of an encroachment, the plaintiff is not bound to prove that actual damage has occurred, or the immediate prospect of damage, to his property; it is sufficient if he shows that the defendant has made the alleged encroachment and some damage may hereafter possibly arise therefrom. Independently of any damage immediately accruing, a person may be entitled to bring a suit in order to prevent a right being acquired by the opposite party for his neglect to interfere and his remedy becoming barred by lapse of time. [*R.*, 25 W R. 524.] Though a plea may not have been set out in a plaint, it may be raised even in special appeal, provided all the facts necessary to support it have been set out in the plaint and there has been no omission calculated to mislead the Court. JUDDOONATH MULLICK v. KALEE KRISTO TAGORE, **22 W.R. 73.**

(4)—*Encroachment—Plea of plaintiff—Burden of proof.*—In a suit for removal of an encroachment by demolishing a newly built boundary wall, where the defendant himself had obliterated the old boundary mark, it is sufficient for the plaintiff to show the general direction of the old wall, and if any deviation is relied upon by the defendant, it is for him to give precise proof of it. JUDDOONATH MULLICK v. KALEE KRISTO TAGORE, **25 W.R. 524.**

(5)—*Right of suit—Construction of building—No obstruction or impediment to any other—Ground for removal of building.*—A person cannot be liable to a suit because he has changed the state and materials of the construction in front of his shop, if he has not obstructed or impeded the access of the shop of his neighbour thereby. SHEIKH KOODRAT ALI v. SHEIKH GHOLAM ALI, **3 Agra 71.**

(6)—*Holders of adjoining plots of land for building, liability of, in respect of party walls — Suit not maintainable for declaration of ownership of wall and for injunction — Order amounting to decree within the meaning of s. 2 of the Civ. Pro. Code, right of appeal from.*—The defendant in this case was the lessee and the plaintiff, the assignee of adjoining building plots under agreements made with the Secretary of State as lessor. Under the said agreements the plaintiff and defendant were required to erect certain buildings within a prescribed time and it was provided that the buildings to be erected should be "continuous with party walls common to both adjoining houses," and that all disputes touching the party walls should be decided by the Government Surveyor. After the lapse of several years, the plaintiff desired to make openings in the part of the wall which extended beyond the defendant's house. This was objected to by the defendants, and plaintiff instituted this suit claiming either to be paid by the

Right of Suit—continued.

——7.—**Building, Suit to restrain**—*concluded.*

defendants half the cost of the portion of the wall unused by them, or to be declared the owner of that part, with an injunction restraining the defendants from interfering with him in the enjoyment of it. The defendants denied their liability and pleaded limitation, and the first defendant claimed a set-off. A decree was passed declaring that the defendants were severally liable to pay the half of whatever sum the Government Surveyor might certify to be due for the construction of the disputed portion of the wall, and that the defendants were entitled to set off in the calculation of what was due from them, the cost of any work or materials the Government Surveyor might find that the first defendant had contributed towards the erection of the said wall. On appeal by the defendants, they were held entitled to appeal, even though more than twenty days had elapsed from the order, since it was not a decree within the meaning of s. 2 of the Civ. Pro. Code. Another question arose as to whether the Court had power to determine the questions raised by the pleadings in the suit, or whether it could do more than pass a decree on the certificate of the Government Surveyor as to what might be due from one of the parties to the other, and it was held that the real question raised by the suit, *viz.*, as to how the cost of the wall should be borne, was intended by the agreement to be referred to the Government Surveyor. With regard to the plaintiff's claim to make openings in the part of the wall to the cost of which the Government Surveyor had not made the defendants contribute by his certificate, the Court decided that, although the materials of which the wall was built were the plaintiff's, it was still erected under the provisions of the agreement, and that it should be used for a purpose inconsistent with the idea of its being a party wall, would be opposed to what must be understood to have been the true intention of the parties to the agreement whether of Government or the lessees. It would be contrary to such intention that the plaintiff should claim the full right of ownership over the wall as if it had been built on his own ground. COVERJI LUDDHA AND KESSERBAI v. MORARJI PANJA, **9 B. 183.** [*R.*. 13 P.R 1901=137 P.L.R. 1901, 36 C. 493=12 C.W.N. 1102=2 Ind. Cas. 553.]

——8—**Caste Questions, Suits concerning.**

(1)—*Jurisdiction — Caste question—Suit for damages for withholding customary present to member of caste.*—There cannot be any legal right to the funeral presents, which it may be customary for a member of the caste on the occasion of the death of a member of his family to give to the other members of the caste. And the slight, which the omission to give such presents to the plaintiff, might imply, can only be regarded as the result of a breach of etiquette with which the caste alone is competent to deal, and not the Civil Courts. MAYASHANKER v. HARISHANKER, **10 B. 661.** [*D.*, 23 B. 122.]

Right of Suit—continued.

——8.— **Caste questions, Suits concerning** —*continued.*

(2)—*Custom — Caste usage — Expulsion—* Audi alteram Partem—*Civil Courts—Jurisdiction in caste matters.*—The maxim *audi alteram partem* contains a fixed principle of justice. It prevails in all countries subject to the British rule. It is not confined to public Courts of justice, but applies to all tribunals, public or private, of every kind, which are vested with or assume power to decide on the conduct or rights of parties. Immemorial custom cannot prevail against the principle contained in the maxim. The caste institution is not above or outside the law. The usages and customs of caste exist only under and not against the law. A custom according to which a member may be expelled, although he has had no opportunity of meeting the charge against him, is not reasonable and of no force. [*R.*, 19 B. 507, 23 M. 171.] It is open to a Court of law to determine whether or not an alleged expulsion from caste is valid, also to decide that a caste-man does not *ipso facto* lose all the rights of a citizen in respect of property belonging to the caste as a body if he be expelled by the tribunal which represents the caste or by a faction in it, provided that such body acts under a mistaken but *bona fide* belief that the accused person has committed a caste offence, when in fact he has not done so, and to secure to those aggrieved the civil rights of which it is attempted to deprive them. KRISHNASAMI v. VIRASAMI, **10 M. 133.** [*R.*, 12 B. 247, 23 B. 122, 26 B. 174.]

(3)—*Caste question — Funeral ceremonies—Assistance by fellow members of caste—Custom —Refusal to assist at funerals—Cause of action —Suit for damages and injunction—Maintainability.*—The plaintiff, who was a member of the *Kharva* caste alleged in his plaint (1) that, by a custom of the caste, a member thereof in whose family a death has taken place was entitled to call upon the other members of the caste to come to his house and assist in the removal of the dead body to the burial ground and to take part in performing the customary caste ceremonies incidental to the funeral, (2) that on the death of a child in his family, the defendants not only refused to assist him, but also induced others of the caste to refuse, in consequence of which the plaintiff and his family had suffered in their status and character. He, therefore, prayed (1) for a declaration that the aforesaid acts of the defendant were illegal and contrary to the usages of the caste, and that he was lawfully entitled to exercise and enjoy all his customary caste rights, and (2) for an injunction restraining the defendant from preventing other members of the caste from recognising the plaintiff as a member of the caste and (3) for damages. *Held* that the suit must be dismissed, as the plaint disclosed no cause of action against the defendant. KANJI BAVLA v. ARJUN SHAMJI, **18 B. 115.** [*Rel. on.*, 26 B. 174=3 Bom. L.R. 718.]

Right of Suit—continued.

——8.—Caste questions, Suits concerning —*continued.*

(4)—*Caste question—Excommunication--Civil Court — Jurisdiction — Bombay Reg.* II *of* 1827, *s.* 21, *cl.* (1).—A suit brought for a declaration that excommunication of the plaintiffs from their caste by their caste man was illegal and that they were still members of the caste falls within s. 21 (1) of the Bombay Reg. II of 1827, and is not cognizable by a Civil Court. *Per Chandavarkar, J.*—A suit raising a caste question must fall in one of the three classes: I. It may be a suit brought by a member of a caste complaining of his exclusion from it and asking for a declaration that the expulsion is illegal and that he is still a member of the caste and as such entitled to its social privileges. The Civil Courts have no jurisdiction to entertain such a suit. II. It may be a suit, brought by a member of a caste expelled from it, for a declaration that the excommunication is illegal and that he is entitled to certain rights of property or office as a member of the caste. The civil Courts have jurisdiction to entertain such a suit, if the result of the excommunication is to deprive a man of his *civil rights*; but even here the jurisdiction is limited; all that the Court can enquire into is whether the order of excommunication was passed *bona fide* in accordance with natural justice. The enquiry is to be conducted from the point of view of the caste and not of the Court into the reasonableness of the rule for a breach of which the order of excommunication was passed. If these conditions are fulfilled, the Court must hold that the caste acted within its powers as a domestic tribunal with whose discretion it will not interfere. III. It may be a suit brought by an expelled member for damages on account of loss of caste or character. The civil Courts have jurisdiction in such a suit, but the jurisdiction is subject to the law that a libel to a man's position in his caste can give him no right to claim damages from any of his caste fellows if they have acted *bona fide* for the protection of their caste interests in the discharge of their caste duty. NATHU VELJI v. KESHAWJI, **3 Bom. L.R. 718=26 B. 174.** [*R.*, 9 Bom. L.R. 514.]

(5)—*Civ. Pro. Code*, 1882, *s.* 11—*Caste matters—Order of the spiritual head of a community restoring a person to caste—Claim for injunction restraining the person restored to caste from entering temple—Civil rights—Cause of action—Jurisdiction of Civil Courts.*—The first defendant, who was ex-communicated from caste for having married a Numbudri girl, was restored to caste by the second defendant, the spiritual head of the community. The temple moktesars sued for a declaration that the second defendant's order did not bind the temple, and for an injunction restraining the first defendant from entering the temple. *Held*, (1) that the mere fact of the second defendant having passed the order did not give the temple moktesars any cause of action.—(2) That the right of entry into a temple for worship is a civil right and can be adjudicated on by Civil Courts. UPPANGALA SUBRAYA BHATTA v. BEDRADI SUBRAYA BHATTA, **5 Ind. Cas. 57=7 M.L.T. 190.** (13 M. 293, 31 M. 236, 12 C.W.N. 946, 4 M.L.T. 101, 3 C.L.J. 230, 10 Bom. L.R. 781, *R.*)

(6)—*Removal of a trustee by a caste is not a caste question.*—The question of the power of a caste to remove a trustee of any of its charitable trusts is not a caste question. A caste has power to do what it likes for the internal regulation of its affairs; and all questions relating to them are caste questions. But where a caste deals with its own property and creates civil rights in others according to law, the rights and obligations arising out of such dealing do not appertain to caste questions as such or the internal regulation of its own domestic or social affairs. They are legal rights and legal obligations enforceable by our Courts as much as if any entity such as a private person had been a party to their creation. The fact that the caste happens to be a party to the creation is merely accidental. Where a trust is created whether by a caste or by an individual, the same law applies to both. CHAPSEY v. JETHABHAI, **9 Bom. L.R. 514.**

(7)—*Removal of a priest from office—Jurisdiction of Civil Courts.*—It was resolved by the members of a certain caste that the plaintiff, a priestess, should be dismissed from all the offices connected with the caste and that the same should be performed by the defendant. The plaintiff, thereupon, filed a suit to obtain an injunction restraining the defendant from usurping the said office and from receiving the fees and income thereof: *Held*, that it was not competent to a Civil Court to question the decision of the caste in the matter. The following principle appears to be the sound one, *viz.*, would the taking cognizance of the matter in dispute be an interference with the autonomy of the caste? And applying that principle, it would be equally clear, whether the question turns upon the obligation of the members of the caste to accord to the holder of the office certain privileges and honours or to pay him fees in virtue of his office. In either case it is one which, if a caste is to be considered in any sense a self-governing body, as is contemplated by the Reg. II of 1827, should be left to be decided and dealt with by the caste according to its customary mode of procedure. KALA v. JUGANATH, **1 Bom. L.R. 711.**

(8)—*Caste question.* — Comaties.—Suit by certain *Comaties* of the *Vaisyas*, or third caste of the Hindoos, against the *Mantrimahanad* (secret assembly, for avenging encroachments upon rules or rights of caste), to establish their right to have performed for them and their tribe certain religious ceremonies, called *Soobha* and *Assoobha* (auspicious and inauspicious) by *Brahimns* in the language of the *Vedas*; in the

Right of Suit—continued.

——8.—**Caste questions, Suits concerning** —*continued.*

enjoyment of which they had been disturbed by the *Brahmins* refusing to perform such ceremonies. In the answer to the plaint, the defendants denied the right of the *Comaties* and set forth certain acts, whereby they had forfeited their right to have the ceremonies performed for them by the *Brahmins*. The *Zillah Court*, taking that part of the defendants' answer which set forth the acts by which the forfeiture of the rights in question was occasioned, framed it into a statement of facts and law, for the opinion of the *Pundit* of the Court; and, upon his opinion, declared the plaintiff's tribe entitled to have the ceremonies performed for them by *Brahmins*. Upon appeal, the Provincial Court remitted the suit to the *Zillah* Court, to take evidence, and upon such evidence and the opinions of the *Pundits*, which the Provincial Court took upon the same statement as the *Zillah*, they affirmed the decree. The *Sudder Dewanny Adawlut*, upon the whole case, reversed these decisions. *Held*, by the Judicial Committee of the Privy Council, reversing the decisions of the three Courts, that the whole proceedings were irregular, and contrary to the express provisions of the *Madras* Regulation XV of 1816, s. X, cls. 3 and 4, which required the Judge to record the points necessary to be established, before the evidence could be taken; the opinion of the *Pundits* being also taken upon an assumed statement of facts, not admitted or recorded. But, in consideration of the circumstances, such reversal was without prejudice to bring a fresh suit. NAMBOORY SETAPATY v. KANOOCOLANOO PULLIA, **7 W.R. P.C. 7=3 M. I. A. 359=1 Suther 163=1 Sar. 290.** [*R.*, 11 W. R. 457.]

(9)—*Property purchased by faction seceding from a caste—Possession of property by member of faction—Suit for recovery of possession brought on behalf of caste—Cognizability of suit by Civil Court.*—The property in dispute was purchased by a small section of a caste which had seceded from the caste. This section subsequently became reunited with the caste excepting one member of it the defendant, who remained in possession of the property. Plaintiff sued to recover possession of such property for and on behalf of the caste. The lower Courts had decided wrongly that the suit involved a caste question and was not therefore cognizable by the Civil Courts. *Held* on second appeal that, although, if the lands in dispute had been originally the property of the caste, the question would have been between the caste and a section of it and would form a caste question not cognizable by the Civil Courts, yet, as the lands had been admittedly purchased by the members who had seceded and formed the small section, out of their own funds and for their own purposes, it was for the Civil Court to determine who was entitled to the disputed property, notwithstanding that it might be incidentally necessary for that purpose to inquire into the usages and practices of

Right of Suit—continued.

——8.—**Caste questions, Suits concerning** —*concluded.*

castes and sections of castes in respect of properties acquired by the sections. MEHTA JETHALAL v. JAMIATRAM LALUBHAI, **12 B. 225.** [*R.*, 19 B. 507, 26 B. 174, 9 Bom. L.R. 569, 34 Bom. 467=11 B.L.R. 1014.]

(10)—*Inspection of account books—Right of a member of a caste to inspect documents and books of account relating to caste property—Injunction where such inspection refused.*—Where a member of a caste, who was also a trustee of the caste property, was refused inspection of books of accounts, documents, etc., by the President of the managing committee of the caste:—*Held*, that an injunction could be granted restraining the President from refusing such inspection. Every member of a caste, being interested in its affairs, has a right, incidental to his membership, to every information which the books, records, and documents of the caste can give him to enable him to discharge the duties he owes to the caste. It is a right similar to that of a partner in a firm to the partnership books and can be taken away from him only by an express caste rule, resolution, or usage. But a trustee or a member of a caste has such right to inspection only for the *bona fide* purpose and in the interest of the caste and not for any purpose hostile or injurious to those interests. Though a Court will not interfere with the jurisdiction and discretion of a caste as regards its internal purposes and management with reference to which it is its own master to frame rules and regulations, yet it will interfere in favour of any individual member of the caste as against any other member or members of it, where the Court is asked to give effect to any rule, resolution, or usage, of the caste, if the right claimed in virtue of such rule, resolution, or usage, is a civil right cognizable by the Court. In giving relief in such cases, the Court so far from interfering with the autonomy of the caste, or encroaching upon its jurisdiction as to its internal affairs, recognizes them by giving effect to its rule, resolution, or usage. CHAPSEY v. JETHABHAI, **9 Bom.L.R. 569.**

——9.—**Contracts, Suits on.**

(1)—*Contract*—Lex loci contractus—Lex fori. —It is the *lex loci contractus* that determines the validity of a contract made in a foreign state, and if by that law a bond or promissory note requires registration for its validity and is unregistered, it cannot be made the basis of a suit. The question whether a judgment may be given on the consideration of the document is one of procedure governed by the *lex fori*. PALANIAPPA CHETTI v. PERIA KARUPPAN CHETTI, **17 M. 262.** (5 M. 166, *Cited & F.*)

(2)—*Contracts and agreements — Suit for value of goods covered by bill of exchange—Payee for honour.*—A payee for honour, though entitled to the same remedies upon the bill as the

Right of Suit—continued.

——9.—**Contracts, Suits on**—*continued.*

party for whom payment was made, is not entitled to bring a suit in his own name and in his own behalf for the value of the goods for which the bill was drawn. CARMICHAEL v. BROJONAUTH MULLICK, **1 Hyde 274.**

(3)—*Indian Contract Act* (IX *of* 1872), *ss.* 10 *and* 11—*Bond in favour of minor, suit on.*—A money bond obtained by a minor in his name is good in law and may be sued on. HANMANT LAKSHMAN v. JAYARAO NARASINHA, **13 B. 50.** [*Diss.*, 20 C. 508, 19 B 697; *R.*, L.B.R. 1893-1900, 398, U.B.R. 1897—1901, 313.]

(4)—*When third person to contract may sue contracting parties*—In order to entitle a third person not named as a party to a contract to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract. LAXMAN BHAT LABHE v. GOVINDA, **11 C.P.L.R. 108.** [*R.*, 3 N.L.R. 111.]

(5)—*Written contract superseding oral contract—Suit on oral contract—Maintainability.*—Where an oral contract has been superseded by a written contract, a suit based on the former and not on the latter was held not to be maintainable. BIRCH v. GAUTIER, **A.W.N. 1882, 156.**

(6)—*Suit for compensation for breach of contract—Contract to be entered into in the future.*—No suit for compensation for breach of a contract can be maintained, where the document relied on as the contract evidences only an agreement to enter into a contract in the future. MAUNG SHWE OH v. MAUNG TUN GYAW, **9 C.W.N. 147 P.C.=32 C. 96=31 I.A. 188=8 Sar. 704.**

(7)—*Agreement to pay remuneration to receiver.*—An agreement to pay the remuneration of a Receiver without any leave from the Court, even if it is not conditional, is not binding on the persons promising, as it is made in contravention of the law. A suit cannot be brought on such an agreement. PROKASH CHANDRA SARKAR v. ADLAM, **30 C. 696.** (22 C. 648, *R.*)

(8)—*Decree in favour of plaintiff's husband, bond executed by defendant in satisfaction of—Omission to certify satisfaction—Right to sue on bond as on new contract not affected.*—Plaintiff sued on a bond executed by the defendant in satisfaction of a decree passed in favour of her husband against defendant. The suit was dismissed by the lower Court with reference to the last sentence in s. 258 of Act X of 1877, on the ground that the plaintiff had failed to certify satisfaction of the decree to the Court, *held* that the suit was not liable to dismissal on that ground, the decree itself having been superseded by a valid contract between the parties and there being no reason why plaintiff should not sue on the new bond. MUSSAMMAT KISHEN DEVI v. UMAR DIN, **182 P.R. 1882.**

(9)—*Act* XI *of* 1865, *s.* 6—*Small Cause Court—Jurisdiction—Suit on implied contract—Contribution.*—If a man request another to pay money for him, there is an implied contract to repay the amount, for which an action will lie in the Small Cause Court, if it does not exceed Rs. 500. A suit for contribution, not founded on any contract, is not cognizable by the Small Cause Court. SHABOO MAJEE v. NOORAI MOLLAH, **B.L.R. Sup. Vol. 691, F.B.=7 W.R. 386.** [*F.*, 7 C. 605=9 C.L.R. 90, 9 C. 395=12 C.L.R. 314.]

(10)—*'Puchotra'—Assignment—Civil Court—Jurisdiction.*—The assignment of 'Puchotra' cannot be enforced in a Court of law. MALUK SINGH v. NUTHA SINGH, **31 P.R. 1872.** (16 P.R. 1870, *R.*) [*R.*, 56 P.R. 1886.]

(11)—*Contract by head of caste—Procuring re-admission to caste—Procuring marriage within caste—Contract to pay money in consideration—Validity.*—Plaintiff (the head of a caste) sued to recover Rs. 3,149, being the balance due under an agreement entered into between him and the defendant (one of 3 brothers of a family), whose mother had been put out of caste (the *Lovana* caste) for marrying a man of a different caste. Under the agreement, the head of the caste was to re-admit the brothers into and marry them to girls of the caste, in consideration of a sum of Rs. 5,000. Part of the money had been paid to the plaintiff, who now brought the suit to enforce payment of the balance. *Held* that the suit was not maintainable for the following reasons:—(1) Since the agreement provided for money payment for the negotiation of a marriage by a third party, it was immoral and opposed to public policy. (ii) The agreement was made with the plaintiff (as head of the caste) in his representative, not in his private capacity. The benefit of the agreement accrued, not to him, but to the caste. It was for the caste to say whether they wished to enforce its terms. Plaintiff (in this particular case) had ceased to hold office since the agreement and as such did not represent the sentiments of the caste. The successor also appeared and told the Court that those of the leaders of the caste with whom he had spoken disapproved of the suit like himself. PITAMBER RATANJI v. RAGJIVAN HANSRAJ, **13 B. 131 Note.** [*F.*, 13 B. 126; *Appl.*; 17 M. 9=3 M.L.T. 132; *R.*, 22 B. 658, 1 C.L.J. 261.]

(12)—Lambardar *appointed under cl.* 3, *s.* 10, *Reg.* VII *of* 1822—*Assignment of share of* lambardar *allowance—Suit by assignee for share assigned—Suit for damages.*—Where a *lambardar* appointed under cl. 3, s. 10, Reg. VII of 1822, assigns share of his *lambardaree* allowance, the assignee cannot sue for the share assigned, though he may have an action of damages for breach of contract against the *lambardar*. HUREE SINGH v. MAHAN SINGH, **16 P.R. 1870.** [*R.*, 31 P.R. 1872, 56 P.R. 1886.]

(13)—*Contract to deliver cotton—Assignment—Suit by assignee—Sham assignment—Fraud—Demand for delivery of cotton as per terms of*

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Right of Suit—continued.

——9.—Contracts, Suits on—*continued.*

contract—*S.* 93, *Contract Act* (IX *of* 1872).—On 25-12-1886, A contracted to deliver 100 bales of cotton to B on 26-5-1887. The latter became insolvent on 7-3-1887 after having previously assigned the contract to one K on 28-2-1887. Neither the contract, nor its assignment, nor the receipt of consideration therefor was mentioned in the schedule attached to the petition in insolvency. K, the assignee, called on A to deliver the goods. The latter refused and pleaded that the assignment, not being a *bona fide* one, did not pass the beneficial interest in the contract to K, and that K was not an assignee for valuable consideration. K sued A for damages for breach of the contract, which suit was dismissed on the ground that the assignment to K was fraudulent. B did not press A to perform the contract, although he knew that the suit of K against A had been dismissed. The petition in insolvency presented by B having been dismissed for want of prosecution in 1889, K re-assigned the contract to B, who brought the present suit against A for recovering damages for breach of the contract. The plaintiff urged that the assignment to K was not made to defraud the defendant, and that the parties had been restored to the position which they occupied prior to the insolvency proceedings, in respect of their rights and liabilities under the contract, for the reason that his (plaintiff's) petition in insolvency had been dismissed. *Held* that the plaintiff was not entitled to the damages claimed. The beneficial property in the contract had not passed to K, although the defendant would be bound to recognise an assignee who could establish his title of full ownership in the contract, he was not under any obligation to do so, when, as a fact, the property in the contract still remained in the person with whom the defendant had originally contracted. Moreover, as K asked for delivery as beneficial owner and not on behalf of the plaintiff, there has been in fact, no demand for delivery by the plaintiff or on his account, as required by s. 93 of the contract Act, which the defendant was bound to recognise. The law in England is that, where there has been an assignment by the deed, the assigned property passes by force of the deed, and it cannot be impeached at law by the assignor or by third parties other than creditors on the ground of its not being a real transaction. Even in England, where the assignment is not by deed, the true nature of it as a sham transaction may be proved. In this country, it is, in all cases, open to third parties to show that such was the case. MULJI GOVINDJI v. NATHUBAI HIRACHAND, **15 B. 1.** [*Appl.*, 9 Bom. L. R. 462; *R.*, 16 C.P.L.R. 164, 1 S.L.R. 60, 5 N.L.R. 146, 12 Bom. L.R. 822.]

(13-*a*)—*Contracts for forward delivery—Payment of difference*—Sutta *or wagering contracts — Assignment — Consent — Endorsement and delivery of contracts, effect of.*—The defendant in the suit entered into a series of speculative transactions through a broker for the purchase and sale of produce. His *modus operandi* was, when he entered into a contract of purchase, to sell again the same quantity in one or more contracts, either to the original vendor or to some one else, so as either to secure the profits or to ascertain the loss before the "Vayda" day; and in a similar way to deal *mutatis mutandis*, with produce which he sold. This mode of dealing when the sale and purchase were to and from the same person, of course had the effect of cancelling the contracts, leaving only the differences to be paid. When they were two different persons, it put the defendant in a position vicariously to perform his contract. The plaintiffs as assignees of one S sued the defendant for "differences" on certain contracts. The defendant contended that these contracts were in the nature of *sutta* or wagering contracts. *Held* that this was, no doubt, a highly speculative mode of transacting business; but the contracts were not wagering contracts, unless it be the intention of both contracting parties, at the time of entering into the contracts, under no circumstances to call for or give delivery, from or to each other. There is no law against speculation as there is against gambling. [*F.*, 1 Bom. L R 263, 25 A. 38, 5 Bom. L.R. 503; *Commented on*, 9 Bom. L.R. 125; *R.*, 17 M. 480, 18 M 306, 22 B. 899, 5 Bom. L.R 768, 30 B. 83=7 Bom. L.R. 385, 11 Bom. L.R. 997; *D.*, 24 B. 227=1 Bom L.R. 786.] In the above case, the plaintiffs got an assignment of the contracts from one S without the consent of the defendant. The latter contended that the action was not maintainable. *Held* that the objection was a good one. An assignment of a contract (is distinguished from an assignment of a contract in action) to be effectual, must amount to a novation which requires the consent of the other party to the contract. The Contract Act has no section bearing upon the assignability of a contract, except s. 62 which is confined to cases of novation, and s. 40 which shows what contracts a promisor is bound to perform personally and what he may perform by employing a competent person to carry out. The legal effect of the endorsement and delivery of such contracts considered. J. H. TOD v. LAKHMIDAS PURUSHOTAMDAS, **16 B. 441.** [*R.*, 9 Bom. L.R. 114.]

(14)—*Putnee taken with notice of agreement with third party, not maintainable in equity—Right of third party to relief against putneedar.*—Where a person taking a putnee to the prejudice of another, has at the time of taking the putnee had notice of an agreement existing between that person and the zemindar, he could not, in equity, claim to maintain the lease so obtained by him to the prejudice of the other, but, on the other hand, that other will be entitled to relief against him. DWARKANATH CHOWDRY v. KOMUL LOCHUM DOSS MUNDUL, **10 W.R. 414.**

(15)—*Partnership—Dissolution—Suit for receipt—Evidence.*—Where A obtains through

Right of Suit—continued.

——9.—Contracts, Suits on—*continued.*

the Magistrate the return of certain goods placed with B, his partner in trade, independent of the partnership speculation, a suit by the latter against the former for a declaration that the goods were the partnership goods, and to obtain a receipt for them as such, is not maintainable. *Held*, further, that such a suit could not be converted into one for dissolution of partnership, there being neither books, accounts, nor any other evidence. J. C. ELIJAH v. ARATOON BROTHERS, **14 W.R. 47.**

(16)—*Contract—Consideration of discharging decree-debts—Payment towards debts—Successful opposition of decree-holder's claim—Suit for recovery of amount.*—The plaintiff took a putnee lease from the defendant, agreeing, among other things, to pay off certain decree debts due to third parties from the defendant. Subsequently, another agreement was entered into between the parties by which the plaintiff paid the decree amounts to the defendant and was released from any liability on that score. The defendant thereafter successfully contested the payment of one of the decrees. The suit was for recovery of that amount. *Held* that the money in question was paid to the defendant absolutely and that the plaintiff was not entitled to recover the amount, merely because the defendant had escaped paying the amount to the decree-holder. SREENATH CHOWDHRY v. MR. JOHN JAMES GREY, **13 W.R. 114.**

(17)—*Agreement to grant putnee—Grant to third party in violation of agreement—Grant if can be set aside.*—An agreement was entered into between the plaintiff, an ijaradar, and the proprietors of a mehal that, in the event of their granting a putnee to anybody during the term of the ijara, plaintiff should have the refusal. Notwithstanding this agreement, the proprietors afterwards gave a putnee to the defendant, another ijaradar, and the plaintiff sued to have the putnee set aside, and to compel the proprietors to execute a fresh putnee to him. *Held* that, whatever stipulations were made between the plaintiff and the proprieters, the defendant having been no party thereto was not bound and the putnee granted to him could not be set aside. KOMUL LOCHUN DASS v. DWARKANATH CHOWDHRY, **10 W.R. 254.**

(18)—*Arbitration—Award prohibiting sale or mortgage to strangers—Award upheld by Court—Hypothecation to stranger in violation of award—Suit by other party for possession of property hypothecated—Such suit if maintainable.*—Two brothers, D and N, succeeded to the property left by their deceased father. As they could not agree about its division, the matter was referred to arbitration, and by the award therein it was determined that if either of them desired to sell or mortgage his share, he should make the offer of the transaction in the first instance to the other, and, should that other refuse, then only should he be at liberty to deal with a third party. The arbitrators also fixed the consideration for which the

Right of Suit—continued.

——9.—Contracts, Suits on—*concluded.*

brothers were empowered to alienate to each other. The award was subsequently upheld by the High Court and made binding upon the parties. N subsequently hypothecated his share to one P, a stranger, contrary to the terms of the award. The latter got possession of N's share in execution of his decree obtained on the hypothecation bond. Thereupon the other brother D instituted a suit for possession and establishment of title to that property by payment of the price fixed by the arbitration. *Held* (by the majority of the Full Bench) that as the mere hypothecation of the property did not give the hypothecatee a title to it as purchaser, the suit as brought must be dismissed and that the terms of the award did not expressly provide that a sale or mortgage, which had been made without a previous offer of the property to the other party, and refusal of it by him, should be liable to be set aside, nor did they confer a right to be substituted for the person to whom a transfer might have been made in breach of those terms. *Held contra* (*per Stuart, C.J.*) that the arbitration and award formed a complete contract to be carried out to all its legal consequences, and that when a plaint contained matters sufficient to enable the Court to consider the validity of the claim made by the suit, and on the facts and merits to do justice between the parties, the objection to the form of the suit ought not to stand in the way of the plaintiff being decreed his rights under the award. RAJAH PIRTHEE SINGH v. DYA KISHUN, **5 N.W.P. 226, F.B.**

See BETROTHAL, 69 P.R. 1868.

Agreement of compromise, mode of enforcing—Reciprocal promises—Right to sue—Performance of whole contract—Decree—*See* CONTRACT ACT, 1872, s. 51, 19 B. 546.

Suit to recover fees paid to Barrister—Maintainability of—*See* LEGAL PRACTITIONERS—BARRISTER, 8 C.P.L.R. 13.

Promise to pay subscription—Right of promisee to institute suit to recover same—*See* SUBSCRIPTION, 13 C.P.L.R. 57.

——10.—Co-sharers, Suits by.

See CO-SHARERS.

(1)—*Mortgage by one of two co-tenants of forest—Mortgagee in possession—Licenses from both co-tenants, rights of.*—A mortgagor left in possession of a forest might dispose of the annual felling or cutting in any way which could be consistent with good management. As such a mortgagor might properly sell, so a purchaser might properly buy, and should be protected in his purchase against any claims of the mortgagee upon the mortgagor in virtue of his mortgage. In this case, however, the mortgagee had possession—that is, such possession as the mortgagor had previously held for himself, as a tenant-in-common with another, and in the license issued for cutting wood that other co-tenant had also joined. The other

Right of Suit—continued.

——10.—Co-sharers, Suits by—*continued.*

co-tenant who was not the mortgagor had herself a right to license a cutting of the wood, not limited to her own share, but extending to the whole forest held by her in common with the mortgagor. So too had the mortgagee. So that the licensee from either would do no wrong to the other in acting on his license. The rights of the co-tenants *inter se* would be only to an account of the profits realised, and a distribution of them according to their proportions of the ownership. BALVANTRAV OZE v. GANPATRAV JADHAV, **7 B. 336.** [*R.*, 32 C. 837=1 C.L.J. 437.]

(2)—*Pre-emption—Offer by plaintiff to pay amount of purchase-money found due—Dispute as to amount of purchase-money, effect of—Claim for specific land at specific price.*—Assuming that the plaintiff might have been entitled to a declaration of his right of pre-emption notwithstanding the dispute as to the amount of the purchase-money, if he had offered by his plaint to pay the real amount of the purchase-money whatever it might be, the High Court *held* that, in the present case, the claim of the plaintiff was to purchase a specific quantity of land at a specific price and such alleged right was found to have no existence, and plaintiff was therefore not entitled to a decree. ACHURBUR PANDAY v. BUKSHEE RAM, **2 W.R. 37.**

(3)—*Suit by representative of one of several judgment-creditors to recover her share—Proper form of suit one for a declaration as sharer—Suit not barred by wrong form of action.*—Plaintiff, as the widow of one of several brothers, sued on her own behalf and on behalf of her minors for a share of certain decretal moneys which had belonged to her husband's estate and had been realised in execution by one of the brothers as the managing member of the family. There having been practically no defence on the merits in the Court below, plaintiff obtained a decree for the whole amount claimed. On special appeal, however, it was objected that the plaintiff could not maintain this action in its present shape and the High Court held that the objection was untenable. It appeared from the record that the plaintiff had endeavoured to be made a party to the original suit in which the decree had been obtained and, failing in that, her only course was to sue for her share of the money received under the decree; in other words, inasmuch as she had been prevented by the defendants from being included amongst the original parties to the suit, it was open to the plaintiff to maintain an action as far as claiming a share of such sums as had been recovered under the decree. MUSSAMUT BUZMOONISSA v. BIBEE ROWSHAN JAHAN, **10 W.R. 397.**

(4)—*Suit for share in joint property under ekrarnamah—Accrual of cause of action after date of ekrarnamah—Burden of proof*—Pro forma *defendant, costs of—Co-defendant not*

Right of Suit—continued.

——10.—Co-sharers, Suits by—*concluded.*

liable.—Plaintiff in this case did not sue upon the ordinary allegation that the property, a share of which she claimed, was joint family property hitherto undivided. She had come into Court alleging certain family arrangements in respect of the property that had been reduced to the shape of an ekrarnamah, and she claimed the share to which her husband was entitled under the arrangement which she said had thus taken place, and upon the happening of the necessary conditions. Under the circumstances, the rules relating to *onus* of proof where a plaintiff sues for a share of joint family property as such could have no application. It was incumbent upon the plaintiff to give some *prima facie* proof of the particular cause of action upon which she had chosen to come into Court. Until the plaintiff had given some legal evidence of the ekrarnamah and of the happening of the events after the execution of the ekrarnamah, sufficient to entitle her, in the character in which she appeared in Court, to claim a share in the property settled by the ekrarnamah, the defendant ought not to have been called upon to prove his case at all. Where a plaintiff has made a person a defendant without even alleging a cause of action against him, it would be wrong on the part of the Court to order his co-defendant to pay his costs. The proper course would be to dismiss the plaintiff's suit as against the unnecessary defendant and to make the plaintiff to pay his costs. RAM CHUNDER MITTER v. KISTO KAMINEE DOSSEE, **10 W.R. 194.**

(5)—*Suit by purchaser of eight anna share for possession of half of* sir *and* Khud kasht *land—Maintainability.*—The purchaser of an eight anna share in a village cannot sue for possession of half of the entire *sir* and *Khud kasht* land in the village. RATAN TELI v. YADO RAO, **9 C.P.L.R. 81.**

See CONTRIBUTION, SUITS FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR, 5 N.W.P. 215.

See HINDU LAW—PARTITION, 11 B.H.C. 69.

See MAHOMEDAN LAW—INHERITANCE, 11 B.H.C. 104.

——11.—Costs.

See COSTS.

(1)—*Costs incurred in Revenue Court, when recoverable by fresh suit for damages.*—Where a Court has jurisdiction and orders costs, that order is final and binding. Where the Court in which proceedings have been formerly held was not entitled to order costs, and costs have been incurred, they may be made the subject of consideration as to damages in a subsequent suit. In the present case, the Rent Court in the former suits was entitled to deal with the question of costs, and dealt with it, and such

***Right of Suit*—continued.**

——11.—Costs—*continued.*

costs cannot, therefore, be made the subject-matter of fresh litigation. MAHRAM DASS v. AJUDHIA, **8 A. 452=A.W.N. 1886, 189.** (6 M.H.C. 192, 8 B.H.C. 29, 2 B. 360, 1 B. 467, *R.*) [*F.*, 9 A. 474=7 A.W.N 95, 11 C.W.N. cclxiii, N.; *R.*, 15 C.P.L.R. 129, U.B.R. 1904, 1st Qr., Civ. Pro Code, 283, U.B.R. 1905, 2nd Qr., C.P. 283, 5 A.L.J. 140=A.W.N. 1908, 18.]

(2)—*Suit for compensation for costs of prosecution—Suit by Hindu father against abducter of his daughter for damages for loss of her services whether maintainable.*—A Hindu father can maintain a suit, against a person who abducted his daughter while under his protection, for the costs incurred in a successful prosecution of such abductor. [*Diss.*, 12 A. 166; *Not F.*, 15 C.P.L.R. 129.] *Per Stuart, C. J.*—Such a suit is maintainable where the daughter had been deserted by her husband, and was under her father's protection when she was abducted. *Per Oldfield, J., contra.* RAM LAL v. TULA RAM, **4 A. 97=A.W.N. 1881, 143.** [*R.*, 13 B. 126.]

(3)—*Suit to recover expenses incurred in prosecuting defendant.*—A suit to recover as damages the expenses incurred in prosecuting the defendant will not lie in a Civil Court. This has no analogy to the case of a defendant in a malicious prosecution bringing a suit against the prosecutor and obtaining as damages the expenses he was put to in defending himself at the criminal trial. FAZAL IMAM v. FAZUL RASUL, **12 A. 166=A.W.N. 1890, 19.** [*Appr.*, 15 C.P.L.R. 129, 32 C. 429.]

(4)—*Costs incurred in defending criminal prosecution, no suit maintainable for—Act* IX *of* 1887 *(Provincial Small Cause Courts), sch.* II, *cl.* 35 (*c*).—There is no cause of action arising by reason of costs having been incurred in defending a criminal prosecution and no suit is therefore maintainable to recover such costs except in the form of damages or compensation in a suit for malicious prosecution which is a suit excluded from the jurisdiction of a Small Cause Court. MAHOMEDALI v. BAYAMA, **14 B. 100.**

(5)—*Costs incurred in Mamlatdar's Court—Suit for recovery.*—No action can lie for the recovery of costs incurred in the Mamlatdar's Court in defending a claim for possession of land under Bombay Act V of 1868. JALAM PUNJA v. KHODA JAVRA, **8 B.H.C. A.C. 29.** [*R.*, 8 A. 452, U.B.R. 1905, Civil Procedure 4; *D.*, 2 Bom. L.R. 960.]

(6)—*Suit for costs of a suit.*—Since by the law of India, a champertous agreement is not a punishable offence, an action founded on an alleged champerty, cannot be sustained to recover losses and costs incurred in litigation, on the ground that a remedy by action accrues where an indictable offence has been committed. RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE, **2 C. 233, P.C.=4 I.A. 23=3 Sar. 654.** [*R.*, 8 B. 391, 20 B. 167.]

***Right of Suit*—continued.**

——11.—Costs—*concluded.*

(7)—*Costs incurred in a suit—Separate suit, if maintainable.*—Where costs are incurred in prosecuting a suit but no provision is made in the decree, the proper course is to ask for a supply of the omission, and not to bring a separate suit to recover the same. By the term "costs" is meant the whole of the expenses incurred by either party on account of the suit. *In re* A REFERENCE BY THE JUDGE S. C. COURT, AMRITSAR, **73 P.R. 1867.** [*R.*, 88 P. R. 1868.]

Order as to costs by Court having jurisdiction, separate suit, not maintainable in respect of such costs—*See* EXECUTION OF DECREE—MISCELLANEOUS, 9 A. 474=A.W.N. 1887, 95.

——12.—Customary Rights.

See CUSTOM.

See CUSTOMS—PUNJAB.

(1)—*Dhardhura Reg.* XI *of* 1825, *ss.* 2, 4 (III).—Whether the custom of Dhardhura, applies to lands gained by gradual accretion only, or also to lands separated from a mauza by sudden change in the river's course, is a question that can be decided on evidence. And although evidence of such custom, in respect of lands long held and enjoyed, being suddenly transferred to another person, must be scrutinized with great care, it cannot be laid down generally that such a custom can in no case be established and given effect to. SIBT ALI v. MUNIR-UD-DIN, **6 A. 479=A.W.N 1884, 185.** (N.W.P. 1868, 189, N.W P. 1869, 142 and 20 W.R. 427, *R.*)

(2)—*Marriage fee for use of temple—Custom—Legal obligation.*—Where the manager of a temple sued a person to recover the amount of marriage fees which the latter became liable to pay for the use of the temple upon his marriage with a woman residing in the village wherein the temple was situated, by virtue of long-established custom, held (*a*) that there was no authority in Hindu law making the marriage fee claimed due of common right (*b*) that a legal obligation to pay a due of this nature would probably be held to exist in a case in which the evidence showed presumptively that it had been customarily contributed from time immemorial by the community residing within a village for the enjoyment of the benefits attached to the right of worshipping in the temple and attendance at its ceremonials and the services rendered to them by the managers and other officers of the temple and that in such a case there would be a consideration of advantage to which to ascribe the origin and continuance of the custom sufficient probably to make it valid and binding, and (*c*) that, in the present case the existence of the alleged immemorial custom had not been proved so as to be binding upon the defendant. MAADAN v. ERLANDI, **M. H.C. 147.**

Right of Suit—continued.

—— **12.—Customary Rights**—*concluded.*

(3)—*Right to sue* aghat *for the purpose of collecting religious offerings—Right to the soil.*—Where the plaintiffs had no right of any kind to the soil of a *ghat*, they could not maintain a suit for a declaration that they had an exclusive right by custom to use it for the purpose of collecting alms. HUSAIN ALI v. MATUKMAN, **6 A. 39=A W.N. 1883, 185.** (S.A No. 151 of 1871, dated the 15th March, 1871, *F.*) [*F.*, 20 A. 200.]

(4)—*Prescription—Bathing* ghat *dedicated to public—Easement in gross not recognized by Indian or English Law.*—Where a bathing *ghat* has been dedicated to the public, no person could, by occupation or other user of any part of it establish a right by prescription to the exclusive use of such part, as against the public. (*Turner* v. *Ringwood Highway Board*, 9 Eq. 418, 6 A. 39, *R.*) Such user will amount only to a licensed user. The person has a right to be there, but his right of user cannot carry with it a right to exclude the other persons. [*F.*, 2 O.C. 1; *D.*, 7 P.R. 1899.] Neither the English nor the Indian law recognizes such a right as an easement in gross. Therefore, where the plaintiffs claim the right of exclusive use of portions of a bathing *ghat*, without alleging any right either in the soil of the *ghat* or in any other soil to which the user of the *ghat* was appurtenant, *held* that such right could not be claimed as an easement, or customary right. THE MUNICIPAL BOARD OF CAWNPORE v. LALLU, **20 A. 200=A.W.N. 1898, 25.**

(5)—*Mahars—Right to share proceeds of* watan.—Though the owner of cattle is not bound by the Mahar's rights, yet, as between themselves, a Mahar has a right of action against his brother Mahars for a share in the proceeds of the *watan*, such as the carcasses of dead animals, etc. YELLAPPA BHIMAPPA v. MANKIA, **8 B.H.C. A.C. 27.** [*R.*, 8 N.L.R. 53.]

(6)—*Right to profits from ceremonies at cremation—Jurisdiction.*—The obligation on *jujmans* to employ a particular purohit to perform the ceremonies at the burning of Hindu bodies may be a matter of conscience, and not one which a Court of law can enforce, but the question of the right to enjoy the joint profits accruing from the performance of such ceremonies is cognizable by a civil Court. BECHARAM BANERJEE v. SRIMATI THAKUR MANI DEBI, **8 B.L R. 53. Note=10 W.R. 114.** [*Not F.*, 3 B. 9; *Appr.*, 8 B.L.R. 50=10 W.R. 114; *R.*, 12 W.R. 372.]

(7)—*Suit to enforce payment to* shebait—*Custom to contribute Murjada.*—A suit does not lie to enforce a payment to a *shebait* under colour of a custom according to which persons of the Kassary caste having marriage ceremonies or *shrads* performed in their houses, are bound to contribute "*Murjada*" (respect money) to the Sheeb Thakoor as representing the Kassary community in general. MADHUB CHUNDER MUNDUL v. NOBEEN CHUNDER DUTT, **5 W.R. 224.** [*R.*, 12 C.L.J. 74=14 C.W.N. 1057.]

Right of Suit—continued.

——**13.—Debtor and Creditor.**

See DEBTOR AND CREDITOR.

(1)—*Cause of action—Suit by debtor to compel creditor to accept money due.*—A suit will not lie by a debtor to compel the creditor to accept payment of an instalment due under a bond, which contains a stipulation, that it is to be paid in instalments, and on failure to pay any instalment, the whole sum then due, should become payable at once A suit, is a demand made judicially for attaining or recovering a right, and it does not lie for the bare performance of a duty at the instance of the person bound to perform it, for the evident reason that, when he is willing to perform it, there is no need for a suit, and that, if he is not, it is for the other party to enforce its performance. KRISTAYA v. KASIPATI, **9 M. 55.**

Suit on mortgage bond before expiry of term for re-payment of principal—*See* MORTGAGE—GENERAL, 15 C.P.L.R. 78.

Suit for foreclosure by prior mortgagee—Foreclosure decree made absolute — Puisne mortgagee not made party—Right of puisne mortgagee to foreclose his mortgage — *See* MORTGAGE—FORECLOSURE, 11 C.P.L.R. 75.

——**14.—Decrees.**

See EXECUTION OF DECREE.

(1)—*Execution of decree—Suit to enforce—Interpretation of decree.*—A suit will not be entertained to enforce the execution of a decree in another suit. The Courts must be left to interpret their own decrees in execution. TAREKNARAIN SINGH v. PANCHA SINGH, **W.R. 1864, 376.**

(2)—*Right declared, suit for enforcement of.*—The decree-holder may sue for the enforcement of the right declared. SABHANATHA v. LAKSHMI, **7 M. 80** [*F.*, 7 M. 83, 1 M.L.T. 69; *Appr.*, 14 M. 396; *R.*, 17 M.L.J. 423, 4 M.L.T. 330; *D.*, 12 B. 65, 12 M. 183.]

(3)—*Suit upon decree of High Court.*—A suit can be brought upon a decree of the High Court. ATTERMONEY DOSSEE v. HURRY DOSS DUTT, **7 C. 74=9 C.L.R. 357.** [*F.*, 33 C. 560=9 C.W.N. 952; *D.*, 6 B. 7, 8 B. 1.]

(4)—*Decree pending appeal — Fresh suit—Right of action.*—*Quære*:—Whether a new suit will lie upon a decree pending an appeal? RANEE IMAMUM v. HURDYAL SINGH, **5 W.R. 276.**

(5)—*Judgment destroyed during the mutiny—Suit—Limitation.* — Where the plaintiff sues for the amount due under a decree which was destroyed during the mutiny, *held*, that the suit would lie, the cause of action accruing from the date on which the decree was lost or destroyed. RANEE ENAMUN v. HURDYAL SING, **W.R. 1864, 301.**

(6)—*Destruction of the records of a case—Former decree, execution of—Fresh suit for the same subject-matter—Maintainability.*—Where,

Right of Suit—continued.

——**14.—Decrees**—*continued.*

the records of a case being destroyed, the plaintiff brought a second suit for the same subject-matter for which he had before got a decree, *held*, that the suit was not maintainable, but that the plaintiff may prove her first decree and execute the same. MUSSAMUT NUZUR BANOO v. HOSSEIN ALI KHAN, **W.R. 1864, 378.**

(7)—*Decrees—Suit on decree where there are no means of enforcing it by execution.*—A decree in a suit upon a bond against the heir of the deceased obligor awarded to the plaintiff the amount of the bond from the property of the obligee, and directed that "the defendant be released from the claim in this suit." An order for execution of the decree was set aside, on the ground that the decree did not warrant the issue of an attachment, since it was not against any person. *Held* that a suit was maintainable by the plaintiff upon the decree recovered in the former suit, there being no other means of enforcing the former decree or recovering his debt. ANUND ROY v. MUNORUT SINGH, **Marsh 611.**

(8)—*Decrees—Suit for balance after execution of decree for rent—Suit under Rent Act to recover sum due after sale in execution of decree under Ben. Reg.* VII *of* 1799.—A suit was held to be not maintainable under the Rent Act to recover a sum due under a decree for rent obtained under Regulation VII of 1799, and remaining unsatisfied after sale of the tenure. DHEERAJ MAHTAB CHAND v. DENO NATH ROY, **Marsh 340=2 Hay 445.**

(9)—*Judgments of Courts of Native States, suits not maintainable in British Courts on.*—A suit will not lie in any of the British Courts in India, on a judgment passed by a Court in a Native State. The administration of justice in the Courts of Native States does not generally command that amount of confidence which is necessary to raise the implied obligation upon which the action on a foreign judgment rests, and which is therefore a condition precedent of English Courts entertaining an action on one of their judgments. HIMMATLAL v. SHIVAJI RAV, **8 B. 593.** [*D.*, 24 B. 86.]

(10)—*Decrees—Suit on decree of Small Cause Court—Decree unsatisfied by execution.*—Where plaintiff had obtained a decree in the Small Cause Court, and execution had been issued, but defendant had not moveable property sufficient to satisfy the decree.—*Held* that a suit in the High Court, on the decree of the Small Cause Court, would lie for the balance, but costs will not be given to the successful plaintiff in such a suit, nor interest on the judgment be obtained in the High Court. MOHENDRONATH ASH v. BEEDOBODUN DUTT, **1 Ind. Jur. N.S. 220.**

(11)—*Suit on decree of P.S.C. Court.*—A suit may be maintained in the High Court on a decree of the Presidency Small Cause Court. KHOBLALL BABOO v. RAMCHUNDER BOSE, **2 C. 434.** [*Overruled*, 5 C. 294; *R.*, 8 B. 1.]

Right of Suit—continued.

——**14.—Decrees**—*continued.*

(12)—*Small Cause Court decree, right of suit upon.*—No suit would lie in the High Court on a decree of the Calcutta Court of Small Causes. MOONSHI GOLAM ARAB v. CURREEM BUX SHAIKJEE, **5 C. 294=4 C.L.R. 477.** (2 C. 434, *Overruled.*) [*R.*, 6 B. 7, 8 B. 1.]

(13)—*Decree barred by limitation, suit not maintainable on—Judgment of Court of Small Causes in Bombay, suit in High Court on—Pleadings—Evidence.*—No Court can entertain a suit based on a decree the execution of which is barred by limitation. Suits upon decrees of the Bombay Court of Small Causes can be instituted on the original side of the High Court. The ground of interference of the High Court by way of entertaining such suits being, practically, that the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor, the plaint, in a suit of the kind, must contain the averment, and the plaintiff must establish, to the satisfaction of the High Court, that there is not any sufficient moveable property of the defendant against which the decree of the Court of Small Causes can be fully executed and that he has immoveable property situated within the jurisdiction of the High Court against which execution can be had. The execution of the High Court's decree obtained in such a suit should be confined to immoveable property within its jurisdiction. FAKIRAPA v. PANDURANGAPA, **6 B. 7** (5 C. 294, *R.*) [*F.*, 8 B. 1; *R.*, 7 B. 467, 25 M. 300.]

(14)—*Presidency Small Cause Courts Act* (XV *of* 1882), *ss* 1, 94—*Suit on judgment of Small Cause Court, whether maintainable in that Court.*—In this case, the Chief Judge of the Court of Small Causes, Bombay, referred to the High Court the question whether before the 1st of July, 1882, the day on which the Presidency Small Cause Courts Act came into operation, a judgment-creditor in the Small Cause Court had a right to sue in that Court upon his judgment; in other words, whether before the Act of 1882 came into operation, a judgment of the Small Cause Court was a good cause of action in that Court, and the High Court answered the question as follows:—that a judgment-creditor in the Court of Small Causes had not before the 1st July, 1882, the right to sue in that Court on his judgment. MERWANJI NOWROJI v. ASHABAI, **8 B. 1.** [*R.*, 27 M. 243, F.B.=14 M.L.J. 84.]

(15)—*Decree for possession—Failure to execute decree—Fresh suit on same cause of action.*—Where a party brings a suit for possession and obtains a decree which he neglects to execute, no subsequent suit on the same cause of action will lie. GOPI MOHUN DASS v. TINCOWRI GUPTA, **1 C.L.R. 254.**

(16)—Res judicata—*Decree in a prior suit barred by limitation—Subsequent suit on same cause of action.*—The plaintiffs relying on their

Right of Suit—continued.

——14.—Decrees—*continued.*

proprietary title got a decree for possession in a former suit. But they allowed the period of limitation to pass without issuing process of execution. They then brought the present suit based on their old title and again seeking substantially the relief which was sought and obtained in the first suit. *Held* that they had lost this remedy by their own neglect and could not be permitted to revert to the possession which they had held prior to the institution of that suit, and to ask for a remedy by suit. SHEIKH GOLAM HOSSEIN v. MUSSAMUT ALLA RUKHEE BEEBEE, **3 N.W.P. F.B. 62.** [*Not F.*, 11 A. 386; *F.*, 4 A. 481=2 A.W.N. 114, 19 A. 202=17 A.W.N. 24; *R.*, 21 A. 251=19 A.W.N. 50, 25 M. 300, F.B.; *D.*, 8 M. 478, 13 A. 309=11 A.W.N. 117, 24 A. 44, F.B.=21 A.W.N. 194.]

(17)—Res judicata—*Suit for declaration of right to share—Partition.*—In a suit against the vendor to decree plaintiff's right to a share of the property alleged to have been sold, the plaintiff obtained a decree directing his share to be taken out of a certain *puttee*. Pending the suit, he became a party to a certain partition proceedings before the Collector, but omitted to include his claim or to withhold his consent till it was ascertained what he was entitled to. *Held* that he could not bring a second suit against the same parties to establish the same right. SHEIKH HOSSEIN BUKSH v. SHEIKH MUSUND HOSSEIN, **18 W. R. 260.**

(18)—*Decree for possession barred by limitation—Fresh suit*—Res judicata.—A party failing to execute a decree for possession cannot bring a second suit against the same defendant in respect of the same property, unless the second suit is founded on a cause of action which has risen since that decree was passed, and which is not itself barred by limitation. MOHUNT NUR SINGH DOSS v. MOONSHE KUMROODDEEN, **20 W.R. 412.**

(19)—*Civ. Pro. Code, s. 13—Suit for maintenance—Prayer for future maintenance*, res judicata.—When a person entitled to maintenance not contented with asking for a declaratory decree has asked for a decree relating to future maintenance, he cannot thereafter bring a separate suit to recover arrears of maintenance even though the former decree omitted to specify any fixed date for the annual payment of such maintenance. VENKANNA v. AITAMMA, **12 M. 183.** [*F.*, 22 M. 175; *R.*, 4 M.L.T. 330.]

(20)—*Suit on decree capable of execution—Maintainability of—Execution barred by Limitation.*—Where the object of the plaintiff in a suit was to enforce the title that had accrued to him under a previous decree and to obtain possession which also had been awarded to him by that decree, *held* by a majority of the Court that the suit would not lie as what a decree-holder could enforce by execution in the ordinary way after obtaining his decree he

Right of Suit—continued.

——14.—Decrees—*continued.*

could not recover in a subsequent suit founded on that decree. When a decree is merely declaratory and does not require to be carried into effect by process of execution, the right thereby declared and ascertained exists independently of any process for enforcing it. But when the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to elapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought by execution. *Turner, C. J., held* that the plaintiff by his failure to execute his decree did not thereby lose his right although he may be barred of his remedy under the decree, and, as a new cause of action accrued to the plaintiff by reason of the continued trespass of the defendant, it could not be said that the suit brought in respect of that cause of action was a suit for the determination of a question arising between the parties relating to the execution of the former decree within the meaning of s. 11 of Act XXIII of 1861. RAM JUS RAE v. RAMNARAIN, **2 N.W. P. 382.**

(21)—*Decree obtained by fraud—Judgment-debtor's remedy—Act* VIII *of* 1859, *s.* 90—*Act* XXIII *of* 1861, *s.* 11.—The case of a judgment-debtor who alleges that a decree was obtained by fraud and false personation, does not fall under s. 90, Act VIII of 1859, which refers to attachments before judgment, nor under s. 11, Act XXIII of 1861, which relates to disputes as to the way in which decrees not contested ought to be executed. The debtor's remedy is by suit to set aside the decree as fraudulent and collusive, or he may apply to the lower Court to review and rehear the case on the ground of deep and designing fraud and to direct an inquiry, not into the real outward regularity of the proceedings, but into the substantial regularity of the suit. MUSTAUNT RAJBAUSEE KOOMEREE v. BHUGWATTEE KOOMAREE, **1 W.R. Mis. 29.** [*F.*, 14 W.R. 299; *D.*, 22 B. 267.]

(22)—*Execution of decree—Process of execution—Bar of limitation—Omission to execute.*—Where a decree is merely declaratory and does not require to be carried into effect by process of execution, the right thereby declared and ascertained existed independently of any processes for enforcing it. But when the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to elapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought for by execution. DOBEE SINGH v. JOWKEE RAM, **3 Agra 381=Agra F.B., Ed., 1874, 172.** *See also* YAKOOB ALI v. UBDOOL-RAHMAN, **3 Agra 383=Agra F.B. Ed., 1874, 172.** *See also* JUGURNAUTH v. BALGOBIND, **1 N.W.P. 115=Ed., 1873, 154.** [*F.*, 3 N.W.P. 62; *R.*, 2 N.W.P. 382, 24 A. 44=21 A.W.N. 194, 25 M. 300, F.B.; *D.*, 13 A. 309=11 A.W. N. 117.]

Right of Suit—continued.

——14.—Decrees—*concluded.*

(23)—*Right of suit—Breach of duty by a third person—Equity with respect to property received as belonging to another.*—Where the plaintiff (reversioner) was ordered by the lower Court to repay Rs. 400 the amount of the purchase-money received from the widow as a condition precedent to recovering possession from the defendant (purchaser) from the widow, the sale being invalid for want of necessity beyond the life-time of the widow. *Held*, there was no equity in favour of the defendant and as against plaintiff entitling that defendant to the amount of the purchase-money. An action will not lie at the suit of A for the breach by B of a duty which B owed to C, because in order to support an action there must be either a contract with the person sued or some other relation establishing a duty on his part towards the plaintiff. Where a party receives from another goods or their value in money as belonging to a third party with notice of that party's ownership, that third party can sue the receiver therefor. JANKI v. MAHADU, **9 Bom. L.R. 710.**

(24)—*Suit to set aside decree*—Res judicata—*Review.*—Where a suit seeks the reversal of a former decree between the same parties on the allegation of the falseness of a fact which the former decree establishes as true, the suit cannot lie. The plaintiff's remedy is by way of review of judgment in the previous suit. MALAKSHAHBAZ v. MOWAZ, **31 P.R. 1868.**

Suit on judgments—Courts in Native States—Foreign judgments—Judgment of British Indian Court—Suit in High Court on judgment of Court of Small Causes—Civ. Pro. Code, 1877, s. 434—*See* FOREIGN COURT, JUDGMENT OF, 6 B. 292.

——15.—Dignities.

(1)—*Jurisdiction—Civil Court—Marks of honour—Religious festivals.*—A suit for a declaration of a right to receive, at the hands of a Poorohit of the village idol, at certain festivals, *malla* and *telok* and other marks of recognition and honor, and to obtain damages from the priest for withholding these marks of respect, is not cognizable by a Civil Court. GOSSAIN DOSS GHOSE v. GOOROO DOSS CHUCKERBUTTY, **16 W.R. 198.** [*R.*, 23 B. 122.]

(2)—*Right to mere dignity—Suit to vindicate right—Maintainability.*—A suit to vindicate plaintiff's right, not to any office, but to a mere dignity unconnected with any fees, profits or emoluments, is not maintainable. (3 M.I.A. 198, *F.*) Accordingly a suit by a Lingayet for a declaration of his right to take a *cupola* to a Lingayet temple and to place it upon the car of the idol, and to take a *nandicola* (bamboo) with tom-toms from his house to the temple, and to offer the first cocoanut to the idol at the annual festival held in honour of a certain Lingayet saint, was held not to fall within the cognizance of a Civil Court. SANGAPA *bin* BASLINGAPA v. GANGAPA *bin*

Right of Suit—continued.

——15.—Dignities—*continued.*

NIRANAJPA, **2 B. 476.** [*F.*, 6 B. 116, 10 B. 233; *Appl.*, 7 M. 91; *R.*, 14 B. 25, 11 M.L.J. 215, 3 N.L.R. 131, 33 B. 278=11 Bom. L.R. 58.]

(3)—*Suit for declaration of rights of mere dignity, not cognisable by Civil Courts.*—Plaintiffs in this case sued for a declaration of their right to take their bullock first in the procession of the *Pola* day in alternate years. The lower Courts entertained the suit and decreed for the plaintiffs on the ground that the right claimed was not one relating to a mere dignity so as to be beyond the jurisdiction of the Civil Courts, but related to an office and *vatan*, and the annual procession of the bullocks on *Pola* day was the most prominent non-official recognition of the plaintiffs' status as *vatandars* in the village. The High Court, however, *held* that the suit was not maintainable because it was one to establish a mere dignity unconnected with any fees or profits and that even the fact that such dignity was connected with an office could not make any difference. Civil Courts are not to be permitted to involve themselves in the determination of trivial questions of dignity and privilege, which would be much better left to the decision of the society in which they arise. RAMA v. SHIVRAM, **6 B. 116.** [*F.*, 3 N.L.R. 131; *R.*, 10 B. 233, 14 B. 25, 33 B. 278=11 Bom. L. R. 58=1 Ind. Cas. 331; *D.*, 11 M. 450.]

(4)—*Chief priests of different sects—Dispute relating to* adavipalki *right, whether within jurisdiction of Civil Courts—Action if maintainable for damages and injunction.*—The appellant, as the chief priest of the Smartha sect of Brahmins, claimed, under a grant from the supreme power of the State, the privilege of *adavipalki*, *i.e.*, of being carried on solemn ceremonial occasions and processions in a palanquin borne crossways so that the poles traversed the line of march. The respondent who was the chief priest of Lingayats claimed the like privilege. And on his exercising the same at a religious festival at Hoobli in Bombay, plaintiff-appellant filed this plaint in the Zillah Court asserting his own right, complaining of the usurpation by the respondent, claiming damages, and praying for an order in the nature of an injunction that, in future, the respondent should not be carried crossways in a palanquin. On appeal, it was pressed for the respondent that the Judicial Committee should take upon itself to decide that the action was not maintainable, and, on that ground, should affirm the judgment of the lower Courts, whatever miscarriages there might have been in the conduct of the suit; but such ground of objection not having been taken before and considered by the Judges below, the Committee refused to give effect to it. The Committee, however, observed that the right in question, namely, that of *adavipalki*, was one of a substantial nature and could not be treated with levity, being marks of distinction conferred by the sovereign authority and highly valued in the East, but held that,

Right of Suit —continued.

——15.—Dignities—*concluded.*

for the above reasons, they could not advise that the judgment should be affirmed. The evidence actually adduced in the Zillah Court was insufficient to establish the right of the appellant or to negative that of the respondent. The case was therefore remitted to the Sudder Dewanny Adawlut for a new trial. Their Lordships directed that the Judges of the Court will, in the first instance, consider whether the action was maintainable at all, and that, if their opinion should be in the affirmative, the Judges should use the necessary means for having witnesses of high rank, who would object to taking an oath, examined without oath according to the regulation in force upon that subject and having the interrogatories so framed as to elicit the truth from them without offending their dignity. SRI SUNKUR BHARTI SWAMI v. SIDHA LINGAYAH CHARANTI, **6 W.R. P.C., 39=3 M.I.A. 198=1 Suther. 142=1 Sar. 266.** [*F.*, 2 B. 470, 6 B. 116; *Appl.*, 7 M. 91; *R.*, 2 B. 476, 33 B. 278=11 Bom. L.R. 58.]

(5)—*Jurisdiction of Civil Courts—Questions as to dignity and privilege—Suit for right to mans, if maintainable, and for injunction.*—The Civil Courts ought not to be involved in the determination of trivial questions of dignity and privilege, although connected with an office. In the present suit, the plaintiffs and the defendants as members of the family of Ganvkars claimed to be entitled to certain *mans*, consisting of the right to be the first to worship the deity on certain occasions and to receive gifts of rice, cocoanut and *vida* and venison made by the priest on certain religious ceremonies and other occasions. The plaintiff being obstructed by the defendants in the enjoyment of the *mans*, sued for a perpetual injunction against the defendants. *Held* that the suit was not maintainable, as the *mans* were mere dignities to which no profits or emoluments were attached. The trifling gifts made by the priest, of rice, a cocoanut and *vida* on the occasion of worshipping the deity and of a piece of venison on other occasions, could not be regarded as emoluments, being merely symbols of recognition of and marks of respect to the holders of the *mans*. NARAYAN VITHE PARAB v. KRISHNAJI SADASHIV, **10 B. 233.** [*R.*, 14 B. 25, 21 C. 463, 11 M.L.J. 215, 3 N.L.R. 131, 7 A.L.J. 529; *D.*, 11 M. 450, 13 B. 548, 13 B. 429, 17 C. 906.]

(6)—*Suits for precedence at religious festival—Cause of action.*—A suit will not lie for a mere honour or dignity not conferred by the King. KARAPPA v. KOLANDHAYAN, **7 M. 91.** [*R.*, 23 B. 122, 11 M.L.J. 215; *D.*, 11 M. 450.]

——16.—Endowments, Suits relating to.

See CIV. PRO. CODE, 1908, S. 92.

(1)—*Idols, Suits concerning—Mahant—Mortgage—Suit to redeem by the Mahant's successor.*

Right of Suit—continued.

——16.—Endowments, Suits relating to—*ctd.*

—G was a Mahant of an order of Bairagis and in that capacity was trustee and manager of certain temples at Ajodhia. He dedicated a large portion of his property to the temples: and by a *tamliknama* provided: "During my life-time I shall myself manage and deal with all these villages as a trustee and manager—after my death one Bishambhar Das, my disciple, shall be trustee and manager." G during his life-time lent to the defendant Rs. 19,000 (from the charity funds) on two mortgage bonds. G died in 1892. The plaintiff, Bishambhar Das, who succeeded D to the Mahantship, sued the defendant to recover the amount due under two mortgages executed by him. The defendant denied plaintiff's title to sue upon the mortgages: *Held*, that as the plaintiff was appointed by G to succeed, and did in fact succeed, him as trustee and manager of the temple property under the *tamliknama*, he was, as such trustee and manager, entitled to maintain the suits and to recover the moneys due by the defendant to the trust estate under the mortgages. MAHANT BISHAMBHAR v. THAKUR DRIGBIJAI, **7 Bom. L.R. 869=9 C.W.N. 914=2 C.L.J. 182=8 O.C. 297, P.C.=27 A. 581=15 M.L.J. 323=32 I.A. 172=8 Sar. 849.**

(2)—*Idols—Right to deal with—Civil Court.*—Hindu idols are property, in the eye of law, and the right to deal with such property must, in the event of disputes arising, be determined by a Civil Court. SUBBARAYA v. CHELLAPPA, **4 M. 315.** [*R.*, 11 M.L.J. 215, 30 M. 158=17 M.L.J. 1=2 M.L.T. 69.]

(3)—*Holder of inam for offering food to idol—Suit for damages for omission to make offering—Whether could be maintained by temple servant.*—Plaintiff, a temple servant, claimed damages from the defendant on account of his omission to offer food to the idol, which he was bound to do as the holder of an inam for the purpose, and the consequent loss by the plaintiff of the perquisites which he would otherwise have received. He was held to be not entitled to maintain such a suit. The defendants' obligation, if any, was towards the idol. He was under no direct legal obligation to the plaintiff or to any similar other temple servant; and though the result of the defendant's omission to supply food to the idol might involve loss to the plaintiff, it would be *damnum absque in juria* not giving plaintiff any cause of action. DHADPHALE v. GURAV, **6 B. 122.** [*R.*, 12 B. 247, 27 M. 435=14 M.L.J. 105.]

(4)—*Joint right to profits from idol—Enjoyment in rotation—Prayer by one party to remove idol to her place, when can be granted.*—In this case the lower appellate Court had decreed the plaintiff's right to take an idol, in which she had an interest jointly with others, to her own house, for the period for which she was entitled to the profits from that idol. The defendant urged that the idol had always

Right of Suit—continued.

——**16.—Endowments, Suits relating to**—*ctd.*

remained in the temple, which was his (defendant's) property. It appeared that the defendant was taking advantage of his being the sole proprietor of the temple to obstruct the use and worship of it by the plaintiff, and the plaintiff, therefore, claimed a separation of the rights which she had, up to the time, enjoyed jointly with defendant, and the right of removal of the idol to her own house on rotation. The Judge had therefore rightly ordered the separation and removal sought by the plaintiff, the more so, as the defendant had been the cause of the plaintiff's requiring the same. DWARKANATH ROY v. JANNOBEE CHOWDHRAIN, **4 W.R. 79.**

(5)—*Public charitable or religious institution, trust not necessary under Hindu Law for purpose of creating—Offerings at idol's shrine, recipients of, responsible as trustees—Property belonging to idol, liability of persons in charge —Trust for Hindu idol and temple—Trust "for public charitable purposes"—Civ. Pro. Code,* s. 539.—Plaintiffs came forward in the character of relators as persons interested in the religious foundation of the temple at Dakor, praying that the Court will make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property so acquired. Plaintiffs alleged that the income of the temple was being wrongly and unduly appropriated by the defendants (styled *shevaks* or ministers) to their personal purposes, and sought for the appointment of a receiver for the exaction from the defendants of accounts of management, for the delivery up by them of all property appertaining to the temple and for the construction of a scheme of future management. The suit was rejected by the lower Court on the ground that the plaintiffs had no direct interest in the charity so as to entitle them to sue under s. 539 of the Civ. Pro. Code. This decision was reversed by the High Court which held that the plaintiffs who were priests taking part in the worship at the temple were persons directly interested in its due performance and its maintenance. They were clearly among those who would be benefited by the execution of the trust, if there was one. They had thus an undeniable *locus standi* as relators enabling them to maintain the suit. Questions also arose whether the defendants, the *shevaks*, took the property and the revenue from the offerings to the idol, as their own, without any trust or annexed duty, or, whether, if they enjoyed by a kind of agency or representation of the idol conceived as a personality, they had to fulfil any obligation owed by them to such ideal person, the deity. *Held* that, though the defendants might not have consciously accepted any trust, they were yet liable as trustees, and remedy could be sought against them for mal-administration by a suit open to any one interested. The Hindu Law recognizes not only corporate bodies with rights of corporation vested in them apart from their individual members, but also

Right of Suit—continued.

——**16.—Endowments, Suits relating to**—*ctd.*

judicial persons or subjects called foundations. According to the Hindu Law, a Hindu desiring to establish a religious or charitable institution may do so by merely expressing his purpose and endowing the institution leaving it to the Ruler to give effect to the bounty, and a trust is not required for this purpose as it is by the English law. Apart from the creation or acceptance of any trust, therefore, those who take charge of gifts made to a religious or charitable institution, incur a legal responsibility for their due application to the purposes of the institution. The High Court, in the result, decreed for the plaintiffs directing (1) that the District Judge should take steps either by appointing a receiver or otherwise for guarding the property of the temple without disturbance of its services, (2) that he should take an account of the property and of the receipts and disbursements, (3) that he should make the requisite orders for recovering property misappropriated and sums due to the foundations as well from others as from the *shevaks* or any of them and (4) that he should draw up a scheme for the future management of the temple and its funds, giving due consideration to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it. The question of the jurisdiction of the Civil Court in matters of the nature involved in this suit had to be discussed, and it was held that the religion of the Hindu population being jurally allowed, the duties and services connected with it must be deemed objects of public concern, and, at least as to their physical and secular elements, enforceable like other obligations. MANOHAR GANESH TAMBEKAR v. LAKSHMIRAM GOVINDRAM, **12 B. 247.** [*F.*, 33 B. 387=11 B.L.R. 389; *Appr.*, 15 B. 309, 15 B. 625, 23 C. 645, 24 C. 418, 25 C. 112; *R.*, 11 A. 18=8 A.W.N 276, 23 B. 659, 28 B. 215, 27 M 435=14 M.L.J. 105, 2 C.L.J. 460; *R.*, 8 Bom. L. R. 756, 37 C. 128=10 C.L.J. 355=14 C.W.N. 18; *D.*, 33 M. 75=19 M.L.J. 651=6 M.L.T. 199.]

(6)—*Suit by worshippers to set aside mortgage of property of shrine—Person interested—Civ. Pro. Code,* 1882, s. 30.—A suit will lie by worshippers at a shrine (Bbabras of Jagraon) to have a mortgage by the manager of the property belonging to it set aside, as the former have an interest in seeing that such property which ought to be used for its due up-keep is not diverted to private objects; and a public advertisement under s. 30 of the Civ. Pro. Code, should be put out to notify the other interested parties so as to prevent defendant from being harassed by a succession of suits by different worshippers in case of failure of the plaintiffs' suit. RAM PARTAB v. KALU MAL, **27 P.R. 1885.** (75 P.R. 1884, *Appl.*; 6 A. 284, *D.*) [*F.*, 94 P.R. 1885; *R.*, 9 P.R. 1904.]

(7)—S. 539, *Civ. Pro. Code* (1882), *scope of —Interest required to enable person suing under* s. 539 *must be existing and must not be a mere*

Right of Suit—continued.

——16.—Endowments, Suits relating to—*ctd.*

contingency—Possibility of interest or possibility of succession only—Act XX *of* 1863 —There is no reason to suppose that the Indian Legislature under s. 539, Civ Pro. Code, intended to provide for a non contentious case, leaving contentious cases wholly unprovided for. If s. 539 were restricted to non-contentious cases, a large number of trusts of a public, charitable and religious nature, not covered by Act XX of 1863, would be left wholly unprovided for. So, s. 539 applies not only to non-contentious cases but also to contentious cases. (12 C. 546, *Appr.*) The mere possibility of an interest or the mere possibility of succession to the Managership of certain trust properties, with regard to which the suit is instituted, does not and cannot give a right to sue for those properties under s. 539. The interest for enabling a person to bring a suit under that section must be an existing one, and not a mere contingency. MOHIUDDIN v. SAIYIDUDDIN, **20 C. 810.** [*F.*, 20 A. 46=17 A.W.N. 210, 24 C. 418, 2 C L.J. 431: *R.*, 17 M. 462, F.B., 21 B. 48, 2 C.L.J. 460, 6 A.L.J. 632.]

(8)—*Act* XX *of* 1863 (*Religious Endowments*), s. 14, '*misfeasance and breach of trust*' *meaning of in—Duty of trustee to utilize voluntary contributions—Suit for breach and neglect of duty, maintainable by persons interested.*—In the case of religious institutions such as temples, even in the absence of any special endowments as such, it is part of the proper functions of the trustees thereof to receive and utilize voluntary contributions made towards processional or other religious worship and like purposes in the institution. It is the trustee's duty to accept such contributions, and apply them for the specified purpose, unless there are proper grounds for rejecting such offers. If, therefore, the trustee from corrupt or improper motives refuses to allow voluntary contributions offered for purposes not inconsistent with the principles, rules, or usages of the institution to be applied for those purposes, persons interested in the institution will have the right to proceed against the trustee. The words "any misfeasance or breach of trust, etc." in s. 14 of the Religious Endowments Act ought not to be construed otherwise than in its ordinary sense, and they unquestionably cover any misfeasance, breach of trust, or neglect of duty with reference to the trust. Also, though Courts cannot be called upon to decide questions of ritual and worship unconnected with civil rights, it is perfectly competent to them to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights. ELAYALWAR REDDIAR v. NAMBERUMAL CHETTIAR, **23 M 298=10 M.L.J. 86.** [*R.*, 15 M.L.J. 458, 30 M. 158=17 M.L.J. 1=2 M.L.T. 69, 2 M.L.T. 94.]

(9)—*Civil Procedure Code, s.* 539—*Suit to remove a trustee.*—A suit to remove a trustee to a charitable trust does not lie under s. 539 of the Code of Civil Procedure. *Per Shephard, J.*—

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——16.—Endowments, Suits relating to—*ctd.*

The language of s. 539, Civ. Pro. Code, is in part borrowed from the Statute of George III known as Sir Samuel Romilly's Act and the decisions upon it are in a measure reproduced in the section of the Code. S. 539 must be construed in the light of the decisions on that statute, so far as they are applicable to the language of the section, and the statute having been from the first held to be inapplicable to cases in which the hostile removal of a trustee is required, s. 539 is likewise inapplicable to such cases. RANGASAMI NAICKEN v. VARADAPA NAICKEN, **17 M. 462, F.B.** (12 M. 157, *F.*) [*Diss.* 24 C 418, 20 A. 46, 21 A. 200, 5 O. C. 110, 2 C. L. J. 431, 2 C.L.J. 460; *R.*, 21 M. 406, 23 M. 28=7 M.L.J. 281, 9 M.L.J. 93, 33 C. 789=10 C.W.N. 581.]

(10)—*Act* XX *of* 1863—*S.* 14—*Removal of trustee.*—The terms of s. 14 of Act XX of 1863 (Religious Endowments Act) are so general as to empower any person, interested in a temple etc., to sue the trustee, manager or superintendent or the members of a committee appointed under the Act for misfeasance. [*Diss.*, 19 C. 275.] Darga is a religious institution within the meaning of the Act. S. 14 of the Act empowers the Civil Court to remove trustees for misfeasance, breach of trust or neglect of duty, though they be hereditary trustees. FAKURUDIN SAHIB v. ACKENI SAHIB. **2 M. 197.** [*F.*, 34 C. 587; *R.*, 17 M. 95, 26 M. 166.]

(11)—*Jurisdiction—Civil Courts—Wrongful alienation of temple property—Suit by worshippers to set aside.*—The plaintiffs who sued, as residents in the Mohulla in which the temple in dispute was situate, and, as supporters of the worship, to set aside a sale executed by the defendants of a certain house forming a portion of the premises of the temple were entitled to a decree. *Held* that the allegations in the plaint showed that the plaintiffs sued as persons interested in the maintenance of the temple and its worship, and that, being so beneficially interested, there was no reason for holding that a suit not relating to property which could have come under the control of Government under Reg. XIX of 1810 and Act XX of 1863, must be brought under the provisions of the latter Act; or that, apart from that Act, the plaintiffs could have no right to sue to set aside the improper alienation of the temple property. SUKH RAM v. SUNDARMAL, **75 P.R. 1884.** (81 P.R. 1869, *Cited*) [*R.*, 27 P.R. 1885, 95 P.R. 1900=6 P.L.R. 1901.]

(12)—*Religious Endowments Act* (XX *of* 1863), *s.* 12—*Suit by the dharmakartha of a temple to recover possession of a temple property.*—S. 12 of Act XX of 1863 relates only to the rents of property transferred by the Board of Revenue or local Agents of Government to the Committee of a religious endowment. The right to bring suits for the recovery of the property of a religious or charitable institution is vested, as an ordinary incident of his office,

Right of Suit—continued.

——16.—**Endowments, Suits relating to**—*ctd.*

in the Trustee or Manager of such institution, unless he is precluded, by any special law, from exercising it. There is nothing in the Act to take a way such right from the Trustee appointed by the Committee. SANKRA MURTHI MUDALIAR v. CHIDAMBARA NADAN, **17 M. 143.**

(13)—*Suit to recover property as* sebayet—*Statements made by ancestors of parties, evidentiary value of.*—Plaintiffs sued to recover property claiming as *sebayets* lately in possession and wrongfully ousted therefrom by the defendant. Certain statements made by the ancestors of the plaintiffs and by the ancestors of certain of the defendants on a previous occasion were taken into consideretion by the Lower Appellate Court, which thereon came to a conclusion adverse to the plaintiffs. Plaintiffs on special appeal contended that they had a right in law to recover possession assuming only that they had previously been in possession in the capacity of *sebayets. Held* that possession and user in the apparent capacity of *sebayet* might, if unrebutted by any other evidence at all, be sufficient as evidence of title to make out a *prima facie* case in favour of the plaintiffs. In the present case, however, the Lower Appellate Court had considered the statements of the ancestors as affording evidence over-balancing the *prima facie* case, and if those statements were made by the plaintiff's and the defendant's ancestors, they were indubitably receivable as evidence in the suit. NUND PANDAH v. GYADHUR, **10 W.R. 89.**

(14)—*Alienation of* devasom *property by trustee—Suit to set aside alienation by successor.*—Where property is dedicated to religious purposes, it is, as a general rule, inalienable, and although, for some purposes, the manager or trustee, for the time being, represents the estate, his successor in office may recover, for the trust, property improperly alienated by him. He may insist on the restoration of the property to its intended uses. VEDAPURATTI v. VALLABHA, **13 M. 402.** (12 M. 387, *Dist.*) [*R.*, 6 M.L.J. 270.]

(15)—*Civ. Pro. Code, s. 539—Suit to enforce performance of duties conencted with shrine—Suit maintainable only in District Court—Necessity of Advocate-General's consent in writing.*—This suit in which the plaintiff sought for an injunction to enforce the defendants to perform their duties connected with the worship at a shrine and the revenues arising from offerings made by worshippers as it was held to be a case contemplated by s. 539 of the Civ. Pro. Code, the trust for a Hindu idol and temple having to be regarded as one "created for a public charitable purpose." The Court of the Subordinate Judge in which the suit was instituted had no jurisdiction in the case. The suit was not one that could be instituted in a Court inferior to the District Court, nor was it competent to the plaintiff to bring the suit by himself or without the consent, in

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——16.—**Endowments, Suits relating to**—*ctd.*

writing, of the Advocate-General. MANOHAR v. KESHAVARAM, **12 B. 267, Note = P.J. 1878, 252.** [*R.*, 6 B. 42, 2 C.L.J. 460, 37 C. 128 = 14 C.W.N. 18, 10 C.L.J. 355.]

(16)—*Civ. Pro. Code, s. 539—Suit for declaration of land as endowed property and for removal of trespasser, not a suit falling within s. 539.*—Where the plaintiffs asked for declaration that the land in question was endowed property, for the appointment of a mutawalli of the property with a scheme framed for its management, and for ejectment of the defendant from the land, such suit was held not to come within the purview of s. 539 of the Civ. Pro. Code. That section contemplates the existence of an express or constructive trust created for public, charitable, or religious purpose, whereas in this case it was merely alleged that certain land was endowed property from which it was sought to eject the defendant, and there was no allegation of any express or constructive trust in favour of any one. The section cannot cover the case of endowed property from which it is sought merely to remove a trespasser. MUHAMMAD ABDULLAH KHAN v. KALLU, **21 A. 187 = A.W.N. 1899, 18** (8 B. 365, 16 M. 31, *R.*) [*F.*, 33 C. 789 = 10 C.W.N. 581; *R.*, 2 C.L.J. 431.]

(17)—*Enforcement of religious or charitable trusts--Testator's representatives with no personal interest therein—Security for costs in such a suit—Decree for account in such suit—Distinct breach of trust.*—A testator's representatives, who are not personally interested in the religious or charitable trusts created by him, may institute proceedings for the rectification of abuses in the trusts, as there is no officer in India corresponding to the Attorney-General in England, by whose information at the relation of some private individual they are enforced there. Such a suit by the testator's representatives cannot be admitted except on sufficient security for costs being given. To entitle the plaintiffs in such a suit to a decree for an account, there must be a substantive allegation of what must be a distinct breach of trust and it is not sufficient to make out a case of mere suspicion or to rely upon particular passages in the defendant's written statement. BROJO MOHUN DOSS v. HUROO LALL DOSS, **5 C. 700.**

(18)—*Property dedicated to religious purposes—Restraint of use for other purposes—Right of suit.*—Where the defendant used for the purpose of landing goods certain buildings, which were erected by the plaintiff's father for the removal of the bodies of Hindus just before death and for the performance of certain religious ceremonies, *held*, the plaintiff was entitled to sue to restrain the defendant from so using them, certainly if the grantor's intention was to create a right of easement in favour of the Hindu community, and probably even if there was an intention to transfer the ownership

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——16.—Endowments, Suits relating to—*ctd.*

therein to the community, in the apparent absence of any *sevait* or trustee. JAGGAMONI DASI v. NILMONI GHOSAL, **9 C. 75=11 C.L.R. 502.** [*R.*, 33 C. 1290=4 C.L.J. 343=10 C.W.N. 1044; *D.*, 27 C. 793.]

(19)—*Removal of worshipped property from temple—Suit for injunction against manager.*—Where a sacred book was kept in a temple and worshipped by the votaries with great veneration, a suit would lie at the instance of worshippers for an injunction against its removal to any other place as against the Superintendent of the temple. DHURRUM SINGH v. KISSEN SINGH, **7 C. 767=9 C.L.R. 410.** [*R.*, 12 B. 247, 17 M.L.J. 1=2 M.L.T. 69=30 M. 158.]

(20)—*Endowment—Sale—Purchaser.*—The plaintiff was one of the two widows of the eldest of the three sons of the deceased ancestor who created charges on his estate for the worship of idols and for certain other religious ceremonies. After the death of his ancestor, the share of the husband of the plaintiff was sold for his debts without notice of these incumbrances. The plaintiff brought a suit for the management of the endowments. Subsequent to this but prior to the sale of the share of the youngest brother, without disclosure of these charges, a trustee for one of the endowments obtained a decree that one-third of the expenses allowed for the service of the idols was a charge on the share to be sold. *Held* that if the plaintiff was entitled to act as the *shebait* as the widow of the eldest son, she could not usurp the claim of her co-wife, but could only ask to be *shebait* to the extent of one-sixth of the estate of her father-in-law. *Held* also that the purchaser of the rights and interests of her husband was not bound by a decree to which he was no party. KHEMUNKERY DOSSEE v. JUGGUT CHUNDER SHOME, **1 W.R. 357.**

(21)—*S.* 11—*Suits cognizable by Civil Court—Suit to enforce right of worship in a temple—Right to make offerings at a particular place—Right to require idol to be stopped in front of plaintiff's house—Plaint—Amendment.*—The right to worship in a temple is enforceable in a Civil Court, but that right can be exercised only during hours of public worship. Where the plaintiff in his suit merely alleges an immemorial custom to make offerings to an idol at a particular place, but does not prove that he has acquired any right thereunder, no relief can be given to him in respect of such a claim. The plaintiff, in such a case, may be permitted to amend the plaint by inserting the necessary averments. The right to enforce the stopping of an idol in front of a person's house is not part of the right of worship by a member of the community for whose benefit the temple has been dedicated, and such a right is not cognizable by the Civil Courts. SRI KRISHNASWAMI IYENGAR v. RANGASWAMI IYENGAR, **5 Ind. Cas. 76=19 M.L.J. 743=7 M.L.T. 248.** (11 M.L.J. 215, 6 M. 151, *R.*; 15 M.L.J. 458, *Expl.*)

Right of Suit—continued.

——16.—Endowments, Suits relating to—*ctd.*

(22)—*Will by Khaleefa of endowment—Appointment of successor—Interference by committee—Legality of—Act* XX *of* 1863.—The Khaleefa of an endowment made a will appointing a successor according to old legal usage. The document was declared to be null and void by the members of the committee appointed under Act XX of 1863 to whom a copy of this document was sent for their information. The Khaleefa brought a suit to prevent the committee from illegal interference and to reverse their order respecting the will. *Held* that, as they had in no way obstructed or hindered him, the mere opinion of the committee could not affect the validity of his act nor could it form the basis of a suit, and their so-called order being an expression of opinion in answer to his communication, was not of a kind to be reversed by suit. HAKEEM HISAN-OOD-DEEN KHAN v. KHALEEFA UNWAR-OOL-LAH, **2 N.W.P. 400.**

(23)—*Habitual worshipper—Trespasser—Right to sue.*—Every Mahomedan who has a right to use a mosque is competent to maintain a suit against any one interfering with the exercise of his right or committing an injury upon property devoted to the support of the mosque. MUHAMMAD UMAR v. RAM CHAND, **87 P.R. 1892.**

See ACT XX OF 1863, s. 2, 14 M. 1.

See ACT XX OF 1863, s. 14, 9 C. 133=11 L.R. 333.

Suit between private individuals claiming to be *Muttuwallis—Wakf* property—Necessity for sanction of Advocate-General—Maintainability of suit—*See* CIV. PRO. CODE, 1908, ss. 92 and 93, 9 C.W.N. 151=32 C. 273.

See CIV. PRO. CODE, 1908, O. I, r. 8 (1), 21 M. 10.

Endowed property—Cause of action during *Shebaits* minority—Limitation—*See* LIMITATION ACT, 1908, ss. 6, 8. 32 C. 129. P.C.=31 I. A. 203=8 C.W.N. 809=7 Bom.L.R. 765=1 A. L.J. 585.

See RELIGIOUS ENDOWMENT, 22 M. 117.

——17.—Enhancement of Rent.

See ENHANCEMENT OF RENT.

See RIGHT OF SUIT—LANDLORD AND TENANT, SUITS CONCERNING.

——18.—Execution of Decree.

See CIV. PRO. CODE, 1908, O. XXI.

See EXECUTION OF DECREE.

(1)—*Attachment of property—Dismissal of claim for default—Suit to establish right—Suit for damages for wrongful attachment—Civ. Pro. Code*, 1877, *ss.* 278, 283.—Where an objection under s. 278 of the Civ. Pro. Code, to the attachment of property in execution of a decree, on the ground that such property belongs to

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——18.—**Execution of Decree**—*continued.*

the objector and not to the judgment-debtor, is struck off for want of prosecution, such order is not conclusive as regards the right of the objector to the property claimed by him, within the meaning of s. 283 of the Civ. Pro. Code. Orders having such conclusive effect are only those passed under s. 283 after an investigation of the claim preferred. Therefore, a person whose claim has been dismissed for default can sue the decree holder for damages for wrongful attachment of his property, without suing to establish the right which he claimed to such property. KALLU MAL v. BROWN, **3 A. 504.** [*F.*, 1 C.W.N. 24, 13 C.P.L R. 69, 87 P.R. 1904; *Appr.*, L.B.R. 1893-1900, 234; *Appl.*, 6 C.L.J. 362; *Discussed*, 19 A. 253, F.B.; *R.*, 62 P.R. 1894.]

(2)—*Civ. Pro. Code*, 1882, *ss.* 244, 278—*Attachment of trust-property under personal decree against trustee—Order on claim presented by trustee—Appeal.*—When a person against whom there is a personal decree claims property which has been attached under such decree, on the ground that he holds it as trustee for persons not parties to the suit, such claim falls under s. 278 and not under s. 244 of the Civ. Pro. Code, and no appeal lies against any order passed on such claim by the Court executing the decree. The suit not having been brought nor the decree passed, against such person in his *persona*, as trustee, he is, as such trustee (in which capacity he makes the claim to the attached property) not a party to the suit. If the decree had been passed against the judgment-debtor, as trustee, or he had been sued as such, the case would be different. RAMANATHAN CHETTIAR v. LEVVAI MARAKAYAR, **23 M. 195, F.B.=10 M.L.J. 64.** [*F.*, 10 M.L.J. 85; *R.*, 31 M.125=18 M.L.J. 21=3 M.L.T. 325; *D.*, 30 M. 215=17 M.L.J. 377=2 M.L.T. 31, 8 C.L.J. 20.]

(3)—*Civ. Pro. Code, ss.* 280 *to* 283—*Suit by judgment debtor to establish title to property the subject-matter of claim in execution proceedings—Limitation.*—A judgment debtor is not necessarily a party to an investigation under s. 278, Civ. Pro. Code, so as to preclude his instituting a suit, after the lapse of one year from the date of the order referred to in s. 283 of the Code, to establish his title to the property, which has been the subject-matter of a claim in execution proceedings. KHEDAR NATH CHATTERJEE v. RAKHAL DAS CHATTERJEE, **15 C. 674.** [*F.*, 3 C.L.J. 381; *R.*, 13 M. 366, 17 B. 629, U.B.R. 1892—1896, Vol. II, 458, 22 B. 875, 25 M. 721=12 M.L.J. 411.]

(4)—*Sale of mortgaged property in execution of money decree—Purchaser of mortgagor's equity of redemption, order rejecting claim preferred by—Suit by purchaser to establish title—Limitation.*—Where an unsuccessful claimant under s. 246 of the Civ. Pro. Code of 1859, or the corresponding sections of the Code of 1882, fails to assert his title to the property within one year from the date of the order against

Right of Suit—continued.

——18.—**Execution of Decree**—*continued.*

him in the summary proceedings, he is precluded from asserting it against the auction-purchaser, whether as plaintiff or as defendant. In the present suit, the plaintiff was held to rightly claim that the defendants, the purchasers of the equity of redemption from the mortgagor, could not rest their right to possession on their purchase, their title as such purchasers not having been established by a suit within one year from the date of the order disallowing their objection to the attachment of the property. Though such order was conclusive as against the defendant's claim to the equity of redemption, it was held that it would be contrary to equity, justice and good conscience were the Court to assist the plaintiff in obtaining possession without paying to the defendants what they might have paid to the mortgagee of the property for freeing the same from incumbrance and recovering possession. NILO PANDURANG v. RAMA PATLOJI, **9 B. 35.** [*Appr.*, 14 B 372; *R.*, 14 B. 222, 7 C.P. L.R. 3, 22 B. 640; *D.*, 20 B. 270, 1 C.W.N. 701.]

(5)—*Hindu law—Decree against father—Execution against family property—Sons' intervention and release of their shares—Suit to contest release.*—Where the property belonging to an undivided Hindu family was attached in execution of a decree against the father upon a hypothecation bond, but the shares of the sons were released on their intervention, a fresh suit is maintainable by the decree-holder against the sons to have it declared that their shares are also liable in execution of the decree against their father. RAMAKRISHNA v. NAMASIVAYA, **7 M. 295, F.B.** [*R.*, 16 M. 99, 7 M. 328; *D.*, 8 M. 376, 10 M. 117, 10 M. 316, 11 M. 408.]

(6)—*Act* X *of* 1859, *s.* 78—*Imperfect decree—Execution—When a wrongful act—Commission of wrongful act under decree of Court—Maintainability of action.*—The execution of an imperfect decree involves what is unlawful, or the doing of a wrong, only when the decree is incorrectly interpreted. An action could be maintained in a Civil Court where a wrongful act is committed under color of the decree of another Court. DALMIAH v. RADHA PERSHAD SINGH, **19 W.R. 188.**

(7)—*Execution—Cause of action*—Res judicata—*Part satisfaction.*—A co-sharer (A) of an estate paid the arrears of revenue due by the other co-sharer (B) to save the estate from sale and obtained a decree for the amount against him. The decree was transferred to C and the whole estate came subsequently into the possession of D. C got an order for execution against B's property and transferred the decree to the Calcutta High Court and proceeded against the properties in the possession of his (B) widow and son. An arrangement was entered into between C and D that other properties of B than his interest in the estate were to be proceeded against, in consideration of which E was granted a patni

Right of Suit—continued.

——18.—**Execution of Decree**—*continued.*

lease of a portion of the estate. In a suit by the widow and the son of B against C, D and E for the ascertainment of B's share in the estate and for a decree against D personally and against B's instalment in the estate, *held*, (1) the matter was *res judicata* as between the plaintiffs and C; (ii) The question of treating the patni to E as a part-payment could only be decided in execution-proceedings; (iii) The existence of the agreement between C, D and E did not entitle the plaintiffs to join them as co-defendants; and (iv) So far as D was concerned, the suit could be regarded only as trying to establish a lien on the estate, which, being out of Calcutta, the Court had no jurisdiction to try it. KRISTO MOHINEE DOSSEE v. KALIPROSONO GHOSE, **8 C. 402.** [*Appr.*, 14 C. 809, F.B.; *Cons.*, 11 B. 313; *R.*, 13 A. 195 =10 A.W.N. 228, 26 B. 437, 26 M. 686, F.B.]

(8)—*Execution of decree—Agreement to give time—Suit on agreement, whether maintainable.*—A suit is not maintainable on an agreement between a judgment-debtor and the decree-holder presented to the Court executing the decree, whereby the latter gives time to the former for the payment of the amount of the decree, and it is agreed that in default of payment of interest as therein stipulated, the whole amount should be realised by execution of the decree. The decree-holder's only remedy, on default occurring, is by execution of the decree. CHAMPAT RAI v PITAMBAR DAS, **6 A. 16 = A.W.N. 1883, 174.** [*F.*, 6 A. 228; *R.*, 12 A. 571; *D.*, 61 P L R. 1907=71 P.W.R. 1907= 29 P.R. 1908, F.B.]

(9)—*Decree—Uncertified payment of money out of Court—Suit, whether maintainable for recovering money so paid.*—A suit for the recovery of money paid to a judgment-creditor out of Court, and not certified, would be barred by s. 244 (c) Civ. Pro. Code, 1877, and also by the of the last para of s. 258 as amended by Act XII of 1879. PATANKAR v. DEVJI, **6 B. 146.** [*Overruled*, 11 B. 6, F.B; *Diss.*, 7 A. 124=4 A. W.N. 277, 17 C.P.L R. 61; *F.*, 10 B. 155; *R.*, 9 C. 788=12 C.L.R. 390, 10 C. 354, 10 B. 288, 11 B. 724, 32 B. 463; *D*, 15 C. 187.]

(10)—*Execution of decree—Disallowance of assignee's application for execution—Suit for decretal amount—Declaratory decree, Suit for.*—Where an application for execution of a decree by its transferee was rejected owing to the opposition of the judgment-debtor, and he was referred to a regular suit, and he instituted a suit for the amount of the decree, *held*, that the amount of the decree could only be recovered by execution, and not by separate suit; but that the plaintiff was entitled to a decree, declaring that the assignment of the decree to him was valid, that he had a right to execute it, and that the rejection of his application under s. 232 was improper. A suit for such relief must be maintainable, for there is no other remedy, as orders under s. 232 are not

Right of Suit—continued.

——18.—**Execution of Decree**—*continued.*

appealable. *Per Mahmood, J.*—Such a suit would be maintainable, because, the plaintiff never having been accepted on the record, as holder of the decree, the questions which were disposed of by the Court executing the decree, as between the assignee (plaintiff) and the judgment-debtor, cannot be regarded as questions within s. 244 of the Civ. Pro. Code. RAM BAKHSH v. PANNA LAL, **7 A. 457 = A.W.N. 1885, 72** [*F.*, 20 A. 539; *Cons.*, 16 A. 483; *R.*, 3 O.C. 32, 15 C P.L.R. 69.]

(11)—*Execution of decree—Civ. Pro. Code, 1877, s. 244—Excess money collected in execution—Separate suit.*—Excess money unduly collected, as due under a decree, is recoverable by application to the Court executing the decree and not by separate suit. PARTAP SINGH v. BENI RAM, **2 A. 61, F.B.**, (1 A. 388, *Diss.*, 1 B. L.R. A.C. 138, 4 B.L.R. A.C., 111, *D.*)

(12)—*Execution of decree—Fresh contract—Fresh suit.*—Where, by a petition put in Court, the decree-holder and the judgment-debtor come to an agreement by which the execution of the decree is to be postponed in consequence of arrangements made by the judgment-debtor for the payment of the decree, the decree alone can be executed on failure of payment, and a suit on the agreement would not lie. MAKUND RAM v. MAKUND RAM, **6 A. 228.** (3 A. 781, 4 A. 40. A.W.N. 1883, 93, 6 A. 16, *F.*) [*R.*, 12 A. 571.]

(13)—*Reversal of decree on appeal—Money taken under decree previous to reversal—Suit to recover whether maintainable—Question arising in execution—Act XXIII of 1861, s. 11.*—On the reversal of a decree on appeal, the present defendant became bound to restore the money received by him in execution of the decree and the present suit was for recovery of that money. *Held* that the suit was not maintainable. The terms of s. 11 distinctly show that such a matter is not to be the subject of a new suit, but must be enquired into by the Court passing the decree, as a question arising relating to the execution of such decree. NURSING CHURN SEIN v. BIDYADHUREE DOSSEE, **2 W.R. 275.** [*F.*, 4 B.L.R. App. 64; *R.*, 10 W.R. 130, 3 C. 720=2 C.L.R. 75.]

(14)—*Decree for enhancement—Decree for arrears of rent—Sale in execution of decree—Suit to set aside sale—Act X of 1859, s. 58.*—Suit to set aside a sale of an estate in execution on the allegation that plaintiff had no notice of a previous suit for arrears of rent by the defendant in which he had obtained a decree at an enhanced rate. The lower Courts were held to have rightly dismissed the suit. Plaintiff had his remedy under s. 58 of Act X of 1859 to apply to set aside the judgment within fifteen days after the process for enforcing the judgment was executed. Although the defendant was not in the position of a purchaser without notice of the proceedings in the suit, he had a perfectly valid title to the property he had

Right of Suit—continued.

——18.—**Execution of Decree**—*continued.*

bought. DOORGA PERSHAD PAL CHOWDHRY v. JOGESH PROKASH GUNGOPADHYA, **4 W.R. Act X, Rul. 38.**

(15)—*Instalment bond, empowering execution of bond as decree—Regular suit still maintainable.*—In this suit on an instalment bond to pay arrears of rent, it was contended that the terms of the bond gave a right to execute it as a decree, and, therefore, plaintiff had no power to bring a suit to recover its amount, but should have taken out execution under the terms of the bond which was equivalent to a decree. But it was *held* that, though it was open to the plaintiff to have done so and saved himself the trouble of a suit, yet the term in the bond was not sufficient to deprive the plaintiff of a separate right of action, should he elect to exercise it. RAMKOMUL CHOWDHRY v. MODHOO SOODUN PAUL CHOWDHRY, **4 W.R. 81.**

(16)—*Money realised in execution of decree—Decree set aside—Recovery of money—Suit—Execution.*—Money realised in execution of a decree may be recovered by suit, if the decree is set aside as regards the party seeking to recover. Where the party seeking to recover money realized under a decree which is set aside is not a party to the original decree, he is not restricted to the Court executing the decree, but is at liberty to seek his remedy in a separate suit. SHEO COOMAREE DABEE v. SHITARAM HAZRA, **21 W.R. 346.**

(17)—*Decree for possession—Execution—Duty of decree-holder—Limitation.*—When a plaintiff obtains a decree for possession of immoveable property, it lies upon him to take steps to obtain actual possession, and to assert that possession by taking rents or the like; and if he omits to do so, and suffers twelve years to elapse without any actual possession, he loses the benefit of his previous decree and is not entitled to maintain a suit. SREEMUTTY NUBO DOORGA v. SREEMUTTY SEETA MONEE, **23 W.R. 407.** [*R.*, 24 W.R. 418.]

(18)—Zuripeshgee *mortgage—Some of mortgaged properties sold for Government revenue—Mortgagee in possession of the remaining lands—Suit for mortgage money.*—H executed a *Zuripeshgee* deed in favour of N, and one of the conditions of the deed was that, should H contravene any of the terms of it, N would be entitled to recover the amount advanced with interest from H, or by the sale of the mortgaged properties. Subsequently, H executed a deed of sale in favour of N and R in respect of several properties including those mentioned in the *Zuri-peshgee* deed. Notwithstanding this sale, H again sold the same properties to B. Thereupon N and R brought a suit to have their rights upheld against B. That suit was eventually decided according to the award of certain arbitrators, that the properties were to be divided in equal shares between R and B. Then R paid off amicably his share of the debt to N; but B not having done so, but on the contrary having dispossessed N, the latter brought this suit against H and B to recover one half of the principal sum advanced with interest. B contended that the suit was not maintainable on the ground that the plaintiff while in possession of all the mouzah mortgaged, did not pay the Government revenue of some of the mouzahs and allowed them to be sold for arrears of Government revenue and that he was still in possession of the remaining mouzahs. *Held* that if it be found that the mouzahs when they were sold for arrears of Government revenue, were in the possession of B, and it was on account of his laches that they were so sold, and if it be further found that the plaintiff was still in possession of the remaining mouzahs, then the plaintiff would be entitled to maintain this action notwithstanding his possession. BISHEN DYAL SINGH v. HURUCK NARAIN SINGH, **24 W.R. 17.**

(19)—*Auction sale—Suit to set aside.*—A suit to set aside an auction-sale in execution of decree is maintainable. RAM PRASAD v. NAFAILI KUARI, **A.W.N. 1882, 5.**

(20)—*Adjustment of decree out of Court, suit upon—Civ. Pro. Code,* 1882, *ss.* 257-*A. and* 258.—Since the amendment made in s. 258 of the Civ. Pro. Code, 1882, by s. 27 of Act VII of 1888, a private agreement made out of Court in satisfaction or adjustment of a decree without the sanction of the Court which made the decree, may be recognised by a Civil Court except when executing the decree. And therefore, a suit based upon such payment or adjustment is maintainable. And, the concluding clause of s. 258 of the Civ. Pro. Code, 1882, as amended, has no direct bearing on s. 257-A, as it relates to a different subject-matter. In the present case, plaintiff held a decree for Rs. 315 against the defendant, and the latter paid a portion thereof to the plaintiff and for the balance executed a bond in plaintiff's favour. These transactions took place without the knowledge of the Court. The present suit was by the plaintiff for recovery from the defendant of the amount due under the bond executed in adjustment of the said decree. The defendant contended that the agreement to pay the amount of the decree at a deferred date was void for want of sanction of the Court making the decree according to, s. 257-A of the Civ. Pro. Code, 1882. *Held* on a reference to the High Court, that the plaintiff was entitled to maintain the suit, as such adjustment cannot be recognised under s. 258 of Civ. Pro. Code, 1882, only in executing the decree, and not for other purposes. SWAMI ROW NARAYAN DESHPANDE v. KASHI NATH KRISHNA MUTALIK DESAI, **15 B. 419.** [*F.*, 16 B. 589; *Cons.*, 21 C. 437, 25 B. 252; *R.*, 19 B. 204, 18 A. 479, U.B.R. 1897—1901, Vol. II, 252, 20 P.L.R. 1900=16 P.R. 1900.]

(21)—*Right of suit—Decree unsatisfied by execution.*—In a suit to recover Rs. 177 due on

Right of Suit—continued.

——18.—Execution of Decree—*continued.*

a decree of the Small Cause Court, which decree had been obtained by the plaintiff against the defendant as executor of the estate of one R, deceased, the defendant had appeared in the Small Cause Court and denied assets of the deceased, and the decree was wholly unsatisfied as appeared from the certificate of the first Judge. The plaintiff proved by the evidence of the defendant himself that he was in possession of immoveable property of the deceased out of which the decree could be satisfied. The plaint prayed that the defendant as executor might be ordered to pay the amount with interest and costs, and if he should deny assets, then, for administration of the estate of the deceased. The defendant did not enter appearance. The Court granted a decree for the amount with interest and costs on scale No. 1, in default of payment for six months from date of decree, the estate to be administered in due course. MODOOSOODUN PAUL v. DOYAL CHUND MULLICK, **10 B.L.R. App. 35.**

(22)—*Execution — Agreement to pay larger sum by instalments— Right of suit.*—Where, after a decree had been passed, the decree-holder and the judgment-debtor came to some arrangement, under which it was agreed that the amount of the decree should be paid in instalments at a very large rate of interest from year to year, for eight years swelling the amount of decree from Rs. 5,500 to nearly 20,000, and subsequently about Rs. 15,000 had been paid under the arrangement, and the decree-holder took out execution for the balance, it was held that, under the circumstances, it would not be proper in execution of the decree to direct payment by the judgment debtor of a sum beyond what was stated in the decree. KANHYALAL PUNDIT v COLLECTOR OF CUTTACK, **14 B. L.R. 291, Note=16 W.R. 275.**

(23)—*Execution of decree — Agreement for payment of decree amount with interest by instalments— Agreement acted upon—Objection to execution.*—Where an agreement was come to between a decree-holder and a judgment-debtor that the amount payable under the decree should be paid by instalments with interest, and the parties had treated and acted upon the *kist-bundee* as if it had become part of the decree; and they moved the Court to credit the payment which was made as a satisfaction of the instalments due according to it, *held* that, under the circumstances, the judgment-debtor was precluded from saying that the judgment-creditor was bound to execute the original decree, and, if he could not execute, that he was bound to bring a regular suit upon the *kistbundee.* The decree-holder was entitled to take proceedings upon the *kistbundee* as if it were a part of the original decree. DINONATH SEN v. GURUCHURN PAL, **14 B.L.R. 287=21 W.R. 310.** [*D.*, 23 W.R 129, 24 W.R. 205.]

(24)—*Execution of a decree—Symbolical possession — Second suit for actual possession. maintainability of.* — Where a person has

Right of Suit—continued.

——18.—Execution of Decree—*continued.*

obtained only symbolical possession in execution of a decree previously obtained by him, there is nothing in the law precluding him from maintaining a fresh suit to obtain real possession from the same defendants, and, in such a case, the Court is not bound to take into consideration the averments that the plaintiff might have made in his plaint to the effect that he was seeking to recover the possession, which the original decree in his favour had awarded him. SHANKAR v. NARSINGRAV, **22 B. 667.** [*F.*, 25 B. 358 ; *R.*, 25 B. 275, 16 C.P.L.R. 109, 17 M.L.J. 598.]

(25)—*Subsequent* Kistbundee *for payment—Act* VIII *of* 1859.—Where the judgment-debtor executed a *kistbundee* in favour of the decree-holder for the money due under the decree, as well as for other sums of money due (but not under the decree) and pledged certain properties, and the *kistbundee* was not incorporated into the decree and made part and parcel of it, there is no procedure under Act VIII of 1859 amounting to a warrant of attorney under the English law, according to which execution may be taken out upon the *kistbundee* without first resorting to a regular suit. MADHUB CHUNDER DUNDPUT v. MADHUB LAL KHAN, **14 B.L.R. 288, Note=15 W.R. 542.**

(26)—*Payment of decree amount out of Court —Payment not admitted owing to its not having been certified—Right to recover money paid.*—There is no prohibition against a suit for the recovery of money which a judgment-debtor has paid to the decree holder out of Court, but which could not be admitted by the executing Court owing to the payment not having been certified. ATMARAM PATEL v. KISAN KIRAD, **17 C.P.L.R. 60** (3 A. 538, 1 B. 6, 10 C. 354, 21 M. 409, *F.*)

(27)—*Uncertified payment towards decree—Suit to recover money paid, not precluded by s. 258, Civ. Pro. Code (Act* XIV *of* 1882).—The question referred to the Full Bench in this case was substantially whether the change in the language of s. 258 of the Civ. Pro. Code, which was made by Act XII of 1879, the language of which is repeated by the present Code, takes away the jurisdiction of the Court trying a subsequent suit, to try the question whether a decree-holder has received any payment from a judgment-debtor, intended to be applied in satisfaction of the decree, but which he failed to certify to the Court executing the decree, in consequence of which the judgment-debtor was not given credit for the payment in the execution proceedings. *Held*, that the last clause of s. 258, Civ. Pro. Code, is no bar to the maintenance of a suit by a judgment-debtor to recover from the decree-holder monies paid by the former to the latter out of Court, in order to be applied in discharge of the decree and that the words "any Court" are to be construed as restricted to the Court executing the decree and the Courts having jurisdiction

Right of Suit—continued.

—18.—**Execution of Decree**—*continued.*

over the execution proceedings as such. MULA MAL v. RAHMAN, **83 P.R. 1884, F B.** (47 P.R. 1881, *Overruled*; 11 P.R. 1883, 66 P.R. 1877, *R*) [*R.*, 90 P.R. 1909, 7 P.R. 1885 (Cr.), 79 P.R. 1892.]

(28)—*Payment out of Court in satisfaction of decree—Payment not certified to Court—Suit to recover money paid—Civ. Pro. Code (Act X of 1887), s. 258.*—A judgment-debtor cannot sue to recover money alleged to have been paid by him out of Court in satisfaction of a decree on the ground that the judgment creditor has refused to credit the amount towards the payment of the decree. S. 258, Civ. Pro. Code, as amended by Act XII of 1879, provides that payment out of Court shall not be recognised by *any* Court (not merely the Court executing the decree), unless it has been certified. The only remedy of the judgment-debtor is to apply under s. 258 within 20 days to have his payment certified. ALA BAKSH v. MUHAMMD SHAH, **11 P.R. 1883.** (47 P.R. 1881, *F.*) [*Overruled*, 83 P.R. 1884.]

(29)—*Decree not executed—Execution barred by limitation—Second suit for same relief not maintainable.*—A decree for a share in an occupancy tenure was obtained against the present defendant by the plaintiff which he never executed, and, admittedly, the defendant had not allowed him to take possession of the land. Plaintiff instituted the present second suit after the period within which the previous decree could be executed had expired: and it was held that, since the decree was unconditional and gave a relief which the decree-holder could enforce by taking out execution, if the judgment-debtor did not give up possession out of Court, the decree-holder was bound to follow the procedure prescribed by law to enforce the right created by the suit, and could not again proceed by action. DASONDHA SINGH v. WARIAM SINGH, **78 P R. 1882.** [*R.*, 91 P.R. 1883.]

(30)—*Act IV of 1872, s. 29—Insolvency—Breach by insolvent of conditions of discharge—Execution Court whether can enter into question of breach—Remedy of creditor.*—It is not open to a Court in execution, with a view of reviving the execution of a decree stayed during the proceedings in the insolvency of the judgment-debtor, to enter into and decide the question whether the judgment-debtor broke the conditions of his discharge granted by the Insolvent Court under s. 29 of Act IV of 1872. An agreement signed by an insolvent under s. 29 of Act IV of 1872 must be viewed in the light of a new contract, and if the insolvent has broken the conditions of his agreement, the remedy of the creditors lies in the Civil Court by a regular suit on the breach of contract. AMI CHAND v. F. WILLIAMS, **44 P.R. 1877.**

(31)—*Act XXIII of 1861, s. 11—Question arising in execution between parties to suit, to be determined by executing Court and not by separate suit—Appealability of order passed in execution.*—Where the question raised in a subsequent suit happens to be identical with that which occurred in the course of the former suit, it constitutes "a question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree," and it is, therefore, by s.11 of Act XXIII of 1861, "a question to be determined by the Court executing the decree, and not by separate suit," and the order passed by the Court in execution is open to appeal so that a second suit relating to the matter is not maintainable. MEHTAL SINGH v. BELA SINGH, **32 P.R. 1879.** [*R.*, 38 P.R 1898.]

(32)—*Decree-holder attaching debt due to judgment-debtor—Suit to realize decree-amount out of attached debt, if maintainable.*—Where the plaintiff a decree-holder, in execution of his decree against his judgment-debtor, attached a debt alleged to be due to the judgment-debtor from a third person, and without bringing the debt to sale nor getting a Receiver appointed by the Court to realize the debt sought to recover the amount of his decree out of the attached debt by filing a suit against such third person, *held* that the suit was not maintainable. TRIBENI SAHAI v. RAMAN LAL, **11 P.R. 1880.**

(33)—*Decree—Absence of provision regarding interest—Subsequent arrangement for payment of interest—Whether valid.*—A decree having been passed without interest, an arrangement was entered into between the parties subsequently, by which it was provided that, in default of regular payment of the instalments fixed, the decree-holder might recover the whole amount due with interest. The judgment-debtor having failed to fulfil his engagements, the decree-holder applied to execute his decree with interest. *Held* that, as the arrangement was not incorporated in the decree, nor was it recognized by the Court as the mode in which the decree was to be satisfied, the decree holder could not claim to recover his debt with interest by summary proceedings in execution of his decree, and that he must bring a separate suit if he wanted to recover the whole amount with interest. SIRDAR AMIR SINGH v. JOWAHIR SINGH, **48 P R. 1880.** [*Appl.*, 190 P. R. 1882; *R.*, 29 P.R 1908, F.B.=61 P.L.R. 1907.]

(34)—*Execution of decree—Claim not adjudicated — Regular suit to establish right —Act VIII of 1859, s. 246—Limitation.* — Where the claim preferred by an objector in execution of decree has not been adjudicated upon by the Court executing the decree, and no opportunity has been given to the objector to produce evidence in support of his claim, the limitation of one year prescribed for a suit to set aside an order under s. 246, Civ. Pro. Code, does not apply, the order passed not being such an order as is contemplated by that section. MUSSAMUT RAM KOUR v. RAI BHAG SINGH, **73 P.R. 1880.**

Right of Suit—continued.

——18.—Execution of Decree—*concluded.*

See ACT XXIII OF 1861, s. 11, 5 B. 382.

See BENAMI TRANSACTION — MISCELLANEOUS, 6 W.R. Mis. 122.

See CIV. PRO. CODE, 1877, 6 M. 41.

See CIV. PRO. CODE, 1882, s. 257, 18 A. 479 =A.W.N. 1896, 160.

Exonerated defendant in former suit, whether could maintain suit to recover his property taken in execution—*See* CIV. PRO. CODE, 1908, s. 47, 23 M. 361=10 M.L.J. 123, F.B.

See CIV. PRO. CODE, 1908, s. 47, O. XXI, rr. 58 to 63, 15 C. 437.

See CIV. PRO. CODE, 1908, O. XXI, r. 63, 7 C. 608=9 C.L.R. 8.

See SALE—SALE IN EXECUTION OF DECREE, MISCELLANEOUS, 13 C. 326.

——19.—Fresh Suits.

(1)—*Suit for possession by auction-purchaser, when maintainable—Civ. Pro. Code,* 1882, s. 318.—An auction-purchaser can bring a suit to obtain possession of land, the subject-matter of his purchase, when it is shown that an unsuccessful attempt was made to obtain possession in execution proceedings. In 10 C. L. R. 258, the Court did not intend to lay down that no such suit could be under any circumstances maintainable, but that, so long as the means provided by s. 318 are open to a purchaser, he is bound to have recourse to that section, rather than bring a fresh suit. ISWAR PERSHAD GURGO v. JAI NARAIN GIRI, **12 C. 169.** [*Cons.*, 14 C. 644.]

(2)—*Application for possession by a purchaser from auction-purchaser—Subsequent suit for possession.*—An auction-purchaser is not confined to the remedies provided by ss.318, 319, Civ. Pro. Code, but he may sue without proceeding under those sections at all, or if the possession he obtained under them prove to be infructuous. SERU MOHUN BANIA v. BHAGOBAN DIN PANDEY, **9 C 602** [*F.*, 12 C. 169, 30 A. 72=5 A.L.J. 20 =A.W.N. 1908, 12; *Cons.*, 14 C. 644; *R.*, 11 C. 93, 10 M. 53, 15 M. 331, 4 A.L.J. 434=29 A. 463=A.W.N. 1907, 131; *D.*, 31 A. 82=6 A.L.J. 71=5 M.L.T. 185.]

(3)—*Act* XXII *of* 1872—*Dismissal of appeal—Original Court not competent to receive plaint—Institution of fresh suit before Act* XXII *of* 1872, *legality of.*—No provision of Act XXII of 1872 sets aside decrees passed by appellate Courts before the date on which it came into operation, or restores decrees of the Court of first instance which have been annulled by the appellate Court; nor is there any provision which debars the plaintiff whose suit had been dismissed on the ground of its institution in a Court incompetent to receive it, from re-instituting his suit in a competent Court. CHOONEE LALL v. KUDHIRA, **6 N.W.P. 34.**

Right of Suit—continued.

——19.—Fresh Suits—*continued.*

(4)—*Suit on decree capable of execution—Maintainability of—Execution, barred by limitation—Fresh suit.*—Where the object of the plaintiff in a suit was to enforce the title that had accrued to him under a previous decree and to obtain possession which also had been awarded to him by that decree, *held* by a majority of the Court that the suit would not lie as what a decree-holder could enforce by execution in the ordinary way after obtaining his decree he could not recover in a subsequent suit founded on that decree. Where a decree is merely declaratory and does not require to be carried into effect by process of execution, the right thereby declared and ascertained exists independently of any process for enforcing it. But when the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to elapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought by execution. *Turner, C.J.*, held that the plaintiff by his failure to execute his decree did not thereby lose his right although he may be barred of his remedy under the decree, and, as a new cause of action accrued to the plaintiff by reason of the continued trespass of the defendant, it could not be said that the suit brought in respect of that cause of action was a suit for the determination of a question arising between the parties relating to the execution of the former decree within the meaning of s. 11 of Act XXIII of 1861. RAM JUS RAE v. RAMNARAIN, **2 N.W.P. 382.**

(5)—Ex parte *decree—Execution sale—Ss.* 108, 311, *Civ. Pro. Code,* 1882, *rejection of applications under—Effect—Fresh suit to set aside* ex parte *decree on ground of fraud.*—The rejection of applications to set aside an *ex parte* decree, on the ground of insufficiency of service under s. 108, Civ. Pro. Code, and sale in execution of such decree, on the ground of irregularity under s. 311, Civ. Pro. Code, relates only to specific matters in that suit. So a separate suit to set aside the *ex parte* decree, on the ground that the whole suit was fraudulent, lies, notwithstanding that the plaintiff has been unsuccessful in his applications under ss. 108 and 311, Civ. Pro. Code, and has preferred no appeal against the order of refusal passed on those applications. KHAGENDRA NATH MAHATA v. PRAN NATH ROY, **29 C. 395, P.C.=29 I.A. 99 =6 C.W.N. 473=4 Bom. L.R. 363=8 Sar. 266.** (28 C. 475, *R.*) [*F.*, 9 C.L.J. 367=13 C.W.N. 493; *R.*, 34 C. 241=5 C.L.J. 385; *D.*, 29 A. 212 =4 A.L.J. 51=A.W.N. 1907, 31, 29 A.608=4 A.L.J. 668=A.W.N. 1907, 191, 4 A.L.J. 233, Note.]

(6)—*Suit originally brought against one defendant—Defendant found not liable—Addition of another person as defendant—Procedure whether legal—Government, liability of, for acts done by its servants.*—In a suit against the Secretary of State for India for recovery of money alleged to

Right of Suit—continued.

——19.—**Fresh Suits**—*concluded.*

have been advanced by him on the credit of Government, the Court, after finding that the defendant was not liable, permitted the plaintiff to make H a defendant and the plaint to be amended. *Held* that the Court had no power, after virtually deciding the suit, to permit the plaintiff to make a new defendant against whom he had a different cause of action, and that the plaintiff should have been referred to a new suit. Because a servant of Government borrows money and applies it to the purposes of Government, it does not necessarily follow that the lender can maintain a claim against Government. In this respect, there is no difference between the Government and a private individual. To make either responsible for the acts of an agent, proof must be afforded that the agent was acting within the scope of his authority. SETH DHUNRAJ v. MAJOR J. C. HANKIN, **1 N.W.P. 204.**

(7)—*Fresh suits—Delivery of possession in execution—Subsequent dispossession by judgment-debtor—Right of decree-holder to bring fresh suit.*—Where the decree-holder in execution of a decree for possession obtained delivery of the property but was subsequently dispossessed by the judgment-debtor, he could maintain a suit for possession and was not bound to execute the decree again, inasmuch as the unlawful possession of the judgment-debtor gave him a new cause of action. BHAIRAO PRASAD v. SANGRAM SINGH, **1 C.P.L.R. 143.**

Dismissal or withdrawal of suit—Right to bring fresh suit—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 14 C.P.L.R. 104.

See RES JUDICATA—GENERAL, 1 N.W.P. 154.

——20.—**Injuries by Representatives of Deceased.**

(1)—*Act* XII *of* 1855—*Wrong committed by deceased person.*—Wrongs committed by a deceased person survive to his heirs. Act XII of 1855 relates only to wrongs which do not survive to the representatives of a deceased person. SREEMUTTY CHUNDER MONEE DASSEE v. SANTO MONEE DASSEE, **1 W.R. 251.** [*R.*, 4 B.L.R. F.B., 134=13 W.R., F.B., 21.]

(2)—*Act* XII *of* 1855, *right of action surviving against representatives of deceased, not within scope of.*—Act XII of 1855 relates to suits for wrongs which, according to the law then in force, did not survive to or against executors, administrators or representatives. In the present case, however, it was clear that the wrong complained of was not of such a nature that a right of action in respect of it would not survive against the legal representatives of the wrongdoer. Plaintiffs alleged that the deceased, who was the agent of the Official Assignee of the Insolvent Debtors Court at Calcutta, and whom the defendants represented, had misappropriated a large sum of money and sued to

Right of Suit—continued.

——20.—**Injuries by Representatives of Deceased**—*concluded.*

recover such amount; and, inasmuch as, by the alleged wrong, property was acquired which benefited the estate of the deceased, the right of action was not such as expired on the death of the wrong-doer, but was such as could survive against his representatives, and the lower Court was wrong in having rejected the claim as barred by Act XII of 1855. NUJUF ALI v. PATTERSON, **2 N.W.P. 103.**

(3)—*Act* XII *of* 1855, *s.* 1—*Adoption by Hindu widow—Right of adopted son to maintain suit under Act—Son adopted by widow, if entitled to portion of damages awarded—Measures of damages in suits under Act* XII *of* 1855, *mode of assessing discussed.*—Where no probate, or letters of administration or certificate of heirship was granted in respect of the estate of a person, who met his death in consequence of the negligence and default of the defendant Railway Co., the person adopted on his death by his widow was entitled to maintain a suit for compensation under the Act in the Presidency of Bombay inasmuch as, under the law prevailing in that Presidency, an adoption by a widow is valid. [*R.*, 28 M. 479=15 M.L.J. 363.] A posthumously adopted son is not entitled to any portion of the damages awarded in such a suit. It could not have been the intention of the Legislature to confer upon the widow of a deceased Hindu the power of imposing upon persons sued under the Act a greater liability than existed at the death of her husband. VINAYAK RAGHUNATH v. THE GREAT INDIAN PENINSULAR RAILWAY CO., **7 B.H. C.O.C. 113.** [*R.*, 4 M.L.T. 238.]

——21.—**Injuries to Enjoyment of Property.**

(1)—*Suit for removal of trees—Contingent damage—Present cause of action.*—A suit is not maintainable for the removal of trees planted on defendant's land adjoining, on the ground that they had been planted so near plaintiff's land that when they grow up they would injure his crops, as the plaintiff could not have a cause of action until his enjoyment of his own land is directly and immediately interfered with by the growth of the trees, and the defendant would be entitled to have them there so long as he does not thereby injure the plaintiff. RAM LAL v. DALGANJAN, **5 A. 369=A. W.N. 1883, 58.**

(2)—*Interference by one mortgagee with another—Opening of shut-up door in common party wall—Duty of mortgagee—S.* 76, *Transfer of Property Act.*—A mortgagee has a possessory title in the mortgaged premises and, on the strength of such title, he has the right to maintain an action with the view to restrain others from trespassing upon it. The re-opening by a mortgagee of a door of communication between the portion of the house mortgaged to him and the portion mortgaged to another, which door had been closed before the mortgage, would constitute an interference with his enjoyment and

***Right of Suit*—continued.**

——21.—Injuries to Enjoyment of Property —*concluded.*

an act of trespass which the latter could proceed to prevent. He could maintain an action, not only for the above reasons, but also on the ground that, as a mortgagee in possession, it was his duty to preserve the mortgaged property from destruction. LACHMI NARAIN v. JETHU MAL, **16 A. 386 = A.W.N. 1894, 129.**

(3)—*Superior and lower riparian owners—Embankment erected by the superior owner for self-protection—Loss to the lower owner—Right of suit.*—Where a superior riparian owner fortified and raised the bank of a jungle stream to protect his lands from being flooded, and thereby caused loss to the lower riparian owner, there being no reasonable means of protecting his lands without injuring his neighbour lower down, he could not be sued for damages by the lower riparian owner, as no actionable wrong can be said to have been committed. GOPAL REDDI v. CHENNA REDDI, **18 M. 158 = 4 M. L J. 244.** [*D*, 27 M. 409 = 14 M.L J. 162, 28 M. 15 ; 1 N.L.R. 182.]

(4)—*Obstruction to light and air by trespasser on adjoining land—Easement by prescription not necessary in plaintiff.*—Where the defendant has, by constructing a balcony on land next to the plaintiff's house, interfered with a balcony belonging to the latter and with the light and air of one of his windows, if such defendant is a mere trespasser, it is not necessary, for the plaintiff to maintain an action, to establish that he has acquired an easement to the light and air in question by prescription. Where, however, the defendant is not a mere trespasser or wrong doer, but is himself the owner of the adjoining land or has built with the permission of such owner, the plaintiff will be entitled to the relief sued for only where he has acquired an easement by prescription, as against the defendant or against the owner who has permitted the defendant to build. DHUMANKHAN v. MUHAMMAD KHAN, **19 A. 153 = A.W.N. 1897, 22.** (5 M.L.J. 25, *D*)

See PARTIES TO SUIT—SUITS BY REPRESENTATIVES OF A CLASS, 18 B. 699.

——22.—Judicial Officers, Suits against.

(1)—*Obstruction—Removal by Magistrate—Liability of Magistrate—Right of suit against Government.*—The plaintiff was building a *chabootra* and obstructing the thoroughfare. The Magistrate ordered the plaintiff to remove the *chabootra*, and the order was carried into effect. The plaintiff then sued the Government to recover possession of the ground covered by the *chabootra*. *Held* that the Government was in no way liable to be sued in respect of such matters even assuming that the Magistrate exceeded his jurisdiction. BAGAISHREE DYAL v. GOVERNMENT, **2 Agra 81.**

(2)—*Jurisdiction of Civil Court—Order of Magistrate for removal of building from public place—Suit to establish right—Maintainability—*

***Right of Suit*—continued.**

——22.—Judicial Officers, Suits against—*ctd.*

ss. 308 *and* 311, *Crim. Pro. Code*—The provisions of the last para of s. 311, Crim. Pro. Code, have no further effect than to bar a suit to prevent a Magistrate from carrying out an order made under s 308, or a suit for damages on account of anything done by the Magistrate or any other person in carrying out such order in the manner provided by law. It does not prevent a person against whom such an order has been carried into effect, from instituting a suit to prove that land declared by the Magistrate to be public thoroughfare is his private property. LALJI UKHELA v. JOWBA DOWBA AND THE COLLECTOR AND MAGISTRATE OF KHANDESH, **8 B.H.C.A.C. 94** [*Appr.*, 15 C. 460]

(3)—*Cause of action—Entry in Revenue register—Title—Action against Collector.*—The mere fact that the Collector has entered in the Revenue books the name of one parcener in a certain property as the occupant or owenr thereof, cannot give the plaintiff a cause of action to sue the Collector. The Collector's book is kept for purposes of revenue and not for purposes of title. But if the Collector issued species of injunction against the plaintiff drawing his share of the profits, then an action may be maintained against the Collector. THE COLLECTOR OF POONA v. BHAVANRAV BALKRISHNA, **10 B H C. 192.** [10 B.H C. 187, *F.*) [*F.*, 13 B. 75 ; *R*, 10 B.H.C. 194, 5 Bom. L.R. 956, 6 Bom. L.R. 983.]

(4)—*Pleadings—Defect—Suit for damages—Malis—Jurisdiction — Cause of action—Act XXVII of* 1850—*Actions against Judicial officers —Extent of liability — Protection — Wrongful seizure of property.*—A suit was instituted for recovery of damages, against an Assistant Judge for "knowingly and maliciously issuing illegal orders." The plaint alleged no act on the part of the Assistant Judge by which he transgressed his jurisdiction, though it ascribed evil and unworthy motives to him. *Held*, that the plaint was defective and must not be received by the Court of first instance. If the plaintiff really meant to say that the Assistant Judge had acted without jurisdiction and without reasonable grounds for supposing that he had jurisdiction, then he should have so stated it in the plaint. The plaint as framed was held not to disclose any cause of action. A Judge exercising the functions of adjudication and those immediately ancillary to it, represents the State. He is appointed by it, and while acting within the province assigned to him, is responsible to the State alone for any abuse of the powers it has assigned to him. The State may prosecute and punish him for a gross dereliction of duty, at the same time that it will not allow him, so long as he sits as its representative, to be harassed by actions brought by disappointed suitors to whom, except mediately through it, he is under no legal obligation. [*R.*, L.B.R. (1872-1892), 83.] A suit to recover damages caused by wrongful deprivation of

Right of Suit—continued.

—22.—**Judicial Officers, Suits against**—*cld.*

property is governed by the six years rule under s. 1, cl. 16 of Act XIV of 1859, and not by the one year rule under cl. 2, s. 1, of the same Act. PRAHLAD MAHARUDRA v. A.C. WATT, **10 B. H C. 346.**

(5)—*Cause of action—Suit against Collector—Entry in Revenue register—Parties to suit Jursidiction—Objection—Appeal.*—It must be taken as the settled doctrine of the Court that the entry by a Collector of a particular person's name as "occupant" in the revenue books, kept for the purpose of determining to whom the duty or the right attaches of settling for the Government revenue, affords, however mistaken, no ground for an action against the Collector. But if the Collector proceeds further and interferes with the plaintiff's rights by an order placing him in an appreciably worse legal position than that to which he is entitled, the Collector at once becomes liable to an action. A suit was instituted against a Collector and another person and a decree against them was passed. The Collector did not appeal from the decree. The other defendant appealed against it. He contended that the plaint disclosed no cause of action against the Collector and therefore the District Court had no jurisdiction to entertain the suit. *Held* that the appellant could take the objection as to jurisdiction, because it was a ground common to all the parties affected by the judgment, even though the Collector did not prefer an appeal. SANGAPPA MALAPA v. BHIMANGOWDA MARIAPA, **10 B.H.C. 194.**

——23—**Landlord and Tenant, Suits concerning.**

See LANDLORD AND TENANT.

(1)—*Receiver duly appointed by Court—Right to maintain suits for rent due—Interest—Right to property and right to rent, inseparable.*—Where a muchalka is executed by the tenant to a person who was then considered to be the owner of the land and afterwards, owing to disputes about the ownership, a receiver is appointed by the Court to represent the rightful owners of the estate, the receiver can maintain a suit against the tenants to recover the fair rent payable for the use and occupation of the land under the muchalka, which is good evidence of what is the fair amount of rent. But the right of suit does not extend to recover anything as interest on the rent due. When a muchalka was executed by a tenant to a person who then claimed to be the owner of the land but who has since been held to possess no title to the property, such a person could not afterwards maintain an action for the non-payment of the rent of a portion of such property due according to the terms of the muchalka. The right to the property and the right to the rents payable by the tenants occupying portions of it are inseparable. C.L. MORRIS, v. MUTHUSAMI PILLAY, **6 M.H.C. 363.**

Right of Suit—continued.

——23.—**Landlord and Tenant, Suits concerning**—*continued.*

(2)—*Arrears of rent paid to Government under certificate, suit to recover—Maintainability.*—Where arrears of rent of a zemindari, due by the plaintiff to the zemindar, were paid, on the issue of a certificate, under s. 19 of Act VII of 1868 (B.C.), by the Settlement Officer, who had entered into khas possession after cancelling the original lease to such officer after objection and waiver by the plaintiff, he could not sue subsequently for the recovery of the amount on the ground that it was really payable to the zemindar and not to the Government. *Quaere.*—Whether, if the plaintiff be compelled to pay the amount again to the zemindar, it would be recoverable by suit BEPIN BEHARI SINGH v. THE GOVERNMENT, **5 C. 325.**

(3)—*Landlord and tenant, suit concerning—Suit for excess payment—Omission to make deductions from rent.*—Where a person has a right to make deductions of rent payable to the surburakar under his kabuliat on account of rent due from raiyats or others, and pays his full rent without making any deduction, his not doing so gives him no right of action against the zemindar or his representatives. CHUNDER SEEKUR ROY v. GHOLAM SHURREEF *alias* LOOPAN MEEAH, **1 Ind. Jur., N.S. 146.**

(4)—*Suit for rents collected by unauthorised person without title—Cause of action.*—Where A without title has collected rents due to B, B may sue A for the recovery from him of the rents so received. RAM CHURN BANERJEE v. MUDDUN MOHUN TEWAREE, **Marsh 269=2 Hay, 198.**

(5)—*Rent—Excess payment to landlord—Suit against payee—Right of suit.*—Where A, a landlord, has received money from his tenants which B has a right to receive, B is entitled to recover those moneys directly from A by a civil suit, and he need not sue the tenants who made the payments. GOOROO CHURN NAG v GOBIND CHUNDER GOOHO, **24 W.R. 352.**

(6)—*Patta—Right to enforce—Regular suit.*—A suit to enforce the acceptance of a patta is maintainable on the regular side. KARIM v. MUHAMMAD KADAR, **2 M. 89.** [*F.*, 13 M. 361, 14 M. 441, 12 M. 134.]

(7)—*Actionable wrong—Dissuading tenants from paying rent.*—It is no actionable claim to dissuade the tenants from paying rent to their landlord. EDWARD DALGLEISH v. JEEBAN MAHTO, **25 W.R. 230.**

(8)—*Suit for arrears of rent—Exemption from rent—Validity of.*—A suit to recover the "balance of two years' rent with interest" is not the appropriate mode for testing the validity of exemption claimed by the defendant by virtue of some rent-free grant, which could be settled only by a suit for the assessment of the land. HUREE CHUND v. BRIJ KOMAR SINGH, **1 Agra, Rev. 35.**

Right of Suit—continued.

— 23.—**Landlord and Tenant, Suits concerning**—*continued.*

(9)—*Tenant refusing to resort to well-irrigation — Suit to eject — Suit for enhancement of rent — Tenancy Act*, ss. 11, 19.— Plaintiff claimed to eject the defendant on the ground that he refused to resort to cultivation by well-irrigation and this entitled the plaintiff to cause his ejectment in accordance with a previous order of the Financial Commissioner that, if the tenant should leave the land waste, the landlord might at his option give over the land to other cultivators. It was held *per Boulnois* and *Lindsay, JJ.* (*Campbell, J.*, dissenting) that the suit was not maintainable either on the Financial Commissioner's order, or under the terms of s. 19, Act XXVIII of 1868, and that the plaintiff must therefore fail. S. 19 of the Tenancy Act restricts the grounds upon which a tenant with rights of occupancy may be ejected, and a decree for ejection can only be made as therein laid down and the proper course for the landlord would be to sue his tenant for enhanced rent under grounds 2 and 3 of s. 11 of the Act. JODAR v. SODHI INDAR SINGH, **54 P.R. 1875.**

(9-*a*)—*Enhancement, notice of—Suit to set aside notice of enhancement—Act X of* 1859, ss. 13 *and* 14.—Where notice of enhancement of rent has been served under s. 13, Act X of 1859, upon a raiyat who has no right of occupancy, and whose rent has not been fixed by agreement with his landlord, such raiyat cannot maintain a suit to set aside the notice of enhancement. His remedy, in case the rent is excessive, is under s. 14. MOHEEM v RAHEEMOTOOLLAH, **Marsh 341=2 Hay, 433.**

(10)—*Unassessed jummai land, suit for rent relating to, maintainable under Act* X.—One of the grounds taken for this special appeal was that as no rate of rent had been fixed or arranged between the parties, as respects the land in question, the plaintiff could not recover rent for the land and that no suit would lie under Act X of 1859. The High Court *held* that, under the circumstances, the plaintiff was entitled to rent for the land and that the suit was therefore maintainable as for arrears of rent under Act X of 1859 in respect of the jummai lands on which no rent had been assessed, and that the rate should be calculated in accordance with the rates prevailing for similar land. MIRZAN BISWAS v. MR. R.T. HILLS, **3 W.R. Act X, Rul., 159.**

(11)—*Act X of* 1859, *s.* 23, *cl.* 6, *s.* 25—*Illegal ejectment--Right of suit.*—The order of a Deputy Collector passed under s. 25 of Act X of 1859 is not a judicial, but is a mere ministerial act; consequently, any person aggrieved by it can have recourse to a regular suit under cl. 6, s. 23 of the Act, whether he was illegally ejected by the direct act of the landlord or indirectly by him through the Deputy Collector. GOLAM KOODSEE CHOWDHRY v. KISHOREE BEWAH, **5 W.R. Act X, Rul., 46.**

Right of Suit—continued.

— 23.—**Landlord and Tenant, Suits concerning**—*concluded.*

(12)—*Proprietary talook under zemindar, rent or revenue assessed upon, suit maintainable for, under Act* X.—In this case, the lower Appellate Court threw out the suit upon the ground that it could not lie under Act X of 1859, because defendant was not a ryot or tenant but a proprietor. The defendant was liable to pay to the plaintiff, and the plaintiff was liable to pay the Government revenue, the money receivable from the defendant being part of the assets of his estate and the whole estate being liable for default of revenue. The High Court was of opinion that, under the circumstances, the defendant stood in the position of a tenant towards the plaintiff and that the definite rent or revenue assessed on the whole talook and payable to the plaintiff might be the subject of a suit under Act X of 1859. CHUNDER KANT CHUCKERBUTTY v. MOULVIE MAHOMED HOSSEIN, **6 W.R. Act X, Rul., 1** [*Appl.*, 38 C. 278=15 C.W.N. 266=9 Ind. Cas. 394.]

(13)—*Ejectment—Right of suit—Jurisdiction—Act X of* 1859.—A plaintiff, if ousted by the real defendant, is entitled to sue in a Civil Court and it is no answer to his case to say that until the real defendant and the zemindar defendant settle any dispute between them by a suit under Act X of 1859, the plaintiff must be out of Court. For, failing any such suit between the zemindar and the real defendant, the plaintiffs would be literally left without redress. TARA CHAND DUTT v. OAFUNISSA BIBEE, **5 W.R. Act X, Rul., 52.**

Suit against agricultural tenants for arrears of rent—Conditions for maintenance of suit—*See* U.P. ACT XII OF 1881, s. 93 (*a*), 2 A.L.J. 1.

— 24—**Mesne Profits.**

See MESNE PROFITS.

(1)—*Mesne profits—Suit for mesne profits.*—The party in possession is the only person legally competent to sue for mesne profits. KHETTER MONEE DOSSEE v. GOPEEMOHUN ROY, **1 Ind. Jur. O.S. 83=1 Hay, 178.**

(2)—*Fraudulent sale by debtor—Subsequent assignment by debtor—Assignee not competent to sue previous vendee for mesne profits.*—C L, who was opposed in executing a decree obtained by him against G, instituted a suit for a declaration that a deed of sale that had been executed by G in favour of her husband was false and fraudulent. In the judgment in that suit, it was declared that C L, was entitled to sell in execution of his decree only the two-annas share possessed by G, his judgment-debtor. A subsequent assignee from B having sued G's vendee for mesne profits, during the pendency of the previous suit, it was *held* that the plaintiff had no right to sue for the mesne profits, since no such right had accrued to G, his assignor. MONOHUR DASS v. SHAIKH DUTAFUT HOSSEIN, **4 W.R. 8.**

Right of Suit—continued.

——25.—**Municipal Officers, Suits against.**

(1)—*Madras Act* X *of* 1865—*Assessment unlawfully levied—Suit, maintainability of.*—A person cannot maintain a suit for the recovery of assessment unlawfully levied from him by Municipal Commissioners under Mad. Act X of 1865. BHIMAVARAPU BALARAMAYA v. G.R. HODSON, **3 M.H.C. 370.**

(2)—*Act* XXVI *of* 1850—*Order of Municipal Commissioner—Course open to person aggrieved by order.*—Where an order was passed by the Municipal Commissioners of a town in respect of a matter within their jurisdiction, the person aggrieved by such order was bound to exhaust all the remedies open to him according to the rules prescribed under the Act, before he instituted a suit in the Civil Court in respect thereof. SAKHARAM SHRIDHAR GHADKARI v. THE CHAIRMAN OF THE MUNICIPALITY OF KALYAN, **7 B.H.C A.C., 33.** [*R.*, 10 B. H C. 194, 22 B. 384.]

(3)—*Bom. Act* II *of* 1865, *ss.* 4, 11, *Act* IV *of* 1867—*Action against Justices of the Peace for alleged wrongful distress—Municipal Commissioner.*—An action against the Justices of the Peace of the City of Bombay in respect of an alleged wrongful distress for unpaid rates levied by the Municipal Commissioner of that City either under Bom. Act II of 1865 or under Act IV of 1867, is not maintainable. In such actions, the Municipal Commissioner himself or the actual tort-feasor is the proper defendant. SHIRSHANKAR GOVINDRAM v. THE JUSTICE OF THE PEACE FOR THE CITY OF BOMBAY, **5 B.H.C.O.C. 145.**

(4)—*Act* III *of* 1864 (*B.C.*), *s.* 67—*Prosecution under—Suit for damages by person prosecuted.*—A suit is not maintainable against a Municipal Corporation for the value of goods sold and damages in consequence of attachment and sale of plaintiff's moveable property under a prosecution instituted by the Municipality under Act III of 1864 (B.C.). MOTEE LALL BOSE v. HOWRAH MUNICIPALITY, **23 W.R. 227.**

See BOM. ACT VI OF 1873, ss. 17, 33, 12 B. 490.

——26.—**Obstruction to Public Highways, Suits concerning.**

(1)—*Suit for obstruction of highway — Special damage.*—The rule of English law, that no action can be maintained by an individual against another for obstruction to a highway, without proof of special damage, should be enforced in British India as a rule of "equity and good conscience." ADAMSON v. ARUMUGAM, **9 M. 463.** [*Appr.*, 14 M. 177; *R.*, 7 C.P.L.R. 97, 2 N.L.R. 110, 31 M. 54=17 M.L.J. 537 =2 M.L T. 461.]

(2)—*Obstruction of public lane—Suit by one person without special damage for a declaration and an injunction.*—The plaintiff by himself, and without permission under s. 30, Civ. Pro. Code, sued to remove a gate put up by the

Right of Suit—continued.

——26.—**Obstruction to Public Highways, Suits concerning**—*continued.*

defendant in a lane with the permission of the Municipal Council and to declare his right to draw water from a well on the other side of the gate and for an injunction to compel the removal of the gate. No special damage was alleged and proved. *Held*, the English rule,—that no action can be maintained by one person against another for obstuction to a highway, unless special damage or injury beyond what is sustained by the general public is proved—applied, and the suit was to be dismissed. SIDDESWARA v. KRISHNA, **14 M. 177=1 M. L.J. 321.** [*D.*, 103 P.L.R. 1901=64 P.R. 1901.]

(3)—*Obstruction to public road—Proof of Special damage—Right of Zemindar.*—In a road which is a public thoroughfare, unless the plaintiff proves special damage from the obstruction, he is not entitled to bring a suit. This equally applies whether he is a Zemindar or any ordinary member of the community. RAJNARAIN MITTER v. EKADASI BAG, **27 C. 793.** (9 C. 75, *D*)

(4)—*Procession along public highway—Right of private persons to stop procession — Liability for damages for obstruction.*—The right to make use of a public highway for conducting a procession can only be questioned by a Magistrate who, for preservation of the peace, may, if he sees sufficient grounds, interdict the procession. Private persons have no such authority. An action in damages will lie against a private person obstructing a procession conducted on a public highway, though it is not usual for persons of the plaintiff's caste to conduct such procession. SIVAPPACHARI v. MAHALINGA CHETTI, **1 M.H.C. 50.** [*R.* 6 M. 203.]

(5)—*Suit to enforce right to conduct religious procession, maintainability of—Personal damage—What constitutes special damage—Loss of sentimental gratification.*—A suit to enforce a right to conduct a religious procession along a public road will not lie without alleging any personal loss or damage. [*F.*, 9 M. 463, 10 A. 498, 18 B. 693, 5 C.W.N. 285, 11 Bom. L.R. 372=2 Ind. Cas. 494; *Appl.*, 14 M. 177; *R.*, 12 Bom. L. R. 274 = 5 Ind. Cas. 213; *D.*, 1 Ind. Cas. 716=32 M. 478=19 M.L.J. 617.] The mere loss of the religious or sentimental gratification, arising from obstruction to carrying *tabuts* along a public road, is not such special loss or damage as would sustain a civil action. SATKU *valad* KADIR SANSARI v. IBRAHIM AGA *valad* MIRZA AGA, **2 B. 457.**

(6)—*Public obstruction — Right of suit — Special damage.*—In order to sustain a civil action for the removal of a public obstruction, the plaintiffs are bound to show that they themselves have suffered some particular inconvenience by the conduct of the defendants. GEHANAJI *bin* KES PATIL v. GANPATI *bin* LAKSHUMAN, **2 B. 469, Note.** [*R.*, 2 B. 457; *D.*, 9 A. 434=A.W.N. 1887, 82, 22 C. 551.]

Right of Suit—continued.

—26.—**Obstruction to Public Highways, Suits concerning**—*continued.*

(7) — *Public way — Obstruction — Special damage.*—A suit to remove an unlawful obstruction from a public thoroughfare is not maintainable, when the plaintiff fails to show that he has suffered special damage. NATHU v. JAGRAM DAS, **A.W.N. 1881, 3.**

(8)—*Public way, obstruction of—Right of suit —Special damage—Mere inconvenience.*—An action for obstructing a public way is not maintainable if no damage peculiar to the plaintiff is proved. Mere inconvenience or remote danger will not make such an action maintainable. MAHOMED ALAM v. DILBAR KHAN, **5 C.W.N. 285.** (2 B. 457, *F.*)

(9)—*Public road or highway, action for obstruction to, maintainable only on particular damage personally to plaintiff.*—Both according to the English decisions as well as by those of the Indian Courts, it is settled law that a Civil suit does not lie for an obstruction to a public road or highway unless the plaintiff can show some particular damage to himself personally in addition to the general inconvenience occasioned to the public. MALUK SINGH v. BELA SINGH, **134 P.R. 1882.** [*D.*, 218 P.L.R. 1910.]

(10)—*Suit to remove obstruction to a public way—Proof of special damage by person suing.*—No suit will lie in a Civil Court to remove an obstruction to a public way unless the party suing suffers special damage. HOSEIN SHAH v. HABIBULLA SHAH, **73 P.R. 1877.**

(11)—*Public nuisance, suit for removal of—Special damage to be proved.*—A brought a suit to compel B to close a drain through which the water from the latter's mosque flowed on to the street in front of A's premises. The street was admittedly a public thoroughfare. *Held* that the special damage required to sustain an action of this sort must be damage differing not merely in degree but in kind from that sustained by the rest of the public. NUR ALI v. RAM GOPAL, **10 P.R. 1878.** [*F.*, 134 P.R. 1882; *R.*, 4 P.R. 1895.]

(12)—*Injury caused to inhabitants of a village —English Law—Special damage.*—According to the English Law, in order to entitle a plaintiff to maintain an action for obstruction of a highway, he must show a particular damage suffered by himself over and above that suffered by all the Sovereign's subjects. Where this is shown, a suit for damages or for an injunction, would lie. (*Winterbottom* v. *Lord Derby*, L.R. 2 Exch., 316; *Ricket* v. *Metropolitan Ry. Co.*, L.R., 2 H.L., 175; *Cook* v. *Mayor and Corporation of Bath*, L.R., 6 Eq., 177, *R.*) The same rule has been substantially followed in this country. (12 W.R. 160, 12 B. 469 and 3 C. 20, *R.*) The injury caused to the inhabitants of a village, by the obstruction of a public highway leading from the village where they lived, to that in which they had their fields and pasture, was held to be peculiar to them, so as

Right of Suit—continued.

—26.—**Obstruction to Public Highways, Suits concerning**—*continued.*

to entitle them to bring an action for the removal of the obstruction. ABZUL MIAH v. NASER MAHOMMED, **22 C. 551.** [*R.*, 2 L.B.R. 134.]

(13)—*Powers of Municipal Committee—N.W.P. & Oudh Municipalities Act, ss. 27, 32 and 38 —Infringement of rights by the exercise of such rights—Relief.*—By s. 38 of the N.W.P. and Oudh Municipalities Act, the property in all public highways is vested in the committee, and by s. 27, the committee can, with the sanction of the Local Government, sell any portion of land, referred to in that section, which is not required for the purposes of the Act, and shall keep roads in repair, and may do all acts and things necessary for purposes of general utility. But there is nothing in the Act which debars the Civil Courts from entertaining suit and giving relief in respect of any Civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act. FAZAL HAQ v. MAHA CHAND, **1 A. 557.**

(14)—*Rights of rival sects—Religious procession.*—Persons of all sects are at liberty to erect buildings and conduct public worship on their own land, provided they neither invade the rights of property enjoyed by others, nor cause a public nuisance. They are also entitled to conduct religious processions through public streets without interfering with the ordinary use of such streets by the public, subject to any lawful directions of the Magistrate. PARTHASARADI v. CHINNA KRISHNAN, **5 M. 304.** [*Appr.*, 26 M. 376, 26 M. 551, F.B. = 1 Weir 279; *R.*, 12 M. 356, 19 M.L.J. 617, 9 Bom. L.R. 663, 32 M. 478.]

(15)—*Removal of nuisance—Orders by Magistrates and Sessions Judge—Suit in Civil Court —Jurisdiction.*—Where, in respect of the removal of a nuisance caused by the defendant encroaching on a public road, a Magistrate issues no specific order but only a general prohibition against him, and the Sessions Judge passes no order on the matter either in appeal or otherwise, but simply gives his opinion, on a reference made to him that the matter is one for the Civil Court, *held* that a subsequent action by the plaintiff in a Civil Court was maintainable. SOOKMOY MITTER v. PERTAB CHUNDER SEIN, **1 W.R. 14.**

(16)—*Suit to contest order under s. 133, Crim. Pro. Code, 1882.*—A suit to call in question the order of a Criminal Court under s. 133, Crim. Pro. Code, 1882, will not lie by reason of the penultimate clause of the same section. KHAIR-UD-DIN v. KARAM BAKSH, **94 P.R. 1889.** [*Overruled*, 34 P.R. 1892, F.B.]

(17)—*Order under ss. 133 and 137, Crim. Pro. Code, 1882—Suit to contest—Declaration of right in Civil Courts.*—In spite of the penultimate clause of s. 133 in Crim. Pro. Code, 1882, a person claiming to be the sole owner of land as regards

Right of Suit—continued.

— 26.—**Obstruction to Public Highways, Suits concerning**—*concluded.*

which the Magistrate has made a conditional order under s. 133, treating it as a public place, which order has been made absolute in due course of law under s. 137, Crim. Pro Code, may sue the opposite party in the Civil Court for a declaration of his rights in such land. MEGHA AND JASSA v. SHADI, **34 P R. 1892, F B.** (50 P.R. 1888, *Cited and F.*)

See JURISDICTION OF CIVIL COURTS, 10 A. 553 = A.W.N. 1888, 213.

See PROCESSION, 18 B. 693.

— **27.—Office or Emolument, Suits relating to.**

(1)—*Village* joshi, *hereditary right of, to officiate at marriages in* yajman's *house—Invasion of right of* joshi, *liability of* yajman *for.*—A person who, as the village *joshi*, is entitled by hereditary right to officiate at and perform all religious ceremonies in the *yajman's* house can claim to recover his usual fees, no matter whether such ceremonies have been performed by another Brahmin or by any one else of the caste to which the *yajman* belongs, because, in either case, there has been an invasion of his privileges, as the village priest, against which he is entitled to be protected. WAMAN JAGANNATH JOSHI v. BALAJI KUSAJI PATIL, **14 B. 167.** [*Diss.*, 14 C.W.N. 1057 = 12 C.L.J. 74 ; *R.*, 3 N.L.R. 47.]

(2)—*Obstruction to public highway—Action for interfering with right of performing ceremonies—Right of* yajmans *to select purohits.*—An action is not maintainable by a purohit against another purohit for interfering with an alleged exclusive right of performing religious ceremonies at a particular place, there being no legal obligation upon the *yajmans* to abstain from employing another. DAMODUR MISSER v. ROODURMAR MISSER, **Marsh 161** = ROODURMAN MISSER v. DAMOODUR MISSER, **1 Hay 365.**

(3)—*Declaration of right*—Pujari—Mandir.—A suit lies to obtain a binding declaration that the plaintiff is entitled to perform the duties of *pujari* and to receive the proceeds of the *mundir*. PRANSHANKAR v. PRANNATH MAHANAND, **1 B.H.C. 12.** [*F.*, 13 B. 548.]

(4)—*Hereditary right to office—Right of suit—S.* 11, *Civ Pro. Code.*—Under s. 11 of the Civ. Pro. Code, a suit lies for establishing a right to the hereditary title of musicians to a satra though the right is one which brings in no profit to those claiming the same. MAMAT RAM BAYAN v. BAPU RAM ATAI BURA BHAKAT, **15 C. 159.** [*F.*, 13 B. 429; *Disc.*, 3 N.L.R. 131; *R.*, 11 M. 450.]

(5)—*Agreement among village Brahmins recollection of offerings—Validity.*—An agreement among the Maha-brahmins of a village that some of them should collect offerings in certain months and should not be disturbed by the others, and that, in certain other months, the others of them should have a like right, is a valid agreement capable of enforcement and is not against public policy. WOCHI v. ULFAT, **20 A. 234 = A.W.N. 1898, 23.** [*R.*, 5 O.C. 225.]

Right of Suit—continued.

— 27.—**Office or Emolument, Suits relating to**—*continued.*

(6)—*Questions of religious tenets—Duty of Courts.*—It is not the duty of a Civil Court to pronounce on the truth of religious tenets, nor to regulate religious ceremony ; but, in protecting persons in the enjoyment of a certain status or property, it may incidentally become the duty of the Civil Court to determine what are the accepted tenets of the followers of a creed, and what is the usage they have accepted as established for the regulation of their rights *inter se.* A Civil Court may take cognisance of the claim of plaintiffs to the offices to which they assert an exclusive right, may secure them in the enjoyment of that right, and may award them damages for the invasion of their right in so far as such damages are not too remote and too uncertain. KRISHNASAMI v. KRISHNAMA, **5 M. 313.** [*Appr.*, 11 M. 450 ; *R.*, 23 B. 122, 26 M. 554.]

(7)—*Right of administering Purohitam to Rameswaram pilgrims, suit to establish exclusive exercise of—Privilege, effect of alienability of, in rendering it a proprietary right.*—The subject of litigation in this case was the right of administering what is called Purohitam to seventeen classes or castes of the numerous pilgrims, resorting to the pagoda and other temples in the Island of Rameswaram. The issue settled in the suit threw upon the appellants the burden of proving, *first*, the hereditary and exclusive right of the Arya Brahmins to administer Purohitam to all castes of people frequenting Rameswaram as pilgrims and their ancestors' enjoyment accordingly. The proofs adduced in support of the issues consisted of extracts from one of the old Puranas. Even taking the authority of the Purana texts at the highest, their Lordships of the Judicial Committee were of opinion that they did not more than enjoin upon pilgrims who wished to have the fullest spiritual benefit of their pilgrimage, the duty and necessity of resorting to the Aryas for their offices. They do not show that the duty was universally recognised as imperative, or that the enjoyment of the privilege as it then existed, was exclusive. Further, the value of the texts as evidence, was in their Lordships' opinion much diminished by the consideration that the privilege now claimed was admitted to be capable of alienation or delegation. They would be of far more weight if the case made were that, by positive ordinance or by traditionary usage, the privilege of administering certain religious rites had become vested in a particular class of priests. The principle of alienation or delegation being admitted, texts to the effect that the efficacy of the rite depends on the character of the ministering priest necessarily lose their force. The privilege of exercising the function, when alienable for money,

Right of Suit—continued.

—27.—**Office or Emolument, Suits relating to**—*continued.*

ceases to be the subject of religious sentiment, and becomes a mere proprietary right. Moreover, this quality of the privilege must greatly increase the difficulty of proving its continued enjoyment, supposing that it ever existed, because every long continued enjoyment of the privilege by others is capable of being ascribed to a presumed grant or alienation of which the direct evidence is lost In the result, their Lordships were of opinion that the evidence, though it might establish that the Arya community had existed as part and a principal part of the hierarchy of the Rameswaram Pagoda and its dependencies from a period of remote antiquity, and that the appellants might be taken to be the actual representatives of that community, failed to show, either by documentary proof of its origin or by such proof of long and uninterrupted usage as in the absence of a documentary title would suffice to establish a prescriptive right, the existence at any time of the original and exclusive privilege which the appellants had made the foundation of their title. The appellants had on all points failed to relieve themselves of that burthen which the necessities of their case, and the particular issue directed in the cause, imposed upon them. RAMASAMY AIYAN v. VENKATA CHARI, **2 W R. P.C 21=9 M.I A. 344=1 Suther. 492=2 Sar. 1.** [*Appr.*, 5 M.H.C. 6; *R.*, 2 M H.C. 330.]

(8)—*Suit to establish exclusive right to receive fees paid to* purohits—*Necessity for proof of contract or usage.*—Plaintiffs sued to establish their exclusive right to receive fees paid to certain *purohits* by the pilgrims resorting to a temple, and to recover a certain amount received by the defendants in that capacity. *Held* that in the absence of any contract between the parties or of any proof of long and uninterrupted usage, as, in the absence of a documentary title, would suffice to establish a prescriptive right, the suit was not maintainable. KRISHNA AIYAN v. ANANTARAMA AIYAN, **2 M H.C. 330** [*R.*, 7 M. 424, 3 N.L. R. 47; *D.*, 5 O. C. 225.]

(9)—*Civ. Pro. Code, s.* 11—*Infringements of rights connected with office—Suit, maintainable*—An action lies in respect of infringements of rights connected with an office. SRINIVASA THATHACHARIAR v. SRINIVASA AIYANGAR *and* SRINIVASACHARIAR v. SRINIVASA THATHACHARIAR, **9 M.L.J. 355.** [*R*, 32 M. 291=5 M.L.T. 33.]

(10)—*Civ.Pro.Code*, 1882, *s.*11--*Dignities and emoluments appertaining to office in temple—Dignities and emoluments not separable—Suit for dignities and emoluments—Maintainability.*—Plaintiff had bought the right to certain dignities and emoluments under the name of Malji Dharmakarta Miras in the Conjeevaram Devastanam. The emoluments consisted of money and food given on periodical occasions, and

Right of Suit—continued.

—27.—**Office or Emolument, Suits relating to**—*continued.*

the dignities were honours without any appreciable money value. Both these rights had been accorded to the plaintiff and his predecessors in title by the trustees of the temple. Plaintiff instituted a suit for a declaration of his right to the said rights and for recovery of arrears of incomes and *swotantrams* unlawfully withheld from him. It was contended on behalf of the defendants that the rights claimed were of a religious nature of which the Civil Courts had no cognizance. *Held* that the emoluments claimed possessed a money value and as such was cognizable by a Court of law. *Held* also that, as the right to the dignities was inseparable from the other right and as both had been mortgaged, bought and sold and recognized and enforced by the decrees of Civil Courts, it was cognizable by such Courts. KRISHNASAWMI THATHACHARIAR v. APPANAIYANGAR, **7 M.L.J. 23.**

(11)--*Right of receiving offerings at a public* Tal.—*Held*, that no person can appropriate to himself any particular spot on the banks of a public *Tal* (tank), or claim the exclusive right to receive offerings from the persons who resort to the *Tal* to bathe. SHEO DIN v. JAI RAM SINGH, **2 O.C. 1.**

(12)—*Suit for share of fees obtained by joint members of a family as Purohit—Jurisdiction.*—A suit by the widow of one of the members, for her share of the fees obtained by the joint members of a family as Purohits is cognizable in a Civil Court. KHEDROO OJHA v. MUSSAMUT DEO RANEE KOOMAR, **5 W.R. 222.** [*Appl.*, 8 B.L.R. 50=15 W.R 531.]

(13 & 14)—*S* 11, *explanation, Civ Pro. Code*, 1882—*Right to offerings, suit for establishment of—Offerings being of substantial value as emoluments.*—A suit for the regular offerings made out of the funds of a temple, which are not the voluntary offerings made by pilgrims, but which are of a substantial value as emoluments, being a suit of a civil nature as explained in s. 11, is cognizable by the Civil Court. KALI KANTA SURMA v. GOURI PROSAD SURMA BARDEHRI, **17 C. 906.** (2 M. 62, *R.*; 10 B 233, *D.*) [*F.*, 27 C. 30.]

(15)—*Custom—Suit for a declaration of a right to 'Dharat' (weighman's fees), whether enforceable by custom.*--Plaintiff sued for a declaration of his right to one-fourth seer per maund on all foreign grain weighed within the Kasba in lieu of service as *chowdry* according to ancient custom. *Held* that no custom sanctioning such a right was established, that it was only with the consent of the shop-keepers that the *chowdhry* was enabled to levy the fees, and that unless with such consent or as remuneration for services actually rendered at the request of the parties, he was not entitled to levy the fees. DEVI DAS v. NARAINA, **45 P.R. 1878, F.B.** (8 P.R. 1872, *R.*)

(16)—*Office of* Grunthee *in Sikh temple at Umritsar—Succession—Offerings or* ardass—

Right of Suit—continued.

——27.—**Office or Emolument, Suits relating to**—*continued.*

Joint family property—Evidence of separate enjoyment of ardass *admissible though family joint.*—M, who was formerly *grunthee* of the Sikh temple at Umritzar, died leaving behind him the plaintiffs, grand-sons by his elder son and the defendant, grandson by his younger son. Defendant was performing the duties of the office both before and after M's death, receiving no extra share in the profits of the office for so doing, but dividing what he received with his cousins. Defendant also shared with his relations the special offerings called *ardass* which a *grunthee* receives. Disputes subsequently arose and the defendant refused to share these offerings with the plaintiffs. *Held* that the office of *grunthee* or *Guddee nusheen* was not a descendible inheritance devolving on all the members of the family, to which the *Guddee nusheen* belonged, and that the *ardass* belonged separately to the *guddee nusheen* though he happened to be the member of a joint and undivided Hindu or Sikh family. The sharing of the offerings by the defendant with the plaintiffs was not either obligatory as a matter of law or custom. What had been thrown into the family funds only need be divided equally, and the profits made by the defendant as *Guddee nusheen* cannot by general law be treated as joint family property. NOWRUNG SINGH v. BHUGUT SINGH, **4 P.R. 1870.** [*R.*, 49 P.R. 1892.]

(17)—*Suit for confirmation of possession—Vague intention to set up claim—Cause of action—Possession of hill and places of worship.*—A plaintiff sued that his possession of a certain hill, the places of worship appertaining thereto, and the idols set up thereon by virtue of proprietary right, might be confirmed, alleging that the defendant was intending to lay claim to the offerings made to the idols and at the places of worship, and purposed to call into question his (plaintiff's) possessory right to the hill and places of worship. *Held* that the plaint disclosed no cause of action whatever, as the allegation against the defendant was a vague intention on his part to set up a claim. POORUM CHAND GALEECHA v. PARESHNATH SINGH, **12 W.R. 82.**

(18)—*Suit by holder of office of village priest.*—A suit by the holder of the office of a village priest for damages against an intruder who deprives him of his rights and benefits will lie. VITHAL KRISHNA JOSHI v. ANANT RAMCHANDRA, **11 B. H. C. 6.** [*F.*, 3 B. 232, 3 N.L.R. 47, 8 N L.R. 133; *Appr.*, 2 B. 470; *R.*, 3 B. 9, 12 C.L.J. 74, 5 S.L.R. 107.]

(19)—*S.11, Civ. Pro. Code*, 1882—*Suit of a civil nature—Shankaracharya—Dispute as to setting up a claim as a Shankaracharya—Injunction.*—The plaintiff, the Shankaracharya of the Sharada Math at Dwarka, sued for a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya, and that he was not entitled to call for or receive any offerings from the people of Ahmedabad or other places in Gujerat either in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jotir Math or of a branch of that Math, and for an injunction restraining the defendant from styling himself as a Shankaracharya in Gujerat or from claiming or receiving offerings in Gujerat as a Shankaracharya or as a Shankaracharya of the Jotir Math or of a branch of that Math:—*Held*, that the suit was not of a civil nature such as the Court would entertain. The office of Mohunt of the Sharada Math is in no way endangered by the defendant's action in claiming to be a Shankaracharya of the Jotir Math, nor are voluntary offerings made to Shankaracharyas in Gujerat fees claimable as of right by the holder of the plaintiff's office. For interference with a mere dignity or for voluntary offerings no suit can be maintained. Civil Courts will not decide disputes as to precedence or privilege between purely religious functionaries, nor will they grant injunctions to prevent preachers from preaching where they like, under any title they please, provided no office or property is disturbed or interfered with. MADHUSUDAN PARVAT v. SHREE MADHAV TEERTH, **11 Bom. L.R. 58 = 33 B. 278 = 1 Ind. Cas. 331.**

(20)—*Exclusive right to act as khatib—Suit for declaration and injunction when maintainable.*—A suit by a person for a declaration of his exclusive right to act as Khatib in a certain locality and for an injunction restraining others from acting as such is not maintainable without allegation of disturbance of the plaintiff in the exercise of his office. MIRA MOHIDIN v. ASAN MOHIDIN, **17 M.L.J. 421.** (15 M. 355, 19 M. 62, 2 M.L.J. 83, *R.*)

(21)—*Act* XXIII *of* 1871, *ss.* 3, 4, *and* 6—*Suit for declaration of right to officiate as* patil.—Act XXIII of 1871 should receive a strict construction, as being in derogation of the right of the subject to resort to the ordinary Civil Courts. (1 B. 523, *R.*) The Act does not prohibit a Civil Court from entertaining a suit merely for a declaration as to the eligibility of a person to officiate as *patil* of a village. GURUSHIDGAVDA BIN RUDRAGAVDA v. RUDRAGAVDATI KOM DYMANGAVDA, **1 B. 531.** (1 B. 75, *D.*) [*R.*, 10 A. 396, 14 B 395, 16 B. 537, 29 B. 480 = 7 Bom. L.R. 497.]

(22)—*Suit for declaration of right to officiate as priest and receive offerings—Maintainability—Declaratory decree, Specific Relief Act, s.* 42.—A Civil Court has jurisdiction to entertain a suit for a declaration of one's right to officiate, in alternate years as priest in a certain temple and to receive the offerings of worshippers of the idol. A Court of appeal must not dismiss a suit, because it is one praying only for a declaratory decree without any consequential relief

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where the defendants had not taken that objection, but must allow the plaint to be amended. LIMBA *Bin* KRISHNA v. RAMA *Bin* PIMPLU, **13 B. 548.** [*F.*, 14 M. 46; *R.*, 15 M. 15. U.B. R. 1897-1901 Vol. II, 231, 5 Bom. L. R. 329, 12 C.L.J 74=14 C.W.N. 1057; *D.*, 15 M. 255, 19 A. 429, 26 C. 845.]

(23)—*Civ. Pro. Code*, 1882, s. 11—*Suit for office with no emoluments—Maintainability—Jurisdiction of Civil Courts—Reg.* II *of* 1827—*If applicable to suits between Mahomedans.*—A suit for a declaration of one's right to hold a religious office, even though no fixed fees are attached to it, will lie under s. 11 of Civ. Pro. Code, 1882. A dispute as to the right to an office, as for example the office of *Khatib* among the Mahomedans, is not a caste question within the meaning of the term as used in s. 21 of Reg. II of 1827, which has no application to suits between Mahomedans. SAYED HASUN SAHEB v. HUSSANSHA, **13 B. 429.** [*R.*, 12 C.L.J. 74=14 C.W.N. 1057.]

(24)—*Religious office—Suit for injunction restraining defendants from officiating in temple—Jurisdiction—Civil Courts—Kangra Bhojkis of Bhowan shrine—Right to officiate in temple—Custom.*—A suit by the plaintiffs, the Bhojkis of the Bhowan shrine at Kangra, for an injunction restraining the defendants from officiating in the Bhowan temple on the ground that by custom the defendants were disqualified by descent for performing the services of the shrine, was held cognizable by a Civil Court. By the custom obtaining among the Kangra Bhojkis of the Bhowan shrine, only the sons of Kangra Bhojkis by wives who were the daughters of Kangra Bhojkis were entitled to officiate in the temple, and not sons of Kangra Bhojkis by daughters of Bhojkis of Jawala Mukhi or Naina Dai. BHAG MAL v. SANT, **27 P.R. 1880.**

(25)—*Suit to establish right to personal office, nature of.*—Where the object of a suit is to establish a right to a personal office, the suit is of a personal character. SHAM CHAND GIRI v. BHAYARAM PANDAY, **22 C 92.**

(26)—*Cause of action—Pecuniary benefit—Performance of religious services.*—A claim for pecuniary benefits in respect of the performance of religious services is one cognizable by a Civil Court. [*R.*, 11 M. 450, 17 C. 906, 30 M. 158, 3 N.L.R. 131, 17 M.L.J. 1.] If, for the determination of such claim, it becomes necessary to determine incidentally the right to perform the services, the Courts must try and decide that right. KRISHNAMA v. KRISHNASAMI, **2 M. 62=6 I.A 120. P.C.=3 Ind. jur. 322=3 Suther 620=6 C.L.R. 201=4 Sar. 28.**

(27)—*Dharmakartha—Dancing girl—Mirasi.*—Where it is alleged that honours and perquisites are appurtenant to the hereditary office of dancing girl of a pagoda, the question

Right of Suit—continued.

—27.—**Office or Emolument, Suits relating to**—*continued.*

of their existence ought to be inquired into. KAMALAM v. SADAGOPASAMI, **1 M. 356.** (1 M. 168, *D.*) [*Appr.*, 14 B. 90; *R.*, 4 B 545, 11 M. 393, 19 M. 127, 3 N.L.R. 47.]

(28)—*Dancing girl — Immoral custom.*—Granting that the *devadasis* of a pagoda have, by the custom of that pagoda, a right to vote the introduction of any new dasis, such a right cannot be countenanced by Courts as it would be recognizing an immoral custom and encouraging the association of women to enjoy the monopoly of the gains of prostitution. (HINNA UMMAYI v. TEGARI CHETTI, **1 M. 168.** (2 M. H.C. 56, 5 M.H.C. 161, *D.*) [*R.*, 4 B.545, 11 M. 393, 19 M. 127; *D.*, 1 M. 356.]

(29)—*Suit for* wasilat *in respect of certain turn of worship, maintainability of—Offerings to idol and profits of* shebait.—A suit for *wasilat* does not lie in respect of profits derived from a turn of worship, the offerings constituting the profits being in their nature uncertain and voluntary. If offerings are intended for an idol, there can be no personal claim to them. If they are intended for the *shebait* of the idol, they being voluntary and uncertain, must be taken to have been intended for the person performing the worship, at the time the offerings are made, whether rightfully or wrongfully, as against any other person who might have had a better title to perform the worship during the same time. KASHI CHANDRA CHUCKERBUTTY v. KAILASH CHANDRA BANDOPADHYA, **26 C. 356=3 C.W.N. 279.** (10 W.R. 457, *F.*) [*D.*, 27 C. 30; *Diss.*, 17 M.L.J. 493.]

(30)—*S.* 11, *Civ. Pro. Code.* 1882—*Suit for declaration and enforcement of right to officiate as* shebait *and to share offerings—S.* 211, *Civ. Pro. Code*, 1882.—When a member of a family brings a suit against another for the declaration and enforcement of a hereditary right to officiate as *shebait* or priest, at the worship performed by votaries at the foot of a certain tree, and to share the offerings made at such worship, such a suit is maintainable, having regard to s. 11, Civ. Pro. Code. (13 S D.A. Part I, 362. 26 C. 356, *D.*; 17 C. 906, *F.*) There cannot be a decree for possession in such a case. *Quaere.*—Whether s. 212, Civ. Pro. Code, applies to such a case, and whether the question of the amount of these profits should be determined in execution of the decree. DINO NATH CHUCKERBUTTY v. PRATAP CHANDRA GOSWAMI. **27 C. 30=4 C W.N. 79.** [*F.*, 17 M.L.J. 493.]

(31)—*Claim to be Chalvadi of Lingayet caste at Bagalkot—Caste question— Reg.* II *of* 1827, *s.* 21—*Claim to caste office—Jurisdiction of Civil Courts.*—A claim by a certain person to be Chalvadi of the Lingayet caste at Bagalkot is a caste question within the meaning of so much of Reg. II of 1827, s. 21, cl. (1) as remains unrepealed by Act X of 1861. [*Appl.*, 6 B. 725; *R.*, 15 B. 599, 18 B. 115, 19

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——27.—**Office or Emolument, Suits relating to**—*continued.*

B. 507, 26 B. 174=3 Bom. L.R. 718; *D.*, 11 M. 450, 13 B. 548, 23 B. 122.] A claim to a caste office, to be entitled to perform the honorary duties of that office, and to enjoy certain privileges and voluntary offerings at the hands of the members of the caste, is a caste question and is not cognizable by a Civil Court. (3 M.I.A. 198, *R.*) [*Appl.*, 6 B. 725; *R.*, 15 B. 599, 18 B. 115, 19 B. 507, 11 M. 450, 13 B. 548, 23 B. 122.] If a person usurps the office of another and receives the fees of the office, he is not bound to account to the rightful owner for them if the payments are merely voluntary. SHANKERA *Bin* MARAHASSAPA v. HANMA BHIMA, **2 B. 470.**

(32)—*Fees attached to Office—Suit to recover—Voluntary payments—Hereditary offices—Alienation of.*—If a person usurps the office of another, and receives the fees of the office, he is bound to account to the rightful owner for them. Where the payments are merely voluntary, the case is different and no suit can be brought. [*R.*, 11 B.H.C 6, 2 B. 470, 14 C. W.N. 1057=12 C.L.J. 75=6 Ind. Cas. 864.] Where the purchasers of an hereditary office were the grand-children of the then holder who would eventually succeed to the office as heirs, and the grandfather did nothing more than relinquish his right in their favour, *held*, that the alienation was valid. SITARAMBHET v. SITARAM GANESH, **6 B.H.C.A.C. 250.** [*R.*, 6 B. 293, 23 C. 645, 23 B. 131, 5 S.L.R. 107, 13 C.L.J. 449=16 C.W.N. 347=10 Ind. Cas. 41; *D.*, 34 C. 828=11 C.W.N. 782.]

(33)—*Office, right to—Right undefined and indefinite—Voluntary payment—Declaration.*—Plaintiffs sued for the establishment of their right to an office without stating the exact rights and duties pertaining to that office, on the mere allegation that the defendants had obstructed them in the collection of the dues or profits. Both the lower Courts dismissed the suit. *Held* that, as those who made payments to a person in the plaintiff's position were under no legal obligation to render them to any particular individual in preference to another, nor to any person against their will, the plaintiffs were not entitled to an exclusive right and that the suit was not maintainable. RAM DEEHUL v. CHUKHOO, **1 N.W.P. 291.** (*Pooran Mull* v. *Khedoo Sahoo*, S.D.A. 1846, *F.*)

(34)—Archaka *kept out of office by* co-archaka—*Loss of voluntary contribution—Suit for damages.*—A claim by an *archaka* of a temple against his *co archaka* to recover what might have been received as voluntary contribution, if he had not been kept out of office, is maintainable. BHIMA CHARYULU v. RAMANUJA CHARYULU, **17 M.L.J. 493.** (27 C. 30, *F.*; 26 C. 653, *Diss.*)

(35)—*Civ. Pro. Code*, 1908, *s.* 9—*Suit for declaration and injunction—Right to perform*

Right of Suit—continued.

——27.—**Office or Emolument, Suits relating to**—*continued.*

Ram Lila—Not connected with shrine or temple—Office—Voluntary payments—Suit of civil nature.—The plaintiff, a minor, sued for a declaration that he had the right to hold a certain Ram Lila and claimed an injunction to restrain the defendant from interfering with that right. It was admitted that the Lila used to be held by means of voluntary subscriptions of the Hindu community. The expenses of the Ram Lila used to be paid out of these subscriptions, and the balance was appropriated by the plaintiff. *Held* that the suit was not maintainable under s. 9, the pageants not being connected with any temple, shrine or sacred spot, and the plaintiff not holding any office or receiving any emoluments. CHUNNU DAT VYAS v. BABU NANDAN, **7 A.L.J. 529=6 Ind. Cas. 223=32 A. 527.** (19 M. 62, 11 M. 450, *R.*, *and Disc.*)

(36)—*Civ. Pro. Code, s.* 11, *questions of religious ritual whether cognisable by Civil Court under—Emoluments for the ritual, effect of.*—In this suit relating to a contest as to the right to recite certain mantras in a temple and to receive the emoluments given, on an objection raised that the matter could hardly be considered as the subject of a Civil suit, their Lordships of the Privy Council observed that there was a question of emoluments which could be preceded by questions of purely religious rituals without being barred by them. VENKATAVARATHA THATHACHARIAR v. ANANTHACHARIAR, **16 M. 299=3 M.L.J. 150, P.C.=6 Sar. 364.** [*R.*, 30 M. 158=17 M.L.J. 1=2 M.L.T. 69.]

(37)—*S.* 9, *Civ. Pro. Code*, 1908—*Maripora Brahmin, suit by—Claim to officiate as priest at the cremation ceremony—Custom, valid, essentials of—Agreement with Municipality to officiate as priest, is specifically enforceable—Bengal Municipal Act* (III *of* 1884, *B.C.*), *s.* 260-*A*—*License to employ cremation priest, if can be granted.*—Where the plaintiff claims a hereditary right to officiate exclusively as a priest on the occasion of the cremation ceremony of all dead bodies brought for funeral to a particular place, the suit is maintainable as one of a Civil nature. A claim for a declaration that the plaintiff is entitled, to the exclusion of all other Brahmins of the class to which he belongs, to officiate as a priest at the cremation ceremony, is not maintainable under Hindu law, or under any customary right. A custom, to be valid, must have four essential attributes; first, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin, and fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. In order to ascertain whether a particular custom is reasonable or not, one must look to the possible period of its inception. A voluntary consent of the people to the employment of the

Right of suit—continued.

—27.—Office or Emolument, Suits relating to—*continued.*

plaintiff or his predecessors as cremation priests cannot confer upon him any exclusive right, and the continuance of this state of things, even for generations, cannot confer upon him a legally enforceable right. An agreement with the Municipal Corporation that the plaintiff alone would officiate as a priest at the cremation ceremony is not specifically enforceable. S. 260-A of the Bengal Municipal Act does not contemplate that the commissioners should create a monopoly in favour of any person, even in respect of fuel shops. More than one person can get licenses to keep fuel shops for the sale of the necessary articles at the prescribed rates. The Municipality and the licensee from them are not entitled, by the grant of the license under s. 260-A of the Bengal Municipal Act, to compel any person to employ a particular cremation priest, and they have no authority to levy any fee for this purpose. GOURMONI DEBI v. CHAIRMAN OF PANIHATI MUNICIPALITY, **12 C.L.J. 75=6 Ind. Cas. 864 =14 C.W.N. 1057.**

(38)—*Civ. Pro. Code*, 1908, *s.* 9—Stotrapatam *office—Suit for declaration of right to recite* stotrams, *and injunction—Whether cognizable by Civil Court—Voluntary offerings—Refusal of right to participate in—Damages.*—A suit for a declaration of the right of *Vadagalais* to recite *stotrams*, on certain occasions in the Conjeevaram temple, and also for an injunction to restrain *Tengalais* from interfering with their *stotrapatam* by themselves reciting the *prabandham* or in any other way is one cognizable by a Civil Court. (5 M. 313, *R.*) Where the offerings are voluntary, damages cannot be awarded, but when voluntary offerings have been actually contributed, then the refusal of a person's right to participate in the fund causes damage, which is a natural consequence of the refusal, and the Courts are entitled to award damages in such cases. BASHIAKAR v. VENKATA VARADA THATHACHARIAR *alias* CHINNASAWMI THATHACHARIAR, **20 M.L.J. 530=8 M.L.T. 137=7 Ind. Cas. 148.**

(39)—*S.* 11, *Civ. Pro. Code*, 1882—*Suit for honours attached to religious institutions and offices—Competency of Civil Courts to entertain such suits—Whether Civil Court can declare rituals and regulate them*—A suit for honours will lie in the Civil Courts if they are claimed as attached inseparably to an office, as parts of its emoluments, and not simply accorded to its holder as marks of respect, which might be excluded to any other person to whom the decree of respect is due. A Civil Court can declare the rituals to be followed in any case where it is necessary to protect and preserve to the plaintiff the enjoyment of his office. SRIRANGACHARIAR v. RANGASAWMY BUTTACHARIAR, **5 M.L.T. 33=32 M. 291=3 Ind. Cas. 881.** (9 M.L.J. 355, *R.*).

(40)—*Hereditary village office—Emoluments of office—Enfranchisement—Suit by dismissed*

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—27.—Office or Emolument, Suits relating to—*continued.*

holder.—A suit does not lie by a dismissed hereditary village officer, for the recovery of land, which formed the emoluments of his office and which has been enfranchised and granted to his successor in office. SRINIVASA v. LAKSHMAMMA, **7 M 206.**

(41)—*Hereditary village office—Severance of office from emoluments — Enfranchisement — Suit, by member of the family of office holder, for a share in the lands*—Where lands which were appurtenant to a hereditary village office were severed from it and allowed to be enfranchised by the office-holder for the time being, a person who never held the office, though a member of the family of the office holder, could not have a claim on the emoluments. BADA v. HUSSU BHAI, **7 M. 236.** [*Expl.*, 10 M. 1; *R.*, 17 M.L.J. 101=2 M.L.T. 101=30 M. 434.]

(42)—*Reg.* VI *of* 1831 — *Madras Act* IV *of* 1866 — *Lands forming emoluments of hereditary office—Enfranchisement — Title to emoluments of office — Village office — Incapacity—Held by the Full Bench, Hutchins, J., dissenting.*—Where the lands, forming the emoluments of a hereditary village office, having been separated from the office by Government, were enfranchised and granted by the Inam Commissioner to a person who had been appointed to, and at the date of enfranchisement, was holding, the office, though he had no hereditary claims to the same, a member of the family of the hereditary office-holders cannot claim such lands from him. [*F.*, 15 M. 234, 21 M. 47; *Cons.*, 26 M. 339; *R.*, 20 M. 454, 7 M.L.J. 248, 27 M. 16, 17 M.L.J. 101, F.B.=30 M. 434=2 M.L.T. 101, 4 M.L.T. 282, 18 M.L.J. 603=31 M. 526; *D.*, 22 M. 204.] In the case of permanently settled estates, inability, by reason of age or sex, to discharge personally the duties of the office, is a sufficient disqualification. VENKATA v. RAMA, **8 M. 249, F.B.** [*F.*, 9 M. 214; *D.*, 10 M. 226.]

(43)—*Enfranchisement of Inam lands in favour of two persons — One solely appointed to office — Right to recover the other's lands.*—Where inam property attached to a hereditary office is separately enfranchised in favour of the two persons entitled by hereditary right to that office, and pattas are issued to each of them for a moiety of the lands, the subsequent appointment of one of them solely to the office does not entitle him to recover the other moiety of the lands. SANKARA SUBBAYYAR v. RAMASAMI AYYANGAR, **20 M. 454.** [*R.*, 27 C. 242.]

(44)—*Enfranchisement, effect of—Grant to member of undivided family — Succession.*—The effect of enfranchisement was to free the lands from their inalienable character, and to empower the Government to deal with them as they pleased. The grant of the enfranchised land to a member of an undivided family, and

Right of suit—continued.

——27.—Office or Emolument, Suits relating to—*continued.*

the issue of a title deed to him in respect of that land is not a grant to the undivided family, but to the grantee personally, and the future succession and transmission of the land was placed in the same position as any other private property. Members of the undivided family who were neither holders of the office at the time of enfranchisement, nor in possession of the lands, cannot maintain a suit to establish their right to the land on the death of the grantee without male issue VENKATARAYADU v. VENKATARAMAYYA, **15 M. 284.**

(45)—*Enfranchisement of inam — Grant to person not in office—Validity.* — If, on the enfranchisement of a service inam, the Government grants a portion of the inam lands to a person who, though a member of the family of hereditary office-holders, was himself not actually in office at the time of enfranchisement, such a grant is not illegal on the ground that he was not the office-holder, and the Civil Court cannot refuse to recognise his title. TARIA GOWDU v VONAMO GOWDU, **22 M. 204.** [*R.*, 26 M. 359.]

(46)—*Civ. Pro. Code.*, 1882, *s.* 11—*Declaration of right to recite sacred texts in a temple on processional and other occasions—Suit of a Civil nature — Maintainability of suit—Right to office — Jurisdiction of Civil Courts.* — Plaintiffs, some of the members of the *Vadagalai* community, sued for a declaration that they were entitled to recite certain sacred texts at a certain temple on processional and other occasions and for damages in the shape of value of betel-nut, *tulsi*, etc., which they might, otherwise, have received but for the obstruction of the defendants, the *Tengalais*. The suit was laid by plaintiffs on behalf of themselves and other members of the *Vadagalai* community, wherever residing. *Held*, the suit was unsustainable, the dispute being one relating to a mere matter of ritual or ceremony in a religious matter, with which a Civil Court can have nothing to do, there being no claim to any office or right to property and the claim for damages being nominal and imaginary. There could, in this case, be no claim to any particular office in the temple, the suit being one on behalf of untold thousands of people of an ill-defined community. SUBBARAYA MUDALIAR v. VEDANTACHARIAR, **28 M. 23 = 14 M.L.J. 171.** [*R.*, 30 M. 158 = 17 M.L.J. 1 = 2 M.L.T. 69, 3 M.L.R. 47.]

(47)—*Incapacity of next heir—Nearest male sapinda —Right to sue for office — Regulation* XXIX *of* 1802, *s.* 7. —Under s. 7 of Regulation XXIX of 1802 the heir of the preceding Karnam should be chosen by the landholders concerned for the vacant office of Karnam, and on proof of incapacity of the heir, the landlord may exercise his discretion in the nomination of persons, so that though the heir may be incapacitated, a sapinda of the deceased

Right of suit—continued.

——27.—Office or Emolument, Suits relating to—*concluded.*

Karnam is not entitled to the office against the will of the landholder. CHANDRAMMA v. VENKATRAJU, **10 M. 226.** [*R.*, 12 M. 188.]

See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 8 B.H.C., A.C., 35.

See JURISDICTION OF CIVIL COURTS, 12 B. 614, 2 Agra 80.

See KAZI, 1 B.H.C. App. 18.

See POSSESSION—ADVERSE POSSESSION, 2 M.I.A. 479.

——28.—Orders, Suits to set aside.

(1)—*Suit to set aside order passed under Ben. Act* VIII *of* 1869, *s.* 63.—A suit will be to set aside an order passed under s. 63 of Ben. Act VIII of 1869. WOOMA CHURN CHATTERJEE v. KADAMBINI DABEE, **3 C.L.R. 146.**

(2)—*Orders, suit to set aside —Order in contested application—Improper procedure.*—A has no right of suit against B to set aside an order of Court on an application in a suit, which application has been contested between them and decided in favour of B. Such a mode of procedure for the purpose of getting an order of Court reversed is not allowed by law. NORROTOM SIKDAR v. JUGGERNATH SHAW, **Bourke, O.C. 371.**

(3)—*Decree for lands with mesne profits—Endowed lands—Lands and mesne profits held as* shebait—*Personal decree—Decree—Interpretation.*—A decree for lands with *wasilat*, where the defendant had held and claimed those lands as *shebait* of an endowment, and the profits of those lands had wrongly gone into the treasury of the *shebait* of the idol, is not a decree against the defendant personally but against her as the *shebait* of the idol to whose benefit the lands were endowed. The interpretation put upon a decree in execution is final until it is modified or reversed on review. No suit will lie to obtain a different interpretation. RANEE SHIBESHUREE DEBIA v. MOTHOORANATH ACHARJEE, **5 W.R. 202.** [*R.*, 18 W.R. 226.]

(4)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 256, 257—*Act* XXIII *of* 1861, *s* 14—*Sale of property in execution of decree—Claim of pre-emption—Cancelment of sale—Suit by pre-emptor to maintain sale.*—An order setting aside a sale in execution of decree, solely on the ground that a claim of pre-emption under s. 14 of Act XXIII of 1861 had been preferred in collusion with the judgment-debtor, is not warranted by the provisions of ss 256 and 257, Act VIII of 1859, and is liable to be contested in a regular suit by the pre-emptor whose legal rights have been injuriously affected by it. AMRIT MISSER v. GURDA PARDAN, **7 N.W.P. 183.**

(5)—*Minor widow. Property of—Management—Order of competent Court vesting—Suit to set aside, if maintainable—Suit for order*

Right of Suit—continued.

——**28.—Orders, Suits to set aside**—*continued.*

directing widow to adopt, if maintainable—Declaratory decree.—Where a Court, having jurisdiction to determine who should have the management of the property of a minor widow, decides that the Will under which the plaintiff claimed to have the management was not sufficiently proved, and consequently ordered that the management should be in the defendant as guardian of the minor widow, *held* that no suit to set aside the order would lie. A suit for obtaining an order directing a minor widow to make an adoption is not maintainable. Nor can the Court, in the exercise of its discretion, grant a decree declaring the validity of such direction. It would be of no use to the plaintiff to establish a right under it, the management of the property of the widow having been vested by a valid order in some person other than the plaintiff. MUSSAMAT PEAREE DAYEE v. MUSSAMUT HURBUNSEE KOOER, **19 W.R. 127.**

(6)—*Act* XXVII *of* 1860—*Grant of certificate—Remedy open to person affected.*—An order granting a certificate under Act XXVII of 1860 is conclusive as to the right to the certificate, and the remedy of any person affected by the certificate lies in a regular suit to recover any sum received by virtue of that certificate. A suit merely to set aside the certificate will not lie. RUGHOOBAR DYAL SINGH v. RAM NARAIN KOLYO, **22 W.R. 312.**

(7)—*S.* 272, *Act* XIV *of* 1882 (*Civ. Pro. Code, suit to set aside an order contemplated by the proviso to—Ss.* 278 *to* 283, *Civ. Pro. Code, providing for the mode of investigation, etc., to be made under s.* 272.—A regular suit will lie for setting aside an order such as is contemplated by the proviso to s. 272 of the Code of Civil Procedure, that is, an order determining any question of title or priority as between the decree-holder and any other person in respect of money in deposit in a Court of Justice. The mode of investigation, the nature of the order to be made under s. 272, and the extent to which such an order is final are provided for in ss. 278 to 283, Civ. Pro. Code. TIKUN SINGH v. SHEO RAM SINGH, **19 C. 286.**

(8)—*Act* XXI *of* 1841, *and s.* 308 *of Act* XXV *of* 1860—*Magistrate's order for removal of local nuisance—Suit not maintainable in Civil Court to set aside order.*—The object of this suit being to get cancelled two orders of the Magistrate, the one passed under Act XXI of 1841, and the other under s. 308 of Act XXV of 1860, restraining the plaintiff from closing a public pathway, the High Court dismissed the appeal without entering into the merits of the case, on the ground that the suit was one which no Civil Court has jurisdiction to entertain. KADERNATH MOOKERJEE v. PARBUTTY PEISHKER, **2 W.R. 267.** [*D.*, 7 W.R. 95, 15 C. 460, F.B.]

(9)—*Order absolute for foreclosure obtained by fraud—Suit to set aside order, maintainability of.*—An order absolute for foreclosure

Right of Suit—continued.

——**28.—Orders, Suits to set aside**—*concluded.*

may be set aside on the ground of fraud by means of a regular suit. KALOO SINGH v. MT. LACHMI BAI, **12 C.P.L.R. 82.** (25 C. 133, *F.*) [*R.*, 16 C.P.L.R. 111.]

(10)—*Crim. Pro. Code, s.* 185, *sale of property under—Civil suit not maintainable to reverse.*—Property belonging to plaintiff had been attached and sold under s. 185 of the Crim. Pro. Code. Plaintiff having been subsequently discharged from the offence of which he had been accused, instituted this suit to get back the property sold, making both Government and the purchaser of his property defendants in his action. The first Court gave him a decree. The Judge reversed that decision, holding that the suit could not be maintained under s. 185 of the Crim. Pro. Code, according to which the property had been sold. The High Court upheld the Judge's view of the law. The plaintiff might have availed himself of his right to appeal against the orders of the Magistrate, but he had no right to institute a civil action seeking to reverse a sale of property legally carried out under proper provisions of law. BUKHOOREE SINGH v. THE GOVERNMENT, **8 W.R. 207.** [*R.*, 19 B. 668.]

(11)—*Cause of action—Resumption proceeding—Jurisdiction of Special Commissioner.*—Certain resumption proceedings were going on between the Government and a third party, wherein some lands, alleged to be the property of the plaintiff, were included in the lands to which the proceedings related. The plaintiff thereupon preferred an objection to the Collector which was disallowed. The Special Commissioner, on appeal, rejected the claim, holding that he had no jurisdiction. *Held* that the order would not constitute a cause of action either against the Government or against the third party. SHIBOOSOONDUREE DABEA v. THE SECRETARY OF STATE, **7 W.R. 373.**

——**29.—Possession, Suit for.**

See POSSESSION.

(1)—*Suit for declaration of right to and confirmation of possession—Possession obtained without aid of Court—Suit for dispossession of such possession maintainable.*—If a person in whose favour a decree for possession is passed, obtains possession peaceably without the aid of the Court and is subsequently dispossessed, he can maintain an action against the persons who have dispossessed him, although he has not taken out execution of his decree. RAM NEWAZ SINGH v. KISHUN RAI, **6 N.W.P. 137.**

(2)—*Suit for possession—Land taken in execution of decree—Boundary suit.*—A person has no right to bring a civil suit for recovering possession of land taken in execution of a decree passed in a boundary suit. RANEE SHAMASOONDERY DEBEA v. BEJOY GOBIND BURAL, **W.R. 1864, 331.** [*F.*, 14 W.R. 39.]

(3)—*First and second mortgage—Dispossession of second mortgagee—Cause of action—*

Right of Suit—continued.

——29.—**Possession, Suit for**—*continued.*

Limitation—Interest.—There were two mortgages on the same property, the condition in each being that, on failure to re-pay the amount within a fixed time, the mortgagee should be put in possession ; the second mortgagee obtained a decree on his mortgage and, in execution of it, took possession ; the first mortgagee then sued on his mortgage, obtained a decree, and in execution of it ousted the second mortgagee, and finally the heirs of the mortgagor discharged the debt of the first mortgagee and resumed possession. In a suit by the representatives of the second mortgagee against the heirs of the mortgagor for possession of the lands and recovery of interest on the mortgage-debt, the Court of first instance decreed the plaintiff's claim. The High Court on appeal reversed this decree-holding that no right of action accrued to the plaintiffs by reason of the satisfaction of the debt of the first mortgagee, and the recovery of the estate by the mortgagor or his heirs. SHIMBHOO v. NARAIN SINGH, **5 N. W.P. 153.** [*Reversed*, 1 A. 325, P.C.=4 I. A. 51.]

(4)—*Suit for separate possession of share.*—A suit will lie for partition of the lands of a certain talook, in order that the plaintiff may obtain separate possession of his share of those lands. GOLOKE CHUNDER CHUCKERBUTTY v. KALEE KINKUR CHUCKERBUTTY, **1 W.R. 164.**

(5)—*Formal possession in execution proceedings, sufficiency of, to maintain suit for possession—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 316, 318. — Plaintiffs sued to obtain possession of a garden, alleging that they had previously been put in possession of it by order of Court under a purchase made by their father in execution of a decree against the defendant, and that they had sufficiently been ousted by the defendant. Defendant contended that the plaintiffs never obtained possession of the garden, and that the sale proceedings were not regularly conducted. On the first ground the Chief Court held that even assuming that the possession given to the plaintiffs was only formal, it would sufficiently perfect the title of the plaintiffs or rather that of their father, acquired by purchase at the sale in execution so that it could be taken to have operated against the defendant as a complete transfer of the possession to the plaintiffs, who were therefore entitled to sue for possession. KARAM BAKSH v. NUND LAL, **103 P.R. 1884.**

(6)—*Suit for possession by purchaser at execution sale—Civ. Pro. Code,* 1882, *ss.* 11 *and* 318—*Concurrent remedies.*—The remedy for obtaining possession of property, given by s. 318 of the Civ. Pro. Code to the purchaser at an execution sale, does not preclude him from bringing a regular suit therefor, before exhausting the remedy under the section ; the remedies are concurrent. KISHORI MOHUN ROY CHOWDHRY v. CHUNDER NATH PAL, **14 C.**

Right of Suit—continued.

——29.—**Possession, Suit for**—*continued.*

644. (9 C. 602. 12 C. 169, *Cited.*) [*F.*, **4 A.** L J. 434=29 A. 463=A.W.N. 1907, 131, 3 M. L.T. 306=31 M. 177 ; *D.*, 3 Bom. L R. 94, A. W.N. 1908, 12=5 A.L J. 20=30 A. 72 ; *R.*, 2 L.B.R. 140, F.B., 16 C.P.L.R 135, 74 P.R. 1907=16 P.L.R. 1908, 5 A.L.J. 285=A.W.N. 1908, 122, 31 A. 82=6 A.L.J. 71=5 M.L.T. 185.]

(7)—*Dur-putneedar of part of patni estate—Person holding under kaimee patta from, right of, to sue for possession of share.*—This suit related to a putnee estate which the plaintiff stated was the inheritance of five brothers of whom two had appropriated the whole of it. Plaintiff, as holder of a kaimee patta from the dur-putneedar of the three ousted brothers, instituted the present suit to obtain possession of his share of the estate. The decision of the Principal Sudder Ameen that such a suit was not maintainable as not having been preferred by the ousted brothers, was *held* by the High Court to be wrong in law. Under the circumstances, plaintiff was the sole person who could bring a suit to recover the portion of the estate covered by his patta, as he represented the original owners, the three brothers. TARA SOONDERY DEBYA v. SHAMA SOONDERY DEBYA, **4 W.R. 58.**

(8)—*Bengal Rent Act* (VIII *of* 1869), *s.* 26—*Ejectment of unregistered purchaser of tenure—Right of suit for possession — Unregistered transferee — Disadvantages — Shareholder in zamindari—Sale of tenure under rent—Decree —Effect — Suit by unregistered transferee for possession — Burden of proof.*—None of the decided cases under the Bengal Rent Act show that an *unregistered transferee* of a tenure takes no title or has no *locus standi* to bring a suit complaining of an ejectment. But an unregistered purchaser takes subject to many disadvantages by reason of the want of registration, *e.g.*, he cannot come in and object to a sale—proviso to s. 63 of the Act. And if a sale takes place in a rent-suit brought by and against proper persons, *and the sale be of the tenure*, the unregistered transferee has no title as against the purchaser. The holder of a rent-decree, in execution of which the tenure is sold, assuming that he is only a shareholder in the zamindari right, has no right, under s. 64 of the Rent Act, to sell the tenure, but only the interest of the person against whom the decree is passed, so that the onus would be on the purchaser, in a suit against him for possession of the tenure by the ejected, unregistered transferee, to show that the sale under the rent-decree was such as to give him priority over the unregistered transferee (plaintiff). KRISTO CHUNDER GHOSE v. RAJ KRISTO BANDYOPADYA, **12 C. 24.** [*D.*, 26 C. 677 ; *R.*, 4 C.L.J. 68=10 C.W.N. 176.]

(9)—*Suit under kobala—Plea that plaintiff was mere benamidar—Onus on plaintiff to prove not only title but also possession within* **12** *years of suit.*—In this suit for possession, plaintiff

Right of Suit—continued.

——22.—Possession, Suit for—*concluded.*

rested her title on a kobala by which the property was sold to her. Defendant, while admitting the *factum* of the kobala, pleaded that the purchase was really hers though made by her in the name of the plaintiff who was a mere benamidar; she also pleaded that the plaintiff was never in possession. *Held* that the defendant, having from the first pleaded that the plaintiff never had actual possession, was entitled to a distinct decision upon this point; for, the kobala under which the plaintiff claimed, bore date more than 12 years prior to the institution of the suit, and she could not get a decree unless she proved, not only her title, but also that she had been in possession within 12 years of the filing of her plaint. KEDAR NATH MAHATAH v. KADUMBINEE DEBEA, **10 W.R. 239.**

(10)—*Suit to recover land with arrears of rent, cognizable only in Collector's Court under Act* X *of* 1859.—This was a suit to recover possession of lands and arrears of rent, although in the plaint it was stated to be one for possession and *wassilat*. The suit was, therefore, held to have been wrongly brought in the Civil Court; for, the plaintiff's remedy, if any, should have been sought in the Collector's Court under Act X of 1859. ISSUR CHUNDER CHUCKERBUTTY v. ASSAN SIRDAR, **10 W.R. 134.**

(11)—*Suit--Survey award--Possession—Limitation—Act* XIV *of* 1859, *s.* 1, *cl.* 12.—Where a plaintiff sued not only for the cancelment of a survey award, but also to be restored to possession of land wherefrom he had been subsequently dispossessed, his suit was held not to be barred because not brought within three years of the award, the latter claim being a different cause of action, to be governed by the limitation of twelve years in cl. 12, s. 1, Act XIV of 1859. An appellate Court can *suo motu* raise the question of limitation for the first time, where it appears on the face of the plaint that the suit is barred. MOZAFFUR ALLY v. GIRISH CHANDRA DAS, **1 B.L.R.A.C. 25=10 W.R. 71.**

(12)—*Crim. Pro. Code, s.* 320—*Possession—Title—Jurisdiction.*—Where, as regards the right of use of a piece of land, the Magistrate on enquiry under s. 320, Crim. Pro. Code, forbade the opposite party to retain possession until the decision of a Civil Court adjudging his title to do so, and the opposite party subsequently brought a Civil suit in which his title was decreed, *held* that the order of the Magistrate was not a final adjudication, plaintiff's right of suit being reserved by law. MOHESH CHUNDER MOOKERJEE v. RAMMOOTUN PALIT, **14 W.R. 163.**

See JURISDICTION OF CIVIL COURTS, 2 N.W.P. 85.

Right of Suit—continued.

——30.—Privacy, Invasion of.

See PRIVACY, RIGHT OF.

Easement—Privacy—Injunction.—The invasion of privacy by opening windows is not a wrong for which an action will lie. SAYYAD AZUF v. AMEERUBIBI, **18 M. 163.**

——31.—Public Worship, Suits concerning, Rights to.

(1)—*Public mosque—Rights of worshippers to sue* mutwalis *or superintendents.*—People who use a public mosque for the purpose of worship are entitled to sue the *mutwalis* or superintendents in charge of it to restrain them from acts believed by them to be contrary to the intention or purpose for which the mosque and its appurtenances were built, or which are likely to obstruct or impede worshippers in their entrance to or exit from the mosque. ABDUL RAHMAN v. YAR MUHAMMAD, **3 A. 636=A.W.N. 1881, 34.**

(2)—*Civil Court—Cognizance—Suit to establish claim by worshipper to have procession of idol carried along his street.—Per Sir Arnold White, C.J.*—A suit by an individual worshipper to establish a claim to have the procession of an idol carried along his street is not cognizable by a Civil Court. *Per Davies, J.*—Such a suit is cognizable by the Civil Court. The right of public worship if infringed is remediable in a Civil Court. NAGIAH BATHUDU v. MUTHACHARRY, **11 M.L.J. 215.** [*R.*, 32 C. 1072=2 C.L.J. 590=10 C.W.N. 505, 17 M.L.J. 1=30 M. 158=2 M.L.T. 69, 19 M.L.J. 743=7 M.L.T. 248=5 Ind. Cas. 76.]

(3)—*Liberty to erect places of worship.*—In India, members of one sect are at liberty to erect a place of worship on their own property, although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The people of any sect are at liberty to erect, on their property, places of worship, either public or private, and to perform worship provided that, in the performance of their worship, they do not cause material annoyance to their neighbours. SESHAYYANGAR v. SESHAYYANGAR, **2 M. 143** [*F.*, 7 C. 694; *Appr.*, 5 M. 304=2 Weir 73.]

See CIV. PRO. CODE, 1908, ss. 92, 93 O. I. r. 8, 11 A. 18=A.W.N. 1888, 276.

See MAHOMEDAN LAW—WAKF, 5 A. 497=A.W.N. 1883, 19.

——32.—Registration of Name.

(1)—*Plaint — Parties — Collector—Entry in Revenue register—Title—Effect.*—In a suit for the recovery of a share in land in right of heirship, the plaintiff cannot make the Collector a party defendant, simply because he has entered in his Revenue register only the name of one person as occupant of that land. The proper prayer for relief should be for an award of his share in the property of the deceased or

Right of Suit—continued.

——32.—**Registration of Name**—*continued.*

for a declaration of his right to such a share and not for the entry of his name in the Collector's book. The fact that another person's name has been entered in the Collector's book, as occupant of the land, does not necessarily of itself establish that person's title or defeat the title of the plaintiff. The Collector's book, is kept for purposes of revenue and not for purposes of title. FATMA KOM NUBI SAHEB v. DARYA SAHEB, **10 B.H C. 187.** [*F.*, 13 B. 75; *R.*, 10 B.H.C. 192, 10 B. H.C. 194, L B.R. 1892—1900, 181, 6 Bom. L. R. 988, 5 Bom. L.R. 956, 13 Bom. L.R. 879 = 35 B. 487.]

(2)—*Plaintiff in possession suing for change of registry—No allegation of refusal by proper authorities—Proper authorities not impleaded—Suit liable to be dismissed.*—Where a person alleges that he is in possession of property and prays the Court to cause the registry to be altered into his name, without any allegation that the proper authorities have improperly refused to make the entry, and without joining as defendant the only person who has power so to do, his suit ought to be dismissed. IBRAI BYARI v. REVD. H. A KAUNDINYA, **2 M H.C. 363.**

(3)—*Chota Nagpur—Registration by Collector.*—There is no law in force in Chota Nagpur province by which the Collector can be compelled to register the plaintiff's name as the proprietor of an estate. LALLA BISSEN PERSHAD v. THE COLLECTOR OF HAZAREEBAGH, **13 W.R. 397.**

(4)—*Purchase of share in transferable tenure—Zemindar still treating owner of share as full owner—Suit in Civil Court against zemindar and vendor—Absence of registration in sherista—Court bound to consider undue advantage to zemindar by reason of his fraud.*—Where a person had purchased, with the knowledge of the zemindar, a share in a tenure transferable by sale, the zemindar is bound to act as against that person in good faith; and if, with that knowledge, he chooses to treat the actual owner of 8 annas as if he still remained the owner of 16 annas, with a view of injuring and avoiding the rights purchased by the new tenant, the Court, notwithstanding that the formal act of registration has not been gone through, will take care that the zemindar gains no advantage from an act which, on the supposition, is a fraudulent one in itself. In such a case, a suit will lie in the Civil Court against the zemindar as well as against his vendor. Because, if two parties collude to do any act injuring the rights of a third party, that party has an action against them of some sort or other. MOHESH CHUNDER SHOMADDAR v. HURONATH ACHARJEE, **6 W.R. 179.**

(5)—*Suit for maintenance of possession of lands—Misjoinder of parties—Trial of portion of suit on merits—Procedure, whether regular—Correction of error in register, Settlement paper.*

Right of Suit—continued.

——32.—**Registration of Name**—*concluded.*

—A suit based on the allegation that the lands in suit, which were in the possession of the plaintiffs, had been wrongly recorded in some settlement papers, as belonging to the defendants, was brought by the plaintiffs for maintenance of possession by correction of the error which threatened to disturb their possession. The defendants pleaded that the plaintiffs, not being joint owners of the lands claimed by them, were not competent to sue for them jointly, and that they were not warranted in impleading them (the several defendants) in a single suit, as they were not in joint possession of those lands. Further, there was no allegation in the plaint that the lands in question or any portion of them had been recorded as jointly belonging to the defendants. The Court of first instance and the lower appellate Court decreed a portion of the plaintiffs' claim. *Held*, on special appeal, that the suit as brought should have been dismissed on the ground of misjoinder, without adjudication on the merits as the plaintiffs had no common cause of action in the matter of the suit against the defendants, such as to justify suing them all together, and as the irregularity by which the suit was brought before a Court other than the one which would otherwise have had cognizance of it, was calculated to produce error or defect in the decision on the merits. GANGA RAI v. MUSSUMAT SUKEENA BEGUM, **5 N.W.P. 72.**

——33.—**Revenue, Sale for arrears of.**

See SALE— SALE FOR ARREARS OF REVENUE AND CESS.

(1)—*Sale of immoveable property by Revenue Court—Objections by third party—Title of latter—Right of suit—Act* XXXII *of* 1860, *s.* 184.—Where a third party objected to the sale of certain immoveable property by a Revenue Court, *held* that s. 184 of Act XXXII of 1860 did not prohibit the institution of a suit by him to declare that the property was his, although he had not deposited the money demanded by Government or filed security. SHEO PERSHAD SINGH v. GOPAL LALL, **14 W.R. 276.**

(2)—*Transfer of Property Act* (IV *of* 1882), *s.* 83—*Payment of Government revenue by mortgagee in possession to save property—Payment of mortgage money into Court by mortgagor—Mortgagee drawing the money and relinquishing deed and possession of property—Subsequent suit for recovery of revenue paid by sale of mortgaged property.*—A usufructuary mortgagee had paid arrears of Government revenue on the mortgaged property to prevent its being sold in auction therefor, but on payment by the mortgagor into Court under s. 83 of the Act of the amount of the mortgage-debt only, the mortgagee took out the amount and deposited the mortgage-deed in Court to be handed over to the mortgagor, and also quitted possession of the property in his favour. After thus having lost

Right of Suit—continued.

—33.—Revenue, Sale for arrears of—*concld.*

his lien and rights as mortgagee, he brought a suit to recover the payment made by him on account of arrears of revenue paid by him, by sale of the mortgaged property. *Held* that, although he could have added these payments to the principal money due under the mortgage while the mortgage was in existence, and could have recovered them as part of the mortgage debt, yet, he was not entitled, after the mortgage has been extinguished, to proceed against the mortgaged property on account of such payments. *Held* also that he might, under such circumstances, bring a simple money-suit for the money paid, subject, however, to the law of limitation applicable to the case. ANANDI RAM v. DUR NAJAF ALI BEGUM, **13 A. 195 =A.W.N. 1890, 228.** [*R.*, 22 M. 332.]

(3)—*N.W.P. Land Revenue Act* (XIX *of* 1873), *ss.* 185, 186 —*Revenue sale—Surplus proceeds—Payment by Collector to two mortgagees of defaulter—Suit by one mortgagee, against the other, if maintainable.*—A certain estate which had been mortgaged separately to the plaintiff and to the defendant, on being sold for arrears of revenue, fetched a much larger sum than was necessary to discharge such arrears. The Collector, disregarding the provisions of ss. 185 and 186 of the Land Revenue Act, refused to pay the surplus proceeds to the defaulter, and handed it over to the two mortgagees of the defaulter one of whom, alleging that his mortgage had priority over the other's mortgage, brought the present suit against that other, whose debt the Collector had paid in full to recover money sufficient to pay off the balance of his own debt. *Held*, that such a suit was not sustainable, the plaintiff having failed to show any cause of action. The voluntary and unauthorised payments by the Collector in violation of his duty under the provisions of the Land Revenue Act did not create any right of action in the plaintiff as against the defendant for having the balance of his mortgage-debt made good by the defendant because of its priority over the debt due to the latter. KUNJ BEHARI LAL v. PARSOTAM NARAIN, **21 A. 137=A.W.N. 1898, 210.**

See JURISDICTION OF CIVIL COURTS, 8 P. R. 1872.

—34.—Sale in Execution of Decree.

See EXECUTION OF DECREE.

See SALE—SALE IN EXECUTION OF DECREE.

(1)—*Limitation Act*, XIV *of* 1859, *s.* 3, *cl.* 1 —*Suit by judgment-debtor to set aside execution sale—Fraudulent sale under satisfied decree—Civ. Pro. Code, Act* VIII *of* 1859, *s.* 256.—The limitation of one year provided by s. 3, cl. 1 of Act XIV of 1859 is not applicable to a suit brought by a judgment-debtor to set aside an execution sale, on the ground that the decree-holder fraudulently got the property sold in

Right of Suit—continued.

— 34.—Sale in Execution of Decree—*contd.*

execution of a previous satisfied decree. S. 256, Act VIII of 1859, did not bar such a suit. BUDREE v. LOKEMUN, **3 Agra 89.**

(2)—*Execution—Proceedings without judgment-debtor's knowledge—Act* VIII *of* 1856, *s.* 257, *order under—Sale in execution—Suit by judgment-debtor against purchaser to set aside—Effect of making decree-holder party to suit—Act* XXIII *of* 1861—*Fraud.*—There can be no order under s. 257, Civ. Pro. Code, where the judgment-debtor has not been aware of the proceedings in execution and has not made his objection till after the sale has been confirmed. A suit by a judgment-debtor against an auction-purchaser to set aside the sale in execution, to which suit the decree-holder is made a party in order that he may be made liable for the costs of all the parties, is not barred by s. 11, Act XXIII of 1861. Where, in execution of a decree for a sum of three rupees, landed property of the judgment-debtor was attached and sold, and the sale was conducted by a common peon of the Nazir's office, and the moment the judgment-debtor heard of what had happened, he went to the Court and deposited the money due under the decree, *held* the circumstances gave rise to the inference that what was done was done behind his back, and were sufficient to raise a case of fraud. SREEMENTO PURAMANICK v. OBHOY CHURN MANNA, **11 W.R. 297.**

(3)—*Execution of decree—Attachment of property—Private sale of property to pay decree amount—Subsequent Court sale for interest and costs due to decree-holder—Purchaser at private sale objecting to confirmation of execution-sale—Suit to set aside sale—Civ. Pro. Code*, 1859, *s.* 246.—A decree-holder who had two decrees against his judgment-debtor, one against the landed property, and the other a simple money-decree, proceeded to execute the former decree by attachment and sale of the property, the amount of the latter decree being also entered in the execution petition. Before sale of the property, the judgment-debtor having sold the property privately to the plaintiff, paid the total amount of the two decrees except interest and costs. The decree-holder after six months brought the property to sale for interest and costs and it was purchased by the defendant. The plaintiff after having unsuccessfully objected to the confirmation of sale, sued to set aside the order confirming the sale. *Held* that the Court had no alternative but to sell the right of the judgment-debtor, in the absence of objections, that the law which allowed the parties to object to the confirmation of the sale, on the ground of irregularities, was not wide enough to cover an objection of the nature contemplated by s. 246, Civ. Pro. Code, but brought at the wrong time, and that the suit as framed did not disclose any cause of action, inasmuch as the order which he sought to set aside did not at all concern him, and as his rights under the private pur-

Right of Suit—continued.

— 34.— **Sale in Execution of Decree**—*contd.*

chase had not been touched by the auction-sale. MIRZA HOOSEIN BEG v. JEEWA RAM, **5 N.W.P. 139.**

(4)—*Rent—Sale of tenure—Previous private sale without notice—Rights of such purchaser—Right of suit—Bengal Act of* 1869, s. 26—*Civ. Pro. Code.* s. 311— *Execution sales under Civ. Pro. Codes,* 1859 *and* 1877—*Difference.*—Where a zemindar, who had no notice of a private transfer of his registered tenant's interest in the land (such as is described in s. 26 of the Bengal Rent Act), brought a suit for rent against his tenant and sold the whole tenure in execution, which he himself purchased, and an application by a prior private purchaser from the tenant, to set aside the sale under s. 311 of the Civ. Pro. Code, was (wrongly) rejected, *held*, such purchaser might have satisfied the rent decree and so prevented the sale, or might have appealed from the order refusing to set the sale aside; but could not, in the absence of fraud, treat the proceedings in the rent-suit as a nullity on the ground that he was not a party thereto and *sue* the zemindar and the tenant to set aside the rent sale. [*R.*, 20 C. 418, 22 C. 802, 9 C.W.N. 134; *D.*, 4 C.L.J. 68=10 C.W.N. 176.] *Obiter.*—An execution-sale under the Civ. Pro. Code of 1877 is different from one under that of 1859; what was sold under the older Code was "the right, title and interest of the judgment-debtor"; but under the later, the property of the judgment-debtor, *i.e.*, the thing itself was sold. PANYE CHUNDER SIRCAR v. HURCHUNDER CHOWDHRY, **10 C. 496.**

(5)—*Decree for arrears of rent—Sale in execution—Right of judgment-debtor to set aside sale.*—A judgment-debtor cannot sue to set aside a sale in execution of decree for arrears of rent. RUTHUN MONEE DASSEE v. KALEE-KISSEN CHUCKERBUTTY, **W.R. F.B. 147.**

(6)—*Act* X *of* 1859, *ss.* 107, 110, 111, 151—*Sale in execution of under-tenure—Suit to set aside sale—Limitation.*—A party who objects under s. 111 of Act X of 1859, to a sale, in execution of a Civil Court's decree, of a saleable under-tenure other than that from which arrears of rent are due, and whose objection is overruled, is entitled under s. 107 to bring a suit in a Civil Court to set aside the sale, and s. 151 of the Act is no bar to such suit. The provisions of s. 110 are applicable to the case. JUGGESSUR SUHAYE v. GOPAL LALL, **11 W. R. 260.**

(7)—*Lands outside District—Suit to set aside sale by Collector—Jurisdiction of Civil Court.*—Where a Collector proceeds to sell lands not lying within his district, he acts without jurisdiction; in such a case, a suit can be maintained in the Civil Court to set aside as illegal that which has been done by the Collector without jurisdiction. KHOONOO v. AOODAL SINGH, **8 W.R. 511.**

(8)—*Execution of decree for rent—Collector's order for sale made without jurisdiction—Suit*

Right of Suit—continued.

— 34.—**Sale in Execution of Decree**—*contd.*

maintainable in Civil Court to set aside.—Plaintiffs, the judgment-debtors under a decree for arrears of rent, had applied to have their rights and interests in the tenure which had fallen into arrear, sold and then, if the arrear were not realised, that their other immoveable property might be sold. The Collector rejected this petition. The present suit was brought to set aside the above order as illegal. The lower Courts held that, under the provisions of s. 105, Act X of 1859, the tenure upon which the arrear accrued must be first sold, and that the decree-holder was not entitled to proceed against other landed property till this be done; and they accordingly set aside the sale. The defendant, on special appeal, urged that s. 105, Act X of 1859, did not restrict the power of a decree-holder to select such property as he pleased for sale in liquidation of his decree; and that the terms of the section were permissive and not peremptory. But it was *held* by the High Court that the permissive words in s. 105 have reference not to the immoveable property, but to the person and moveable property of the debtor, and that s. 105 clearly lays it down that, till the tenure on which the arrear has accrued be sold, other landed property cannot be brought to sale, and concurred in the opinion of the lower Courts, that the order of the Collector was wholly without jurisdiction and that the sale of the suit estate could not be made according to law till the tenure on which the arrear accrued was sold. JOKEE LAL v. NARSING NARAIN SINGH, **4 W.R. Act X, Rul. 5.** [*R.*, 8 W.R. 511, 14 C. 14.]

(9)—*Execution of decree—Sale in execution—Suit to set aside sale on grounds which could have been taken in appeal against decree—Suit not maintainable—Civ. Pro. Code,* 1882, *s.* 244, *scope of.*—A party to a decree and subsequent execution proceedings, allowed execution to proceed and property to be sold, without appealing. He subsequently brought a separate suit to recover the property so sold on grounds such as (i) that he was wrongly impleaded personally instead of as a representative; (ii) that the Court had wrongly reinstated execution proceedings after dismissing them for default in payment of deficient Court-fees ordered by the Court, &c. *Held* that a separate suit was not maintainable because these grounds could have been taken in appeal from the original decree or orders in execution. Questions arising between the decree-holder and the representative as to whether the attached property has come to the representative as such and so is liable to be taken in execution, or is the representative's own property derived from some other source, and therefore not liable to be taken in execution, must, under s. 244, Civ. Pro. Code, be decided in the execution proceedings and not by a separate suit. BENI PRASAD KUNWAR v. LUKHNA KUNWAR, **21 A. 323=A.W.N. 1899, 104.** (16 C. 1, 12 A. 313, 11 B.L.R. 149, *R.*)

Right of Suit—continued.

——34.—Sale in Execution of Decree—*contd.*

(10)—*Sale in execution of a decree—Suit to set aside order setting aside sale—Civ. Pro. Code*, 1859, *ss.* 256, 257.—By the Full Bench, *Oldfield, J.*, dissenting—Where an order setting aside a Court-sale is illegally passed, that is, passed in the absence of objections permissible under ss. 256, 257 of the Civ. Pro. Code, it cannot be either valid or final; and, though an appeal against such an order is prohibited, there is nothing to prevent the auction-purchaser from filing a suit to set it aside. DIWAN SINGH v. BHARAT SINGH, **3 A. 206, F.B.** (1 A. 374, *R.*) [*Appr.*, 20 A. 379, F.B.; *R.*, 3 A. 701.]

(11)—*Auction sale set aside—Suit for confirmation of sale—Civ. Pro. Code*, 1877, *ss.* 311, 312, 588—*Finality of order setting aside sale.*—(By the Full Bench, *Oldfield, J.*, dissenting)—Where a sale of immoveable property in execution of a decree has been set aside under ss. 311 and 312 of the Civ. Pro. Code, the auction-purchaser can maintain a suit for the confirmation of the sale on the ground that there was no irregularity in the publication or conduct of the sale. It is not barred by the last clause of s. 312, for, it is not a suit to *set aside* a sale, nor is it barred under the last clause of s. 588 which declares that "the orders passed in appeal under this section shall be final;" for this only means that there shall be no second appeal. AZIM-UD-DIN v. BALDEO, **3 A. 554, F.B.** [*Not F.*, 18 A. 437; *F.*, 9 A. 602; *R.*, 19 B. 216.]

(12)—*Sale in execution of decree—Order of attachment and sale-notification not signed by Judge, but by Munsarim—Sale set aside—Suit to set aside order and confirm sale—Subsequent bona fide purchase—Equitable estoppel.*—S. 222 of the Civ. Pro. Code, 1859, requires that warrants for execution shall be signed by the Judge. Therefore, an order of attachment and notification of sale of immoveable property in execution of a decree, not signed by the Judge, but by the Munsarim, can have no legal effect, and a sale of such property held after such attachment and in pursuance of such notification will be void. And even though such a sale may be irregularly set aside by the Court executing the decree, a suit to set aside the order setting aside the sale is not maintainable, as the sale itself was *ab initio* void. [*Affirmed*, 7 A. 507, P. C.; *R.*, 12 A. 96.] Where, subsequent to the setting aside of such sale, the properties were privately purchased *bona fide* and for value by a person who discharged previous incumbrances on it, the auction-purchaser would, in any view of the case, be estopped from suing after a long delay, for confirmation of his sale and for the avoidance of the private sale, and thereby taking advantage of the circumstances which have considerably enhanced the value of the property. RAM DIAL v. MAHTAB SINGH, **3 A. 701=A.W.N. 1881, 62.** [*Affirmed*. 7 A. 507, P.C.; *R.*, 12 A. 96.]

Right of Suit—continued.

——34.—Sale in Execution of Decree—*contd.*

(13)—*Execution of decree—Sale in execution—Objection to sale by third party—Civ. Pro. Code*, ss. 311, 244, 278, 283—*Suit for confirmation of sale in execution—Declaratory decree—Specific Relief Act*, s. 42.—A sale in execution of a decree cannot be set aside at the instance of persons who are neither the holders of the decree executed nor the owners of the property sold. [*D.*, 15 A. 318.] Where a sale of property in execution of a decree was wrongly set aside at the instance of persons who had no *locus standi* to object to it, and the property was attached in execution of another decree against the judgment debtor (owner), *held*, in a suit by the purchaser to cancel the order setting aside the sale, to confirm the sale, and for a declaration that the property was not liable to be sold in execution of the latter decree, that such a suit could only be maintained under s. 42 of the Specific Relief Act, but that, reading s. 244 with ss. 278 and 283 of the Civ. Pro. Code, it was evidently intended by the Legislature that such questions should be decided in the execution department, and was premature and not maintainable. MAN KUAR v. TARA SINGH, **7 A. 583=A.W.N. 1885, 124.** [*Diss.*, 23 B. 266; *Cons.*, 18 A. 410=16 A.W.N. 126.]

(14)—*Decree of High Court—Execution-purchaser, rights of—Suit for partition before conveyance—Rules* 415, 431 *of High Court.*—The position of a purchaser in execution of a decree of the High Court with a certificate from the Registrar, is that of one clothed with a right to a conveyance by virtue of a contract; he does not, save as regards the parties to the contract of sale, hold the position of an owner. All that passes to him, as against the defendant in the suit, is an equitable estate and a right to the conveyance of the property. And he would not be entitled, before actual conveyance of the property, to maintain a suit for partition. JOHUR MULL KHOORBA v. TARANKISTO DEB, **10 C. 252.**

(15)—*No suit or appeal for refund of sale proceeds paid to wrong party.*—No suit or appeal will lie for refund of proceeds of sale in execution of decree paid to wrong party under s. 270, Civ Pro. Code, 1859. HURISH CHUNDER SIRCAR v. AZIMOODEEN SHAHA, **W.R.F.B. 180.**

(16)—*Civ. Pro. Code*, 1882, *s.* 295, *Proviso* (*c*) (=*s.* 73, *new Code*)—*Transfer of Property Act* (IV *of* 1882), *s.* 80—*Execution of decree—Sale in execution of decree enforcing mortgage—Priority.*—B's hypothecation was intermediate between two hypothecations of the same property made to A. A obtained two decrees on his mortgages, and the whole of the sale-proceeds, realised in execution of his decree, was paid to him. B on obtaining a decree in his mortgage, sued A for having his decree satisfied out of the sale-proceeds under A's decree after discharging the amount due to A under his first incumbrance. *Held* that:—

Right of Suit—continued.

——**34.—Sale in Execution of Decree**—*contd.*

(*a*) The suit was maintainable. (*b*) The words "when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon" could not mean sale ordered for the discharge of more incumbrances than one. (*c*) Such construction would frustrate the object the Legislature had in view, not only in s 295, Civ. Pro. Code, but also in s. 80 of Act IV of 1882, and would be to apply a principle to the distribution of proceeds which would give priority to a subsequent incumbrance. (*d*) If A's second mortgage incumbrance be also treated as incumbrance within the meaning of s. 295, proviso (*c*), for the discharge of which the sale was ordered, B would come neither within the third nor within the fourth category of distribution, inasmuch as his decree was a decree for enforcement of a lien, and not a decree for money within the meaning of that proviso. MITTHU LAL v. KISHAN LAL, **12 A. 546 = A.W.N. 1890, 77.**

(17)—*Sale in execution of decree—Order setting aside sale—Suit to set aside order—Suit for possession—Civ. Pro. Code*, 1859, *ss.* 256, 257.—An order setting aside a sale in execution of decree is final and not liable to be set aside by means of a separate suit, only when it is regularly made under the provisions of s. 257, Civ. Pro. Code. Therefore, when the same property was sold on the same day to two persons in execution of two different decrees, and the sale to one of them was, at the instance of the other, set aside on the ground that the decree of the former had been satisfied prior to the sale, a separate suit to set aside the order of the Court was maintainable, as the order setting aside the sale was not passed under s. 257. The plaintiff in the above case could only sue for a declaration that the sale to him should be confirmed; he could not sue also for possession, as that remedy must be sought in the Court executing the decree, which would, after confirming his sale, put him in possession of the property. SANGAM RAM v. SHEOBART BHAGAT, **3 A. 112.**

(18)—*Decree enforcing sale of immoveable property—Sale of such decree by Court without jurisdiction—Sale in execution—Fraudulent representation by decree-holder—Suit to set aside sale.*—The sale of a decree enforceable by sale of immoveable property, by a Court which has no jurisdiction over such property, is illegal and invalid, and liable to be set aside. [*R.*, 34 C. 576.] When a decree-holder makes a fraudulent representation that a decree in favour of his judgment-debtor, which is attached and sold at his (the decree-holder's) instance, subsists and that the judgment-debtor has a subsisting interest in it, the auction-purchaser purchasing such decree on the faith of such representation, will be entitled to sue for the setting aside of the sale; and this, notwithstanding the rejection of his application under s. 313 of the Civ. Pro. Code, 1877, for the cancelment of such sale. RAGHUNATH DAS v. KARKAN MAL, **3 A. 568.**

Right of Suit—continued.

——**34.—Sale in Execution of Decree**—*concld.*

(19)—*Declaratory decree — Decree ordering sale of property by Court—Second order—Decree of Revenue Court—Refusal of Collector to sell property in execution—Second application to Collector—Right of action—Suit to establish lien—Sale to discharge lien.*—Where a person has got a decree of a Civil Court ordering the sale of certain property by one Court or the other, he cannot come to the Civil Court for a second order, or rather for the Court to repeat its former order, in the absence of any cause shown. If a person whose application to the Deputy Collector to sell certain property in execution of the decree of a Revenue Court is refused, fails to bring a suit within the proper time for a declaration of his right to have the property sold, he cannot procure for himself more time by simply making a second application to the Deputy Collector for execution, and getting the refusal repeated. A suit brought for declaration of right to have certain property sold by a Deputy Collector in execution of a Revenue Court's decree, cannot be treated as a suit brought in the Civil Court to establish the lien which the plaintiff has got by virtue of the kubooleut on the property, and to bring the property to sale in the Civil Court in order to discharge that lien. RAJAH RUGHOONUNDUN SINGH BAHADOOR v. GOPAL CHUND CHOWDHRY, **20 W.R. 17.**

(20)—*No saleable interest in judgment-debtor at time of sale—Right of purchaser to sue to recover purchase-money.*—Where it was found that at the time of a sale the judgment-debtor had no saleable interest in the property sold the purchaser was entitled to institute a suit to recover the purchase-money from the decree-holder. DHANNOO JINGAR v. ANTOBA JANNARDAN KALAR, **12 C.P.L.R. 49.**

(21)—*Registration—Sale of immoveable property—Loss of sale deed before registration—Subsequent sale to another with notice of first sale—Right of first purchaser.*—A deed of sale of immoveable property for more than Rs. 100 was lost before registration. The vendor subsequently resold the property to another who had knowledge of the first sale, and put him in possession. *Held* that the first purchaser could sue the vendor to compel the execution of a fresh deed of sale and for possession of the property. NALLAPPA REDDI v. RAMALINGACHI REDDI, **20 M. 250.** [*R.*, 5 N.L.R. 70; *D.*, 1 L.B.R. 293.]

See CIV. PRO. CODE, 1908, O. XXI, r. 92, 12 W.R 41.

See TRANSFER OF PROPERTY ACT, 1882, ss. 60, 68, 72, 74, 75, 95, 22 M. 332.

——**35.—Subscription.**

(1)—*Suit to recover money collected as subscriptions for building* debera—*Person collecting subscriptions, trustee for community—Suit for recovering of subscriptions—Suit entertainable by Subordinate Judge's Court and not on small cause side.*—The father of the defendants had

***Right of Suit*—continued.**

——35.—Subscription—*concluded.*

been collecting certain subscriptions for the purpose of building a *dehera* (temple) over a dargah at Broach as authorized at the meeting of the community of that locality for the purpose of raising such subscriptions. This suit was instituted against the defendants after the death of their father for recovering the subscription moneys collected and received by him and left in their hands. On the question whether the suit could be brought in the Court of Small Causes or was entertainable only by a Subordinate Judge as a suit connected with a trust, the High Court *held* that the defendants' father, after receiving the subscriptions, held the amount in the capacity of a trustee for the community for the purpose of expending it upon the dargah and the suit was entertainable, therefore, only by the Subordinate Judge and not by the Small Cause Court. The Subordinate Judge, therefore, was directed to accept the plaint which the plaintiff was ordered to amend by suing (with the permission of the Court) on behalf of the community under s. 30, Civ. Pro. Code, 1882. MAHOMED NATHUBHAI v. HUSEN, **22 B. 729.**

——36.—Torts.

(1)—*Injury to civil rights—Action in respect of—Prior prosecution not necessary—High Court, Original side.*—Within the original jurisdiction of the High Court of Madras a person who is injured in his civil rights by an act which is also a non-compoundable offence is not bound to institute criminal proceedings in the first instance, before maintaining a civil action. ABDUL KAWDER v. MUHAMMAD MERA, **4 M. 410.** [*R.*, 14 C.P.L.R. 123.]

(2)—*Attached property made away with—Suit for recovery—Criminal prosecution not launched—Act* VIII *of* 1859, *s.* 81.—Where a peon of the Court executing the process under s. 81 of Act VIII of 1859 attached certain property belonging to the plaintiffs during their absence from home, and in collusion with the other defendants made away with it, a suit will lie for its recovery or its value without a criminal prosecution being previously instituted. CHOITUNNO PARAMANICK v. ZUMMEEROODDI SHAIKH, **18 W.R. 27.** [*Rel. on*, 14 C.P.L.R. 121.]

(3)—*Suit for damages for malicious prosecution—Award of compensation by Magistrate no bar to suit.*—The compensation which a Magistrate who dismisses a complaint as frivolous or vexatious is empowered in his discretion to award to an accused person, does not deprive the latter of any right of suit in the Civil Court which he may possess. The section of the Code which gives the Magistrate the power does not (like s. 79, Civ. Pro. Code), provide that the award of compensation shall bar a suit for damages. ADRAM v. HURBULLUB, **2 N.W.P. 58.**

(4)—*Right of suit—Cause of action—Imprisonment in default of fine—Suit to recover fine*

***Right of Suit*—continued.**

——36.—Torts—*concluded.*

realized—Maintainability.—An accused person was punished by the Magistrate both by imprisonment and fine, and was sentenced in default to further imprisonment. The accused, after he had undergone both the principal punishment and the additional imprisonment, was released, and after his release, the fine was also realized. In a suit by him to recover the amount of fine which was unlawfully taken from him, *held* that as the additional imprisonment was not in lieu of fine but as a punishment for non-payment of it, no cause of action accrued to him out of the proceedings of the Criminal Court, and the suit was consequently not maintainable. MANOOLLAH *alias* MANOO v. GUNES KULWAR, **3 Agra 390.**

See SLANDER, 16 W.R. 83.

——37.—Trusts, Suits relating to.

(1)—*Trust property in wrongful possession of defendants—Suit by trustees to recover—S.* 539, *Civ. Pro. Code* (1882)—*Applicability.*—The trustees of a temple sued for possession of certain trust property which was wrongfully enjoyed by the defendants. The defendants challenged plaintiff's title to sue and claimed ownership of the suit property. The Subordinate Judge in whose Court the suit was filed, returned the plaint for presentation to the District Court, holding that the suit was of the character contemplated by s. 539, Civ. Pro. Code (1882). He also found that the defendants were the trustees of the temple. The High Court held that the suit was rightly instituted in the Court of the Subordinate Judge. The suit not being one *against* trustees, but *by* trustees against persons who were alleged to be wrongfully in possession of the trust property, it did not fall within the terms of s. 539, Civ. Pro. Code (1882). VISHVANATH GOVIND DESHMANE v. RAMBHAT, **15 B. 148.** [*F.*, 24 B. 170=1 Bom. L.R. 649, 33 C. 789=10 C.W.N. 581; *Rel. on*, 16 M. 31; *R.*, 21 B. 257, 3 O.C. 299.]

(2)—*Trust property—Trespass—Suit in ejectment—Set-off by trespasser—Equitable defence—Civ. Pro. Code*, 1882, *s.* 539.—On the death of the manager of certain trust property called Chinchvad *sansthan*, the disputes which arose between two persons B and C (each claiming the management) were terminated by a compromise, in 1881. Under the compromise, B was appointed trustee with all rights and privileges and a portion only of the trust property was assigned to C. B was afterwards removed from his office as trustee and the plaintiffs who were appointed in his stead filed the present suit for setting aside the compromise of 1881 and for recovering the trust property in the possession of C. The defendant pleaded by way of set-off or equitable defence that the plaintiffs were not entitled to recover the trust property unless and until they restored to him the private property which belonged to him and which he had given up under the compromise. He further contended that he was

Right of Suit—continued.

— 37.—**Trusts, Suits relating to**—*continued.*

the adopted son of the original manager of the trust estate and that the property which he claimed to recover by way of set-off belonged to him by virtue of the adoption. The adoption was however denied by the plaintiffs. *Held*, that the plaintiffs were entitled to recover possession of the trust property and that it was not open to the defendant to claim, as a set-off or as an equitable defence, to recover from the plaintiffs the private property in question in this suit in which the trustees sought to eject him from the properties of which he obtained possession under the compromise with the late manager. B's action was *ultra vires* in putting the defendant in possession of the trust property. *Held*, also that s. 539 of the Civ. Pro. Code, 1882, was no bar to the suit, which was brought by the trustees to recover trust property from the possession of a trespasser. SHRI DHUNDIRAJ GANESH DEV v. GANESH, **13 B. 721.** [*R.*, 20 B. 250, 24 B. 170 =1 Bom. L.R. 649, 2 C.L.J. 431, 33 C. 789= 10 C.W.N. 581.]

(3)—*Public charitable and religious trust—Civ. Pro. Code*, 1882, *s.* 539—*Suit for removal of trustee and appointment of new trustees—Right of suit by devotees and worshippers—Persons having "direct interest" meaning of—Trustees claiming trust property as their own—Breach of trust.*—The words "direct interest" in s. 539 of the Civ. Pro. Code, include the interest which the worshippers and devotees of the diety naturally have in the management of the temple. Much more therefore does it include the interest of persons who happen to be also the descendants of the original founder of the endowment. Such persons, therfore, are entitled to bring a suit under s. 539 for the removal of the trustees and for the appointment of new trustees. [*R.*, 20 B. 250, 21 B. 48, 22 B. 475, 20 A. 46, 24 C. 418, 1 S.L.R. 155, 13 Bom. L.R. 49, 28 M. 319=15 M.L.J. 133.] Where the trustees of a charitable endowment assert that they have a right to treat the trust property as their own private estate, and that they can apply the trust funds to their private purposes, this constitutes a breach of trust, and will be a good ground for their removal from the trust. CHINTAMAN BAJAJI DEV v. DHONDO GANESH DEV, **15 B. 612.** [*R.*, 28 M. 319= 15 M.L.J. 133, 15 B. 625, 22 B. 493, 21 B. 556, 2 C.L.J. 460.]

(4)—*Act* XL *of* 1858—*Certificate under—Suit by manager—His rights.*—In a suit by T as manager of an estate and trustee of the son of the Raja against an official for an account of various expenses, etc., the defendant pleaded that the certificate granted to the plaintiff under Act XL of 1858 having become inoperative on account of the minor attaining majority, the plaintiff had no right to sue. *Held*, upholding the contention of the defendant, that the suit was not maintainable. T's *locus standi* in the suit was only as one of the members of a committee of guardianship and management

Right of Suit—continued.

——37.—**Trusts, Suits relating to**—*concluded.*

appointed by the Raja which provided that all affairs should be conducted according to the decision of the majority of the committee. He had no authority from the other members to bring the suit. GIBBON v. BUKHTAR TEWAREE, **23 W.R. 242.**

(5)—*Mahomedan Law—Religious endowment—Place used as cemetery—Form of suit—Permission of Court under s.* 30, *Civ. Pro. Code*, 1882. —This was a suit brought by certain members of the Mahomedan community against the defendants to recover possession of the suit property, alleged by the plaintiffs to have been used as a public burial ground for the Mahomedans. The defendants set up their title to the lands, denying that they were *wakf* property as alleged by the plaintiffs and alleging their purchase of the same from T who was the owner of the property. The lower appellate Court dismissed the suit for want of permission from the Court under s. 30, Civ. Pro. Code, 1882. The plaintiffs preferred a second appeal to the High Court. *Held* that, under the Mahomedan Law, the plaintiffs, as representing a Mahomedan endowment in the shape of certain lands used for certain religious purposes, were competent to maintain the suit which related to *wakf* property and that permission under s. 30, Civ. Pro. Code, was not necessary. *N.B.*—The case was accordingly remanded to the lower appellate Court for decision on the merits. FAZL-UL-RAHMAN v. MUHAMMAD YUSUF, **A.W.N. 1885, 219.**

See MAHOMEDAN LAW—WAKF, 3 B. 84.

——38.—**Witness.**

See WITNESS.

(1) — *Witness though served, absent — Suit decreed against summoning party—Suit for damages against witness.*—In a suit to recover damages sustained by plaintiffs on account of the non-appearance of the defendant, to give his evidence as a witness in a former case instituted against them, though the usual process had been served upon him, the *onus* is on the plaintiffs to prove that they were endamaged by the omission of the defendant to appear. The mere fact of the defendant's non-attendance as a witness cannot of itself be a good ground for the plaintiffs to come against the defendant and to recover damages from him. DWARKNATH KOOREE v. ANUNDO CHUNDER SANNAL, **5 W.R.S.C.C.R. 18.**

See WITNESS—EXPENSES OF WITNESSES, 5 W.R. S.C.C. Ref. 6.

See WITNESS—PRIVILEGES OF WITNESS, 15 C. 264.

——39.—**Miscellaneous.**

(1)—*Suit for recovery of doctor's fees—Limitation—Act* XIV *of* 1859, *s.* 1, *cls.* 2, 9.—A doctor is competent to bring a suit for recovery of his fees although he has treated the patient before he is paid. A claim for doctor's

Right of Suit—continued.

—39.—**Miscellaneous**—*continued.*

fees is founded on contract which is of two kinds, expressed or implied. Express contracts are where the terms of an agreement are openly uttered and avowed at the time of making. Implied contracts are those where a person engages another to do any business for him or perform any work and impliedly undertakes or contracts to pay the latter as much as his labour deserves. Where the doctor's services are engaged by implied contract, the article of limitation applicable is cl.9, s. 1 of Act XIV of 1859, and not cl. 2. A suit for recovery of such dues can therefore be brought within three years from the time when the cause of action accrues. HURIS CHUNDER SURMAH v. BROJONATH CHUCKERBUTTY, **13 W.R. 96.**

(2)—*Doctor—Suit by doctor for his fees.*—In an action by a medical practitioner to recover the amount of his fees it is open to the defendant to lead evidence to show that he treated the patient ignorantly or improperly, which plea, if proved, furnishes a good defence to the action. PARREIRA v. GONSALVES, **8 Bom. L.R. 93.**

(3)—*Suit for performance of services by barbers.*—A suit for the performance of certain services by barbers will not lie. RAJ KRISTO MAJEE v. NOBAEE SEAL, **1 W R. 351.**

(4)—*Club—Contract—Liability of the Secretary of a club on a contract entered into on behalf of the club.—Held*, that the Secretary of a club could not, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of the club by his predecessor in office, nor could the members of a club collectively be sued through their secretary as their representative. G. B. GOYDER v. SADULLAH, **A.W.N. 1898, 138=20 A. 497.**

(5)—*Erection of public building from subscriptions—Suit for subscription—Right of suit.*—Where a subscriber is aware that an obligation to a contractor, for erecting a town hall from out of the subscribed funds, is to be incurred on the faith of such subscriptions, a suit would lie for the recovery of the subscription so promised. Such an action may, under the provisions of the Civ. Pro. Code, be brought by a person on behalf of himself and others jointly interested with him. KEDAR NATH BHUTTACHARJI v. GURIE MAHOMED. **14 C. 64.** [*F.*, 13 C.P L.R. 57.]

(6)—*Subscription to charitable institution—Suit—Suit for subscription—Secretary whether competent to sue.*—The extent of a subscriber's obligation to a charitable institution must depend upon the nature of the charity or other object for which the subscription is given, and in some cases, upon what the subscriber actually said or did at the time when he engaged to subscribe. Thus, for instance, where a number of persons undertake to give various sums for the building of a Church or Hospital, and the church or Hospital

Right of Suit—continued

—39.—**Miscellaneous**—*continued.*

is accordingly built by a committee or other managing body upon the faith of the subscriptions promised, each subscriber would be legally responsible for the sum which he promised to provide. On the other hand, there are cases where, from its very nature, the engagement of the subscriber is purely voluntary; as where people give subscriptions or donations towards providing from time to time for the poor of a parish. And there are other cases again, where the subscription is so far voluntary, that the obligation, if any, only continues until the subscriber declares his intention of discontinuing his subscription. It is therefore quite impossible to lay down any fixed rule or rules which would be applicable to all such subscriptions; each case must be governed by its own circumstances and the question of liability will generally be one of fact. *Quære.*—Whether assuming the liability of a subscriber for unpaid subscriptions, the Secretary of a charitable institution with the consent of the committee of management, is entitled to sue a subscriber for the amount of his contribution? KEDAR NATH MITTRA v. ALISAR ROHOMAN, **10 C.L.R 197.**

(7)—*Ferry rights—Right to restrain another from starting ferry*—An owner of a ferry, granted under a Government settlement, who plied it for hire, could restrain by suit another from running his ferry over the same spot, though that other levied no tolls on his ferry, if he did not use it exclusively for the conveyance of his own servants and ryots. LUCHMESSUR SINGH v. LEELANUND SINGH, **4 C 599=3 C.L R. 427.** (16 W.R 281, *R.*) [*R.*, 18 C. 652.]

(8)—*Registration of name—Suit to compel registration of another person's name—Lessee holding as agent of others.*—A Collector may register as farmer a person to whom a farming lease has been given, notwithstanding he holds it in reality as the agent of another, and a third person has no right to sue to compel the registration of such other person. COLLECTOR OF MIDNAPORE v. RAMDHONE DUTT, **Marsh 65=1 Hay 133.**

(9)—*Judgment creditor's right after attachment to protect judgment debtor's property from wrong doers—S. 91, Transfer of Property Act*—A judgment-creditor has, after attachment, no greater interest to protect his judgment-debtor's property from wrong-doers than he had before the attachment nor has he a right of suit against the wrong-doers. (27 A. 378, *R.*) The Court, however, can interfere without a suit and the creditor's remedy is to move the Court executing the decree to do so. The right given by s. 91 (*f*), Transfer of Property Act, is not one given to attaching judgment-creditors by the Civ. Pro. Code, the law which regulates their rights. KARUPPAN CHETTI v. KANDASAMI THEWAN, **17 M L.J. 84=30 M. 207.** (6 C. 663, *Compared.*) [*Reversed*, 30 M. 413=17 M.L.J. 334=2 M.L.T. 365.]

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——39.—**Miscellaneous**—*continued.*

(10)—*Deposit of money, to the credit of a decree-holder under protest, by a person interested in preventing a sale in execution—Suits to recover the money.*—In order to save a family estate about to be sold, under a decree of Court made in a suit against one member of the family, other members, interested in the property, being entitled to dower charged on the estate, paid the amount decreed into Court to be handed over to the decree-holder under protest of their respective rights in the estate, and subject to a suit to be brought by them to set aside a summary order rejecting a claim to their charge on the estate. The money so deposited was taken out of Court by the decree-holder. In an action to recover back the amount, it appeared that the decree-holder had no right to proceed against such part of the estate as belonged to the parties paying the money into Court. *Held*, that an action would lie against the decree holder to recover the amount so paid into Court and handed over to him, as it was a deposit under protest to prevent an injurious sale. *Aliter.*—If the money has been a voluntary payment into Court. FATIMA KHATOON CHOWDRAIN v. MAHOMED JAN CHOWDHRY, **10 W.R. P C. 29=1 B.L.R. P.C. 21=2 Suther. 145=2 Sar. 380.**

(11)—*Judgment-debtor, suit by, to get adjustment out of Court recognized by decree of Court —Civ. Pro. Code, s. 258.*—Where a judgment-debtor desires to have out of Court an adjustment of the decree held by his creditor against him recognized, he must take proceedings under s. 258, Civ. Pro. Code, as amended by Act XII of 1879, and cannot institute a suit for such purpose. KARM SINGH v. AMIN CHAND, **47 P R. 1881.** [*Overruled*, 83 P. R. 1884; *F.*, 11 P.R.1883.]

(12)—*Claim to attached property—Order disallowing claim—Appeal—Separate suit.*—Where a claim to properties attached in execution of a decree is dismissed, no appeal lies against the order of dismissal, the remedy being by separate suit. BUDREE DOSS v. TOOLSEE RAM, **9 P.R. 1866.**

(13)—*Sheriff, incompetency of, to relax on his own authority the imprisonment of the debtor—Permission to debtor to reside out of jail—Sheriff liable to damages on debtor's escape—Consent of creditor to debtor's residence out of prison, Sheriff not bound by, in the absence of rule of Court.* —Where a sheriff, upon the representation that the judgment-debtor was suffering from severe illness, had taken upon himself to relax the imprisonment and suffered the debtor, accompanied by ever so many of his own officers, to go and reside in a house of his own, it would amount to an escape in the eye of law, for which the Sheriff would be liable for damages. The plaintiff in all cases, in order to be barred from continuing his execution, and from having the benefit of his judgment, must voluntarily discharge the defendant out of custody. If he does discharge him out of custody, even if it be only for a week, he cannot by any agreement which he may have made with the defendant, afterwards re-take him, although the defendant may possibly have agreed that, if he does not pay the money within a week, he shall be re-taken. The creditor may, under certain circumstances, or if he feels it to be material and important to the debtor, change the place of imprisonment, and relax somewhat the rigour of imprisonment, without at all discharging the debtor from his debt; it clearly not being the meaning of either party that any such discharge should take place. Where the Court has thought it fit in a case that, for the benefit of the health of the debtor, he should be allowed to be taken from prison and put into some other place under the custody of a Sheriff's officer, and has made a rule of Court to that effect, and the debtor, having been removed under such rule, is being kept in the charge of a Sheriff's officer, in a private house, there is no doubt that he is then to be deemed to be in the custody of the Sheriff. Whenever the plaintiff communicates to the Sheriff that he is inclined to grant the above indulgence to the prisoner and to consent to his going to another house in the custody of the Sheriff's officers, the Sheriff may, in the absence of any rule of Court, refuse to consent to do so, but where the Sheriff and the parties have all consented to do it and the debtor has been kept in custody in a private house, an action for escape may be maintained against the Sheriff on proof that he had not used proper care and surveillance. STAFFORD BETTESWORTH HAINES v. THE EAST INDIA COMPANY, **4 W. R.P.C. 99=6 M.I.A. 467=11 Moo. P.C. 39= 1 Suther. 274.**

(14)—*Crim. Pro. Code, ss, 88 and 89—Property of alleged absconding offender attached and sold under an illegal warrant—Suit for recovery of such property.*—*Held* that where the property of an alleged absconding offender is attached and sold by a Court purporting to act under s. 88 of the Code of Criminal Procedure, and it turns out that the proclamation of sale is irregular and illegal, there is nothing to bar a suit by the owner of the property so sold to recover such property in the hands of a purchaser. ABDUL v. KAZIM BEGAM, **A.W N 1904, 159=27 A. 573, Note.**

(15)—*Instigating proceedings, suit for—Suit against party for instituting proceedings in false name—Form of suit.*—The plaintiffs sued for the reversal of a summary award and for restitution of the money they had paid under it, alleging that the proceedings before the Collector had been promoted entirely by the defendant using the false name of B, a person never in existence, and obtained a decree in the lower Courts. The point taken in special appeal was that, the defendant not being a party on the record of those proceedings, the plaintiffs could not recover in this form of action. *Held* that, though the proper and more prudent course

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—39.—**Miscellaneous**—*continued.*

would have been to sue the defendant for damages, yet, this being a mere matter of form, the Court refused to interfere with the decision of the Courts below. KHELARAM DOSS MISTREE v. DHUREE DOSS, **1 Hay 4.**

(16)—*Offer of money to avoid litigation.*—The Court cannot decree the plaintiff a sum of money which defendant had merely offered as a matter of grace and without acknowledgment of liability (but merely to avoid litigation), and which offer the plaintiff had refused to accept. GRAY v. FIDDIAN. **15 M. 73.**

(17)—*Suit upon razinama—Act* XVI *of* 1864, s. 13—In a suit upon a razinama, the execution of which was admitted by the defendants, which purported to create an interest in immoveable property, and which was not registered in accordance with s. 13, Act XVI of 1864, *held* that as the existence of the agreement was not disputed, its production was not necessary, and that the plaintiff was entitled to whatever relief the effect of the plaint and answer taken together would entitle him on the admission of the defendant. CHEDAMBARAM CHETTY v KARUNALA YAVALANGAPULY TAVER, **3. M. H C. 342** [*F.*, 24 C. 20; *R.*, U. B. R 1897-1901; 371, 19 M. L. J. 228=4 M. L. T. 354; *D.*, 4 M. H. C. 120; 3 N. L. R. 72.]

(18) — *Postpone — Petition — Suit.* — Where parties put in a postpone-petition after decree, which made the amount adjudged by the decree, payable in instalments, and the process of execution to issue in case of default, and no intention existed between them to create new rights enforcible by suit in supersession of those under the decree, a suit on the postpone-petition is not maintainable. DARBHA VENKAMMA v. RAMA SUBBARAYADU, **1 M. 387, F.B.** [*F.*, 4 A. 240.]

(19)—*Suit to declare what the law is cannot be maintained.*—The Courts should not give decrees declaring merely what the law is. If a plaintiff has any cause of action and seeks for relief the Court will give it him, but it is not the province of the Court to lay down the law with a view to preventing a mistake, if a question of law is raised in a subsequent suit between the parties. HIRALAL PATEL v. JAISINGH KIRAD, **2 C.P.L.R. 156.** [*F.*, 6 C.P.L.R. 51.]

(20)—*Recovery of money paid in consideration of marriage which had not been performed, suit for.*—*Held*, that an action would lie for recovery of money paid in consideration of a marriage which had not been performed. RAMAI v. CHEDI, **3 O.C. 241.**

(21)—*Contract for sale of land—Payment of consideration—Sale deed not delivered—Suit for fresh document—Right of suit.*—Where A has contracted to sell to B a certain piece of land and received in advance a sum of money as part of the consideration money and kept the sale-deed with him for the purpose of registering the same, but has not got it registered, B can sue A to recover the document, or to compel him to execute a similar document. TRIPOORA SOONDUREE v. RUSSICK CHUNDER KANOONGOE. **15 W.R. 189.**

(22)—*Partnership—Common member of two firms—Suit by one firm against the other—Practice.*—Where an individual is a common partner in two firms no action can be brought by one firm against the other upon any transaction between them while such individual is a common partner. KASHINATH v. GANESH, **4 Bom. L.R. 525=26 B. 739**

(23)—*Suit by a secured joint-creditor of a partnership business against the other joint-creditors and the partners and their separate creditors—Suit for declaration of the right of plaintiff and other joint-creditors to priority over separate creditors and for injunction against payment of certain money in Court deposit to the latter—Maintainability of suit—Joinder of parties.*—Certain premises were acquired by Government and compensation money was paid in Court. The present plaintiff alleged that the premises and, in consequence, the money to which they were converted belonged to certain partnership business and the plaintiff was one of the joint secured creditors over the premises. It also alleged that one of the separate creditors of the individual partners applied for, and obtained, an order for payment to him of his debt out of the compensation money in Court. There were attachments on the fund by some other separate creditors. The suit was for a declaration that the plaintiff and the other secured creditors were entitled to priority of recourse against the fund in Court over the separate creditors and for an injunction against the payment to the latter. The other secured creditors, the separate creditors and the alleged partners were defendants in the suit. In consequence of a doubt as to its maintainability, the suit came on for settlement of issues. *Held* a plaintiff can ordinarily sue to establish his own right. But, when, in order to give the plaintiff the appropriate relief to which he is entitled, it is necessary to declare the rights of the defendants, those rights might be declared. Such is not the case here. The plaintiff claims to be a joint-creditor of the alleged partnership. The claims of these creditors amount to less than the fund in the Court, and so no question of priority arises as between the joint creditors themselves. Consequently, the claims of the other joint-creditors need not be entered into in this suit. The question to be determined is whether the plaintiff is a joint-creditor of the alleged partnership and whether defendants are separate creditors as alleged and whether they rank after the plaintiff. The suit must be strictly limited to the ascertainment of the plaintiff's rights and the plaintiff cannot be allowed to fight the cause of the other joint-creditors. Holding that the portions of the

Right of Suit—continued.

——39.—**Miscellaneous**—*continued.*

claim, which are not maintainable, are severable from those which can be maintained, the Court framed the issues necessary for the ascertainment of the plaintiff's right as against the alleged partners and separate creditors. WOOPENDRA NARAIN SEN v. AGHORE NATH CHATTERJEE, **9 C.W.N. 498.**

(24)—The rule of Hindu law is that a joint family is represented in all transactions or concerns with the outside world by its *Karta* (manager) provided they are for the benefit or necessity of the family: and that any co-parcener, who does not occupy that position of manager, can represent and bind the family in such transactions or concerns, provided he was either previously authorised to represent it, or, in the absence of such authority, the other co-parceners subsequently by words or conduct ratified his acts. VISHNU v. BABAJI, **10 Bom. L.R. 505.=32 B. 375.**

(25)—Where there are one or more members of a joint Hindu family filing a suit in respect of the property of that family it is essential that all the persons who compose the family should be joined as party-plaintiffs. NARANJI v. MOTI, **9 Bom. L.R. 1126.**

(26)—*Joint Hindu family — Parties.*— A member of a joint family has no right to sue in his individual capacity to recover a debt due to the family. SHIVJIRAM v. VISHNU, **2 Bom. L.R. 121.**

(27)—*Joint Hindu Family—Minors—Parties.*—As a matter of practice suits are not filed in Courts by managers representing their minor co-parceners; the practice is to join all persons interested but it would seem that even if on the face of the plaint there were an allegation of a sole plaintiff that he sued as manager on behalf of a co-parcenary the minor co-parceners would not be bound by the proceedings unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent co-parceners. KASHINATH v. CHIMNAJI, **8 Bom. L R. 268=30 B. 477.**

(28)—*Joint family, member of — Lending money*—Benamidar—*Debtor objecting to creditor's power to lend.*—A member of a joint family, who was at liberty to use the funds in his hands, whether they belonged to the joint family or not, is not a *benamidar* for the family when he lends money in his own name to some body else. Even if he were a *benamidar*, he would be entitled to sue in his own name the person to whom he lent the money. Such suit need not be brought by all the members of the joint family. HARA GOBINDA SHAHA v. PURNA CHANDRA SAHA, **11 C L.J. 47=1 Ind. Cas. 522.** (24 C. 644, *Appl.*, 30 C. 265, *D.*)

(29)—When some only of the members of a joint Hindu family carry on and manage a business on behalf of themselves as well as

Right of Suit—continued.

——39.—**Miscellaneous**—*continued.*

the joint family and a contract is entered into with them alone, they not disclosing the names of the other members of the family at the time of the contract, it is competent for them alone to sue on the contract without joining the other members of the family. GOPAL DAS RAI CHAUDHRI v. BADRI NATH, **2 A.L J. 3=27 A. 361=A. W.N. 1904, 282.** (*Referring to*, 7 C. 739 and 14 MOO. P.C. 160). [*F.*, 7 A.L.J. 161=32 A. 183.]

(30)—*Suit for declaration of plaintiff's right to collect debts due to a deceased person's estate —Previous grant of a succession certificate to defendant—Maintainability of suit—Act* VII *of* 1889, *s.* 18, *cl.* (*e*).—Plaintiff, alleging that he was the undivided paternal uncle of a deceased person, sued for a declaration that he was entitled to collect the plaint mentioned debts due to the deceased's estate. Defendant, the widow of the deceased, had already obtained a certificate under Act VII of 1889 entitling her to collect the debts due to her deceased husband's estate. The Munsiff dismissed the suit, holding that the suit was not maintainable, as it was brought with the object of practically cancelling the certificate granted to the widow under Act VII of 1889, entitling her to collect the very debts specified in the present plaint. On appeal, the Subordinate Judge held that the suit was unsustainable as it contravened the provisions of s. 18, cl. (*e*) of the Act VII of 1889. *Held*, reversing the decrees of the Courts below, that the suit was not brought under Act VII of 1889 and s. 18, cl. (*e*) did not in any way govern or affect it. That act in no way interferes with the rights of any one to bring any suit, which he otherwise is by law entitled to bring and this suit for a declaration that plaintiff was entitled to collect debts in question is maintainable irrespective of the previous grant to the defendant of a certificate under the Act to collect the very same debts. CINNAPPA CHETTIAR v. THULASI AMMAL, **15 M.L.J. 399.**

(31)—*Suit by Hindu father for declaration of his right as guardian and for custody of minor —Guardians and Wards Act*, VIII *of* 1890, *Ss.* 10, 25, 45.—No regular suit lies for the custody of a minor, the only remedy being an application under Act VIII of 1890. Hindu father is, therefore, not entitled to sue, as guardian of his infant child, for the establishment of his right as such guardian, and for the custody of the child, detained by the defendant who is the maternal grandmother of the child. SHAM LAL v. BINDO, **26 A. 594=A W.N. 1904 135=1 A.L.J. 266** (32 P.R. 1896, *Appr.*; 9 M. 31, 25 B. 574, *D.*; 8 C. 266, B.L.R. F.B. 1866, 67, 630, 4 B.L.R. App. 36, *R.*) [*R.* A.W.N. 1907, 24=4 A.L.J. 22.]

(32)—*Life-interest in property—Allegation of waste—Proof of waste threatening* corpus.—Suit brought on the allegation that, as the defendant has only a life-interest in the property in

Right of Suit—continued.

—39.—**Miscellaneous**—*continued.*

dispute, the money which represents that property ought to be so tied up, either by deposit in the Bank, the defendant drawing the interest thereof, or by the defendant giving security, so as to prevent her from wasting the same. *Held* that the suit would not lie unless some act of waste threatening the *corpus* of the property is proved. MUSSAMUT BUDHUN v. MOULVIE FUZLOOR RUHMAN, **9 W.R. 362.**

(33) — *Hindu law—Widow — Compensation awarded to widow under Land Acquisition Act —Claim by reversioner for apportionment—Civ. Pro. Code., s. 43—Suit brought for wrong remedy—Distinct causes of action—Waste.*— Plaintiff, a reversionary heir of the husband of the defendant, a Hindu widow, sued for a share in the sum awarded to the defendant as compensation for a house which had been taken up under the Land Acquisition Act. During the proceedings in the Collector's Court, the plaintiff had applied for a share of the compensation, but the Collector refused to entertain the application. The plaintiff then brought a suit in the Civil Court claiming (1st) that the widow should be restrained from making the alienation, and (2ndly) that the money that was to be awarded to her for compensation should be invested, lest she should waste it, and that she should be entitled to receive only the income from the investment for her life. The suit was finally dismissed by the Chief Court, on the ground that the plaintiff had no cause of action for the relief sought, and that Court observed in its judgment that that suit was no bar to his commencing a suit for the apportionment of the compensation if so advised In the fresh suit for apportionment accordingly brought by the plaintiff, both Courts concurred in overruling the defendant's plea that it was barred under s. 43. On second appeal to the Chief Court, it was again urged that the claim was barred under s. 43 of the Civ. Pro. Code. The Chief Court held that, if a person entitled to one remedy only, by mistake does not sue for that, but for another remedy to which he is not entitled, he cannot be barred by the rule in s. 43 prohibiting persons who have in fact alternative remedies and have elected to sue for some or one of the alternatives omitting others, from bringing a suit for the omitted alternative relief. What the plaintiff asked for in the former suit was not a remedy to which he was entitled, and it was therefore not one of the alternative remedies between which the plaintiff could have chosen, and consequently the former decision could not be a bar to the hearing of the subsequent suit. Further, the interest of the plaintiff in this case was merely a contingent interest, so that the foundation of any suit by him against the widow with reference to her husband's estate must be either that her acts were such as to interfere with his interest in an unauthorised manner, or that her conduct amounted to waste of the estate. Consequently, if there had been any allegation that she was wasting the money, or by her conduct manifested an intention of wasting it, this might give rise to a cause of action to restrain her from waste, and possibly in a suit founded on such a cause of action, if the allegations were proved, such directions might be given as to the custody and investment of the money as to protect it from waste ; but, in the absence of such allegation, the plaintiff could have no cause of action. MAT PRAB DEVI v. HARKISHAN DAS, **47 P.R. 1884.** [*Appr.*, 32 P.R. 1910=57 P.L.R. 1910=50 P.W.R. 1910=6 Ind. Cas. 655 ; *R.*, 35 P.R. 1885, 146 P.R. 1890.]

Right of Suit—continued.

—39.—**Miscellaneous**—*continued.*

(34)—*Reversion—Right of suit—Limitation.* —A party, desirous as a reversioner to obtain a declaration of his right affected by a sale or gift by a Hindu widow, must bring his suit within 12 years of the alienation. After the death of the widow, the remedy open is one of a different description. BISHONATH SURMA v. SREEMUTTY SHOSHI MOOKHEE, **11 B.L.R. App. 1=20 W.R. 1.**

(35)—*Civil Court—Jurisdiction to compel the head of a mutt to do certain acts.*—Civil Courts have jurisdiction to compel the head of an Adhinam to invest a properly nominated disciple to the headship of a mutt, with arukattu, sundara vadam, and cloth, according to the custom and usage of the institutions. GIYANA SAMBANDA PANDARA SANNADHI v. KANDASAMI TAMBIRAN, **10 M. 375.** [*Appr.*, 19 M. 127; *R.*, 19 M.L.J. 772, 18 M.L.J. 205=31 M. 212.]

(36)—*Civ. Pro. Code, s. 539—Suit in respect of charitable trust—Sanction to persons at different times to institute suit.*—A suit having been instituted, with the sanction of the Collector, to compel the performance of a charitable trust, another person was subsequently joined as plaintiff on his getting a similar sanction. The sanction given to the latter relates back to the date of the institution of the suit. RAMAYYANGAR v. KRISHNAYYANGAR, **10 M. 185.** [*Diss.*, 26 A. 162 ; *Not F.*, 21 B. 351 ; *F.*, 7 M.L.J. 281=23 M. 28].

(37)—*Civ. Pro. Code, s. 539—Removal of a hereditary trustee—Power of District Court.*— Though the power to remove a hereditary trustee is not, in express terms, given by s. 539, Civ. Pro. Code, it is a power which, from the nature of the case, may reasonably be held to have been given under the wide words 'such further or other relief as the nature of the case may require.' SUBBAYYA v. KRISHNA, **14 M. 186=1 M.L.J. 95.** (12 M. 157, *Cons.*) [*F.*, 16 B. 626, 21 B. 48, 24 C. 418, 20 A. 46, 2 C.L.J. 431, 33 C. 789=10 C.W.N. 581 ; *Appr.*, 20 C. 810 ; *R.*, 17 M. 462, F.B., 3 O.C. 299, 33 C. 905=10 C.W.N. 867, 32 M. 131=4 M.L.T. 345.]

(38)—*Legal representatives of deceased debtor, suit maintainable against, without allegation of receipt of assets.*—When a creditor sues certain

Right of Suit—continued.

—— 39.—**Miscellaneous**—*continued.*

defendants as legal representatives of a deceased debtor without alleging that they have received assets, such suit will lie and a decree may be given against such persons, in their representative capacity, without proof that they have received assets of the deceased. The question of assets will be one to be enquired into when the decree-holder attempts to execute his decree under s. 252 of the Civ. Pro. Code. BIRJA v. KISHEN JIVAN, **11 P.R. 1881.**

(39)—*Suit in* forma pauperis—*Cause of action—Agreement by guardian of minor to give ward in marriage for money consideration—Validity.*—The plaintiff had been maintaining a girl for a number of years. The defendant agreed to marry the ward on payment of a sum of Rs 2500 to the plaintiff, and also promised to pay her Rs. 2,000 after marriage. Before the marriage took place, the defendant induced the girl to quit her guardian's house in order to have illicit intercourse with him. The plaintiff thereupon sued to recover Rs. 2,500 damages, and also prayed for leave to institute the suit in *forma pauperis. Held* that the action was not maintainable, as the agreement sued on was immoral and opposed to public policy under s. 23 of the Indian Contract Act. *Held* also that, in disposing of pauper petitions, the Court is bound to exercise a measure of caution, because the pauper is often without the advantage of the aid of Counsel. Where the facts are clear and the law evident, the case might be decided on the petition for leave to sue as a pauper. DULARI v. VALLABDAS PRAGJI, **13 B. 126.** [*F.*, 20 A. 299; *R.*, 22 B. 658, 1 C.L.J. 261, 91 P. L.R. 1909; *D.*, 13. M.183, 16 B. 673.]

(40)—*Lessee of Municipal Committee—Octroi dues, suit for—Civil Court—Act* XV *of* 1867, s.19.—A lessee on the part of a Municipal Committee could not sue in a Civil Court for the recovery of money which should have been paid as octroi. MUHAMMAD SULTAN v. KHAZAN SINGH, **60 P.R. 1873.** [*R.*, 55 P.R. 1876]

(41)—*Suit by Head Constable of Police against Inspector of Police for pay received by the latter—Police Act* (XXIV *of* 1859)—*Estoppel by conduct.*—In a suit by a Head Constable of Police against an Inspector of Police to recover his pay which the Inspector had received but failed to give to the Head Constable, the defendant could not plead limitation under s. 53 of the Police Act (XXIV of 1859) as the act alleged to have been done had nothing whatever to do with police duties. People are not estopped from standing on their legal rights by mistaking them, and, as in this case, giving a notice as if required by the Act when it is not. GUNDAM VENKATASAMI v. CHINNAM PURUSHOTTAMA, **5 M.H.C. 466.**

(42)—*Limitation Act, s.* 1, *cl.* (6)—*Order of Settlement Officer—Limitation—Suit by zemindar—Right to cess.*—The order of a Settlement Officer on a proceeding which was of the nature of an enquiry made by the Collector at the instance of the zemindar and for the purpose of the preparation of the record of rights, in the course of which information was given both in support of and against the zemindar's claim to certain cesses, is not an award of the nature contemplated by cl. (6) of s. 1 of the Limitation Act, and the 3 years' limitation is inapplicable. The right of the plaintiff to recover zemindaree cesses which long existed unquestioned could not be summarily extinguished by the refusal of the Settlement Officer to sanction and record such cesses at a recent Settlement, and he is entitled to a hearing before a Court, and the fact that the Settlement Officer rejected his claim could not be a bar to such a suit. MAHOMED ALI KHAN v. OOM RAO SINGH, **2 N.W.P. 425.**

(43)—*Act* X *of* 1859, *decision by Deputy Collector passed subsequent to, in suit brought before commencement of Act—Regular suit not maintainable to set aside decision.*—This suit for setting aside the decision of a Deputy Collector dated 25th January 1860, had been instituted on the 28th June 1859, before the passing of Act X of 1859, but decided on the 25th January 1860, subsequently to the passing of the Act. Under the above circumstances and with reference to ss. 151 and 160 of Act X of 1859, the High Court *held* that the party dissatisfied with the decision of the Deputy Collector should have appealed to the Judge as he had the power to do; but could not have maintained a regular suit for the purpose of reversing such decision. JANKEE RAM MISSER v. LUDHIRA PANDAY, **2 W.R. Act X, Rul. 27.**

(44)—*Act* VIII *of* 1859, *Civ. Pro. Code, s.* 180—*Commissioner—Right to remuneration—Amount not deposited in Court—Recovery by suit.*—Where a party moves the Court for the appointment of a Commissioner under s. 180 of Act VIII of 1859, there is an implied undertaking on his part to pay a fair remuneration to the Commissioner and the omission by the Court to require a sum to be deposited in Court, does not debar the Commissioner from recovering his remuneration from the party at whose instance he was engaged. GOPALA RATNAMAYYAR v. B. NARASIMMA NAYUDU, **4 M. 399.**

(45)—*Act* XIII *of* 1868—*Suit against King of Oudh—Consent of Governor General, necessity for.*—Act XIII of 1868 renders a suit against the King of Oudh, commenced without the consent of the Governor General in Council, null and void, though the suit may have been instituted and judgment pronounced before the passing of that Act. BEGUM BIBEE v. THE KING OF OUDH, **11 WR 116.**

(46)—*Compromise of suit brought by Official Assignee—Sum payable to insolvent's estate wrongly received by defendant's ancestor, suit by Official Assignee for recovery of—Fraud as originally specified in pleadings, party Bound*

Right of Suit—continued.

—39.—**Miscellaneous**—*continued.*

to prove—Amendment of pleadings, when permissible.—This suit was instituted by the respondent, as assignee of the estate and effects of one R.S. an insolvent, against the defendants, the heirs and legal representatives of one Z, to recover a sum of money which had been paid over to Z under the compromise of a certain previous suit. In the first instance, the plaintiff alleged that Z had compromised the suit as the agent and confidential adviser of the then Official Assignee, that the payment to Z was fraudulently concealed by Z and his sons from the Court and also from the Official Assignee before and after the passing of the consent decree. A portion of the money payable to the insolvent's estate under the compromise had been paid to the said Z for his having rendered assistance in taking the account. From the representatives of Z, the present Official Assignee now claimed re-payment of the sum to the insolvent's estate. Their Lordships concurred in the opinion of the first Court that Z never acted as the agent of, or in a fiduciary relation to, the Official Assignee either at the commencement of the former suit or in the conduct of it. He was not in any way connected with the Court; he owed no duty to the Court, and he was under no obligation to the creditors. He was, therefore, not guilty of of any improper concealment. The decree of the first Court dismissing the plaintiff's suit was confirmed by theirLordships of the PrivyCouncil who were, however, of opinion that the suit ought to have been dismissed on the merits and not on the ground that it was barred by limitation. The main charge against the defendants as originally laid down in the plaint was the fraud said to consist in their concealment from the Official Assignee of the payment under the compromise. In the plaint, after its amendment, the fraud was alleged to consist in that the payment of money to Z was itself a fraud upon the Court which the Official Assignee had no power to consent to. With reference to the amendment of the plaint by introducing a new and distinct charge of fraud after allthe evidence had been given and the case closed, their Lordships remarked that the allowance of it was contrary to every principle of justice; it was wholly unprecedented, and did not exhibit a sound exercise of judicial discretion as it contravened, the well-known rule that a charge of fraud must be substantially proved as laid, and that, when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. ABDUL HOSSEIN ZANAIL ABADI v. CHARLES AGNEW TURNER. **11 B. 620, P C.=14 I.A. 111=5 Sar. 25.** [*R.*, 1 O.C. 63, 16 C.P.L.R. 133.]

(47)—*Suit for declaration that certain unexecuted decree of insolvent belongs to Insolvent Court—Insolvency Court or Official Assignee as plaintiff—Maintainability of suit—Procedure—Act* IV *of* 1872, *rules.*—A suit was brought by the Insolvency Court of Ludhiana through its Official Assignee, or in the alternative by the Official Assignee, for a declaration that a decree

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—39.—**Miscellaneous**—*continued.*

obtained by an insolvent K then remaining unexecuted, was the property of the Insolvency Court. *Held* that the suit as framed was not maintainable as the plaintiff in either case had no *locus standi* to institute the suit. The Insolvency Court could not maintain the suit by itself or through the Official Assignee because it was not the legal owner of the decree as trustee for the Official Assignee. Secondly, the Official Assignee could not maintain the suit, for under the rules made under Act IV of 1872, the proper procedure was for the Court to attach the insolvent's property not then within its jurisdiction and not to sue to be declared a decree-holder. KIDAR NATH v. OMAN PERSHAD, **118 P.R 1886.**

(48)—*Insolvent.*—The right of suit pertaining to an insolvent does not pass at his insolvency to the Official Assignee as it is not enumerated in s. 7 of the Insolvent Act. DATTOOBHOY v. VALLU, **1 Bom. L.R. 828.**

(49)—*Government schools—Rules as to admission and retention of pupils—Suit to recover money paid for retention of pupil—Jurisdiction.*—The Government has a right to make rules and regulations as to the terms on which pupils should be admitted into and allowed to remain in their schools. Where, according to the rules, the payment of a certain sum is necessary in order that a boy may remain as a pupil in a Government school, and the sum is paid, and the boy is allowed to remain in the school, a suit cannot be maintained in the Small Cause Court to recover back sum as having been extorted. HURRO MOHUN GAEN v. BONOMALEE MITTER, **11 W.R. 359.**

(50)—*Attachment of money deposited in Collectorate — Unsuccessful opposition by third party—Interest.*—In execution of a decree for money against one H, plaintiffs attached certain money deposited in the Collectorate to which she was entitled, and they were opposed for some time in obtaining possession of that amount by the present defendant who alleged that H's right in it had been transferred to him. Plaintiffs finally succeeded in obtaining the money, and they now sued the defendant for the interest upon it for the time during which he prevented their obtaining the money. *Held* that the suit *was* maintainable. PARBUTTY CHURN SOOR v. PROMOTHONATH GHOSE, **W.R. 1864, 174.**

(51)—*Usufructuary mortgage — Possession withheld by mortgagor—Suit for money.*—A deed of mortgage and conditional sale contained a covenant for possession by the mortgagee during the mortgage term. Possession was withheld, though the mortgagor received the mortgage-money. *Held*, that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest money advanced. RAJA OODIT PURKASH SINGH v. MARTINDELL, **4 M.I.A. 444=1 Sar. 384.**

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—39.—Miscellaneous—*continued.*

(52)—*Suit on hundi not presented and dishonoured, cause of action.*—A suit cannot be brought to recover upon a hundi until it has been presented and payment has been objected to or refused. MALORI MAL v. BUTA MAL, **148 P.R. 1883.** [*R.*, 72 P.R. 1885, 19 P.R. 1888; *D.*, 60 P.R. 1903=120 P.L.R. 1903.]

(53)—*Court Fees Act, s. 7, cl.* iv (*c*)—*Consequential relief—Covenant not to alienate—Subsequent alienation—Suit to set aside alienation.*—The defendant executed a mortgage in favour of the plaintiffs and also covenanted with him not to alienate the property till his debt was discharged. But subsequently in contravention of this agreement he mortgaged the property to C. In a suit by the plaintiff for a declaration that the mortgage in favour of C was invalid, *held*, that the prayer for the cancellation of the mortgage to C was one for consequential relief within the meaning of s. 7, cl. iv (*c*) of the Court Fees Act, and that the plaintiff must therefore value the same accordingly; *held* further that the suit as framed was not maintainable inasmuch as the latter liens created by the mortgagor did not affect injuriously or encroach upon the rights of the plaintiffs as prior mortgagees. CHUNI LAL v. BODAR MAL, **2 P.R. 1886.** (10 P.R. 1879, *R.*) [*R.*, 56 P.R. 1895, 121 P.R. 1907; *D.*, 131 P.R. 1888.]

(54)—*Suit by owners for sum realised by sale of ship—Abandonment of French ship to French consul—Principal and agent.*—The Captain of the French ship C, which had been wrecked, abandoned her to the French Consul for the benefit of all concerned. The owners assented to this arrangement, but afterwards sued the Consul as their agent, for the sum realised by the sale of the ship. *Held* that, when the owners of a foreign ship abandon her to their consul for the benefit of all concerned, they cannot afterwards sue him as their agent. *Semble*—That the owners of a foreign ship, when abandoning to their Consul, cannot legally enter into a private agreement with him with reference to the funds realised by the sale of the ship. ROBERT v. JAQUEHIM, **Bourke O.C. 112.**

(55)—*Income-tax, illegal assessment of—Suit for refund if maintainable, Act* XXXII *of* 1860, s. 137.—S. 137 of Act XXXII of 1860, which authorizes a party seeking a refund of income-tax illegally assessed upon him to apply to the Collector or Commissioner, is not imperative in its terms, and does not preclude any such party from suing in a Civil Court to obtain the refund. THE COLLECTOR OF FURREEDPORE v. GOOROO DASS ROY, **11 W.R. 425.**

(56)—*Costs incurred in criminal prosecution and damages for assault and wrongful confinement, suit to recover—Costs disallowed and damages allowed.*—The plaintiff had prosecuted the defendants in the Criminal Court for assault and wrongful confinement. Most of the defendants were convicted. The present suit was to recover from the defendants the costs incurred by the plaintiff in carrying on the prosecution and also for damages for the assault and wrongful confinement. The lower Courts disallowed the plaintiff's claim for costs and allowed her damages for the assault and wrongful confinement. *Held*, the *ratio decidendi* in the case was that the prosecution of the defendants in the Criminal Court was a voluntary act on the part of the plaintiff. She was not bound to prosecute and, therefore, she could not recover her cost in that case. The lady was not under any necessity to proceed against the defendants in both the Courts, Civil and Criminal. CHURAMONI DASI v. BAIDYA NATH NAIK, **32 C. 429.** (12 A. 166, *Appr.*)

(57)—*Tolls—Damages—Practice—Loss owing to plague regulations—Toll farmer.*—Where a toll contractor suffers loss in his revenue, by reason of the discontinuance of traffic through plague regulations of Government consequent upon the outbreak of plague in the locality, he has no right of action against Government to recover damages, either as on a breach of contract or commission of tort. SECRETARY OF STATE v. ABDUL RAHIM, **4 Bom. L.R. 874.**

(58)—*Tort merging infelony, principle of—Whether applicable to moffusil Courts of India—Suit for value of ornaments stolen—Civil Court—Jurisdiction.*—The principle that tort merges in a felony, although recognized in the English Courts as suspending the right of civil action until the party guilty of the felony shall have been prosecuted, it has long been held that no such principle applies in the moffusil Courts in India. Consequently, a suit brought to recover the value of certain ornaments which it was alleged by the plaintiff that the defendant had stolen, being one relating to the value of personal property wrongfully taken out of the plaintiff's possession, is undoubtedly a suit of a civil nature, and its cognizance is not barred by any enactment in force in India. MUSSAMUT BEGAM v. MT. UMRAO, **26 P.R. 1883.** [*F.*, 13 P.R. 1888.]

(59)—*Action of trover.*—Suit in the nature of an action of trover, by the plaintiff, to recover Company's paper, as heir, such notes being part of his deceased mother's estate, against a purchaser without notice, and the vendor, his brother, alleging first that the dealing with the notes on the part of his brother was illegal and contrary to the plaintiff's rights as heir and secondly, that in a previous suit against his brother, regarding the notes, he had obtained a decree against him in respect of one of the notes sued for, but had not enforced judgment. The suit was dismissed by the Courts in *India* on the grounds (1) of limitation, under Act No. XIV of 1859, and (2) as barred by the previous suit. On appeal, such decree reversed, as it appeared that the real point in issue—the validity of the transfer of the notes—had not been

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—39.—**Miscellaneous**—*continued.*

heard, and the suit remitted back to the Judicial Commissioner at Lucknow to give directions to the Court of First Instance to re-hear the case, with liberty to either party to amend the pleadings. IKBALOODOWLAH v. SAH BUNARSEE DOSS, **12 M.I.A. 507=2 Sar. 463.**

(60)—*Action for false imprisonment, when maintainable—Art.* 19, *Limitation Act*, 1877.—Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment. A person who is released on bail cannot be regarded as under imprisonment so long as he is on bail. Time begins to run from the date on which the plaintiff was enlarged on bail. Hence a suit for false imprisonment must be brought within one year from the date on which his imprisonment ends. MAHAMMAD YUSUFUDDIN v. SECRETARY OF STATE FOR INDIA, **30 C. 872, P.C.=30 I.A. 54 =7 C.W.N. 729=5 Bom. L.R. 490=8 Sar. 503.**

(61)—*Right of suit — Suit for damages for wrongful obstruction of right to weigh and collect weighment-fees in respect of goods sold in bazaar — Right exercised by landholder in lieu of rent, and leased to plaintiff.*—The Maharajah of Dumraon and his predecessors exercised from time immemorial a right to exclusively weigh the goods and produce sold at a bazaar held upon their land, and to claim all the weighment fees in respect of such transactions as took place there, in lieu of charging rent to the traders for the use of the land. The Maharajah leased to the plaintiff the exclusive right to weigh and receive the weighment fees in the bazaar. *Held* that a suit brought by the plaintiff for damages for wrongful obstruction of the right of weighing and making the collections, and to have the defendants restrained from offering such wrongful obstruction, was maintainable. BHIKHI OJHA v. HARAKH KANDU, **A. W.N. 1889, 89.** (N.W.P.H.C. Rep. 1869, p. 208, 11 C. 175, *D.*)

(62)—*Misrepresentation—Suit for damages—Wrong information* bona fide *given—Cause of action.*—Plaintiff who intended to buy coal from the defendant, asked him to ascertain from the Railway Company the cost of carriage of coal from station A to station B. The defendant obtained the information and communicated the same to the plaintiff. It turned out, however, that plaintiff had to pay a larger amount for the carriage of coal purchased and sent by him. *Held* that this gave plaintiff no cause of action to sue defendant. *Held* further that the cause of action for such a suit arise on the date when the misrepresentation was made. THE BENGAL COAL CO., LD. v. THE ELGIN COTTON CO. LD, **2 N.W P. 13.**

(63)—*Security bond for appearance of judgment debtor at insolvency inquiry, attesting witness to, whether liable for misrepresentation as to solvency of surety.*—Where, in a security bond

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—39.—**Miscellaneous**—*continued.*

executed for the appearance of the plaintiff's judgment-debtor, an attesting witness had made a statement as to the solvency of the surety, who, however, happened to be an insolvent, *held*, in a suit by the plaintiff against the attesting witness, that the latter was not liable for the amount of the decree. If the suit be looked upon, as one upon a covenant or promise, it would fail, inasmuch as the defendant, who was a mere attesting witness was not a co-obligor in the bond given by the surety. If it be looked upon as one founded on misrepresentation (if there were misrepresentations), such misrepresentation should be regarded as having been made by the defendant to the public officer of the Court and not to plaintiff, nor was there any allegation or proof that such misrepresentation had been acted upon by the plaintiff. NAGO MAHADEO APTE VAKIL v. NARAYAN RAMCHANDRA PATWARDHAN, **4 B. 465.**

(64)—*Purchase from vender out of possession —Misstatement in sale-deed as to receipt of consideration money—Transaction, whether champertous or gambling in litigation— Suit by purchaser to recover property from trespasser in possession, maintainability of—Adoption, evidence of.*—Certain property was sold by a person, who was out of possession. The sale deed recited receipt by the vendor of a portion of the consideration money and stipulated for payment of the balance on the purchaser recovering possession of the property sold. The purchaser brought a suit to recover the property from the defendant in possession. It was objected on behalf of the defendant that the sale to the plaintiff was void as being champertous and a 'gambling in litigation' contrary to public policy. It was also contended that the vendor had no title to the property sold. The vendor's title depended upon the fact of an adoption at a remote time. *Held*, that the statement in the sale deed to the effect that one lakh had been paid to the vendor was not in accordance with the fact. It is unlikely that the plaintiff would pay down, without any security, so large a sum to a man confessedly without means. If it were so, there would have been no occasion to provide a monthly allowance for the vendor's personal expenses. These circumstances throw suspicion on the whole transaction. But it is no concern of the defendant that the vendor may have a grievance on the score of a misstatement in an instrument, to which he is no party. The vendor had taken no steps to impeach the deed. On the other hand, there were circumstances which showed that he had stood by it. It is not enough for the defendant to show that the sale-deed is voidable at the vendor's option. He must show that it was absolutely void. There was nothing extortionate or unreasonable in the terms of the bargain. There was no gambling in litigation. There was nothing contrary to public policy. Consequently, the transaction was a present transfer of the vendor's interest in the estate, giving a good title to the plaintiff, on which it

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——39.—**Miscellaneous**—*continued.*

was competent for him to sue. *Held*, further, that the evidence in favour of the adoption was preponderating. Their Lordships agreed with the Judicial Commissioner and decreed for plaintiff. LAL ACHAL RAM v. RAJA KAZIM HUSSAIN KHAN, **9 C.W N. 477, P C =8 O C. 155 =27 A. 271=32 I.A. 113=15 M.L J. 197= 8 Sar. 772.** [*F.*, 2 Ind. Cas. 385, 35 C. 420 =12 C.W.N. 393=35 I.A. 48=7 C.L.J. 335= 18 M.L.J. 100=5 A.L J. 184=10 Bom. L.R. 230, P.C.; *D.*, 12 C.W.N. 409 ; *R.*, 13 C.W.N. 44.]

(65)—*Dismissal of suit for land against donors for non-production of deed of gift—Suit against another for damages for having made over deed to donors—Presumption as to validity of deed—Measure of damages.*—A suit for certain land against the donors thereof having been dismissed on the ground that the deed of gift on which the plaintiff based his title was not forthcoming, the plaintiff therein brought the present suit against one M. for damages on the ground that he had failed in the previous suit because M had kept back the deed of gift and had made it over to the donors. M pleaded that he had returned the deed to the donors, first, because it was on insufficient stamp and worthless, and secondly, because he was angry with the plaintiff for having prosecuted him criminally. *Held*, that M, by making over the plaintiff's instrument of title to a third party, whose interest was clearly adverse to plaintiff, had committed a wrongful act, and was liable for damages; that there was no necessity for proving that the possession of the document originated in a crime, or to enquire how M got possession, that the question was whether, after M had got possession of the deed, he could possibly justify his making over plaintiff's title-deed to a party whose interest was adverse to plaintiff, and in this he utterly failed. *Held also*, that there was no proof at all that the stamps on the deed was insufficient, or that the deed was unregistered or that it was in any way inadmissible as evidence, and as the defendant by his own act had put it out of the power of the plaintiff to produce the deed, which was admitted as a deed of gift under which the plaintiff's father held the land, it must be presumed to have been a valid document, and in calculating the damages the same presumption will arise, and the plaintiff would be entitled to the full value of the land by way of damages. KHAN MUHAMMAD v. MORAD BAKSH, **116 P. R. 1883.**

(66)—*Payment of money on account of wager —Whether suit will lie to recover such money.*—There is nothing in the Contract Act to show that an action will lie to recover money which has actually been lost and paid on a wager. Where a bet has been paid by a person allowing another credit in his books, the former cannot sue to recover it as he is in the position of a person suing to get back a sum of money which he has actually given over to another in payment of a bet. KANDARI MAL v. SAVANT MAL, **89 P.R. 1883.** (101 P.R. 1868, *Cited.*)

(67)—*Owner of property—Damage not caused by his acts—Liability—Cause of action.*—An owner of property is under no legal obligation to incur expense upon it for the benefit of his neighbours, where such property has not been altered in character by his acts or with his permission, in such a way as to expose them to any injury. A person is under no legal obligation to drain his garden so as to prevent water from collecting there and injuring the adjoining properties when it is not alleged that he has reduced the level of his garden, or has done anything which has caused water to accumulate there, so as to render him liable for the consequences to his neighbours; and the principle of the maxim *sic utere tuo ut alienum non leadas* has no application in such a case. BALDEO DAS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **30 P.R. 1883.**

(68)—*Wajib-ul-arz—Clause providing condition for partition—Suit for cancellation of clause.*—A clause in a *wajib-ul-arz* clearly provided that the kinds of land last specified therein shall be divisible either with the mutual consent of all the proprietors or by order of the competent authority *bahhukm sarkar.*—*Held*, with reference to the terms of the administration paper, that the present suit was not maintainable for the object of cancelling the provision in that document, because it was not competent for the Civil Court to decide in the first instance whether the land ought to be divided or not, the *hukm sarkar* not being the order of a Civil Court. MEDU v. NIKKA, **100 P.R. 1884.**

(69)—*Resumption, Suit for unlawful—Suit for damage for unlawful resumption by Government.*—Government may be sued by any person injured by its acts of unlawful resumption. RAM NARAIN MOOKERJEE v. MAHTAB CHUNDER, **1 Ind. Jur. O.S. 48.**

(70)—*Landlord and tenant—Right of suit—Civ. Pro. Code, s. 28.*—A suit is not maintainable by a tenant to have it determined which of two defendants, both of whom claimed rent from him, is his landlord. KOYLASH CHANDRA DUTT v. GOLUK CHUNDER PODDAR, **2 C. W.N 61.** [*D.*, 5 C.L.J. 34, Note.]

(71)—*Common land — Suit to demolish a kotha erected by a Kamin—Special damage.*—One of the proprietors of a village sued for demolition of a *kotha* built by defendants Nos. 1 and 2 who were non-proprietary residents on one *marla* of the *gora deh.* The other proprietors who did not join in the suit were made *pro forma* defendants. It was found that previously the site under the *kotha* was used by certain proprietors as a cattle pen who allowed the defendants to build the *kotha.* *Held*, following 52 P.R. 1892, that in the absence of

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——**39.—Miscellaneous**—*continued.*

special damage the suit was not maintainable. RAM v. PIR BAKHSH, **71 P.L.R. 1901=33 P R. 1901.** (9 A 661, 12 A. 436, 18 A. 115; 78 P. R. 1897, 7 P.R. 1885, 54 P.R. 1886, 187 P.R. 1889, *R.*) [*R.*, 91 P.R. 1901=113 P.L.R. 1901.]

(72)— *Act* X *of* 1859, *s.* 107—*Suit under—Party entitled to sue.*—The expression "the party against whom a decision is given" in s. 107 of Act X of 1859, refers to either of the parties, *viz.*, the decree-holder and the claimant, and it is one of these two parties only who has the right to bring a regular suit under the section. PROSUNNO MOYEE DOSSEE v. RAM GOBIND GHOSE, **19 W.R. 106.** [*R.*, 22 W.R 478.]

(73)—*Act* XIV *of* 1863, *s.* 1, *cl.* 1—Lumbardar—*Suit to recover arrears of revenue.*—Cl. 1, s. 1, Act XIV of 1863, provides for a suit for the recovery of arrears of revenue from sharers who are liable to pay revenue and whose *quota* of revenue is fixed. Suit under cl. 1, s. 1, Act XIV of 1863 for the recovery of arrears of Government revenue alleged to be due from the defendants. The plaintiff was a *lambardar*. He represented that, according to the village custom, the surplus remaining, after defraying from the income of the *seer* lands and the rents, realised from the tenants of the common land, the Government revenue, the village expenses, the 5 per cent. charge, etc., is divided among the co-sharers in proportion to their shares. In appeal, the Judge considered the real point at issue to be whether the defendants ought to pay on their holding at a fixed rent, and let such payment remain as their contribution to a common stock to be applied to expenses, and to giving them and their co-sharers rateable dividends out of the balance, or whether the defendants are only liable to pay a portion of the Government demand; and he determined this question against them. He observed that "the so-called sharers, of whose body the defendants are members, appear to be a sort of cultivating tenants of the plaintiffs with a beneficiary interest. The proportion of the Government demand corresponding to their shares is irrelevant, the Government demand not being paid by way of *quota* from each. The administration paper recorded at settlement shows that the plaintiffs have to pay the revenue, and the defendants and other sub-sharers are chargeable to them according to the rent-roll; the nett profits after the Government demand and other payments have been made, being ultimately divisible among them." In the result, however, he decreed the claim against them. *Held*, that, on the facts as found by the Judge, the suit as brought was not maintainable under the section. MUKHUN v. JUSRAM, **4 N.W.P. 165.**

(74)—*Suit against person of unsound mind—Procedure to be adopted.*—No suit could be instituted against a person of unsound mind, without first obtaining an adjudication that he is such, and having a curator appointed for

Right of Suit —concluded.

——**39.—Miscellaneous**—*concluded.*

him under Act XXV of 1858 or some other law for the time being in force. NARAYANA v. KRISHNA, **8 M. 214.** [*R.*, 24 M. 504.]

Right of Support.

(1)—*In pre-emption.*—The right of support is not an appendage to the property but is included in the incident of neighbourhood. RANCHHODDAS v. JUGALDAS, **2 Bom L R. 41=24 B. 414.**

To a proof by a party-wall.— *See* DEED—CONSTRUCTION OF DEED, 2 B. L. R. 214.

See EASEMENTS, 21 P.R. 1877.

Right of Way.

See EASEMENT.

See EASEMENTS ACT, 1882.

See PRESCRIPTION—EASEMENTS.

(1)—*Classes of rights of way and other rights.*—By the common law of England there are three distinct classes of rights of way and other similar rights. First, there are private rights, in the strict sense of the term, vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the free men of a city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term, which exist for the benefit of all the King's subjects; and the source of these is ordinarily dedication. These three classes of rights exist in England as well as in India. The remedies for infringement of the above rights discussed. CHUNI LALL v. RAM KISHEN SAHU, **15 C. 460, F.B.** [*R.*, 2 L.B.R. 134.]

(2)—*Easement—Inference from user—English Law.*—In a suit to establish a right of way, it would not be right in this country to draw the same inference from user as would be proper in a case arising in England. The English rule that user must be presumed to be as of right must not be applied without reference to the habits of the people of this country and the particular circumstancess of each case. SHAIKH KHODA BUKSH v. SHAIKH TAJUDDIN, **8 C.W. N. 359.**

(3)—*Easement—Right of way—Acquisition—User.*—A right of way need not have its origin in an express grant made in favour of the party claiming the right. A grant, no doubt, is one of the modes in which a right of way may be established, but a continued user for a certain period of time which would constitute adverse possession in one ordinary suit might also be, and is often deemed, sufficient to establish a right of way. RAM GUNGA DOSS v. GOBIND CHUNDER DOSS, **16 W.R. 284.**

Right of Way—*continued.*

(4)—*Easement—"Right of way," how created—What must be proved.*—A right of way may be created either by grant, by immemorial custom or by necessity. It is necessary for a party, to establish a right of this kind, to prove its existence and that it is ancient and has been exercised without interruption. No specific time has been held to be sufficient to establish a right of user. The determination of the existence of the right is a question depending on the evidence in each case, the right being inferred from that evidence. Where the right is proved for a period which would give the claimant a right by prescription, the Court would not interfere in special appeal; and where there is evidence showing a long and continued user, it is sufficient for the Court to find whether it has or has not lasted long enough to confer the right to it without particular reference to a specific number of years. IMAMBUNDEE BEGAM v. SHEODYAL RAM, **14 W.R. 199.**

(5)—*Possession—Right of way—User—Prescription—Burden of proof.*—Where the plaintiff who had been out of possession for a longer period than six months, sued the defendant who was in possession, to establish a right of way, *held*, that the plaintiff must prove his title. In order to establish his right of way, he must prove either thirty years' user, or a grant by the power of the ground. The defendant need not prove his title, because his possession is in itself sufficient to constitute a title against any person failing to prove a better title. SAVALGIAPA VIRBASAPA v. BASAVANAPA BASAPA, **10 B.H.C. 399.** [*R.*, 1 B. 592.]

(6)—*Right of way — User—Prescription—Proof.*—In order to give a right by prescription or presumption of a grant, a right of way in this country need not be shown by user for exactly and fully 20 years. Proof of well established and fixed user has been generally regarded as sufficient. BHUGWAN CHUNDER CHOWDHRY v. SHAIKH KHOSAL, **7 W.R. 271.** [*R.*, 14 W.R. 199.]

(7)—*Easement — Right of way—Nature of user—Evidence.*—To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favour of the other party. FUTTEH ALI v. ASGUR ALI, **17 W.R. 11.**

(8)—*User—Right of way —Presumption.*—Where a claim to a right of way is supported by evidence of user only, the Court must satisfy itself whether or not the user was founded on actual right; the guiding principle being that open use of another's land for the purpose of a road or pathway, if continued without interruption for a long time and not attributable to permission or sufferance, induces the presumption that the user was of right. MAHOMED ALI v. JUGAL RAMCHANDRA, **5 B.L.R. App. 84=14 W.R. 124.**

(9)—*Right of way—Uninterrupted user—Cause of action—Right of driving cattle over whole property.*—In order to establish a right of way, the person claiming it must prove uninterrupted user for a certain length of time; if his right is interrupted, he must go into Court *at once* if he wishes to maintain the right. [*D.*, 16 W.R. 277.] A right of way or easement must not be so large as to extinguish or destroy all the ordinary uses of the servient property. No length of time would give a party such a right, as for instance, a struggling right to the promiscuous use of the whole property for the purpose of driving his cattle over it. JOY DOORGO DOSSIA v. JUGGERNATH ROY, **15 W.R. 295.** [*D.*, 16 W.R. 277.]

(10)—*Easement — Continuous enjoyment—Permission.*—A person claiming a right of easement over another's property is bound to prove that he has had the continuous enjoyment of that easement without interruption, and not merely by the permission of the opposite party, but as of right. HEERA LALL KOOER v. PURMESSUR KOOER, **15 W.R. 401.**

(11)—*Right of way—Use of pathway for over twelve years—Right to the path as against owner.*—Defendant was occupying a certain plot of ground where he had his house and was using the pathway in dispute to proceed to his house without any opposition on the plaintiff's part; that pathway was also the only mode of access which he had to his house. The lower Courts had found that previous to the defendant's occupation of the plot it was occupied by other persons who as a fact were using the same pathway for over twenty years antecedently to the defendant. *Held* on these facts, that the defendant had a right of way along the pathway in question as against the owner. MOHIM CHUNDER CHUCKERBUTTY v. CHUNDEE CHURN GOOHO, **10 W.R. 452.** [*Appr.*, 11 W.R. 522.]

(12)—*Easement—Right of way—User—Act* IX *of* 1871.—Where a person sues to establish a right of way, he must prove not only user for a period of 20 years, but also that the user was within two years next before the institution of the suit. GOPEE CHUND SETIA v. BHOOBUN MOHUN SEN, **23 W.R. 401.** [*R.*, 7 C. 132=9 C.L.R. 281.]

(12-*a*)—*Easement—User—Prescription —Act* IX *of* 1871 (*Limitation*), *s.* 27.—Where the owner of a dominant tenement, with the intention of preventing the use of a way, creates an obstruction of a permanent nature rendering such use impossible, the way cannot be said, during the continuance of the obstruction, to have been "openly enjoyed" within the meaning of the section. SHAM CHURN AUDDY v. TARINEY CHURN BANERJEE, **1 C. 422=25 W.R. 228.**

(13)—*Limitation Act* (XV *of* 1877), *s.* 26—*Acquisition of easement under—Knowledge of servient owner—English law different.*—A right of way or other easement is not acquired under s. 26 of the Limitation Act, necessarily with the knowledge of the servient owner. In this respect there is a difference between the Indian

Right of Way—*continued.*

and the English law. ARZAN v. RAKHAL CHUNDER ROY CHOWDHRY, **10 C. 214.** [*R.*, 25 M. 457, 8 C.W.N. 425=31 C. 503, P.C.]

(14)—*Indian Limitation Act, s. 26—Special damage—Public and private rights of way.*—The distinction between public ways and private ways is important, because the remedies for obstruction to them are not the same. The acquisition of a private right-of-way by prescription is in Burma determinable by reference to s. 26 of the Indian Limitation Act. To acquire such right there must have been a peaceable and open enjoyment of the way by the person who claims it as an easement and as of right without interruption and for twenty years up to some date within two years of any suit brought to contest the claim. A person to whose property the direct route is by a public path has a sufficient interest to enable him to bring a civil suit to have an obstruction to the path removed. No one can sue for the removal of an obstruction to a public way or for interference with it unless he can show that he has sustained or sustains special injury by reason of the obstruction or interference. MAUNG THA ZAN v. U SAN WIN, **2 L.B.R. 134.** (15 C. 460, 6 C.L.R. 282, 22 C. 551, *R.*) [*R.*, 4 L.B.R. 246.]

(15)—*Right of private way, Suit for—Special damage, proof of, whether necessary.*—In a suit where a right of way is claimed which is not a right of way by the public but a private right of way, and an easement of right by prescription, the question as to whether or not there has been proof of special damage is immaterial. BAIJ NATH SINGH v. TETAI CHOWDHRY, **6 C.W.N. 197.**

(16)—*Road, Obstruction of—Special damage, facts to establish—Transfer of case—Court failing in a marked manner to do justice—Case sent to another Court on remand.*—Where the road, which the defendant is said to have obstructed, is a road leading from the plaintiffs' village to their fields, and also to the public *bazar* and *ghat*, and there was no other convenient road for them to use: *Held*, that the facts are sufficient under the law to constitute special damage and to entitle the plaintiffs to a decree. (22 C. 551, *F.*) Where a Court failed in a marked manner to do proper justice between the parties, the High Court in remanding the case directed that it should be heard by another Court. GOPAL CHANDRA NASKAR v. GADADHAR MONDAL, **1 Ind. Cas. 110.**

(17)—*Right of way by sufferance.*—A right of way over another's land by sufferance cannot create a permanent right in his favour. ASHOTOSH CHUCKERBUTTY v. TEETOO HOLDAR, **W.R. 1864, 293.** [*R.*, 4 M.L.J. 192.]

(18)—*Specific Relief Act, s. 9—Immoveable property.*—A right of way is not immoveable property within the meaning of s. 9 of the Specific Relief Act, 1877. MANGALDAS v. JEWANRAM, **1 Bom. L.R. 167=23 B. 673.**

(19)—*Crim. Pro. Code, Ch. XX, application of, to public thoroughfares, and not to private roads*

Right of Way—*continued.*

—*Owner of land suffering neighbour's cows to pasture—Easement, if created*—S. 311 of the Crim. Pro. Code, and the other sections of Ch. XX of the Code refer to public thoroughfares, and cannot apply to private roads over which a right of way may have been established. It cannot be contended that, because an owner of a patch of waste land between a village and the public road allows his neighbour's cows to stray over it on their way to pasture, he thereby creates over such land a right of easement having the practical effect of depriving it of all value by rendering its cultivation impossible. GEROO CHURN GOON v. GUNGA GOBIND CHATTERJEE, **8 W.R. 268.**

(20)—*User of right of way prior to partition—No evidence of subsequent right of way over land falling to another's share on partition.*—The lower Court was held to be wrong in having considered that anything which took place before the partition was evidence of the plaintiff's right of way over lands which became those of the defendant by virtue of that partition. Because the lower Court had based its judgment mainly on consideration of the lengthened user, which it thought had taken place before the partition, the High Court reversed the decision and remanded the case for retrial, observing that, although user before the partition must not be taken into consideration in the decision, yet, any user which may have taken place since the partition as of right by the plaintiff and his family would be good evidence, as far as it could be of such a right having been given to him by the defendant. OBHOY CHURN DUTT v. NOBIN CHUNDER DUTT, **10 W.R. 298.**

(21)—*Right of way—User.*—The mere use of the word "formerly" with respect to the enjoyment of a right, without any expression to indicate the length of time for which the right had been exercised is insufficient to prove legally a right of user. So, the finding that a right of way had been "formerly" exercised is not a sufficient finding to indicate the length of time for which the right had been exercised and is therefore insufficient for proving a right of user. KRISHNA CHANDRA CHUKERBUTTY v. KRISHNA CHANDRA BANIK, **3 B.L.R. A.C. 211.** (2 B.L.R. A.C., 323, 11 W.R. 285, *D.*; 7 W.R. 1, 9 W.R. 91, *R.*)

(22)—*Act IX of 1871, s. 27—Right of way—Contract—User—Proof.*—User for twenty years need not be proved, under s. 27, Act IX of 1871, by a person who claims under a contract the reopening of a way. KALLARAM DHUR v. JOOGUL KISHORE SURMAH, **23 W.R. 290.**

(23)—*Right of way—Use of way during particular season every year.*—There is nothing to prevent the creation of such a right of way as would merely consist in the right of passing over particular lands of another at particular seasons of the year. Such right can be acquired by use of the way for a number of years at a particular season. OOMUR SHAH v. RUMZAN ALI, **10 W.R. 363.** [*R.*, 14 W.R. 199.]

Right of Way—*continued.*

(24)—*Easement—Pathway over waste land—Right of user.*—A right of user over a pathway can be established even where that path passes over waste land, and a temporary interruption during the rainy season does not affect the right. SHAIKH MAHOMED ANSUR v. SHAIKH SEFATOOLLAH, **22 W.R. 340.**

(25)—*Suit for right of way—Necessity of proof as to particular right of way claimed.*—In this suit brought by the plaintiff for the right of way by a particular road, the defendant denied the right, stating that there were two other roads over defendant's land by which plaintiff had convenience and permission to pass. The first Court found that the plaintiff's right of way for the particular road claimed was proved. The lower appellate Court, not going into that question, *held* that, as defendant gave plaintiff the option of passing by two other lines of road, the plaintiff could not have a decree for the particular right of way in question. The High Court *held* that the lower appellate Court was wrong and it should have found specifically whether the plaintiff had the particular right of way claimed by him or not, and if plaintiff had such a right, it should have been decreed to him. GOLUK CHUNDER CHOWDHRY v. TARINEE CHURN CHUCKERBUTTY, **4 W.R. 49.** [*F.*, 3 B L.R. App. 118.]

(26)—*Easement acquisition of, by time and user—Right of way, not affected by existence of another pathway.*—Both the lower Courts in this case had found that plaintiff had exercised the right of way claimed by him from time immemorial, that defendant could not interfere with such right and that, consequently, the wall of the defendant sought to be removed by the plaintiff must be removed. On special appeal, defendant urged that user on sufferance never, by any length of time, grows into a right. And moreover there was another pathway by which access to the main road was possible from plaintiff's house. The High Court, however, *held* that, where time and user together have created in the plaintiff a right of easement over the property of the defendant, the latter could not, however inconvenient the exercise of such right may be to him, put an end to it, nor can the fact of there being a pathway in any other place affect the right of way which has accrued to the plaintiff over the property of defendant. SHAM BAGDEE v. FUKEER CHUND BAGDEE, **6 W.R. 222.**

(27)—*Easement— Pathway— Another pathway in existence—Right of user.*—The right of user of a pathway is not affected by the existence of another pathway, by which access may be gained to the same premises. MOKOONDONATH BHADOORY v. SHIB CHUNDER BHADOORY, **22 W.R. 302.**

(28)—*Right of way for particular purpose—Extent of user.*—Where a right of way for a particular purpose is proved, the number of occasions on which it may be enjoyed need not be limited to the number of occasions on which it can be shown to have been exercised; it is exerciseable at all convenient times for the particular purpose. GOPAL CHUNDER MUKERJEE v. JUDDOO LALL MULLICK, **9 C. 778.** [*Affirmed*, 13 C. 136, P.C.]

(29)—*Suit for declaration of right of way over land of another by particular route*—Onus.—In a suit for a declaration of a right of way over certain lands, the property of the defendants, the plaintiffs claiming to have that right by a particular line, *held* that the plaintiffs must prove the right set up by them. Mere proof of a right to pass over the land without proving the particular route will not entitle the plaintiffs to a decree. RADHANATH SUGRACHARJI v. BAIDONATH SEAL KABIRAJ, **3 B L.R. App. 118.** (4 W.R. 49, *F.*)

(30)—*Easement—Right of way—Right to pass from one point to another.*—If any person has a right of way from one place to another over a particular line, if he and his ancestors have been accustomed to use that way for a long time, he has a right to go over it and cannot be compelled to use a *different* and *substituted* way. But where the right is simply to pass from a point A on the north to point B on the south, the pathway between these two points must be kept open and the party desiring to exercise his rights cannot claim to pass in a particular tortuous and indirect course between the two points. SYED HAMID HOSSEIN v. GERVAIN, **15 W.R. 496.** [*R.*, 14 C. W.N. 15.]

(31)—*Easement—Right of way—Rights of purchaser.*—The purchaser of a house acquires the right to the use of the way which has been enjoyed with the house by the person who sold it, where the right claimed is not merely a right to what is called a way of necesssity, but a particular right of way over a defined path. NUBEEN CHUNDER BULLUB v. BHOOBUN CHUNDER MUNDUL, **15 W.R. 526.**

(32)—*Thoroughfare—Right of way—Marriage processions — Evidence.*—A general right of thoroughfare includes a right to take a marriage or other procession unless the original grant, when made, was in such restricted and limited a form as to exclude all processions whether on foot or not. The mere fact of processions not having passed for a number of years would not, of itself, be sufficient or conclusive to prove that the original grant contained a restriction that no processions even on foot should pass over this way. RAJ MANICK SINGH v. RUTTEN MANICK BOSE, **15 W.R. 46.**

(33)—*Right of way—Right to pass with processions.*—A general right of way includes a right to pass with marriage and funeral processions. LOKENATH GOSSAMEE v. MONMOHUN GOSSAMEE, **20 W.R. 293.**

(34)—*Obstruction — Exercise of right.* — A person who has a right of way cannot claim anything more than that the reasonable exercise of his right shall not be obstructed. It is only ownership of the land that carries with it the

Right of Way —*continued.*

ownership of everything *usque ad cœlum.* TOOLSEEMONY DEBEE v. JOGESH CHUNDER SHAHA, **1 C.L.R. 425.**

(35) —*Road —Right of user—Private right.* — Where there is a road, the privilege to use which is enjoyed only by one particular section of a community, it is absurd to say that that road is a public one. It is to all intents and purposes a private road, although the number of people who have the privilege of using it may be great. SHAM SOONDER BHUTTACHARJEE v. MONEE RAM DOSS, **25 W.R. 233.**

(36) —*Right of way -User—Easement—Act* XIV *of* 1859.—A right of passing freely over another's land requires to be kept up by constant use ; if not exercised for a considerable period, *e.g.*, 6 years, it cannot be re-established by suit. HARIDAS NANDI v. JADUNATH DUTT, **5 B.L.R. App. 66 = 14 W.R. 79.** [*R.*, 16 A. 390; *D.*, 16 W.R. 277.]

(37)—*Joint family—Joint doorway -User—Easement—Obstruction.*—Plaintiffs, as members of a joint family, filed this suit to enforce their right to a pathway through a door (which had been blocked up) leading to a joint Thakoorbaree. The first Court found that the obstruction took place nine years ago and held that the plaintiffs' rights were barred by acquiescence. On appeal, *held* that the plaintiffs were entitled to a decree. They did not claim a right of user. They complained of the obstruction of a passage which belonged to them jointly with the defendants. The non-user of a pathway either for nine years as stated by the defendants or for four years as admitted by the plaintiffs does not necessarily constitute an abandonment of any right which the plaintiffs may have possessed. CHUNDER KANT CHOWDHRY v. NUND LALL CHOWDHRY, **15 W.R. 277.** (15 W.R. 295 & 402, 14 W.R. 79, *D.*)

(38)—*Right of way -New way substituted for old one—Consent -Non-user —Right of resumption.*—Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release, the right of resumption is lost, and the non-user need not extend over any defined period. RAJ BEHARI ROY v. TARA PERSHAD ROY, **20 W.R. 188.**

(39)—*Closing right of way—Substitution of another way.*—The owner of the land over which there is right of way by an ancient pathway cannot, without the consent of the parties entitled to the right, substitute another path and shut up the ancient pathway. TARINEECHURN CHUCKERBUTTY v. TARINEECHURN CHUCKERBUTTY, **1 Ind. Jur. N.S. 6.**

(40) —*Change of purpose for which the way was used.*—The plaintiff and defendants were owners of adjacent fields ; and one mode of approaching the defendants' field was by a way which passed through plaintiff's field. The

Right of Way —*continued.*

defendants' field was used for agricultural purposes, but lately they converted their field into a timber yard, and the dispute between the parties was whether the defendants could claim to use the way for the new purpose. *Held*, that the defendants could, not by merely altering the dominant heritage, substantively increase the easement. "The use" must be the reasonable use for the purpose of the land in the condition in which it was while the user took place, so that if the user is for a field devoted to agricultural purposes, the right cannot be claimed for a timber depot into which the field was converted. DESAI BHAOORAI v. CHUNILAL, **1 B. L R. 658 = 24 B. 188.**

(41) —*Landlord and tenant—Dedication to public by owner of land—Encroachment -Right of way—Easement—Suit for injunction—Presumption of covenant or grant.*—The parties to the suit were occupiers of houses which stood opposite to each other in a lane There was an open space in the lane on which a cross on a pedestal had stood for many years. The plaintiff alleged that the said vacant space was originally used by the occupants of the plaintiff's house and the residents in the said lane in common for purposes of recreation, except where the cross was erected, that, in addition to the general use of the said open space, he and his predecessors-in-title had enjoyed the use of the said open space as a footway and a way for carriages and other vehicles to approach his house, and to stand and be able to turn there. The plaintiff complained that the defendant had wrongfully removed the cross and enclosed the greater part of the open space by building walls thereon, and prayed for a declaration that he and the occupants of his house were entitled to the uninterrupted use of the said space for purposes of recreation and as a footway and carriage way, and for an injunction. In his written statement, the defendant alleged that the whole of the open space originally belonged to a Portuguese confraternity who were the fazendars of the property both of the plaintiff and of the defendant, and who erected the cross for purposes of worship, and that the same was removed, the Portuguese having left the locality. He denied the allegations in the plaint in respect of the use of the lane as a place for recreation, and as a footway or carriage way, and pleaded that the part of the open space which he had enclosed belonged to him, the religious confraternity having sold the same to him in 1887. *Held* that the evidence adduced in the case was insufficient to establish that the open space in dispute was dedicated to the public. *Held* also that the Court would be justified in presuming and ought to presume, a covenant on the part of the fazendari owners to keep the lane including the upper end of it open for the use of the owners of the houses abutting upon it. Such a covenant should be presumed equally in the case of a land-owner granting land for building purposes to fazendari tenants on a perpetual tenure at a quit-rent, and in the case of one selling land

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Right of Way—*continued.*

out and out for building purposes. RANCHORDASS ANTHA BHAI v. MANEKLAL GORDHANDASS, **17 B. 648.**

(42)—*Public path, when dedication of, to be presumed—Right of one sect to take their idol in procession.*—The plaintiffs, *Vellalars*, sued for a declaration that the defendants, *Kaikkalars* (weavers) were not entitled to carry their idol in procession along a certain path. It was found that the path was used by all members of the public, including the *Kaikkalars*, who desired to use it, without any objection or interruption of any kind. There was no evidence as to the origin of the user or that the dedication by the *Vellalars* as found was subject to any conditions. *Held*, that the *Kaikkalars* had the same right to conduct religious processions as the *Vellalars*, as the street was a public path. (26 M. 376, 30 M. 185, P.C., *F.*; 26 M. 555, *D.*) Continued user of a way by the public, raises a presumption that the way belongs to the public, that it has been dedicated by the owner for the public use for which it has been used. It does not lie upon the public to show by what particular owner the road has been dedicated. MANNADA MUDALI v. NALLYA GOUNDAN, **6 M.L.T. 285=19 M.L.J. 467=32 M. 527=4 Ind. Cas. 870.** [*R.*, 20 M.L.J. 884 =9 M.L.T. 44=8 Ind. Cas. 175; *D.*, 8 Ind. Cas. 682.]

(43)—*Right of way—Easement of necessity—Evidence Act, s.* 114—*Failure to produce title-deed—Presumption—Way as easement of necessity, what is—How it arises as an incident of property.*—When two adjoining compounds belonged to one individual, the resident of one was using a way over the compound of the other, for access to a well, but subsequently, the first compound being purchased by the plaintiff and the second by the defendant, the latter obstructed the former from using the way and the plaintiff sued for a declaration of his right, *held* that the plaintiff was not entitled to any right of way over defendant's land either as an easement of necessity or otherwise, because there was another and a public way to the well, although it was less convenient and more expensive. (8 C. 956. *Cons.*: 7 A. 240, *R.*) [*R.*, 16 C.P.L.R. 156; *F.*, 28 M. 495=15 M.L.J. 255.] When a person claiming a way refuses to put in evidence the conveyance to him, the Court may act on the principle of ill. (*g*) to s. 114 of Act I of 1872, and presume that evidence which could have been and was not produced, would have been, had it been produced, unfavorable to him. A right of way arising on a grant or lease of land as an easement of necessity, is a way which in law is necessarily implied to be granted, or reserved on the severance of land when the property, whether it be land simply or land with a building upon it, granted or leased, or the property reserved out of a grant or lease cannot be enjoyed by a way over the land of the grantee or lessee in the one case, or over the land of the grantor or lessor in the other. A way of necessity would in the former case necessarily pass as incident to the grant or lease, and, in the other case, arises as incident to the reservation. WUTZLER v. SHAUPE, **15 A. 270=A.W.N. 1893, 151.**

(44)—*Easement—Right of way—Purchase of land adjoining purchaser's land—Way of access—Way of necessity—Sale-deed, construction of—Circumstances existing at time of sale.*—A person purchasing a plot adjoining his own land and having access to the plot through his land, cannot acquire a way of necessity over his vendor's land of which the plot formed a part. The fact that if the plot had been sold to a third person, he would have acquired a way of necessity, does not affect the question. Where a portion of an estate is sold, a right of way leading to such portion may be created by the use of general words, provided that the circumstances existing at the time of the sale were such as to justify the belief that such was the intention of the parties. In this case, the words used were "*sarva hakk wa sambandha*" which, in themselves, apart from the circumstances at the time of the sale, do not specify a right of way over the vendor's property as conveyed along with the portion of land sold. But, if it were found that there was an old path leading across C to B (the plot sold), and that the purposes for which the plot was sold and the conduct of the parties were such as to justify the inference that by the use of the words "*hakk wa sambandha*," "rights and accompaniments" it was the intention to convey the right to use the path, it would be open to the Judge to find as a fact that such was the intention. In the case of a claim to a right of way, the question of convenience can be legitimately considered. MUNICIPALITY OF THE CITY OF POONA v. VAMAN RAJARAM GHOLAP, **19 B. 797.** [*Not F.*, 28 M. 495; *R.*, 16 C. P.L.R. 156.]

(45)—*Right of way—Partition.*—The fact of the public having a right of way over property sought to be divided is not a reason in law against such division. RAM PERSHAD NARAIN TEWAREE v. THE COURT OF WARDS, **21 W.R. 152.**

(46)—*Infringement of—Street—Occupant of the street—Right to sue.*—Where the occupants of a street are shown to have a right of passing over the street way, every occupant of the street entitled to the right of way can sue for an infringement of it just as he was solely entitled to it. NARAN v. LALLUBHAI, **2 Bom. L.R. 116.**

(47)—*Railway—Acquisition of land—Right of way—Representation and conduct of Railway Company—Act* VI *of* 1857, *s.* 8.—Where a Railway Company, with the assistance of Government, acquired certain land under the provisions of Act VI of 1857, the land vested in the Company absolutely and free from every right or interest therein, of whatever description, possessed by the former proprietors or by other persons. All rights before existing cease upon the acquisition. No right of way can afterwards arise or be continued merely because

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Right of Way --*continued.*

there remained no mode of access to the land otherwise than by crossing the line. The express provisions of the law are not consistent with the existence of such a right. But if the Railway Company have, by their representations and conduct, laid themselves under legal obligation to provide a road or crossing, then such obligation may be enforced. COLLECTOR OF THE 24-PERGUNNAHS v. NOBIN CHUNDER GHOSE, **3 W.R. 27.** [*D.*, 4 W.R. 83; *R.*, 24 B. 600.]

(48)—*Exchange of land—Release of rights and interests in land exchanged—Right of way over land not lost.*—Plaintiff instituted this suit for the opening of a certain road. Defendant pleaded that, by a certain exchange of land between the parties the plaint-mentioned land came into defendant's possession, that there was a distinct agreement that the plaintiff should relinquish all right in the transferred land and that consequently his claim to open a road over such land could not be admitted. The lower appellate Court held that the plaintiff did not prove his claim in respect of the roads that he sued for. The main contention of the defendant on second appeal was that in the papers of the land exchanged, there was a remark that the party exchanging gave up all rights and interests in the land exchanged, and that, by such remark the party compensated, lost all right of way. The High Court however *held* that the words relied on by the appellant were general and such as did not waive previous rights of road over the lands. KALEE KISHORE ROY v. DEEN DYAL SINGH, **4 W.R. 83.**

(49)—*Easement—Imposing a greater burden on the servient tenement.*—The defendant set up a cotton press upon a survey number which was used before for agricultural purposes only, and wished to use the previously existing right of way through the adjoining field of the plaintiff for the purposes of the press: *Held*, that the test to be applied in cases like these was to see whether any additional burden had been or would be imposed on the servient heritage of the plaintiff by the use made or sought to be made of the way by the defendant; and that s. 13 of the Easements Act governed the present case. *Held*, further, that the fact that the Land Revenue Code allowed agricultural lands to be used for other than agricultural purposes, did not permit of a right of way being used for all purposes allowed by the Land Revenue Code. JESANG v. WHITTLE, **1 Bom. L. R. 37=23 B. 595.**

(50)—*Wrongful possession of dominant tenement, effect of—Cessation of user of way.*—Where the defendant wrongfully took possession of the dominant tenement and the plaintiff ceased to use the way, which led to it over the defendant's land, it cannot be said that, during the period of dispossession (a period of more than three years), the plaintiff had an open, peaceable and uninterrupted, enjoyment of the way as of right, or that the defendant suffered such an enjoyment, although there was no at-

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tempt to exercise it. JANHAVI CHOWDHURANI v. BINDU BASHINI CHOWDHURANI, **26 C. 593 =3 C.W.N. 610.**

(51)—*Right of way—Cause of action.*—In a suit to remove certain bunds by which an existing channel between the plaintiff's and defendant's tanks was obstructed, the plaintiff has a good cause of action if he has by long user acquired a right of access to his tank and granary for himself and those who come by that passage to remove the rice which he has to sell, and if the defendants have obstructed that passage so as to prevent access to the tank. KALEE MOHUN MUNDUL v. NOBIN CHUNDER MOOKERJEE, **25 W.R. 225.**

Long silence as to obstruction—Acquiescence —*See* ACQUIESCENCE, 1 B.L.R.A.C. 213= 10 W.R. 316.

Settlement Officer's jurisdiction to decide Civil disputes between landlord and tenant—*See* BEN. ACT VIII OF 1885, ch. X, 4 C. W. N. 127.

Settlement Officer's jurisdiction—Dispute as to right of way—*See* BEN. ACT VIII OF 1885, ch. X, 27 C. 364.

See Bur. ACT V OF 1880, L.B.R. (1872—1892), 550.

See AWARD, 5 C.L.R. 338.

See BURDEN OF PROOF—EASEMENTS, 2 C.L.R. 555.

Right of way is immoveable property—*See* CIV. PRO. CODE, 1908, O. II, rr. 4, 5, s. 115, 13 C.W.N. 451=9 C.L.J. 336=4 Ind. Cas. 116.

Easement—Interference with private right of way actionable without special damage—*See* DECREE—DECREE, CONSTRUCTION OF, 9 A. 434=7 A.W.N. 82.

Decision against mortgagor in possession—Mortgagee not estopped—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 4 C. 692.

See INJUNCTION—SPECIAL CASES, 9 B.L. R. 328=18 W.R. 379, 10 B. 390.

Right of way—Suit for removal of obstruction—Limitation.—*See* LIMITATION ACT, 1908, ss. 23. 26, arts. 37, 144, 2 Ind. Cas. 410.

Easement—Limitation Act 1877, s. 26—User as a right of way up the ladder, one end of which rests on the property of another and along the platform which overhangs it—*See* POSSESSION—ADVERSE POSSESSION, 68 P.R. 1899=5 P.L.R.1900, Notes of judgment.

See RES JUDICATA—PARTIES, 59 P.R. 1879.

Right, Title and Interest.

(1)—*Civ. Pro. Code, Act* VIII *of* 1859—*Right, title and interest of judgment-debtor—Construction.*—In all cases where the right, title and interest of the judgment-debtor in certain property is purchased in Court-auction in execution of

Right, Title and Interest—*concluded.*

decree, the question what interest has been purchased must be determined by what, under the circumstances, the purchaser understood to have bought. And this is a question of mixed law and fact. ABDUL AYIZ KHAN v. APPAYASAMI NAIKER, **8 C.W.N 186, P.C.=31 I.A. 1=27 M. 131=6 Bom. L.R. 7=8 Sar. 368.** (17 I.A. 11, 14 I.A. 77, 14 I.A. 84, *R.*) [*R.*, 6 C.L.J. 490]

See CIV. PRO. CODE, 1908, s. 65, O. XXI, r. 94, 25 M. 454.

Right, title and interest of judgment-debtor, attachment of — Claim — Proper Order — *See* CLAIM TO PROPERTY ATTACHED, 4 B. L. R. F. B. 175=13 W. R. F. B. 63.

Attachment of—Possession—Right to have property released—*See* CLAIM TO PROPERTY, ATTACHED, 2 Ind. Jur. N. S. 339.

See HINDU LAW—ALIENATION, 12 C. L. R. 104.

See HINDU LAW—DEBTS, 12 C.L.R. 169, P.C.=6 M. 1=9 I.A. 128, 3 Bom L.R. 322.

Of judgmen-debtor—Sale of – Parties – *See* HINDU LAW—JOINT FAMILY, 11 C.L.R. 263.

Description of property sold as – Of judgment-debtor—*See* HINDU LAW—JOINT FAMILY, 17 C. 584, P.C.= 17 I. A. 11.

Sale of, of judgment-debtor — *See* HINDU LAW—JOINT FAMILY, 7 C. L. R. 465.

Sale in execution of—Of member—Power of remaining co-parcener to ratify sale—Effect of ratification—Gift of his share in property sold by remaining co-parcener in favour of another member of family—Suit by purchaser for general partition, if necessary—Right of donee to recover portion gifted —*See* HINDU LAW-JOINT FAMILY, 13 M. L. J. 477.

See HINDU LAW—JOINT FAMILY, 18 B. 147.

Execution sale of – Of Mortgagor or his heir, what passes at – *See* MORTGAGE – SALE OF MORTGAGED PROPERTY, 5 B. 8.

See SALE – SALE FOR ARREARS OF RENT – UNDER TENURES AND PORTIONS OF. SALES OF, 3 C.L.R. 561, P. C.=6 I A. 47.

See SALE — SALE IN EXECUTION OF DECREE – DECREES AGAINST REPRESENTATIVES, 2 Hay 8.

Decree against father – Sale of "—" of father in family lands — Evidence—Service vatan lands—Fraud—*See* SALE—SALE IN EXECUTION OF DECREE – JOINT PROPERTY, SALE OF, 15 B. 13.

Of judgment-debtor – *See* SALE—SALE IN EXECUTION OF DECREE—JOINT PROPERTY, SALE OF, 9 C.L.R. 350.

See VENDOR AND PURCHASER—POSSESSION, 6 B. 193 (F.B.).

Right to appear.

See LEGAL PRACTITIONERS – PLEADER.

See LEGAL PRACTITIONERS – ADVOCATE, 13 W.R. 60.

Right to begin.

(1)—*General rule.*—The rule is that the party holding the affirmative has the right to begin at the hearing before the High Court. LALL MOHUN MULLICK v. PEARY CHAND MITTRA, **1 Ind Jur. N S. 383.**

(2) –*Practice—Suits under Civ. Pro. Code,* 1859. — It was held under the Civ. Pro. Code of 1859 that the common Law practice in respect of the right to begin ought to prevail in cases under that Act, that practice having been followed up to that time, and the Procedure Code making no distinction between suits in the nature of Common Law actions and those in the nature of equity suits. RUNGUNMONEY DOSSEE v. BRIJO LALL DEY, **Cor., 25.**

(3)—*Civ. Pro. Code,* 1877, s. 179—*Suit for partition.*—In a suit for partition of certain properties and trading business, alleged to be the joint property of the plaintiff and the defendants, the latter admitted that there had been a nucleus of joint property, but alleged that the greater portion of the properties claimed to be joint were their self-acquired properties. *Held* that the plaintiff had the right to begin, unless the defendants admitted all the allegations or all the material allegations in the plaint. AGHORE NAUTH NEOGHY v. PREM CHUND NEOGHY, **7 C.L.R. 274.**

(4) –*Practice—Appeal—Respondent denying right of appeal.*—Where the respondent denies the right of appeal in a case, and this preliminary objection is set down for argument, the appellant has the right to begin. RUSTOMJEE BURGORJI v. KESSOWJI NAIK, **8 B 287.**

(5)—*Civ. Pro. Code.,* 1882, s. 623—*Application for review—Notice to show cause—Right to begin.*—The party opposing an application for review of judgment has the right to begin, where a notice to show cause why the application should not be granted has been issued to him GHANSHAM SINGH v. LAL SINGH, **9 A. 61, F.B.**

(6)—*Preliminary issue—Hearing—Right to begin.*—When a case is argued on a preliminary issue, the party by whom the issue is raised has the right to begin. FATMABAI v. AISHABAI, **12 B. 454.**

Right to begin—Burden of Proof—Irregularity not affecting merits—Powers of Appellate Court—*See* APPELLATE COURT — MISCELLANEOUS, 3 A. 824=1 A.W.N. 86.

See BURDEN OF PROOF – CLAIM TO PROPERTY ATTACHED, 2 B.L.R. F.B. 91=11 W. R. F.B. 8.

Right to sue.

See RIGHT OF SUIT.

Right to Use of Water.

See EASEMENT.

See EASEMENTS ACT, 1882.

See PRESCRIPTION—EASEMENTS.

See RIPARIAN PROPRIETORS.

See WATER COURSE.

Right to use of Water—*continued.*

(1)—*Surplus water of tank—Channel—Easement.*—A right of easement may be acquired in the surplus water of a tank flowing through a defined channel, whether natural or artificial. RAYAPPAN v. VIRABHADRA, **7 M. 530.** [*R.*, 14 C.P.L.R. 145, 11 C.W.N. 85=4 C.L.J. 370.]

(2)—*Right to take water from common canal, established usage regarding—Additional water not to be taken to the injury of neighbours.*—According to law, the right to take water is governed by established uses and no man can open a new conduit to take additional water to the injury of his neighbours. The proper issue in the present case was not, as framed by the lower appellate Court, whether the disputed water-course should be called a *bagla* or a *karba* but whether the defendant had an old-established right to the use of the water-course or not. Both *baglas* and *karbas* were private water-courses by which water was taken from the common canal. The case was, in the result, remanded to the lower appellate Court to be tried on the above proper issue whether or not defendant had an established right by user of the disputed water-course. ATHUR ALI KHAN v. SEKUNDER ALI KHAN, **4 W.R. 28.**

(3)—*Right of water—Irrigation by tapping another's canal.*—A person has no right to abstract water for his own land from a canal belonging to another, unless by grant or prescription. RUN BAHADOOR v. POODHEE ROY, **W.R. 1864, 319.**

(4)—*Riparian owner—Right to deal with stream—Extent of right.*—A riparian proprietor may deal with the stream as freely as with any other portion of his land, provided only that he must not, by so doing, sensibly disturb the natural conditions of the stream as it exists within the limits of other proprietors, whether above or below or on the opposite side. SHEIKH MONOOUR HOOSSEIN v. KANHYA LAL, **3 W.R. 218.** [*R.*, 11 C.W.N. 85=4 C.L.J. 370.]

(5)—*Water-course artificially constructed, not subject to rule of riparian proprietorship.*—Riparian proprietors have a right to the use of the water of a natural water-course under certain restrictions. But these rights have no application to a water-course artificially constructed, and the mere fact of riparian proprietorship gives no rights whatever over such a stream. BHOOP NARAIN SINGH v. KAZEE SYUD KERAMUT ALI, **6 W.R. 99.** [*F.*, 14 W.R. 349.]

(6)—*Riparian ownership—Proprietorship of tidal unnavigable stream—Obstruction to stream—Easement.*—The plaintiff who was the proprietor of lands and premises on one side of a tidal, but unnavigable Khal, the proprietorship of which was vested in the Government, sued the defendant the proprietor of lands on the other side, for the removal of a wall which the latter had constructed and which encroached upon the stream, on the ground that damage might result to his lands and premises by reason of such encroachment upon the stream. It was not shown that the flow of the stream had been sensibly altered, or that the plaintiff had a right or easement to have the waterflow in its accustomed manner. *Held*, reversing the decision of the High Court, that the suit would not lie, the encroachment having been on the soil of the Government without any sensible injury to the plaintiff. (*Bickett* v. *Morris*, L.R. 1 H.L. Scotch App. 47, *D.*) KALI KISSEN TAGORE v. JADOO LAL MALLICK, **5 C.L.R. 97, P.C.=6 I.A. 190=4 Sar. 61.**

(7)—*Water-course—Right to use of water—Origin.*—The proprietor of a pyne has a right to allow or not to allow the use of water flowing through it to other persons accept where they have also a clearly defined right to control the water and convert it to their own use. It will not do to say that "all along" or "for a long time," such persons have been accustomed to use the water. It must be clearly found that the right originated in some grant or some valid contract, or that the right had been exercised for so long a period that such title may be presumed. MAHARANEE INDURJEET KOOER v. LUCHMEE KOOER, **14 W.R. 349.**

(8)—*Right of drainage—Easement.*—A person may have a right to have the water falling on his lands in a higher level run off from it over his neighbour's land in a lower level. KOPIL POOREE v. MANICK SAHOO, **20 W.R. 287.** [*Rel. on*, 12 C. 323.]

(9)—*Easement—Right to drainage of surplus surface water.*—The owner of high land in India has an inherent right to drain off its surplus surface water through the adjacent power grounds. Where such owner of lower ground erects a dam interfering with the right to such drainage of surplus water, the owner of the superior land would not be entitled to have the whole dam removed, but only so much of it as might interfere with his right. ABDUL HAKIM v. GONESH DUTT, **12 C. 323.** [*R.*, 1 N.L.R. 182, 16 M.L.J. 582=29 M. 539=1 M.L.T. 333.]

(10)—*Easement—Natural course—Right to stop flow of water by embankment.*—Where water flows in a defined channel through one's land from the land of another, the former cannot, by an embankment placed across it, stop the flow lower down to the land of a third person, unless he can make out some special right to do so. He can only make a reasonable use of the water as it passes. The onward flow of water is a natural incident to the land in the condition in which it is. BABOO CHUMROO SINGH v. MULLIK KHYRUT AHMED, **18 W.R. 525.** [*R.*, 11 C.W.N. 85=4 C.L.J. 370.]

(11)—*Natural river—Right to erect bund—User—Onus of proof.*—Where a bund is erected in a natural flowing river, and it is alleged by the plaintiff and admitted by the defendant

Right to use of Water —*continued.*

that it entirely cuts off the water from the plaintiff, it lies upon the defendant to prove his right to erect the bund. HEERANUND SAHOO v. MUSSAMUT KHUBEEROONISSA, **15 W.R. 516.** [*R.*, 11 C.W.N. 85=4 C.L.J. 370.]

(12)—*Tort—Deprivation of right to rise of water—Injury—Right to repair bund—Tender of another bund.*—Where, owing to a new bund raised by the defendant on low ground and the obstruction by defendant to plaintiffs repairing their old bund, there is deprivation of plaintiffs' right to some rise of water which they previously enjoyed, such deprivation is an injury. Where the plaintiffs have a right to repair a certain bund for the purpose of securing a right to a rise of water, it is no answer to a claim of such right to say that the party can have another bund quite as good. SHUNKER SAHOO v. GURBHOO SAHOO, **15 W.R. 216.**

(13)—*Right of irrigation—Suit for removal of embankment obstructing right—Obstruction not proved—Mere denial of plaintiff's right, effect of.*—In a suit for damages and for the removal of an embankment newly erected by the defendant on his own lands, on the ground that the embankment infringed the plaintiff's right of irrigation by a certain channel; *held* that, in order to entitle the plaintiff to a decree there must have been some infringement of his right by the defendant, and that, as all that the defendant, did was to question or deny the plaintiff's right without in any way obstructing or interfering with it, the plaintiff was not entitled to a decree. SHAMA CHURN CHATTERJEE v. BOIDONATH BANERJEE, **11 W.R. 2.**

(14)—*Infringement of right—Action, when maintainable.*—Where there has been an infringement of right, it is not necessary, to maintain an action, to show that there has been any subsequent injury consequent upon such infringement. RAM CHAND CHUCKERBUTTY v. NUDDIAR CHAND GHOSE, **23 W.R. 230.**

(15)—*Right of easement*—Onus *of proof.*—Generally, where a plaintiff complains of the act of the defendant founded on an alleged right of easement, it would be for the defendant to prove that right existed. But, where a plaintiff alleges that subsequent to his purchase of a tank, at a specified period, the defendants commenced to take water from the tank for their own purposes and had opened a channel for the discharge of the water, and had thus asserted what was a new right, the *onus* is on the plaintiff to prove the assertion of the new right on the part of the defendants. BUNSHEEDHUR THAKOOR v. KHETTUR MONEE DEBIA, **11 W.R. 15.**

(16)—Butwara—*Rights reserved by agreement—Interference by co-sharers.*—Where the parties have, by agreement in a *butwara*, restricted their rights by a condition that the plaintiff was to have full use of the water in a reservoir, the parties who obtained the lands lying on

Right to use of Water—*continued.*

different sides of that reservoir are not at liberty to put up an embankment round it, and to diminish very materially the flow of water into it, thus rendering nearly or quite nugatory the rights reserved to the other co-sharers. GOUR SAHOY SINGH v. SHEO SAHOY SINGH, **15 W.R. 94.**

(17)—*Easement - Right to water— Right to erect bund*—The fact that water which falls into one's land is collected in a reservoir there and used to flow into the neighbour's land cannot give the latter a prescriptive right to have the water flow from the reservoir into his land, so as to prevent the former from erecting on his own land a bund to prevent the water flowing into the neighbour's land. BUNSEE SAHOO v. KALEE PERSHAD, **13 W.R. 414.** [*D.*, 15 W.R. 94, 18 W.R. 525.]

(18)—*Riparian owners—Right of villagers whose lands about on a stream to conserve water by erecting a dam.*—The plaintiffs and other co-villagers (the riparian holders of the villages of Mitrapur and Bijoypur) whose lands abutted on a stream, are entitled by custom and immemorial user, to the right to conserve water, for agricultural purposes, by building up a dam in the river, during the rainy season, and to allow the surplus water to run out by the sides of the dam. KALUR KHABIR v. JANMEAH, **29 C. 100.** (24 C. 865, P.C., *D.*) [*R.*, 35 C. 851; *D.*, 11 C.W.N. 85=4 C.L.J. 370.]

(19)—*Right of water—Troughs.*—The owner of two properties may conduct the rain water falling on one property through troughs over a water course to the other property. RAMRUTTUN NEOGEE v. PHOOL SINGH, **W.R. 1864, 147.**

(20)—*License—Permissive use—Revocation—Use of water.*—Where the plaintiff who enjoyed a permissive use of the water of the defendant's tank, has not used it for the last 4 years from the date when it was further excavated, it may be taken that the permission was revoked. GOOROO CHURN SOOR v. SREE CHURN GHOSE, **15 W R. 303.**

(21) — *Water-course over another's land, extent of right to discharge water through—Abandonment of right.*—Plaintiff alleged that the water of a considerable area of his land drained into a water-course and used to find exit in a certain direction over the land of the defendant, but that the latter had erected a bund across the water-course whereby plaintiff was injured, and he therefore prayed for a decree that the bund might be removed. Whether or not the water-course was a natural or an artificial one was not found, but in either view of the case, the plaintiff's suit was held to fail, for it was found that the exercise of the alleged right had been continually interrupted by the defendant. The lower appellate Court, therefore, might and ought to have inferred an abandonment of such right on the part of the plaintiff. Plaintiff's right to discharge the water on his land through the water-course

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over the defendant's land did not exist, and consequently no right could be made out on the part of the plaintiff to have the bund removed. KHETTURNATH GHOSE v. PROSUNNO GHOSE GOWALAH, **7 W.R. 498.** [*Cons.*, 12 W.R. 519; *F.*, 12 C 323.]

(22)—*Water-way, right of user of—Abandonment.*—The rule that a "prescriptive right when once acquired, is liable to be lost only by the operation of the law of limitation," is subject to an exception, which is, where the right in question may have been *abandoned.* Where a person, after having allowed a khal (water-way) over which he had a right of way, to be filled up, and another to be dug up in its place without any objection, and having used the new water-way, for two years, subsequently sues for the use of the old water-way, he must, under the above circumstances, be deemed to have abondoned whatever right of user he might have had over it. JUGUTBUNDHOO CHUCKERBUTTY v. JAGUT CHUNDER CHOWDHRY, **12 W.R. 519.**

(23)—*Right of raiyat under Government to sufficient water for irrigation—Opening of new irrigation channels, whether Collector can sanction.*—The diversion of water caused by the defendant's opening a new irrigation channel, in pursuance of an order made by the Sub-Collector, caused a material diminution in the supply of water necessary for the cultivation of the plaintiff's lands Plaintiff, who sustained actual damage in consequence, was given a decree for damages, and an injunction was issued to the defendant to close the channel newly opened by him. The order of the Sub-Collector was held to have been in excess of the power possessed by him for the regulation of the supply of water for irrigation purposes among raiyats holding lands under Government. RAMCHANDRA v. NARAYANASAMI, **16 M. 333=2 M.L.J. 279.** [*R.*, 24 M. 36, 28 M. 72=15 M.L.J. 32, 14 M.L.J. 350, 31 M. 171=18 M.L.J. 178=3 M L.T. 273, 5 M.L.T. 143.]

(24)—*Water rights—Respective rights of riparian proprietors above and below—Quantity of water which can be abstracted by riparian owner—Reparian owner's right to construct dam and take water for irrigation.*—A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may, for legitimate purposes, withdraw so much only of the water as will not materially lessen the downward flow on to his neighbour's land. What quantity of water can be abstracted and consumed, without infringing the rights of the lower riparian proprietors, must, in all cases, be a question of circumstances depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume. The plaintiffs, upper riparian owners, claimed the unrestricted right of constructing a

Right to use of Water—*concluded.*

dam and of taking, for irrigation purposes, as much water as they liked, without any proof that they had ever done so before, or that they had enjoyed the right by prescription or custom. The Privy Council held that in the absence of such right acquired by contract with lower proprietors, or by prescriptive use, the law conceded no such right. DEBI PERSHAD SINGH v. JOYNATH SINGH, **24 C. 865, P.C. =24 I.A. 60=1 C.W.N. 401.** [*F.*, 28 M. 236; *Appr.*, 11 C.W.N. 85=4 C.L.J. 370; *R.*, 3 L.B.R. 23, 35 C. 851, 32 M. 141=5 M.L.T. 149=19 M.L.J. 131=2 Ind. Cas. 325; *D.*, 29 C. 100.]

Rioting.

See PENAL CODE, ss. 153, 296, 26 M. 554, F.B.=13 M.L.J. 171.

Riparian Owners.

See RIPARIAN PROPRIETORS.

Riparian Proprietors.

See ALLUVION.

See EASEMENTS.

See PRESCRIPTION—EASEMENTS—WATER, RIGHT CONCERNING.

See RIGHT TO USE OF WATER.

See WATER COURSE.

(1)—*Water in a stream flowing through separate estates, use of—Upper and lower proprietors, respective rights of, to the use of water — Suit for injunction by one riparian owner against another, maintainability of, without proof of damage.*— A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor who may, for ligitimate purposes, withdraw so much only of the water as will not materially lessen the downward flow on his neighbours's land. (24 C. 865, *R.*) The owner of a tenement adjoining a natural stream has no right ro divert water to a place outside the tenement and there consume it even though he does not thereby diminish the flow of water to the lower riparian tenement. To sustian an action by one riparian owner against another restraining the latter from diverting the water beyond his riparian tenement, it is not necessary for the plaintiff to prove any damage or diminution in the water flowing to his riparian tenement. AIYAVU MOOPPAN v. SAMINATHA KAVUNDAN, **28 M. 236.** [*D.*, 32 M. 141 =19 M.L.J. 131=5 M.L.T. 149.]

(2)— *Upper and lower, rights of— Stream, natural, waters of—Ordinary and extra-ordinary uses, natural and artificial wants, distinction between—Irrigation, if primary use of stream water.*—Riparian owners have equal

Riparian Proprietors—*continued.*

rights to a usufruct of the waters of an adjacent natural stream, and no proprietor has the right to use the water to the prejudice of other proprietors above or below, unless he has a prior right to diversion. There is a distinction between the ordinary and extraordinary uses of water, or uses for the purpose of satisfying natural and artificial wants. Every riparian proprietor has a right to the ordinary use of water, without regard to the effect which such use may have, in cases of a deficiency, upon proprietors lower down the stream. But, in the case of extraordinary use, he must not interfere with the rights of other proprietors. (6 I.A. 33, *F.*) A user, which is extraordinary in one place or at one time, may be ordinary in another, owing to the surrounding circumstances, or to changes in the locality. Under the English law, irrigation is not a primary use, and whether a riparian owner may use the water of a natural stream to irrigate his land, depends upon the quantity of water he requires and the injury he inflicts upon other riparain owners. Under the American law, the balance of authority is in favour of the view, that the relative importance and necessity of the several uses of the water of a particular stream must depend upon the circumstances of each case, and that all the circumstances are to be considered in determining the reasonableness of the use for irrigation. One proprietor cannot, under any circumstances, divert and consume the entire flow of a stream for irrigation purposes to the exclusion of lower proprietors. This rule ought to be applied for India. BALABHADRA PERSAD SINGH v. NAJIBAN *alias* BASMATIA, **4 C.L.J. 370=11 C W.N. 85.** (24 C. 865=24 I.A. 60, *Appl.*) [*R.*, 32 M. 141=5 M.L.T. 149=19 M.L.J. 131.]

(3)—*Riparian proprietors—Changes in bed of river—Boundary—Custom.*—There may be a fluctuating boundary (*viz.*, the course of a river), between two zillahs, which by no means affects the rights of proprietors. A custom to the effect that, where land which had been once alluvial lies between two branches of a river, or between two rivers, and from time to time the water shifts so that alternately one of these channels is deep and the other is fordable, then the whole of such intermediate land belongs to the land-owner on the side of the channel which at any given time is fordable—in short, that the ownership and the right possession of the whole intermediate tract of land shift with the volume of the water always attaching to the riparian proprietors on the side of the channel which happens, for the time being to be fordable—must be established by very clear and distinct evidence, since the operation of such a custom must be to render the rights of property fluctuating and precarious. An *ikrarnamah* between two zemindars as to the mode of determining the boundaries of their estates according as a river becomes fordable on the side of one or other of such estates, whatever may be its effect as between the parties thereto, is not a covenant which will run with the land into the hands of any possessor of it by any title. BABOO BISSESSURNATH v. MAHARAJAH MOHESSUR BUX SINGH BAHADOOR, **11 B.L.R 265, P C.=18 W.R. 160=I. A. Sup. Vol. 34=3 Sar. 147.** [*R.*, 19 W.R. 219.]

(4)—*Riparian rights—Prescriptive right—Erection of bunds—Cause of action.*—The right of a riparian proprietor to have the water of a stream allowed to come down to him substantially in its natural state, not materially diminished by the user and acts of proprietors above him, is not a prescriptive right; it is a right naturally incident to his. property in the land through which the stream passes and he can have no claim to remove bunds situated in the stream upon land which is not his except so far as the removal may be necessary to prevent them from interfering with his natural right to the water. Where bunds had been erected in a river by the upper riparian owners, for taking an excessive quantity of water from the river to the prejudice of a lower riparian owner during a long course of time whenever there was need, and there was no continous maintenance of the bund, each one of the acts of setting up a bund constituted a separate cause of action. THE COURT OF WARDS v. RAJA LILANAND SINGH BAHADUR, **4 B. L R. App. 30=13 W.R. 48.** [*R.*, 10 M.L.J. 136, 11 C.W. N. 85=4 C.L.J. 370.]

(5)—*River—Private property in banks—Public right of easement.*—The bank of a river may be, and constantly is, private property. There may be public rights of passage over the banks for the purposes of navigation. They are in the nature of easements belonging to the public. ROOP LALL DOSS v. THE CHAIRMAN OF THE MUNICIPAL COMMITTEE OF DACCA, **22 W.R. 276.**

(6)—*Bed of flowing stream—Private property—Survey map—Thak map—Evidence.*—The bed of a flowing stream may be the property of a private person. Survey maps as well as thak maps are admissible as evidence. JUGDISH CHUNDER BISWAS v. CHOWDHRY ZUHOOR-UL-HUQ, **24 W.R. 317.** [*R.*, 9 C.L.R. 305.]

(7)—*Water rights—Riparian owners, rights of—Injunction restraining the riparian owner from erecting a dam across the river—Rights of such owners to the flow of water not absolute and exclusive but relative—Injunction allowable only so far as to stop the flow of the stream or cause material injury to the other owners.*—The respondents owned a village on the bank of the river Sai, and the appellants some other villages about 12 miles higher up the river. The appellants built a dam across the river, and the respondents, thereupon, sued to obtain a permanent injunction restraining them from hereafter building a dam across the river which would prevent the water from flowing down to the respondent's village or materially reduce the amount of the water that flows down. The Courts below granted an injunction restraining the appellants altogether from erecting a dam

Riparian Proprietors—*continued.*

of any kind in future: *Held*, that the terms of the injunction granted were too wide. According to the ordinary law, each owner has a right to the usufruct of the river or stream which passes through his land. That means not an absolute or exclusive right to the flow of the water, but subject to the similar right of all the proprietors of the banks on each side to the reasonable enjoyment of the same; in short, a riparian owner has a right to use and consume the water for irrigating the land abutting a natural stream, provided that he does not thereby cause a material injury to other like owners. The decree of the Courts below was, therefore, modified, and an injunction granted restraining the appellant from damming up the river in such a way as to stop the flow of the stream or cause a material injury to the respondents. SHEO NARAIN SINGH v. CHANDRABHAL, **10 Ind. Cas. 181.** (29 B. 357, 7 Bom. L.R. 265, 24 C. 865, 24 I.A. 60 P.C., *R.*)

Disputes between--Suit in Mamlatdar's Court —Jurisdiction—*See* BOM. ACT III OF 1876, 23 B. 47.

Law in England and in India—Disturbance of riparian rights—Jurisdiction of Mamlatdar —Party dissatisfied with decision—Remedy—*See* Bom. ACT III OF 1876, 23 B. 506.

See ALLUVION—CHANGE IN COURSE OF RIVERS, 2 Hay, 541, 3 Agra 18.

See ALLUVION—FORMATION OF CHURS OR ISLANDS, 6 B.L.R. 255, F.B.=14 W.R. F.B. 25, 6 B.L.R. 261, Note=13 W.R. 366.

See ALLUVION—LAND INUNDATED AND REFORMED, 5 B.L.R. 521 P.C.=14 W.R.P.C. 11=13 M.I.A. 467.

Rights of, to the usufruct of the stream—*See* EASEMENTS ACT, 1882, s. 7, ill. (j), 7 Bom. L.R. 265=29 B. 357.

Claiming right to irrigate his lands from river must not interfere with lower riparian owner's right—Upper riparian owner entitled to acquire easement to irrigate his land independently of s. 26, Limitation Act—Proof required from upper riparian owner relying on custom—*See* EASEMENT, 35 C. 851.

Rights and duties of—Use of water flowing in natural channel—*See* EASEMENT, 3 L.B.R. 23.

Natural stream—Rights of upper riparian owners—Natural right—*See* EASEMENT, 18 M. 320=4 M.L.J. 248.

Duty of—*See* EASEMENT, 8 A.L.J. 640.

Riparian owners, upper and lower, rights *inter se*—Rights of Government as upper riparian owner—Right of riparian owners to sue in representative capacity—*See* GOVERNMENT, 5 M.L.T. 149=19 M.L.J. 131=32 M. 141=2 Ind. Cas. 325.

Right of higher—To pass water on to lower —So as to increase the burden upon the lower land—*See* INJUNCTION—SPECIAL CASES, 1 N.L.R. 182.

Riparian Proprietors—*concluded.*

Erection of bund throwing water on land of proprietor on opposite bank—Injunction to prevent erection—*See* INJUNCTION—SPECIAL CASES, 27 M. 409.

See LIMITATION ACT, 1908, s. 26, 1 M. 335.

Right of, in a natural stream — Suit for contribution among—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, 7 M.L.T. 74=5 Ind. Cas. 742=33 M. 258=20 M.L.J. 722.

Superior and lower riparian owners—Embankment erected by the superior owner for self-protection — Loss to the lower owner—*See* RIGHT OF SUIT — INJURY TO ENJOYMENT OF PROPERTY, 18 M. 158=4 M.L.J. 244.

Riparian Rights.

See RIPARIAN PROPRIETORS.

Right to the unimpeded flow of water—Diverting the course of the river— Damages.—A riparian owner may put water that flows through his land to certain uses connected with his land and for that purpose he may be entitled to divert its course: but it must be done in such a manner as not to inflict any material injury on the lower riparian proprietor. WAMAN v. CHANGU, **8 Bom. L.R. 87.**

Risk Note.

Signed by consignor—Exemption from liability—*See* ACT IX OF 1890, ss. 54, 72, 17 B. 417.

Effect of—*See* ACT IX OF 1890, s. 72, 30 C. 257=7 C.W.N. 370.

Risk-note by consignor, enforceability of stipulations in—*See* ACT IX OF 1890, s. 72, 18 A. 42=A.W.N. 1895, 150.

See ACT IX OF 1890, s. 72 (2) (b) 5 O.C. 153.

Liability of Railway Company—Contract to contrary—*See* BURDEN OF PROOF—MISCELLANEOUS, 14 M.L.J. 396.

Rival claims.

See BUR. ACT II OF 1876, Ss. 6, 55, 56, L.B. R. 1893—1900, 429.

Rival Sects.

Rights of—*See* WORSHIP, 5 M. 304.

River.

See ALLUVION.

See FERRY.

See FISHERY.

See RIGHT TO USE OF WATER.

See RIPARIAN PROPRIETORS.

(1)—*River, what is.*—Where a stream has a perennial source, a bed and well-defined banks on either side, the flow in it of water for a part of the year, and discharges itself in a continuous flow into another river, it has all the elements which constitute a river to which

River—*continued.*

riparian rights attach. It is not necessary that water should flow in it continually; it may dry up and the bed may remain dry for several months in a year. BALBIR SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **22 A. 96 = A.W.N. 1899, 194.**

(2)—*Bed of—, right to.*—The East India Company, as representing the Indian Government, have a freehold in the bed of navigable rivers in *India* and to the land between high and low water mark. DOE DEM SEEBKRISTO v. THE EAST INDIA COMPANY, **6 M.I.A. 267 = 10 Moo. P C. 140 = 1 Sar. 540.**

(3)—*Rivers and River-beds—Ownership of riverbeds—Ordinarily vested in Government—Plaintiff claiming ownership therein must prove it by clear evidence.*—In this Presidency, the beds of rivers are ordinarily vested in Government. In a suit by the *Shrotriemdar* of a village for a declaration that a portion of a river-bed belongs to him and for an injunction, it is for the plaintiff to make out that the river-bed belongs to him. When the evidence on which the plaintiff relied in proof of his title was (1) that the grant of the *shrotriem* to his predecessor in title in 1802 was described as the grant of the "village" and (2) that in the margin of the Inam title-deed issued in 1879 the words "beside Poramboke" are used in setting out the grant. *Held*, that there being no specific grant of the river-bed, these general words should not be construed as involving such a grant. The conservation and control of works and sources of irrigation have from the earliest times been the especial function and duty of the Government in India. PAPALA NARAYANASWAMY NAIDU v. KANNIAPPA NAIDU, **(1912) M.W.N. 496.** (1912 M.W.N. 119, 34 M. 296, 1 I.A. 364, 5 M.H.C. 6, 28 M. 539, *R.*)

Tidal or non-tidal—To whom accretion belongs—*See* ALLUVION—GENERAL, 2 C.L.J. 185 = 2 A.L.J. 623, P.C. = 9 C.W.N. 889 = 8 O. C. 293 = 15 M L J. 349 = 7 Bom. L.R. 872 = 27 A. 655 = 32 I.A. 165.

Claim for land subject to river action—Decree in respect of land under water—*See* ALLUVION—CHANGE IN COURSE OF RIVERS, 152 P.L. R. 1906.

River, changing its course and giving rise to formation of a new channel—*See* ALLUVION—CHANGE IN COURSE OF RIVERS. 7 Bom. L.R. 872 = 2 A.L.J. 623 = 2 C L.J. 185 = 9 C. W.N. 889 = 8 O.C. 293, P.C. = 15 M.L.J. 349 = 32 I.A. 165 = 27 A. 655.

See ALLUVION—FORMATION OF CHURS OR ISLANDS, 6 B.L.R. 343 = 14 W.R. 352.

Dried up bed of a—Ownership—*See* BOUNDARY, 12 C.L.J. 216 = 7 Ind. Cas. 140.

See EASEMENT, L.B.R. 1872-1892, 233.

See FERRY, 1 Hay 426.

Public navigable river—Arm of the river being cut off from the main river, effect of, upon fishery right—*See* FISHERY, 12 C.W.N. 559.

River—*concluded.*

Navigable river—Jalkar or right of fishing in—River changing its course—*See* FISHERY, 17 C. 963.

Exclusive fishery rights in tidal navigable rivers—Grant by the crown—*See* FISHERY, 11 C. 434, F.B.

Right of fishing in navigable river—Property—Grant from Government—*See* FISHERY, 2 B. 19.

Tidal river—*See* FISHERY, 8 M. 467.

Private rights of fishery in tidal rivers—Jalkar—Presumption—*See* FISHERY, 4 C. 53.

See FISHERY, 22 C. 252, 12 M. 43.

Shifting its course and forming *dobas* or lakes—Right of fishery in such *dobas*—*See* JALKAR, 33 C. 15 = 9 C.W.N. 934.

Difference between lands temporarily inundated and those becoming part of a river-bed — Rights of owner—*See* LEASE—MISCELLANEOUS, 2 S.L.R. 1.

River-bed.

Presumption of land re-appearing from—*Wajib-ul-arz*—*See* LIMITATION ACT, 1908, Arts, 142, 144, 158 P.L.R. 1906.

Riwaj-i-am.

Bujwa Rajputs—Riwaj-i-am—*Adoption of nearest relative whether imperative*—Factum valet.—In a case of adoption between Bujwa Rajputs of Sialkot district, the *riwaj-i-am* was to the effect "that among Bujwa Rajputs a proprietor may, *having regard to near relationship*, adopt a son from collaterals descended from the same common ancestor, but may not adopt a person from another caste or a daughter's son or a sister's son or a son-in-law." *Held* that the proper construction to be put upon it would be that, a descendant from the same common ancestor in the male line *must* be chosen, that preference should be given to a near relation over one more remote, but that, if a relation otherwise eligible were adopted, the adoption *must not* be held to be invalid on the ground that there were relations in existence at the time of the adoption who were nearer in order of relationship to the adoptor than the adopted son, and that, in such a case, the doctrine of "*factum valet*" would apply. CHANNU, NAR SINGH AND LABHA v. DEVI SINGH, BALWANT SINGH AND MUSSUMMAT BHAGAN, **47 P.R. 1878.** [*R.*, 34 P.R. 1883, F.B.]

Correctness of entry in *Riwaj-i-am* not supported by instances—Effect—*See* PUN. ACT II OF 1905, 90 P.R. 1908 = 157 P.W.R. 1908.

See CUSTOMS PUNJAB—ADOPTION, 51 P.R. 1881.

Entry of special custom in the—Effect—*See* CUSTOMS—PUNJAB—ADOPTION. 198 P.L.R. 1911.

Riwaj-i-am—*concluded.*

Unsupported by instances — Evidentiary value—*See* CUSTOMS—PUNJAB—ADOPTION, 196 P.L.R. 1911.

Entry in, unsuported by instances—Value—*See* CUSTOMS — PUNJAB — ADOPTION, 85 P.W.R. 1911.

See CUSTOMS — PUNJAB — ADOPTION, 81 P.R. 1891.

Evidentiary value of--*See* CUSTOMS--PUNJAB —ALIENATION, 60 P.L.R. 1911=9 Ind Cas. 453=23 P.R. 1911.

See CUSTOMS--PUNJAB--GIFT, 39 P.R.1876.

Arbitrary rule in—Effect—*See* CUSTOMS—PUNJAB—INHERITANCE, 50 P.L.R. 1912.

Riwaj-i-am Rule laid down in—Proof of the contrary—*Onus* of proof—*See* CUSTOMS—PUNJAB—INHERITANCE, 27 P.R. 1912.

Unsupported by instances — Evidentiary value—*See* CUSTOMS — PUNJAB — INHERITANCE, 57 P.W.R. 1912.

See CUSTOMS — PUNJAB—INHERITANCE, 108 P.R. 1900, 117 P.R. 1901.

Value of, when supported by the opinions but not by instances—*See* CUSTOMS—PUNJAB —INHERITANCE, 94 P.L.R. 1911=29 P.L.R. 1911=9 Ind. Cas. 608.

Value of, as evidence of custom stated therein—*See* EVIDENCE ACT, 1872, s. 32 (5), 8 Ind. Cas. 728.

Interpretation and value of —Value of—Entry of custom in, unsupported by instances—*See* HINDU LAW—INHERITANCE, 84 P.W.R. 1910 =7 Ind. Cas. 352.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 17 P.R. 1905=43 P.L.R. 1905.

Road.

(1)—*Public road, right of District Board over—Poramboke, right of zemindar over—Reg.* XXV *of* 1802—*Addition of a party to the suit, direction for, in second appeal--Practice.*—There is a distinction between a road and a public road. The latter alone is vested in the District Board. It is not all kinds of property that is poramboke which is vested in the zemindar. Under Reg. XXV of 1802, he would not be entitled to any *Lakiraj* property. The addition of a new party, for the final determination of a question in the suit, was directed by the High Court in second appeal. SRI RAJA BOMMADEVARA VENKATA NARASIMHA NAIDU BAHADUR ZAMINDAR GARU v. GOVINDARAJULU VENKATA SUBBARYADU, **5 M.L.T. 225.**

(2)—*Ownership of road site between two properties.*—When a road has been, for many years, the boundary between two properties, and there is no evidence that the owner of either property gave up the whole of the land necessary for it, it must be presumed that each party was content to sacrifice one-half of the

Road—*concluded.*

site for the benefit of the public. MOBARUCK SHAH v. TOOFANY, **4 C. 206=2 C.L.R. 446.** [*F.*, 15 C.P.L.R. 93.]

(3)—"*Road*" *in Bengal Municipal Act* (V *of* 1876), *s.* 32, *construction of.*—The word "roads" in s. 32 of the Bengal Municipal Act does not include the soil beneath the roads. CHAIRMEN OF THE NAIHATI MUNICIPALITY v. KISHORI LAL GOSWAMI, **13 C. 171.** [*R.*, 20 C. 732, 25 M. 635, 4 C.L.J. 343=10 C.W.N. 1044=33 C. 1290.]

(4)—*Opening and closing of roads—Trespass.* —In a suit for the re-opening of an old road which defendants had closed, and for the closing of a new road which they had opened on land alleged to belong to plaintiff, the lower appellate Court made a decree declaring the new road to be within plaintiff's premises, and directing that it should be closed, and the old road restored. *Held* that the decree was only in the nature of a declaration that the act of the defendants in making a new road was a trespass, and that, upon this question it was conclusive in point of fact and good in law. HIRA CHAND BANERJEE v. SHAMA CHARAN CHATTERJEE, **3 B.L R.A.C. 351=12 W. R. 275.** [*F.*, 1 A. 249; *Appr.*, 7 B L.R. 184.]

Dedication of, to public—*See* ACT I OF 1894, s. 23, 10 Bom. L.R. 931.

Calcutta—Property in — Duty of Commissioners of the Calcutta Corporation with respect to them—*See* BEN. ACT IV OF 1876, ss. 189, 191, 213, 252, 10 C. 445.

Necessary consequences and implications arising from the duty cast on Local Boards of maintaining roads—*See* MAD. ACT V OF 1884, 18 M.L.J. 91=31 M 117.

Non-repair of—liability of a corporation for —*See* CORPORATION, 6 Bom. L.R. 75=28 B. 340.

Roads and Bridges, Tolls on.

See BOM. ACT III OF 1875.

Road-cess.

Public Works Cess—Ben. Act III of 1877—Public cess—Income-tax—*See* BEN. ACT X OF 1871, 11 C.L.R. 140.

Public Works cess—*See* BEN. ACT X OF 1871, s. 3, 7 C.L R. 373.

See BEN. ACT IX OF 1880, s. 106, 28 C. 637 =6 C.W.N. 128.

Road-cess, District.

See BEN. ACT X OF 1871.

Road-cess returns.

Evidentiary value of—Suit for enhancement —*See* BEN. ACT IX OF 1880, s. 95, art. 2, sch. III, 30 C. 1033, P.C.=30 I.A. 177=8 C. W.N. 1.

Admissibility of—*See* EVIDENCE—MISCELLANEOUS, 3 C.W.N. 343.

Admissibility of—Absence of recital—Effect—*See* EVIDENCE ACT, 1872, ss. 130, 90, 15 C.L. J. 7.

Robbery.

Liability of Railway Company for goods plundered from train—*See* ACT XVIII OF 1854, 3 B. 109.

Rokar Accounts.

Books, admissibility of, when *Khata* books are not produced—*See* EVIDENCE ACT, 1872, s. 34, 9 C W.N. 421=32 C. 582.

Roman Catholic Christians.

Of Indian domicile—Marriage with deceased wife's sister, valid, when—*See* MARRIAGE, 32 C. 187=9 C.W.N. 323=1 C.L.J. 55.

Roman Catholic Church.

Dharmakartas or headmen of a—, Powers of —*See* CHURCH, 17 M. 447.

Roman Law.

Set-off — Principles of English Courts of Equity or of Roman Law of compensation applicable—No weight given to statutes of set-off.— The High Court would deal with the questions as to set off on the principles of English Courts of Equity or of the Roman Law as to compensation and would give no weight to objections derived from the peculiar language of the statutes of set-off. RAMGOPAL v. MAJETI MALLIKHARJANUDU, **1 M.H.C. 396.** [*F.*, 7 N.W.P. 157.]

Roots.

Owner may chop off penetrating—No notice necessary, if he does not trespass on the other's land—*See* TREES, 31 C. 944=8 C.W.N. 710.

Rope.

Contract to purchase— *See* CONTRACT—CONSTRUCTION OF CONTRACTS, Cor. 62.

Royal Family.

Attachment of pension payable in British India to descendants of former Royal family in Ceylon—Validity of attachment—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 26 M. 423.

Royalty.

Suit for recovery of, on registered document —Art. 116 and not art. 110 of Limitation Act governs suit--*See* TRANSFER OF PROPERTY ACT, s. 103, cl. (*j*), 12 C.W.N. 724.

Rozina Allowance.

See BOM. ACT III OF 1874, s. 13, 19 B. 250.

Rule against Perpetuity.

Rule against perpetuity—*See* SUCCESSION ACT, 1865, s. 101, 8 Bom. L.R. 268=30 B. 477.

Wills—Gift for indefinite time carried absolute estate—Charge on testator's estate for payment of annuities—Vesting of contingent interest—Infringement of rule against perpetuity—Effect not to be given to such intention of testator—*See* WILL—CONSTRUCTION, 1 M.H.C. 17.

Rule in Pigot's case.

Rule in Pigot's case—*See* DEED—ALTERATION IN DEEDS, 3 Bom. L.R. 213=25 B. 616.

Rule in Shelly's case.

(1)—*Applicability of the rule in India.*—The rule in Shelly's case is based on feudal considerations and is unsuitable to the people of this presidency and has not been adopted in framing ss. 80, 81, 83 and 84 of the Indian Succession Act. ANTAO v. ARDESHIR, **1 Bom. L.R. 303.**

Rule Nisi.

Rule nisi to show cause against the addition of person as defendant—No grounds set out therein—Discharge of rule—*See* PRACTICE AND PROCEDURE, 9 C. 735.

See RIGHT OF REPLY 7 B.L.R, App. 59.

Rules.

Thus circular prescribes Rules for Examination of Candidates for employment as Mofussil Ministerial officers. **Cir. No. 17, dated 24th August 1865, 3 W.R. Civil Circular Orders. p. 5.**

Rule 220 of Small Cause Court (Presidency) effect of—Restraint upon anticipation—*See* ACT III OF 1874, s. 8. 17 M.L.J. 363=2 M.L.T. 322=30 M. 378.

And orders of local government (N.W.P.)—Kumaun division—*See* ACT XVIII OF 1879, s. 8, 24 A. 348, F.B=A.W.N. 1902, 86.

Suit pending in Agent's Court, High Court not competent to transfer to District Court—Agency Rule No. XXII—*See* MAD. ACT XXIV OF 1839, 23 M. 329.

Framed by Municipal Board of Mussoorie as to building within Municipal limits—Order for demolition of building erected in contravention of such rules—*See* U.P. ACT XV OF 1883, s. 55, A.W.N. 1900, 8.

Government servant —Acquisition of property in contravention of departmental—Right to maintain suit against benamidar in respect of said property—*See* BENAMI TRANSACTION—MISCELLANEOUS, 7 M.L.J. 268.

Local Government Rules under s. 320 of the Civ. Pro. Code, 1877—Notification No. 671 (Judicial Civil Department), dated 30th August, 1880—*See* CIV. PRO. CODE, 1908, s. 68, 4 A. 116, F.B.=1 A.W.N. 178.

Made by the High Court under powers conferred by the Code of Civil Procedure have the force of law—*See* CIV. PRO CODE, 1908, ss. 122, 129, 130 and 131, 5 Bom. L.R. 394.

See DARKHAST RULES, 26 M. 742=12 M. L.J. 417.

Local Government—Under s. 320, Civ. Pro. Code—Delivery of possession — Jurisdiction—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 7 A. 407=A.W.N. 1885, 87.

Rules—*concluded.*

Rule 3, Ch. II—Rules of High Court, Appellate side—*See* GUARDIAN—APPOINTMENT OF GUARDIAN, 26 C. 133=3 C.W.N. 91.

Power to make—*See* JUDGMENT—FORM AND CONTENTS, 9 A. 93, F.B.

Kumaon Rules, 1894, 17—"Final decree"—Arbitration—Retirement of some of the arbitrators before expiry of time fixed for filing award—Award presented by umpire—*See* KUMAON RULES, 1894, A.W N. 1904, 49.

See KUMAON RULES, 1894, r. 17, 1 A.L.J. 29=A.W.N. 1904, 49.

Rule 19, Small Cause Court Rules—*See* LIMITATION—QUESTION OF LIMITATION, 1 B.L.R. O.C. 49.

Of procedure—how far to be followed—*See* PRACTICE AND PROCEDURE, 7 M.H.C. 387.

Of the Board of Revenue for the settlement of the Gorakhpur and Basti districts—*See* PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, A.W.N. 1901, 115.

Of the Board of Revenue for the settlement of the Gorakhpur and Basti districts—*See* PRE-EMPTION—MISCELLANEOUS, A.W.N. 1901, 115.

See REVIEW—JURISDICTION TO REVIEW, 23 C. 339.

See SETTLEMENT RECORD, 17 P.R. 1887.

Voluntary Benefit Society—of Society, whether could be altered—*See* SOCIETY, 22 B. 451.

Mutual Benefit Society—Alteration of rules by majority of subscribers—*See* SOCIETY, 7 C. 1=8 C.L.R. 577.

Privy Council—issued under 2 and 3 Will. IV, c. 51—*See* STATUTES, 2 and 3 William IV, Ch. 51, 17 C. 337.

Rules, Construction of.

(1)—*Rules—Bombay Cotton Trade Association—Agreement to pay differences—Closing the contract—Rules in restraint of legal proceedings—Reference to arbitration of disputes as to the quality of cotton sold.*—One of the rules of the Bombay Cotton Trade Association runs: "If, before the maturity of any contract, either party thereto shall suspend payment or become bankrupt or insolvent the other party or parties to such contract shall be bound to forthwith close the contract and when the contract is thus closed the measure of damages shall be the difference between the market price current at the time of closing for similar goods for delivery at the time named in the contract so closed, and the rate named in the contract. Such market price shall be ascertained either by re-purchase or re sale or shall at the option of the party closing the contract be that fixed by the daily quotation committee subject to the right of appeal to the Board of Directors on payment of the usual appeal fee of Rs. 50 or that quoted by the Board at their usual monthly meetings. The damages ascertained as a foresaid shall become at once payable to or by the party closing the same." *Held*, on a construction of the above rule, that to close the contract is to pay differences and nothing else, and that is a contract by way of wager and void and none the less because it is agreed that under other circumstances the contract is to do that to which no exception can be taken. Some of the rules of the Cotton Trade Association provided for a reference to arbitration (whose award was to be final) in cases of disputes as to quality between buyer and seller: *Held*, on construction of those rules, that the rules are in no way in restraint of legal proceedings, but they are so framed as that legal proceedings do not become necessary. CHAPSEY v. GILL & CO., **7 Bom. L R. 805.**

Rules made under Acts.

(1)—*Civ. Pro. Code*, 1882, *s.* 320—*Framing of rules by Local Government (Bombay) under—Amendment by s.* 30, *Act* VII *of* 1888—*Rules not retrospective in their operation—Decree referred to Collector for execution—Sale—Confirmation and setting aside of—Collector's powers in respect of.*—The rules framed by the Local Government of Bombay in 1890 in exercise of the powers conferred by s. 320 of the Civ. Pro. Code, 1882, as amended by s. 30 of Act VII of 1888, cannot have retrospective effect given to them. So, where certain property was sold in 1889 by the Collector in execution of a decree referred to him under s. 320, and the Collector confirmed the sale acting under the powers given to him by the rules (of 1890) above mentioned, *held* that the action of the Collector was *ultra vires*, because the rules in question had no application to the present case the sale having been held before the promulgation of the rules. It is only the Civil Court that passed the decree, which is competent to confirm the sale. Under the rules, the Collector has no power either to set aside the sale or to extend the time given to the judgment-debtor by the decree to comply with the provisions thereof. GANPATRAM MOTIRAM v. ISAAC ADAMJI, **15 B. 322.** [*F.*, 15 B. 694; *R.*, 23 B. 531.]

(2)—*Act* XV *of* 1882, *s.* 69, *r.* 428 *of rules of Procedure of Presidency Small Cause Court—Stating case for opinion of High Court.*—Rule 428 of the Rules of Procedure of Presidency Small Cause Court is not *ultra vires*, nor is it in conflict with s. 69 of Act XV of 1882. The rule and the section proceed on different lines, the rule providing for cases in which the Judge is in doubt and not for cases covered by the section. MAHOMED KHUMARALI v. RENGA RAO, **24 M. 654.**

See ACT IV OF 1869, s. 7, 19 B. 293.

See ACT I OF 1878, s. 4, 19 B. 626.

Rules framed under Act, rr. 31, 35—Civil Rules of Practice, Rule 282—Vakil's fees—Suit for declaration—Mode of calculation—*See* ACT XVIII OF 1879, 26 M. 654, F.B.

Rules made under Acts—*continued.*

Rules made by the High Court under Act XVIII of 1879—Several pleaders engaged in a case—Division of fees—*See* ACT XVIII OF 1879, ss. 27, 28, 7 C.W.N. 300.

See ACT XVIII OF 1879, cls. 31, 35, 4 M. L.J. 181.

See ACT IX OF 1890, 23 A. 367=A.W.N. 1901, 107.

Responsibility of railway company as carriers —Rules framed under the Act —Reasonableness —Non-granting of final receipt—*See* ACT IX OF 1890, ss. 47, 54, 72, 31 C. 951=8 C.W.N. 725.

Rules framed by Board of Revenue in furtherance of Act I of 1894, not *ultra vires*—*See* ACT I OF 1894, s. 55, 30 C. 36=7 C.W N. 249.

Board's rules of 1859, Rule I —*See* BEN. ACT XI OF 1859, s. 3, 8 C.W.N. 826.

See C.P. ACT XII OF 1898, s. 16, r. 30, 15 C.P.L.R. 153.

Ganjam and Vizagapatam Agency Courts Act XXIV of 1839--Rules Nos. XX and XXXI framed under the Act—Reversal by agent of decree passed by senior Assistant Agent—Power of High Court to direct Agent to review his decision—*See* MAD. ACT XXIV OF 1839, rr. 20 and 31, 24 M. 345.

Agency Rules No. XXXI—Order of Agent in execution—Decree—Appeal to High Court—Review—*See* MAD. ACT XXIV OF 1839, r. 31, 26 M. 266.

See MAD. ACT I OF 1886, s. 24 (*e*), 26 M. 430.

See PUN. ACT XVII OF 1887, 71 P.L.R. 1903=5 P.R. 1902.

See U. P. ACT XVIII OF 1876, Ch. II, s. 9, 4 O.C. 365.

Rules framed by Municipal Board of Mussoorie as to building within municipal limits—Order for demolition of building erected in contravention of such rules — *See* U. P. ACT XV OF 1883, s. 55, A.W.N. 1900, 8.

See CIV. PRO. CODE, 1908, s. 68, A.W.N. 1882, 12.

Civ. Pro. Code, 1882, s. 320 (=s. 70, New Code)—Transmission of decree for execution by Collector— Power of Local Government to provide for appeals from orders of Collector—Rule 17, cl. (19) of 12th November 1883, if *ultra vires*—*See* CIV. PRO. CODE, 1908, ss. 68, 70, 71, 12 A 564=10 A.W.N. 185.

Sale by Collector—Rule XII of rules made by Local Government under s. 320, under notification No. 671 of 1880, dated 30th August 1880—*See* CIV.PRO.CODE, 1908, O. XXI, r.90, s 68, A.W.N. 1882, 61.

See COSTS—SPECIAL CASES, 4 M.L.J. 280.

Rule IV—*See* COURT FEES ACT, 1870, s. 7, (IV) (*d*), 118 P.L.R. 1904.

Rules made under Acts—*concluded.*

Stamps bearing names of different attorneys and different dates—Indulgence in respect of the same—Practice—*See* COURT FEES ACT, 1870, ss. 28, 30, 6 C.W.N. 785.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 14 B. 369.

Local Government Rules under s. 320, Civ. Pro.Code--Delivery of possession--Jurisdiction--*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION, ETC., EXECUTION OUT OF COURT'S JURISDICTION, 7 A. 407=A. W.N. 1885, 87.

See EXECUTION OF DECREE — MISCELLANEOUS, A.W.N. 1885, 319.

Excise Act, Appendix No. 20 of the Excise Rules—*See* JURISDICTION OF CIVIL COURTS, 1 O.C. 121.

Rules under the Punjab Land Revenue Act, 1887—Rules Nos.177 (III) (*b*), 179—*See* LAMBARDAR, 7 P.R. 1904, Rev.

Legal Practitioners Act, rules framed under —Fees paid to pleaders to examine witnesses on commission cannot be allowed — *See* LEGAL PRACTITIONERS— PLEADER'S REMUNERATION, 6 M.L.J. 124.

Refusal to grant certificate to mukhtar to practise in Criminal Courts—Revision—Jurisdiction of High Court—Rules for Kumaon and Garhwal districts issued under s. 6 of Act No.XIV of 1874 (Notification No.XLV A, dated the 23rd May, 1879)—Crim. Pro. Code, s. 439 —Letters Patent, s. 15—*See* LEGAL PRACTITIONERS, MUKHTAR, A.W.N. 1892, 236.

See MAFIDAR, 10 P.R. 1886, Rev.

Rule IV framed under s 9 of the Suits Valuation Act, 1887—*See* MORTGAGE—GENERAL, P.L.R. 1900, p. 135.

Bye-laws of Port Trust, r. 59—*See* SALE OF GOODS, 17 B. 62.

Rules of Governor-General, 3rd March, 1882, 5 (*e*)—*See* STAMP ACT, 1879, 7 M 176, F.B.

See STAMP ACT, 1899, s. 37, sch. I, art. 1, 23 A. 213=A.W.N. 1901, 24, F.B.

See ST. 11 AND 12 VIC., C. 21, ss. 50, 51, r. 20, 17 B. 313.

See VALUATION OF SUIT, 56 P.R. 1892, 6 P.R. 1904.

Rules of Board of Revenue.

This circular deals with a *Nota Bene* to Table in cl. 12, Board Rules, page 43. **Rev. Cir. No. 1, 20 W.R. Rev. Cir. p. 1.**

This circular deals with additions in the list of returns, at page 262, Board Rules. **Rev. Cir. No. 2, 20 W.R. Rev. Cir. p. 1.**

This circular deals with alteration in statement No. 20, Board Rules, page 302. **Rev. Cir. No. 6, 20 W.R. Rev. Cir. p. 1.**

Rules of Board of Revenue—*continued.*

This circular supersedes ch. X of the Board Rules, except ss. 1 and 4 and cl. 5 of s. 8. **Rev. Cir. No. 5, 20 W.R. Rev. Cir. p. 2.**

This circular cancels cl. 18, page 189 of Board Rules. **Rev. Cir. No. 3, 20 W.R. Rev. Cir. p. 3.**

This circular makes an addition and correction in Board Rules, pp. 119 and 225. **Rev. Cir. No 7, 20 W.R. Rev. Cir. p. 9.**

This circular makes an alteration in Board's Rules, s. 5, p. 345.—**Rev. Cir. No. 1, 21 W.R. Rev. Cir. p. 1.**

This circular deals with corrections in s. 4, page 176, Board's Rules, consequent on Board's no longer having to countersign Commissioner's contingent bills. **Rev. Cir. No. 6, 21 W.R. Rev. Cir. p. 2.**

This circular makes an addition to Board's Rule 28, p. 7 of the Salt Manual. **Rev. Cir. No. 7, 21 W.R. Rev. Cir. p. 9.**

This circular substitutes a New Rule for cls. 3, 3-A, 6, and 7, s. 3, ch. VIII, p. 852 of Board's Rules regarding revenue. **Rev. Cir. No. 8, 21 W.R. Rev. Cir. p. 5.**

This section deals with the alteration in cl. 12, s. 2, Ch.XXV, page 341, Board's Rules, regarding converting securities into a book-debt in the Bank of Bengal. **Rev. Cir. No. 2, 21 W.R. Rev. Cir. p. 7.**

This circular deals with an addition to Ch. XIII, (Division III), p. 213 of Board's Rules. **Rev. Cir. No. 7, 21 W.R. Rev. Cir. p.9.**

This circular deals with alteration in cl. 5, s. 7, Ch. XIX, p. 268 of the Board's Rules. **Rev. Cir. No. 2, 21 W.R. Rev. Cir. p. 10.**

This circular substitutes new form of application for the one subjoined to cl. 3, Ch. VI, s. 10, p. 127 of Board's Rules. **Rev. Cir. No. 1, 21 W.R. Rev. Cir. p. 11.**

This circular deals with addition to cl. 3-A, s. 12, Ch. VIII, Board's Rules, regarding transmission by post of covers containing transfer receipts for payment of land revenue. **Rev. Cir. No. 4, 21 W.R. Rev. Cir. p. 11.**

This circular deals with heading for "Kharcha Hisabs" under Khas Tehsil to be added to the Appendix to Ch. XIII, p. 213 of Board's Rules. **Rev. Cir. No. 3, 21 W. R. Rev. Cir. p. 12.**

This circular makes an alteration in the Bengalee translation of Form No. 20, page 302, Board's Rules. **Rev. Cir. No. 7, 22 W.R. Rev. Cir. 1.**

This circular makes certain alterations in Board's Rules regarding settlements, consequent on a Government of Bengal Resolution. **Rev. Cir. No. 1, 22 W.R. Rev. Cir. 3.**

This letter circulates reprint of Ch. XVIII of Board's Rules relating to "Returns." **Rev. Cir. No. 2, 22 W.R. Rev. Cir. 7.**

Rules of Board of Revenue—*continued.*

This circular prescribes Monthly Return in substitution of Form B, page 46 of Board's Rules, and makes alterations in Rules in consequence thereof. **Rev. Cir. No. 3, 22 W.R. Rev. Cir. 7.**

This letter adds 3 clauses to Ch. XXV, s. 1, p. 341, Board's Rules, regarding expenses contingent on filing appeals in wards' cases. **Rev. Cir. No. 2, 22 W.R. Rev. Cir. 10.**

This circular dealing with reference to recent Government orders, authorizing the Board to confirm permanent settlements in certain cases, substitutes new clause for cl. 1, and makes an addition to cl. 3, s. 9, Ch. VIII of Board's Rules. **Rev. Cir. No. 8, 22 W.R. Rev. Cir. 13.**

This circular adds a 4th column to Register No. 69, s. 4, Ch. XIV, p. 225 of Board's Rules. **Rev. Cir. No. 9, 22 W.R. Rev. Cir. 14.**

This circular substitutes new rules regarding estimates for local improvements for those in cls. 1 to 10, s. III, Ch. VII, p. 150 of the Board's Rules. **Rev. Cir. No. 2, 23 W.R. Rev Cir. p. 9.**

This circular calls attention to correspondence with Government, explanatory of a previous order of Government regarding Settlements, and makes alterations in s. II, Ch. VII of the Board's Rules. **Rev. Cir. No. 3, 23 W.R. Rev. Cir. p. 14.**

This circular cancels first part of statement prescribed by Board's Circular No. 1 of 1874 regarding establishments. **Rev. Cir. No. 4, 23 W.R. Rev. Cir. p. 16.**

This circular makes an addition to Board's Rules, cl. 1, s. VI, Ch. XVIII. **Rev. Cir. No. 1, 23 W.R. Rev. Cir. p. 18.**

This circular makes additions to cl. 23, s. IX, Ch. II, p. 30, and to cl, 10, s. XIV, Ch. V, p. 74 of Board's Rules. **Rev. Cir. No. 5, 23 W.R. Rev. Cir. p. 18.**

This circular requests that the several classes of estates enumerated be accurately distinguished, and that alterations be made in s. IV, Ch. XXV, Board's Rules. **Rev. Cir. No. 4, 23 W.R. Rev. Cir. p. 32.**

This circular deals with corrections in Rule 8 of Board's Rules published with Circular Order No. 1 of December 1874. **Rev. Cir. No. 6, 23 W.R. Rev. Cir. p. 34.**

This circular draws attention and makes addition to cl. 9, s. XIII, Ch. XI, p. 188 of Board's Rules regarding the withdrawing of money from a Government treasury under a power of attorney. **Rev. Cir. No. 7, 23 W. R. Rev. Cir. p. 34.**

This circular substitutes new form of store-book for that referred to in cl. 4, s. III, p. 305 of Board's Rules. **Rev. Cir. No. 10, 23 W.R. Rev. Cir. p. 35.**

Rules of Board of Revenue—*concluded.*

This circular adds cl. 12-A, s. VI, Ch. XVIII, p. 260, Board's Rules, regarding Commissioners noticing working of fund for improvement of Government and temporarily settled estates. **Rev. Cir. No. 3, 23 W.R. Rev. Cir. p. 36.**

This circular substitutes rules for cl. 10, s. IX, Ch. XX, p. 284 of Board's Rules, regarding allowances to settlement-holders, &c. **Rev. Cir. No. 4, 23 W.R. Rev. Cir. p. 36.**

This circular expunges certain words from cl. 3, s. VI, Ch. III (p. 44) or Board's Rules. **Rev. Cir. No 2, 23 W.R. Rev. Cir. p. 39.**

This circular substitutes new rules for Ch. XI, s. VI, p. 179 of Board's Rules. **Rev. Cir. No. 3, 23 W.R. Rev. Cir. p. 39.**

This circular makes an addition to cl. 6, p. 49 of Board's Rules. **Rev. Cir. No. 5, 23 W.R. Rev. Cir. p. 40.**

This circular makes alterations in the form of Registers D and E, appended to s. VI, Ch. XIII of the Board's Rules. **Rev. Cir. No. 1, 24 W.R. Rev. Cir. p. 2.**

This circular makes additions to Ch. XXV of Board's Rules. **Rev. Cir. No. 5, 24 W.R. Rev. Cir. p. 5.**

This circular cancels cls. 1 to 5, s. VI, Ch. XII of Board's Rules, and alters cls. 1 and 2. **Rev. Cir. No. 6, 24 W.R. Rev. Cir. p. 5.**

This circular makes an addition to Board's Rules, Ch. XVIII, s. VI, cl. 4. **Rev. Cir. No. 1, 24 W.R. Rev. Cir. p. 6.**

This circular enjoins an addition to cl. 3, s. VI, Ch. XVIII of the Board's Rules. **Rev. Cir. No. 4, 24 W R. Rev. Cir. p. 7.**

This circular issues an amended version of the Rules for the supply of copies of, and information respecting, papers and documents in Collectors' Offices, circulated with G. O. No. 2 of January 1875, to be substituted for s. VI, Ch. XIII, of the Board's Rules. **Rev. Cir. No. 1, 24 W.R. Rev. Cir. p. 8.**

This circular cancels Rule 3 of Board's Rules. **Rev. Cir. No. 1, 24 W.R. Rev. Cir. p. 25.**

This circular adds a clause (4) to Board's Rules, Ch. VIII, s. 9. **Rev. Cir. No. 1, 25 W.R. Rev. Cir. 7.**

This circular substitutes Rules 3 to 10 for cls. 3 to 5, s. VI, Ch. III, Board's Rules. **Rev. Cir. No. 2, 25 W.R. Rev. Cir. 7.**

This circular deals with counterfoils of excise papers in Form 15. **Rev. Cir. No. 10, 25 W.R. Rev. Cir 23.**

This circular deals with corrections of cl. 4, s. IV, Ch. XXV, page 342, Board's Rules-Attached estate manager's agreement. **Rev. Cir. No. 1, 25 W.R. Rev. Cir. 27.**

See SETTLEMENT—MISCELLANEOUS, 3 B. L.R. App. 82.

Rules of Chief Court—Punjab.

(1)—*O.* LVII, *r.* II (*i*)—*Surety under, liability of, only restricted to the performance of the order under revision—When and how such liability can be enforced.*—The decree-holders transferred their decree to one M and R, and the transfer was duly recognised by the Court. Subsequently, one B applied for execution of that decree, alleging that M and R had transferred it to him. Judgment-debtors objected that B had no right to execute the decree. The District Judge, holding that B had a right to execute the decree, passed the following order "Let execution proceed." Then the judgment debtor applied in revision to the Chief Court, and A executed the necessary surety bond required, under R. II (*i*), O. LVII, of the Chief Court's Rules and Orders. On the revision petition being rejected, B, without taking any steps against the judgment-debtor, applied for and got A arrested, *held*, that the order of arrest was illegal. The only security that could be demanded under the rules was for the performance of the order under revision, within a reasonable period. The liability of the surety could not be more extensive than the liability of the judgment-debtors, no matter in what terms the security bond was worded. Before any steps can be taken against a surety, the decree-holder must show that he has endeavoured, without success, to enforce performance of the order under revision, as against the judgment-debtor. No liability could attach to the surety, unless and until the decree-holder had failed to satisfy his decree by sale of the properties of the judgment debtor. AGIA SINGH v. BALLA MAL, **66 P R. 1909=99 P.W.R. 1909=2 Ind. Cas. 959=134 P.L.R. 1909.**

See MINOR—CUSTODY OF MINOR, 10 P.R. 1897.

Rules of the High Courts and Supreme Courts.

1.—BOMBAY.

2.—CALCUTTA.

3.—MADRAS.

4.—NORTH-WEST PROVINCES.

——1.—Bombay.

(1)—*S.* 17, 18, 25 — *Certified copies required by the rule—Limitation Act* (XV *of* 1877)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 652—*Presentation of memoranda of second appeal, etc.—Accompaniments.*—An appeal, etc., if presented in time is validly presented for the purposes of the Limitation Act if it is accompanied by copies required by the Code of Civil Procedure, 1882. The accompaniments directed under Rule 25 of the High Court Rules are extraneous to the memoranda of appeals, applications or appeals in execution, and the rule does not fix any time within which they are to accompany the memoranda, etc. *Per* CHANDAVARKAR, J. —No rule of the High Court can add to or modify the conditions and limitation of the law laid down in the Limitation Act. It is

Rules of the High Courts and Supreme Courts—continued.

——1.—**Bombay**—*continued.*

true that the Court has the power of making certain rules given it by s. 652 of the Code of Civil Procedure, and those rules must be "consistent with " the Code. But there is no power given to frame a rule modifying any rule or mode as to computation of limitation prescribed expressly or by necessary implication, in the Limitation Act. CHUNILAL v. DAHYABHAI, **9 Bom. L.R. 1138=32 B. 14.**

(2)—*High Court Rules (Original side)—Rule* 80 *(a)* (1)—*Pauper, petition to sue as—Prothonotary's decision—Application to judge in Chambers.*—Under Rule 80 *(a)* (1) of the Bombay High Court Rules, it is the right of a party dissatisfied with the Prothonotary's decision to apply to the Judge to have the matter adjourned to him; and the Judge in Chambers is bound to take up the matter and decide it for himself. MEGHBAI v. POONJABAI, **9 Bom. L.R. 475=32 B. 163.**

(3)—*Rules* 111, 112—Ex parte *decree—Suit set down for hearing before the date fixed in the summons—Civ. Pro. Code (Act* XIV *of* 1882), ss. 68, 69, 96, 100, 101, 112, *and* 113.—The plaintiff is not entitled to have a suit set down for an *ex parte* decree before the date fixed in the summons for the hearing of the suit, even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required under Rule 111 of the High Court Rules. DHIRAJLAL PANACHAND v. HORMUSJI EDULJI BOTTLEWALLA, **10 Bom. L.R. 301=32 B. 534.**

(4)—*Rule* 122—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 491—*Arrest before judgment—Damages for wrongful arrest—Damages for arrest cannot be tried by counterclaim—Practice.*—Pending a civil suit against him, the defendant was arrested before judgment but was afterwards released. He then made a claim of Rs. 25,000 against the plaintiff as damages for his wrongful arrest and applied to include in the suit his counterclaim of Rs. 25,000. *Held*, that the question which the defendant desired to be tried was not one which ought to be tried by counterclaim. MAGOOMAL JETHANAND v. HAMID BIN ALI, **10 Bom. L.R. 1002.**

(5)—*Rule* 131—*Third party notice—Application to be before filing written statement—Practice and Procedure.*—An application for a third party notice, under Rule 131 of the Bombay High Court Rules, must be made before the written statement is filed, unless special leave has been obtained from the Court. NIPPON MENKWA KABYSHIKA KAISHA v. GURMUKRAI SUKHANAND AND CO., **10 Bom. L.R. 1024.**

(6)—*High Court Rules, No.* 183—*Attorney—Costs—Order against heirs or representatives of client, if enforceable.*—Rule 183 of the High Court Rules provides that an attorney, when he has taxed his bill of costs against his client may obtain an order in Chambers for payment of the sum allowed on taxation, and such order may be executed under Chapter XIX of the Civ. Pro. Code. There is nothing in the words of Rule 183 expressly authorizing the enforcement of the attorney's claim against any one other than the client himself. It is a well established principle that where a law creates a special privilege it is to be strictly construed. Therefore an attorney's claim cannot, under Rule 183, be enforced against the heirs or representatives of his client. ASSUR PURSHOTAM v. RUTTONBAI, **16 B. 152.**

(7)—*Rule* 195—*Witness—Expenses—Court's jurisdiction to award after he has given evidence—Subpœna to produce documents—Personal presence—Witness not examined by the party summoning.*—Under Rule 195 of the High Court Rules the Court has jurisdiction to allow reasonable sum to a witness for his expenses, even after he has given his evidence. When a witness has been summoned to produce documents, whether he should produce them himself or by one of his servants is a question which must be left to his discretion, unless the summons distinctly tells him that he should depute one of his servants with the documents. It does not lie in the mouth of a party summoning a witness to produce a document or documents to say that if the witness had no documents to produce he was bound to tell them instead of attending the Court in obedience to the summons. A witness subpœnaed by a party to a cause does not lose his right to be paid the reasonable expenses of attendance at the Court by that party merely because he has not been examined for the party and the circumstance that he is examined by the other does not make any difference and extinguish the right which the witness had against the party who subpœnaed him, if the witness attended the Court on that subpœna. PREMCHAND v. BURDITT & CO.; *In re* BULLOCK, **6 Bom. L.R. 1025=28 B. 647.**

(8)—*Rule* 361—*Suit against a firm—Names of members of the firm—Practice.*—Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court; it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length. SHAW, WALLACE & Co. v. GORDHANDAS, **8 Bom. L.R. 56=30 B. 364.**

(9)—*Rule* 544 — *Taxation—Bill of costs—Practice.*—Rule 544 of the Rules of the Bombay High Court does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in Court, unless such order be by consent, and the Court has not any inherent power on which the jurisdiction can be rested. *In re* FRAMJI COWASJI MARKER, **10 Bom. L.R. 76=32 B. 428**, *reversing on appeal*, **9 Bom. L.R. 1014.**

***Rules of the High Courts and Supreme Courts*—continued.**

——1.—Bombay—*concluded.*

(10)—*Rule* 544 *of the High Court Rules, not exhaustive.*—Rule 544 of the High Court Rules is not exhaustive. It gives a party chargeable with the bill power to apply to have his attorney's bill of costs taxed but it makes no corresponding provision enabling the attorney to apply to have his bill taxed without the consent of the party chargeable therewith. Apart from the Rule the Court has inherent jurisdiction to make any order that seems to the Court reasonable and necessary in the interests of justice, when one of its officers applies to the Court for an order for taxation of his costs due to him by his client. *In re* FRAMJI COWASJI, **9 Bom. L R. 1014=32 B. 428** *reversed on appeal*, **10 Bom. L.R. 76.**

See ACT VI OF 1882, s. 134, 18 B. 65.

Rules made by the High Court have the force of law—*See* CIVIL PROCEDURE CODE, 1908, ss. 122, 129, 130, and 131, 5 Bom. L R. 394.

See CIV. PRO. CODE, 1908, O. XXI, r. 41, 17 B. 514.

See COMPANY—ARTICLES OF ASSOCIATION AND LIABILITIES OF SHAREHOLDERS, 3 B. 439.

Rule 577—*See* COSTS—TAXATION OF COSTS, 9 Bom. L.R. 983=32 B. 262.

Rule 859—*See* COSTS—TAXATION OF COSTS, 9 Bom. L.R. 508=32 B. 1.

See LIMITATION ACT, 1908, ss. 4, 5, 18 B. 84.

See LIMITATION ACT, 1908, art. 84, 1 B. 253.

Time within which application to vary—Commissioners' report should be made—Bombay High Court Rules, ch. VI, r 6—*See* PRACTICE AND PROCEDURE, 13 B. 368.

See PRACTICE AND PROCEDURE, 1 B. 158.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 38, 71, 12 B. 408.

See SECURITY FOR COSTS, 13 B. 458.

See SEQUESTRATION, 8 B.H.C., O C. 135.

——2.—Calcutta.

(1)—*Rules for conduct of business, cannot alter period of limitation.*—The rules of the Court, prescribing certain hours for the receipt of petitions and hearing of motions, cannot operate to alter the period of limitation, prescribed by law so as to exclude urgent applications made at any time in the day. DESPUTTY SINGH v. DOOLAR ROY, **1 C L.R. 291.**

(2)—*Calcutta High Court Rules* 1, 3 *and* 4, *ch.* XII—*Necessity for affidavits.*—Where the facts necessary to be proved by affidavit in connection with an application to the High Court are matters of record and are contained in

***Rules of the High Courts and Supreme Courts*—continued.**

——2.—Calcutta—*continued.*

copies of public records produced along with an application to the High Court, affidavits may be dispensed with, so far as those matters are concerned. ZAMIRAN v. FATEH ALI, **32 C. 146.** [*F.*, 8 C.L.J. 308.]

(3)—*High Court rules, Appellate Side, Part* II, *Chap.* IV, *Rule* XX—*Security for respondents' costs in Privy Council appeal—Government securities of the nominal value of Rs.* 4,000, *if sufficient.*—The deposit of 3½ per cent. Government securities of the nominal value of Rs. 4,000 as security for the costs of the respondents in an appeal preferred to His Majesty in Council is sufficient within the requirements of rule XX of chap. IV of the Part II of the rules of the Appellate Side, High Court. BIBI GOLAB KUMARI SHAHEBA v. GONESH CHANDRA MITTER, **13 C.W.N. 629=9 C.L.J. 560=36 C. 653=2 Ind. Cas 844.**

(4)—*Practice—Appeal — Failure to deliver paper book—Dismissal of appeal costs—Rule* 49, *Original Side.*—Where, at the hearing of an appeal, the appellant does not appear and no paper books have been delivered for the use of the Judges either by the appellant or by the respondent in accordance with r. 49 of the Rules of the High Court, Original Jurisdiction, the appeal will be dismissed without costs. HURROSOONDERY DOSSEE v. CALLYPUDOO DUTT, **14 B. L. R. App. 11=23 W. R. 136.** [*Not F.*, 17 C. 289.]

(5)—*Rule* 515-A (10)—*Registrar, power of, to dismiss a suit for want of prosecution.*—In a case where the Registrar had made a peremptory order that the plaintiff should file her affidavit of documents within a certain time, and, in default, the suit to stand dismissed for want of prosecution: *Held*, that the effect of the Registrar's order was to fix a date peremptorily within which the affidavit must be filed and that, in default, the suit is liable to be dismissed on an application made to the Court. If, by the new Rule 515-A (10), it is intended to give the Registrar power to pass a decree, the Rule is *ultra vires*. The Court also can pass an order dismissing a suit, and an appeal lies from such an order. KAMALAKHY DOSSEE v. JOTINDRA MOHUN BANERJI, **6 C.L.J 374.** (19 B. 307, *F.*)

(6)—*Rules of Supreme Court—Rule* 176.—Rule 176 of the Rules and Orders on the plea side of the Supreme Court is still in force. This rule does not apply to a suit on the equity side. KAILAS CHANDRA BOSE v. BHUBAN CHANDRA BOSE, **8 B.L.R. App. 18.**

(7)—*Rule* 12, *Rules of the High Court—Delay in second summons.*—Rule 12 of the 1st of May 1875 is merely declaratory of what had been the previous practice. A Judge at Chambers, under this rule, is bound to exercise a discretion with regard to the granting of a second summons. He is bound to enquire into the circumstances under which it is applied for, and

Rules of the High Courts and Supreme Courts—continued.

——2.—Calcutta—*continued.*

if he finds that a plaintiff has placed himself in a difficulty by his own laches he is quite right in saying that the Court will not help him out of that difficulty. GOURCHURN SOOR v. PEARY LALL PAUL, **15 B.L.R. App. 12.**

This circular draws attention to High Court Rules under the Court Fees Act published in "Calcutta Gazette" of 25th February 1874. **Civ. Cir. No. 10 of 7th March 1874, 21 W.R. Rules and Ors., 17.**

This circular states that a portion of Circular Memo. No. 3 of 1st February 1873, is rescinded. **25 W.R H.C. Rules General Letter No.3, dated 17th February 1876, p. 5.**

Under this circular specimens of all registers kept in subordinate Courts are called for. **25 W R.H.C. Rules General Letter No. 5, dated 25th March 1876, p. 8.**

Government order, allowing Small Cause Court clerks to draw cheques on head treasury cancelled. **25 W.R.H C. Rules General Letter No. 6, dated 29th March 1876, p. 8.**

This circular deals with applications for repairs or construction. **25 W.R.H C Rules Cir. Or. No. 6, dated 24th April 1876, p. 9.**

R. 25, *ultra vires*—*See* ACT XVIII OF 1879, ss. 7, 12, 14 C W.N. 415=1 Ind. Cas. 334.

See ACT XVIII OF 1879, s. 32, 8 C.W.N. 401.

R. 10 (1)—General Rules and Circular Orders of High Court—Applicability to the case of deposit of rent by tenant—*See* BEN. ACT VIII OF 1885, ss. 61 (*b*), 62, 14 C.L.J. 116.

Rules of Court, Belchambers Rules and Orders—R. 436—Meaning of conveyance—*See* BELCHAMBER'S RULES AND ORDERS, 16 C. 330.

General Rules and Circular Orders (Civil), ch. VI, rr. 36 (*b*), 37 (*b*)—*See* COSTS—SPECIAL CASES, 11 C.L.J. 217=5 Ind. Cas. 770.

See COURT-FEES ACT, s. 20, 26 C. 124=3 C.W.N. 82.

S. 515 A—*See* DECREE—MISCELLANEOUS, 13 C.W.N. 787=3 Ind. Cas. 999.

R. 748—Power-of-attorney executed before, and authenticated by, a Notary—Court may call for further evidence to prove execution and authentication—*See* EVIDENCE ACT, 1872, ss. 85 and 114, 9 C.W.N. 986=33 C. 625.

R. 3, ch. II, Rules of High Court, Appellate side—*See* GUARDIAN—APPOINTMENT OF GUARDIAN, 26 C. 133=3 C.W.N. 91.

Rr. 50, 52 of High Court of Calcutta dated 6th June, 1874—*See* INSPECTION OF DOCUMENTS, 1 C. 178.

Nos. 111 to 118 and 132—Attorneyship examination—Discretion of Board of Examiners—

Rules of the High Courts and Supreme Courts—continued.

——2.—Calcutta—*concluded.*

Jurisdiction of the High Court to interfere—*See* LEGAL PRACTITIONERS—ATTORNEY, 12 C.W.N. 873=4 M.L.T. 157=35 C. 915.

R. 515-A—Authority to Registrar or master to grant leave to sue—*Ultra vires*—*See* LETTERS PATENT, HIGH COURT, 1865—CALCUTTA, cl. 12, 5 C.L.J 405=11 C.W.N. 649=34 C. 619=2 M.L.T. 406 and 11 C.W.N. 663.

See MANAGER—MANAGER OF ATTACHED PROPERTY, 8 B.L.R. App. 23=16 W.R. 273.

See PRACTICE AND PROCEDURE, 24 C. 437=2 C.W.N. 57, 17 C. 289, 15 C. 706.

R No. 70—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 38, 3 C.L.J. 199.

(1) R. 740, whether overrides s. 87, Probate and Administration Act—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 87, 37 C. 224=5 Ind. Cas. 1003.

See REFERENCE TO FULL BENCH, 2 C.W.N. 405, F.B.

See REVIEW—JURISDICTION TO REVIEW, 24 C. 350, F.B.=1 C.W.N. 21.

High Court, Original side—Revisional jurisdiction over Presy. S C. Court—Practice—Appellate Side Rules, R. IV (*a*)—*See* SANCTION TO PROSECUTE, 14 C.W.N. 806=6 Ind. Cas. 473=37 C. 714.

See TRANSFER OF PROPERTY ACT, 1882, s. 104, 4 C.W.N. 474.

——3.—Madras.

(1)—*Attorneys—Vakils—Appearance, etc., on the Original side of High Court.*—The 4th and 5th Rules of Court of 1866 are within the powers conferred on the High Court by the Letters Patent of 1865, and the provisions of the Letters Patent "relating to the admission and powers of advocates, vakils and attorneys" are authorized by 24 and 25 Vic., Chap. 104. *In the matter of the petition of the* ATTORNEYS, **1 M. 24, F.B.**

(2)—*Rule of Court—Table of fees—Appeal from order—Court fee.*—Under art. 20 of the Rule of Court, dated 24th July 1874, an appeal against an order should bear a Court-fee of fifty rupees. GANAPATHI v. BALASUNDARA, **7 M. 540.**

(3)—*Rules of Practice (Madras High Court), paras 9 and 10—Para 9 not laying down a condition of sale—Application of para 10 to a party failing to comply with para 9—Civ. Pro. Code, s. 312.*—Para 10 in Form No. 56 of the Civil Rules of Practice, which lays down that, if a purchaser at a Court sale fails to comply with any of the conditions of sale set forth in the form, his deposit shall be forfeited to Government does not apply to a case of failure to comply with

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***Rules of the High Courts and Supreme Courts*—continued.**

—3.—Madras—*continued.*

the directions given in para 9 in the above form, requiring the purchaser to produce, within a fixed time, two copies of his sale certificate for the approval of the Judge. This provision in para 9 is merely directory and cannot be said to be a condition of sale in the ordinary acceptation of the term and if it was intended to be anything more than directory it would be *ultra vires* as inconsistent with s. 312 of the Civ. Pro. Code. SYED ABDUL RAHMAN SAHIB v. GOVINDA PADAYACHI, **15 M.L.J. 406.**

(4)—*High Court (Madras), r. 105 — Two appeals to lower appellate Court and one decree —Plurality of second appeals to High Court—Practice—Procedure.*—There were two appeals to a District Court from the original decree of a District Munsiff. The District Court passed only one decree on both appeals. It was now contended that there should be two second appeals to the High Court on the ground that there were two appeals to the lower appellate Court. *Held*, that High Court R. 105, lays down the practice, that, when there are two appeals from the same decree, they should if possible, be heard together and only one decree passed, that only one second appeal should be entered and that even if two appeals had been entered, the proper course would be to hear them together and pass one decree. GANGULAKURTI SANYASI LINGAM v. MIDUGONDA GAVARAMMA, **16 M.L.J. 411.** (26 M. 97, *R.*)

R. 27—Violation by pleader — *See* ACT XVIII OF 1879, ss. 13, 14, 8 Ind. Cas. 677.

Application of R. 3 No. 2 — *See* COURT-FEES ACT, 1870, s. 7, IV C., 1 M.L.T. 412 = 30 M. 18.

Change of attorney by client, leave of Court necessary for, under Rule 320 of the High Court—Non-payment of costs to previous attorney, ground for witholding leave—*See* LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 23 M. 134.

Rr. 154 and 155 of the Original Side rules —Application to set aside dismissal for default —*See* LIMITATION ACT, 1908, art. 163, 17 M. L.J. 215.

Madras High Court Rules (in original side), 1902, R. 47—Counter claims—Whether could be set up against each plaintiff—Court's discretion—*See* PARTNERSHIP—GENERAL, 8 M.L. T. 73 = 7 Ind. Cas. 267.

Rules of High Court of 21st June 1882—*See* PAYMENT INTO COURT, 7 M. 211.

Rules of the original side of High Court of Madras — R. 533—Right of Advocates to appear and plead instructed by vakils—*See* PRACTICE AND PROCEDURE, 3 M.L.T. 322.

See PRACTICE AND PROCEDURE, 21 M. 490.

***Rules of the High Courts and Supreme Courts*—continued.**

—3.—Madras—*concluded.*

See PRESIDENCY SMALL CAUSE COURTS ACT, ss. 6, 18, cls. (*a*) and (*c*), 33, 18 M. 236, F.B. = 5 M.L.J. 114.

High Court (Madras), Original side rules, r. 470—Application by sureties to vacate administration bond—Legality—*See* SUCCESSION ACT, 1865, s. 256, 7 M.L.T. 160 = 5 Ind. Cas. 311 = 33 M. 373.

—4.—North-West Provinces.

(1)—*Civ. Pro. Code, ss. 36, 37, 39, 635—Pleader handing over brief to another—Rule of Court.*—The High Court is fully within the powers conferred upon it by s. 635, Civ. Pro. Code, in making a rule authorising legal practitioners in certain cases to appoint other legal practitioners to hold their briefs and appear in their place, as the rule is passed to facilitate the work of the Court and for the convenience of the public. MATADIN v. GANGA BAI, **9 A. 613, F.B. = 7 A.W.N. 152.** [*F.*, 9 A. 617; *R.*, 22 B. 654, U.B.R. 1902, 2nd Qr., Power of Attorney 1, 9 O.C. 65.]

(2)—*Letters Patent, High Court, N.W.P., s. 10 —Appeal—Rules of pratice—Limitation.*—Rule I of the Rules of Practice adopted by the High Court for the N.W.P. which provided ninety days for the admission of appeals under s. 10 of the Letters Patent had a legal origin and was not *ultra vires* of the Court. NAUBAT RAM v. HARNAM DAS, **9 A. 115 = A.W.N. 1886, 306.** (5 B.L.R. 47, 2 A. 192, *R.*) [*R.*, 32 B. 14 = 9 B.L.R. 1138 = 2 M.L.T. 410.]

(3)—*Civ. Pro. Code*, 1882, *s. 575—Rules of High Court—"Judgment".*—The word "Judgment" in Rule II of the Rules of the High Court, N.W.P., to regulate references under s. 575 of the Civ. Pro. Code, must not be construed literally, but must be taken to mean an expression of opinion containing reasons for a contemplated or proposed judgment. ROHILKHAND AND KUMAON BANK. (LD.) v. ROW, **6 A. 468.** [*R.*, 9 A. 625, F.B.]

(4)—*Rules of Court of the 4th April 1894, r. 461—Costs—Fees allowable on the withdrawal of a case under s. 373 of the Civ. Pro. Code—Revision—Civ. Pro. Code, s. 622.*—*Held*, that the possibly erroneous decision by a subordinate Court of a question of law which that Court had jurisdiction to decide can form no ground for the exercise of the High Court's revisional jurisdiction under s. 622 of the Code of Civil Procedure. (11 C. 6, 1 C.W.N. 617, *R.*). *Semble* that R. 461 of the Rules of Court of the 4th of April 1894, does not apply to cases where a suit is withdrawn under the provisions of s. 373 of the Code of Civil Procedure. LACHMAN DUBE v. BASANTI BIBI, **A.W.N. 1903, 12.**

(5)—*Rules of Court of the 18th January 1898, r. 221—Costs—Affidavit as to payment of fees of respondent's counsel not filed before delivery*

***Rules of the High Courts and Supreme Courts*—continued.**

——4.—North West Provinces—*continued.*

of judgment—Order allowing counsel's fees for special cause.—A certain outstanding balance of the fees of counsel retained for the respondent was not paid until the day upon which the appeal came on for hearing. On that day the person before whom affidavits are usually made in the High Court was absent at the time when the respondent's agent wished to make the affidavit required by Rule 221 of the Rules of Court of the 18th January, 1898, and such affidavit was not made before the appeal was heard and judgment delivered. Under these circumstances the Court permitted the fees paid to the respondent's counsel to be certified for after judgment, and allowed such fees to be entered in favour of the respondent in their decree dismissing the appeal. SAMUNDAR LAL v. ASHARFI KUNWAR, **A.W.N. 1899, 216.**

(6)—*Practice—Rules of Court of the 30th November*, 1889, *r.* 45—*Process fees—Extension of time for payment of process fees.*—It is competent to the Court upon sufficient cause shown to extend the time limited by r. 45 of the Rules of Court of the 30th of November, 1889, for payment of process fee. RAM LAL v. JAMNA DAS, **A.W.N. 1897, 157.**

(7)—*Rules of Court*, 11*th June*, 1887—*Powers of single Judge—Security for costs of appeal—Civ. Pro. Code*, s. 549—Under the Rules of Court of the 11th June, 1887, a single Judge of the High Court has no power to make an order under s. 549 of the Civ. Pro. Code, requiring an appellant to give security for the costs of the appeal. Where an appeal has been filed and admitted, and the respondents have appeared and are represented, and there is no danger of any further extraordinary costs being incurred, the Court will not make an order calling upon the appellant to give security for costs under s. 549 of the Civ. Pro. Code. FARKHANDATUNNISSA v. THE COLLECTOR OF MEERUT, **A.W.N. 1889, 147.**

(8)—4*th April*, 1894, *No.* 80 (1)—*Certificate and affidavit of Legal Practitioner's fee filed subsequent to judgment.*—Where no certificate or affidavit as to the fees of a legal practitioner under r. 80 (1) of the Rules (High Court) of the 4th April, 1894, was filed until after delivery of the judgment. *Held*, that the amount of the fee should not have been included with the other costs, but that, had their Lordships been satisfied that the fee was in point of fact paid prior to the delivery of the judgment, it is possible that they would not have exercised their discretionary power to interfere under s. 622 of the Code of Civil Procedure. BISHUN SINGH v. RAJA PATESARI PARTAP NARAIN SINGH, **A.W.N. 1906, 169.**

(9)—*R.* 80 (1)—*Provise — Fee paid after first hearing—Allowance on taxation—Discretion—Certificate received after commencement of hearing.*—R. 80 (1) of the rules of High Court, dated 4th April, 1894, prescribes that the

***Rules of the High Courts and Supreme Courts*—continued.**

——4.—North West Provinces—*concluded.*

Court shall be satisfied that the fee is paid to the pleader at or before the commencement of the hearing of a suit, as also of the delivery to the Munsarim of a certificate signed by the legal practitioner certifying the amount of the fee actually paid to him. Where, therefore, the fee was not paid to a legal practitioner till after the commencement of the hearing, the Court was justified in refusing to allow the fee so paid on taxation. The *proviso* to r.80 only gives a Court a discretion to accept a certificate for fees filed after the commencement of the hearing but it gives him no discretion as to allowance of fee, on taxation, which was not paid on or before the first hearing. THE BANK OF BENGAL, CAWNPORE v. KALKA DAS, **8 A.L.J. 109=9 Ind. Cas. 422.**

Application for amendment of decree—Costs incorrectly assessed by the ministerial officers of the Court in drawing up the decree—Rules of Court of the 18th January 1898, r. 212—*See* CIV. PRO. CODE, 1908, O. XX, r. 6 and s. 152, A.W.N. 1901, 94.

See CIV. PRO CODE, 1908, O. XLI, r. 19, A.W.N. 1898, 155.

Rules Nos. 89 and 205—*See* COSTS — SPECIAL CASES, A.W.N. 1905, 83.

See JUDGMENT—FORM AND CONTENTS, 9 A. 93, F.B.

Rules of the High Court of the 18th January, 1898, Rules 2, 180, 182, 183 and 197—Advocate — Misconduct — Removal from the roll of Advocates — *See* LETTERS PATENT, HIGH COURT, N.W.P., 3 A L.J. 592, F.B.=1 M.L.T. 252=A.W.N. 1906, 226.

Rule 197 of — Suspension of Advocate — Disciplinary authority of High Court—Counsel guilty of contempt—*See* LETTERS PATENT, HIGH COURT, N.W.P., 4 A.L.J. 34=9 Bom. L.R. 9, P.C.=17 M L.J. 74=11 C.W.N. 273 =5 C.L.J. 130=2 M.L.T. 1=5 Cr. L. J. 152= 29 A. 95.

See LETTERS PATENT, HIGH COURT, 1865 N.W.P., ss. 10, 27, A.W.N. 1887, 199.

Rules of Court of the 18th January 1898, Rule 8-D — Appeal against a representative of a party deceased since the passing of the lower Courts decree—*See* LIMITATION ACT, 1908, ss. 4 and 5, art. 181, A.W.N. 1901, 46.

Rule 12—*See* MUNSARIM, 2 A.L.J. 55= A.W.N. 1905, 12=27 A. 411.

Rules for Presidency Small Cause Court's Act.

(1)—*R.* 98—*Civ. Pro. Code*, 1908, *s.* 115 — *Suit in Presidency Small Cause Court—Appearance of defendant at one hearing—Evidence recorded in part—Failure to appear subsequently —Decree* ex parte—*Legality—Proper course—Revision—Interference by High Court.*—Where, in a suit before the Presidency Small Cause

Rules for Presidency Small Cause Court's Act—*concluded.*

Court, in which the defendant had previously appeared and some evidence on both sides had been recorded, the Judge dealt with the suit *ex parte* as if the defendant had never appeared at all and passed a decree. *Held*, that the Judge ought to have proceeded under r. 98 of the rules framed by the High Court for the guidance of the Presidency Small Cause Court of Madras, (12 M.L.J. 473, *R.*) and that the present case was a proper one for the interference of the High Court under s. 115, Civ. Pro. Code, 1908. A. P. PATCHAPERUMAL CHETTY v. G. E. SAMPATHU CHETTY, **10 M.L.T. 163.** (18 M.L. J. 566, *R.*)

Rules—Rules of Privy Council.

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 1 B.L.R. O.C. 39.

Admission to practice in Privy Council—High Court Vakil—Ss. 2, 3 of the Rules of 31st March 1871—*See* PRIVY COUNCIL, PRACTICE OF—MISCELLANEOUS, 16 C. 636, P.C. =16 I.A. 163.

Rules of Practice.

See PRACTICE AND PROCEDURE.

Rules of practice, original side, No. 292—*Commission to examine accounts—Commissioner's report, correctness of.*—Where a Commissioner is appointed in a suit to examine certain accounts and he sends a report which the Court does not vary, it is unreasonable that the appellate Court should go into particulars in the accounts in regard to which both the Commissioner and the Judge have come to the same conclusion. According to r. 292 of the Rules of Practice on the original side, the appellate Court cannot question the correctness of the various items in the accounts. THIRUVENGADASAMI MUDALIAR v. RAGHAVACHARY, **8 M.L.J. 133.**

Small Cause Courts—Notes of Judgment—Copy of decree—*See* COURT FEES ACT, sch. I, art. 7, 6 M.H.C. App. 23.

Of Calcutta Small Cause Court—Time for service of summons — *See* PRESIDENCY SMALL CAUSE COURT ACT. 1850, ss. 26, 41, 9 B.L.R. 256.

Rule to show cause.

(1)—*Rule obtained by person not party to suit—Practice.*—The Court will not make a rule absolute obtained by a person who is not a party to the suit. GRANT, SMITH & CO. v. STEEL, **1 Ind. Jur. N.S. 60.**

(2)—Ex parte *application—Contents—Duty to state all facts fully—Issue of rule.*—Parties who come to Court on statements of facts, in the absence of the other side, praying for the issue of rules which interfere with the rights of persons executing decrees, are bound fully and fairly to state all the circumstances within their knowledge which it is necessary for the

Rule to show cause—*concluded.*

Court to consider in grantig the rule. BROJO COOMAR MULLICK v. MON MOHINEE DEBEA, **16 W.R. 55.**

(3)—*When High Court will grant rule—Rule nisi.*—The High Court can grant a rule to show cause only where the arguments are such that, if not displaced by the opposite party, the rule would be made absolute. OMRAO BEGUM, PETITIONER, **13 W.R. 310.**

(4)—*Against review of High Court's decree—Discharge—Discovery of fresh evidence—Admissibility.*—A rule to show cause why the decree of the High Court should not reviewed, on the ground of the discovery of new evidence was discharged; as the applicants failed to show that the document brought forward was admissible as evidence, and that it was not within their knowledge, or could not be adduced by them at the time when such decree was passed. KOKDI v. JAGTAP, **3 B.H.C. A.C. 49.**

(5)—*Rule to show cause—Affidavit.*—A rule to show cause must be supported by an affidavit. The affidavit must be sufficient, so that if no cause is shown, the rule could be made absolute on the affidavit. *In re* COMPTOIS D'ESCOMPTE DE PARIS v. CURRIE AND CO., **3 B.L.R. App. 153.**

See CIV. PRO. CODE, 1908, O. XXI, r. 2, 11 C. 166.

See CONTEMPT OF COURT, 7 B.H.C. O.C. 172.

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See NAWAB OF TANK, 30 C. 843, P.C.=67 P.R. 1903=112 P.L.R. 1903.

Rulings of High Court.

—*Practice—Different rulings by different High Courts—Duty of subordinate Courts—Practice.*—Where there are different rulings by different High Courts on the same point, a Judge must follow the ruling of the High Court to which he is subordinate. BALAJI GANESH v. SAKHARAM PARESHRAM ANGEL, **17 B. 555.** [*Cons.*, 27 B. 1; *R.*, 8 C.W.N. 66=31 C. 83.]

Rural Police, Hazaribagh Lohardugga.

See BEN. ACT VIII OF 1878.

Advocate High Court Jammu & Kashmir Srinagar

Rural Police Rate.

Rural Police rate, suit by proprietor against under-proprietors for recovery of—Implied contract of maintenance of chowkidar—N.W.P. and Oudh Act V *of* 1894, *ss.* 13 *and* 14—Wajib-ul-arz, *admissibility in evidence of.*—The respondent was the superior proprietor of a village and the appellants were the under-proprietors. The respondent sued the appellants for a certain sum which he had paid to Government on account of the Rural Police rate imposed upon the village under s. 13 of N.W.P. and Oudh Act V of 1894. He contended that the appellants were, within the meaning of s. 14 of the Act, "bound by contract" to provide for the maintenance of the chowkidar. It was conceded that if the *wajib-ul arz* of the village was admissible in evidence there was evidence upon the record, facts from which the existence of a contract between the talukdar and the under-proprietors should be inferred whereby the latter were bound to provide for the maintenance of the chowkidar but it was contended that the word "contract" in s. 14 of Act V of 1894 means an express contract and not an implied contract. *Held*, that the Legislature did not intend that the word "contract" in s. 14 of N.W.P. and Oudh Act V of 1894 should be confined to an express contract between the superior and inferior proprietors, that the *wajib-ul-arz* was admissible as evidence of the arrangements made for the maintenance of the chowkidar. KUSHARI DIN v. RANI CHANDAR KUAR, **7 O.C. 35.**

Ruthusanti.

Griha-Pravesam and—Expenses of daughter defrayed by widowed mother—Suit to recover amount expended from husband's undivided brother—Right to maintain suit—*See* HINDU LAW—MARRIAGE, 26 M. 497=13 M.L.J. 25.

Ryot.

See RAIYATI INTEREST.

See RAIYATI LAND.

See RAIYATWARI ESTATE.

Ryoti Holding.

See RAIYATI HOLDING.

Ryoti Kadimi Tenure.

See ENHANCEMENT OF RENT, 12 B.L.R. 229, P.C.=19 W.R. 353.

Ryotwari Settlement.

(1)—*Ryotwari Settlement of Government estate as* khas *mehal—Permanent grant, presumption of.*—The ryotwari settlement for a period of 30 years (from 1247 B. S.), as a *khas* mehal, of an estate that was atone time Government property, and the record in such settlement of a person as tenant at a certain rent, would not compel the presumption that the origin of the tenant's title was a grant to continue in permanent possession. ARUT SAHOO v. PRANDHONE PYKURA, **10 C. 502.** (3 C. 696, *F.*; 13 B.L.R. 417=17 W.R. 383, *R.*)

Ryotwari Tenure.

(1)—*Right to Government to construct* calingula *so as to flood a ryotwari holder's lands—Continuing injury—Limitation Act, s.* 23.—Plaintiffs sued for a mandatory injunction directing the defendant (the Secretary of State) to block up a *calingula* or "bye wash" in a certain channel. The *calingula* was constructed by Government, in 1882, for the purpose of reducing the flow of water into a tank through the channel. Plaintiffs contended that the necessary effect of the *calingula* was to cause the water diverted from the channel to flood their lands and render them unfit for cultivation. The contention for the defendant (Secretary of State) was that the damage to the plaintiffs was caused by the floods of 1895 and not by the construction of the *calingula*. The question for decision was whether the Government were acting within their rights when, in 1882, they erected a *calingula*, which caused water from the channel to flow over the plaintiff's land. *Held, per Arnold White, C.J.*—Though it may be taken as settled law that Government have the right to distribute the water of Government channels for the benefit of the public, subject to the right of ryotwari, (7 M.H.C. 60, 16 M. 333, *R.*) land-holders, to receive such supply as may be sufficient for their accustomed requirements it cannot be said that the rights of Government, in connection with the distribution of water, include a right to flood a man's lands because, in the opinion of the Government, the erection of work which has this effect is desirable in connection with the general distribution of water for the public benefit. The fact that the opening of the *calingula* was necessary for the protection of the tank, and the fact that there was no negligence in its construction—so for as the *calingula* was concerned—did not deprive the plaintiffs of their right to have the property protected. For the defendant, Government, to succeed, it would be necessary to show that they could not exercise their statutory powers without injuring the lands of the plaintiffs. Statutory powers authorizing the construction of works are granted "on the condition sometimes expressed and sometimes understood—but if not expressed always understood—that the undertakers shall do as little damage as possible in the exercise of their statutory powers. (27 B. 344, *R.*) *Held* further, that the injury complained of by the plaintiffs was a continuing injury within the meaning of s. 23 of the Limitation Act, the cause of action accruing *de die in diem* as long as the injury continues. (6 C. 394, 6 B. 20, 1 M. 335, *R.*) *Per Subramania Ayyar, J.*—The imperativeness ascribable to the maintenance of irrigation works once lawfully brought into existence must be confined strictly to the conservation of the work as originally designed and executed and cannot be extended to any material alterations and additions made in, or to, any existing old work. Such alterations and additions should, in reason, be held to stand on the same footing as that of perfectly new works and thus subject to the restriction applicable to the case of new works, *viz.*, there should be no invasion

Ryotwari Tenure—*continued.*

thereby of the rights of others. In this view, it is clear that the 'bye-wash' in question was essentially a new work and that, so long as such work is made, the instrument of throwing water on the plaint lands without the consent of the owners, they (plaintiffs) have a ground of complaint, unless it be that a different conclusion has to be arrived at with reference to the character of the tenure under which those lands are held by them; and there being nothing in the nature of the tenure of the plaintiffs (ryotwari tenure) to support the contention of the Secretary of State, the plaintiff had a cause of action against Government. On the question of limitation, his Lordship agreed with the Chief Justice that the injury was a continuing wrong and that plaintiffs' suit was not barred. In the result, an injunction was granted to the plaintiffs restraining the defendant from throwing the water on plaintiff's lands. SANKARAVADIVELU PILLAI v. THE SECRETARY OF STATE. **15 M.L.J. 32=28 M. 72.** [*R.*, 28 M. 539=15 M.L.J. 251, 32 M. 141=5 M.L.T. 149 =19 M.L.J. 131, 31 M. 171=18 M.L.J. 178=

Ryotwari Tenure—*concluded.*

3 M.L.T. 273, 32 M. 423=5 M.L.T. 143; *D.*, 31 M. 117=18 M.L.J. 91.]

Tenant with undivided share in a holding may be a—*See* BEN. ACT VIII OF 1885, s. 45, 3 Ind. Cas. 350.

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See BEN. ACT VIII OF 1885, s. 85, 29 C. 148.

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Ryotwari Village.

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See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT. 6 C. 196=7 C.L.R. 47.

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